Rollin' On . . . To a Free Market Motor Carrier Regulation 1935-1980

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TABLE OF CONTENTS

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America has always looked to the transportation industry for its heroes. The wagonmaster, the sea captain, the locomotive engineer and the airline pilot all had their place in the spotlight. Today, the popular culture hero, as expressed in country-western music and southern-oriented movies, is the over-the-road truck driver.

This glorification of the truck driver has been accompanied by a lessening of the regulatory shackles which limited the flexibility of the trucking business. Passage of the Motor Carrier Act of 1980[1] ushered in a new era of free entry and increased competition on our nation's highways. The industry is far from being deregulated—the ICC is still operating and the tariff principle still stands, but it is clear that following the lead of the Airline Deregulation Act,[2] Congress has intended to deregulate still another industry in order to eliminate cartel pricing and to check inflation in transportation costs.

I. NATURE OF THE INDUSTRY

Over-the-road trucking is a relatively new industry, with a pedigree about as old as the airlines. The condition of roads prior to the First World War made long-distance hauling impractical, and a heavy duty chassis suitable for hauling goods did not appear until the middle 1920's. Early trucks developed as drayage vehicles, hauling freight to railroads whence the rail-

1. 49 U.S.C. § 10101 (Supp. IV 1980).
2. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending scattered sections of 49 U.S.C.).

roads would carry it on their superior rights-of-way. Railroads at this time had a virtual freight monopoly. The towboat had not yet emerged on the nation's rivers and the few aircraft which were in service were regarded as passenger and mail vehicles exclusively.

Most railroads viewed the motor carrier as adjunct to their operations. Railroads were quick to establish subsidiary motor carriers which funnelled traffic to the railroads' routes. These motor carriers often operated buses as well as trucks, and soon were viewed as a replacement for branch lines which were to be abandoned by the railroads.[3]

Before long, the infant motor carrier industry had reached a level of utility surpassing that of the interurban electric railroads, which had flourished in the earlier years of the century. The interurbans were beaten down by cost of constructing rights-of-way and by the intransigence of the steam railroads, which refused to let them cross their rights-of-way at grade or interchange freight with them. These barriers to entry were not a problem for the trucking lines, which could operate on public highways without the necessity of constructing their own facilities.

The arrival of the Great Depression brought a downturn in production, but did not appreciably slow the growth of intercity trucking. For one thing, an all-weather system of roads was already in place. For another, the slowdown in heavy industry was not paralleled by an equivalent curtailment of light manufacturing, which tended to favor the truckers. Freedom of entry into the market place meant that although some truckers failed, others were able to take their place.

By the 1930's, it was clear that trucking was much more than incidental-to-rail drayage activities. The motor truck had more than supplanted the horse and wagon; it was in a position to challenge the iron horse as well. This was especially true with respect to high-valued shipments. The truck could go from door to door without any incidental switching. Due to the mobility and efficiency of the tractor-trailer, trucks were better suited to protect valuable shipments and make timely deliveries than were the railroads.

Even at this juncture, there was little thought of the motor carrier operations as a separate industry. Rather, trucking developed in many different categories:

1. Local trucking operations. Dealing mostly with small packages, these smaller trucks handled local delivery, often in connection with rail freight or Railway Express Agency operations.

2. Over-the-road carriage. These companies operated in competition with railroads, specializing in high-class freight on overnight schedules.

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3. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 93-94 (1976).

They maintained rudimentary terminals in each of the cities, and usually adhered to a regular schedule.

3. Intercity buses. Replacing the interurban electrics and the branchline mixed train, these companies had expanded from the feeder service which gave them birth. They now operated a cheaper, slower service which was nonetheless competitive with railroads between major cities. On the philosophy of if you can't lick'-em, join'em, railroads purchased several of these intercity operations and formed the bases for today's Greyhound and Trailways systems. Buses have always carried some freight, usually in parcel express service in the same vehicle with the passengers.

4. Railroad subsidiaries. Most railroads by the 1930's used trucks for pickup and delivery services. In addition, they had substituted trucks for abandoned branchlines. One of the largest of these was the New England Transportation Company, a regional bus and truck system which paralleled and supplemented the routes of the parent New Haven Railroad.

5. Independent truckers. These were the so-called "gypsies", family-owned operations which took on loads wherever they could find them and moved on irregular routes throughout the country. Many of these marginal carriers obtained valuable assets in the form of route rights through the "grandfathering" of authority in the Motor Carrier Act of 1935.

6. The mob. There were plenty of trucks left over from bootlegging and rumrunning operations after the end of Prohibition. The influence of organized crime, which was attempting to get into more legitimate pastimes, was an important factor in the call for regulation of the industry.

7. Agricultural transportation. Although bulk commodities, such as grain, even today can only move economically by train or barge, the emergence of the farm truck made the farmer less dependent upon the local general store and the country elevator. The truck and the rural road improvements of the 1920's were important elements in freeing the farmer from the dominance of the railroads. As a result of agricultural insistence, transportation of agricultural products has been exempted from economic regulation throughout the history of regulation of motor carriage.

The truck, with its ability to provide door-to-door transportation, became a strong competitor for intercity freight. It remains an expensive mode, however, because of its lack of fuel economy and labor-intensiveness (every load requires at least one driver) as compared to barge and rail transportation. As highway systems improved, the gentler grades of limited-access roads proved to be a boon to truck scheduling. The truck is able to better the time of freight trains, because of the time that freight cars stay in classification yards waiting to be switched. In price, truck delivery is usually lower than air freight and higher than rail.

The trucking system of the United States is privately owned and oper-

ated by non-rail interests. This is somewhat of an anomaly among the world's transportation systems. In some nations, such as Ireland, the government owns both rail and road transportation systems and operates them as an integrated whole. In most Western European countries, private truckers operate under severe restrictions, to prevent siphoning of traffic from the government-owned railways. In Canada, motor carriers are regulated by provincial authorities. There is little transcontinental hauling of freight by truck in Canada.

II. The Call For Regulation

Up until 1925, motor carriers, if they were regulated, were totally under state control (very much like the provincial situation in Canada). Carriers operating in different states had to obtain authority from each jurisdiction through which they passed (they still must obtain license plates today).

All this changed with the decision of the Supreme Court in *Buck v. Kuykendall*.[4] This proceeding involved a motor carrier who applied to the state of Washington for authority to operate between Seattle and Portland. The application was denied, with Washington's regulatory commission stating that there was already adequate rail and highway service between the two cities.

The Supreme Court, on appeal, held that such a denial was beyond the authority of the state of Washington. Inasmuch as the trucks crossed the Columbia River into Oregon, they were operating in interstate commerce. Constitutionally, a state could not forbid, limit or prohibit competition in interstate commerce. (At the time, the state of Oregon was willing to grant Buck authority to operate in that state.)

The effect of *Buck v. Kuykendall* was to eliminate state controls on entry for motor carriers, limiting regulation by states of interstate service to historic police power areas of motor vehicle safety and highway conservation.[5] At the time of *Buck v. Kuykendall*, some forty states required operators of trucks to obtain certificates of public convenience and necessity, regardless of whether they operated in interstate or intrastate commerce. The *Buck* decision impelled efforts to seek a federal solution to the problem of the regulation of interstate motor carriage. The Interstate Commerce Commission already exerted plenary powers over the operations of railroads. It was logical that Congress should look to that body for the expertise necessary to regulate this new form of transportation.

The rationale which advocates of regulation stressed included several arguments which favored continuity of service over competition. There were few financial barriers to entry into the trucking business such as con-

4. 267 U.S. 307 (1925).
5. Webb, *supra* note 3, at 92.

struction in the railroad industry. During the depression years, an unemployed truck owner might drive just for gas money, or to make payments on a truck. When the inevitable happened and the truck needed repairs, the driver might withdraw from the market, but another trucker would be there to take his place. This cut-rate transportation was a threat to established truck lines and railroads alike.

Justifications for entry controls were given in the following order of importance.

A. Prevention of an Oversupply of Transportation. ICC Commissioner Eastman stated in hearings before the Senate Interstate Commerce Committee in 1935:

> The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it. In the case of railroads that was done in 1920 by the provision that prior to any new construction a certificate of convenience and necessity must be secured from the Commission. In my judgment it would have been much better if there had been such a provision many years before. It would have prevented certain railroad construction which tends to weaken the railroad system and situation at the present time. The States have, I think, in all cases, found the necessity in their regulation of motor transportation to provide for that prevention of an oversupply. It is a provision which has been adopted in most of the foreign countries that I have inquired into; in other words, the granting of certificates or permits in order to prevent an oversupply which weakens the situation.[6]

In other words, many experts believed that if too many motor carriers competed on the same route, no money could be made from the service. It was this rationale which caused the ICC, for 45 years, to protect incumbent carriers against new competitors.

B. Equality of Regulation. At this time, railroads were fully regulated. It was thought to be unfair to continue this regulation while the motor carriers, operating on parallel and competing routes, would be unregulated. In addition, intrastate carriers were regulated by the individual states; it seemed unfair to allow the one out of five trucks which crosses a state line to be able to disregard state law.[7]

C. Interdependence of Entry Controls and Enforcement. Suspension or revocation of a carrier's license is a useful enforcement tool, and most of the studies prior to 1935 which dealt with regulation assumed that control of entry would be part of the system. This was the regulatory scheme under which most states operated.

Interestingly, most of the concern voiced by Congress was about bus operators. The Motor Carrier Act of 1935 required brokers of passenger

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6. *Hearings on S. 1629, S. 1632, and S. 1635 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 78 (1935).

7. Webb, *supra* note 3, at 97.

transportation to deal only with certificated carriers. The ICC had found in a 1928 report that, although intercity bus service was generally satisfactory, so-called "wildcatters" were cutting fares below compensatory levels and otherwise engaging in reprehensible practices.[8] Federal regulation was supposed to end such practices but no thought was given to whether such entry control was necessary for the prevention of these practices.

In short, Congress was pressured by the states, most of which had comprehensive schemes for regulating intrastate motor vehicles, to eliminate these "wildcatters." These regulatory systems were in danger of collapse because of the prohibition against states' regulating interstate traffic.[9] In addition, reasons were being offered for departure from a free market. The free market was considered chaotic and prone to cut-throat competition. Shippers were allegedly being victimized by fly-by-night operators.

Lined up behind the state regulatory agencies in calling for a program limiting entry and regulating rates were many groups interested in the motor carriage industry. The railroads, feeling the unfair competition since they were regulated themselves, were prime supporters of putting trucks and buses under the same regulatory umbrella. The "grandfather" provisions of the Motor Carrier Act would protect the operating rights of the rails' motor carrier subsidiaries. At the same time, new entrants in the field would be curtailed, and rates would have to be just and reasonable.

The emerging intercity trucking companies and bus lines also supported regulation for similar reasons. It would grant them rights to serve territories they were already serving. At the same time, regulation would protect their services against "cream-skimming" by operators who would come in to take the excess, profitable traffic. These established carriers were bound by common carrier obligations to take all traffic proferred them, and did not wish to see their position jeopardized by upstart companies which could pick and choose traffic and operate at random.

Agricultural interests saw regulation of trucking as carrying an obligation to serve small towns and local market areas that otherwise might be bypassed in an uncontrolled market. Farm interests, however, lobbied against any regulation of the transportation of agricultural products. The farmers wanted to be free to haul their own, or their neighbor's produce to market without any interference by regulatory authorities. In contrast to rail regulation, where all commodities were regulated, agricultural products were specifically exempted from regulation by the ICC.

One of the interest groups supporting this call for regulation was the small, independent truckers. They realized that the "grandfather" provi-

8. Motor Bus and Motor Truck Operation, 140 I.C.C. 685, 702 (1928).
9. Webb, *supra* note 3, at 94.

sion would give them authority to operate over routes which they currently were serving. This would be a valuable, marketable asset in the future and would also protect them against new independent companies. A struggling family-owned trucking operation would suddenly have something of value (operating rights) conferred upon them free of charge. These new entrepreneurs were quick to see the possibilities of the new legislation.

Utility-type regulation was thus adopted for an industry which had few characteristics of a natural monopoly. Continuity of service was one lauded characteristic. The bus rider would rather have the certainty of having the Greyhound every day at a fixed schedule than have rate competition but uncertain service. Small towns would prefer to have a guarantee of service by a single carrier than sporadic competitive efforts by a number of struggling operations. In addition, motor carriers should be sufficiently solvent to pay claims or fix up their equipment. These considerations were important, and regulation had strong appeal due to the economic climate of the 1930's. The best way to implement the regulations that were perceived as being needed was to allow the ICC, with its fifty years of transportation experience, to administer it.

III. The Motor Carrier Act of 1935

Enactment of the Motor Carrier Act of 1935[10] more than doubled the jurisdiction of the Interstate Commerce Commission and changed its focus from a railroad agency to one concerned with all surface transportation.[11] As an umbrella agency, the Commission was charged with protecting not only the public but the economic existence of rail, motor and water carriers. Private carriers were exempted from regulation; anyone might haul his own goods in his own trucks. Agriculture was specifically exempted by law, as was local and occasional transportation. Otherwise, the interstate motor carrier industry was subject to strict controls on entry and rates.

Those individuals and firms operating trucks on the highways at the time of enactment of the Motor Carrier Act were grandfathered into certificates and protected from further competition. New carriers would be required to follow ICC procedures to obtain the authority that would allow them to haul for hire. Trucks and buses were considered under the same regulatory scheme, and a similar regime was adopted for entry of air carriers in the Civil Aeronautics Act of 1938.[12]

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10. Act of Aug. 9, 1935, ch. 498, 49 Stat. 543.

11. Dempsey, *Entry Control Under the Interstate Commerce Act*, 13 Wake Forest L. Rev. 729, 730 (1977).

12. Ch. 601, 52 Stat. 937 (codified as amended at 49 U.S.C. §§ 1301-1542).

A. *Motor Common Carriers*

A common carrier has the obligation to serve all customers fairly and equally and hold itself open to the general public for carriage of people or goods. This is the same common-law obligation which had attached to the nation's railroads. Common carriers were required to have a certificate from the ICC, stating that the public convenience and necessity require its services. The term "public convenience and necessity" is not defined in the Interstate Commerce Act. In an early decision, *Pan American Bus Lines Operations*[13] established three considerations to be weighed in determining whether an applicant's proposed operations would satisfy this criterion:

1. Is there a public demand or need for the service?
2. Can this need be served as well by existing carriers?
3. Can the new operation serve the public demand without endangering the operation of existing carriers?

Professor Dempsey suggests that this test boils down to balancing the advantages to shippers or passengers of the new motor carrier as opposed to the actual or potential disadvantages to existing carriers which might result from the institution of particular shipping operations.[14]

Under the scheme of the Motor Carrier Act, the typical application involves an applicant who either wants to get into the motor carriage business or to expand present operations. The application is made to the Interstate Commerce Commission, with supporting statements from shippers who say they would use his service if authority was granted. The application is detailed as to what commodities are to be handled and over which routes. Usually, the application is protested by existing common carriers who fear diversion of traffic. Subsequent to a conference with the protestants, the application may be amended to limit the authority sought. The imposition of these limitations may cause the protestant to withdraw his opposition. Even in the absence of opposition, however, the carrier must establish a prima facie case of the need for proposed operations.[15] Protestants must demonstrate their operating authority and their willingness and ability to handle the shipper's traffic. The applicant may, in turn, show that population or business along the route has increased to the extent that there is enough business for the newcomer as well as existing carriers.[16]

In addition to the public need for the service, the Commission looks at the services of existing carriers. The Commission has imposed an affirmative duty on shippers to inform themselves about which carriers serve their routes before they seek additional motor carriers. But when a carrier proposed a unique type of transportation service which existing carriers do not

13. 1 M.C.C. 190, 203 (1936).
14. Dempsey, *supra* note 11, at 735.
15. Road Runner Trucking, Inc., Extension—Meat, 124 M.C.C. 245, 248 (1976).
16. Dempsey, *supra* note 11, at 738.

or will not offer, the ICC often concludes that the public should have the benefits of the new service, even if it might divert traffic from existing carriers.[17] However, the general trend at the ICC has been to allow existing carriers to handle the traffic which is within their territory.

The ICC has been wary of allowing too many carriers in a market, for fear of diluting the traffic to the level where no one would survive. This concern, however, has been limited to motor carriers. Railroads have been unsuccessful in blocking competitive motor carrier service, since the Commission has long believed that shippers should have the benefits of both modes, wherever possible.

When there has been an increase in traffic, the ICC has been more ready to allow new carriers to serve a market. The last part of the *Pan-American* tripartite test is whether new carriers can serve the market without endangering other carriers. Competition has not, until recently, been a major factor in ICC considerations. In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*,[18] however, the United States Supreme Court decided that the benefits of competitive service to consumers might outweigh the discomforts which existing certificated carriers could feel as a result of new entry, and that a policy of facilitating competitive market structure and performance was entitled to consideration.

B. Motor Contract Carriers

Although the restrictions on entering the field of common carriage were rigorous, the Commission provided for alternative transportation by its issuance of permits for contract carriers. Statutory authority was supplied by Section 203(a)(15) of the Motor Carrier Act, which specifically allowed such a permit for a motor carrier who engages in for-hire transportation;

> under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct needs of each individual customer.[19]

The policy for allowing such services was to help shippers who might otherwise be forced to buy their own trucks for private carriage. It made allowance for the special needs of shippers which ordinary carriers were unwilling or unable to meet. It was, of course, a departure from the tariff principle, as the contract carrier establishes by contract, rather than by filing a tariff with the ICC, what the service will cost. A contract carrier is not required to serve the general public; rather, the law limited him to "a limited

17. *Id.* at 740; *see* Kroblin Refrig. Xpress, Inc., Extension—Morrow, 125 M.C.C. 354, 359 (1976).

18. 419 U.S. 281, 293 (1974).

19. 49 U.S.C. § 309(b) (1970); *see* Dempsey, *supra* note 11, at 753 n.110.

number of persons." For many years the ICC relied upon the "rule of eight" established in the *Umthun Trucking* case.[20] Under this principle, the operations of a carrier with more than eight contracted shippers would be watched closely to see whether or not it would be more appropriate for the carrier to operate as a common carrier. The United States Supreme Court held in *ICC v. J.T. Transport*[21] that consideration must be given to the specialized transportation requirements of the supporting shipper, the manner in which the applicant proposes to satisfy them, and whether they may be satisfied as well as protestants.

Contract carriage is a statutorily authorized exception to the cartelization of the industry brought upon by limitation of entry and the grandfathering of early operators. It was perceived as a necessary exception, provided the number of shippers was in fact limited to a minimum. The most persuasive showing was that service would be provided to a single contractual shipper. The larger the number of shippers a carrier served, the less acceptable would be its application.[22] "Dual operations," i.e. the holding of both common and contract carrier authority for the same area by the same carrier, was frowned upon by the Commission, which saw in dual operations the opportunity to discriminate in favor of one large contractual shipper against smaller shippers in the area who would have to abide by a published tariff.[23]

Contract carriage, as well as exempt transportation and private trucking, were exceptions to the utility-type regulation of the industry. Contract carriers were generally smaller operators than the large trucking lines, and provided a specialized service that was often an extension of the production line of the shipper. Since the contract authority often limited such carriers to a plant-site, terminals and other expensive infrastructures were not needed. It was generally easier for a firm to gain entry into the trucking business as a contract carrier rather than as a common carrier.

C. Control of Rates

Another important factor for stabilizing the structure of the industry is the ICC control of rates as a method to regulate competition. Rate regulation of motor carrier services is based upon the principles of regulating railroad rates, and is similar to utility rate regulation. The Motor Carrier Act provided as follows:

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20. Umthun Trucking Co. Extension—Phosphate Feed Supplements, 91 M.C.C. 691, 696 (1962).

21. 368 U.S. 81 (1961).

22. Dempsey, *supra* note 11, at 757.

23. J. Guandolo, Transportation Law 316-17 (3d ed. 1979). Former 49 U.S.C. § 310 outlawed dual operations and has been repealed by the Motor Carrier Act of 1980.

1. Publication of rates and fares is required and there must be strict observance of tariffs.
2. Rates and fares are to be reasonable and not unjustly discriminatory.
3. Carrier practices and regulations relating to fares and charges are to be just and reasonable.
4. Notice of at least 30 days is required for changes in rates and fares.
5. Proposed rates and fares may be suspended by the Commission for a period not exceeding seven months.
6. The Commission has power to prescribe the maximum, minimum or actual rate to be charged in lieu of a rate found unreasonable or otherwise unlawful.
7. The Commission has the power to hear complaints and institute investigations pertinent to its Congressional mandate.[24]

The intent of Congress was that the rate charged reflect the value of service rather than competitive conditions. The antidiscrimination provisions, common in the transportation industry, were intended to insure that no illegal rebates, kickbacks or other practices favoring one shipper at the expense of others were employed in the transportation industry. The result, however, was that estoppel did not exist in the motor carrier business. A moving company would give you an estimate for moving your household furniture to Florida, but when you arrived there, the company had to adhere to the tariff, not a binding estimate. To do otherwise would be giving you an undeserved and illegal rebate.

Former ICC Chairman Daniel O'Neal wrote:

> Small shippers are particularly susceptible to rate discrimination. Through our present system of published rates and antidiscrimination provisions, the small shipper is able to know the transportation situation of its competitors and enforce upon carriers a duty of equitable treatment. Thus, at least insofar as transportation services are concerned, the small shipper is enabled to compete with the assurance that the economic leverage of others, or its lack of it, will not be permitted to unduly prejudice its business endeavor.[25]

The small shippers whom O'Neal writes of are predominantly small businesses, using motor carrier services in an attempt to compete with larger firms. Abandonment of the tariff principle would disadvantage such small shippers. As for the individual, usually the only area where he has much dealing with motor carriers is as a user of bus service, household goods movers, and package express, whether provided by the bus companies or United Parcel Service.

A rate system which avoids fluctuations results in more solvent carriers and more reliable services. It also makes rates a predictable matter in figuring distribution costs. The tariff principle primarily concerns common carri-

24. O'Neal, *Price Competition and the Role of Rate Bureaus in the Motor Carrier Industry*, 10 TRANSP. L.J. 309, 317 (1978).
25. *Id.*

ers. Contract carriers must publish their rates and abide by them (until 1957 they were only required to publish minimum rates). The ICC had the power to prescribe minimum rates for contract carriers, but not maximum rates.[26]

Motor carrier rates are essentially carrier-made rates, subject to the approval of the Interstate Commerce Commission. The carrier initiates a rate by publishing them in tariffs which are filed with the Commission between 30 and 45 days before they are to become effective.[27] A protest to this rate may be made by any interested party, except that a rate bureau may not protest a rate filed by one of its members. If the Commission agrees that the proposed rates are reasonable, they go into effect without an investigation. However, if the Commission thinks that the proposal may result in unlawful rates, it can investigate the rate and suspend the change. Where a proposed increase is not suspended but is investigated and later found unlawful, it is ordered to be cancelled. The ICC is without power to order refunds of motor carrier rates.[28] After a rate has gone into effect without investigation, shippers may challenge its lawfulness by filing a complaint. If the rate is found to be unlawful, it may be cancelled by the ICC.[29]

Rates must be "just and reasonable", but those terms are not included in the statute. In the railroad case of *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad*,[30] Justice Cardozo spoke of a "zone of reasonableness" between maxima and minima rates, and this concept seems to have been brought into motor carrier ratemaking as well. A rate that does not move the traffic may result in an embargo and thus be *prima facie* unjust and unreasonable. Discriminatory rates are those which give preferential or prejudicial rates to certain shippers. Increased competition has produced a trend toward taking cost, more than value of service, into effect for pricing. But for a long time, trucks could safely price their services considerably higher than railroad rates, and benefit from the lack of competition, thus keeping rates at a higher level than a competitive market would presumably allow.

Rates proposed by carriers fall into two categories: general rate increases and increases on specific commodities. General rate increases are across-the-board raises in tariffs due to general cost factors within the industry. Specific rates apply only to certain movements and are often made for competitive reasons.

As with the railroads, motor carriers have banded together in price-setting conferences called rate bureaus. Rate bureaus started to emerge

26. *Id.* at 318.
27. 49 U.S.C. § 10702 (Supp. III 1979).
28. O'Neal, *supra* note 24, at 320.
29. *Id.* at 321.
30. 294 U.S. 499, 506 (1935).

immediately after the passage of the Motor Carrier Act. Today there are ten major motor carrier rate bureaus.[31] The Reed-Bulwinkle Act of 1948 granted antitrust immunity to those who make, carry out, and act in conformity with the terms of a collective ratemaking agreement if the agreement has been approved by the Interstate Commerce Commission.[32] Parties to rate bureaus have the right to take independent action at any time. Whatever the benefits of rate bureaus may be, it is clear that their existence is due to the regulation of the industry by the ICC. Without ICC regulation, the joint actions of rate bureaus would be subject to antitrust laws and individual publishing by truck lines would become the rule, rather than the exception. The benefits of joint ratemaking by connecting carriers might be lost as the carriers would be dissuaded from even discussing rates with one another.

D. Regulation of Routes

Entry to the trucking business requires ICC authority which specifies what commodities may be handled and what territory may be served. If specific highways and intermediate points are required to be followed, the carrier is considered to be serving "regulate routes", while if no particular routing is specified, the carrier is authorized to use "irregular routes", i.e. it may take whatever route is convenient.

General commodities carriers and bus lines were limited to regular routes. The philosophy seems to have been that local communities along these lines could thus depend on regular service by the bus or truck for handling small shipments or passengers, usually on a fixed schedule, every day. There were some deviations allowed; a small town within a mile or two of the designated route could be served, and trucks or buses could deviate from the designated highway if a parallelling Interstate highway was built. (Greyhound and many other intercity bus lines did just that, which resulted in an abandonment of service to small towns once located on the Greyhound route).

Carriers of specific commodities generally did not have to adhere to regular routes. The irregular routes could be from or to one particular point (radial authority) or unrestricted operations within a certain territory (nonradial authority) or merely between two designated cities.[33] When a carrier had two separate grants of authority, but both included a single point, the operator could "tack" the two authorities together through the "gateway" city. Thus, a carrier who had rights to operate between New

31. McFadden, *Competitive Ratemaking*, 12 Transp. L.J. 71, 74-75 (1979).

32. 49 U.S.C. § 10706 (Supp. IV 1980).

33. Radial authority could be expressed as: between New Orleans, on the one hand, and, on the other, points in Texas, Mississippi, and Arkansas. Non-radial authority could be expressed as: between points in Alabama, Mississippi, and Georgia.

Orleans and Dallas and who later acquired authority to haul between Dallas and points East of the Mississippi River, could transport freight between New Orleans and the East, providing that he first operated through Dallas. Of course, the carrier would then try to eliminate the Dallas gateway in another ICC proceeding, which would then be contested by other carriers who had direct authority between New Orleans and the East Coast. Authority might be limited to the haul of a specific commodity in one direction only (machine parts from Detroit to the Pacific Coast), impelling the carrier to return empty. Circuitous regular routes, gateway restrictions, and empty backhauls were among the fuel-wasting results of regulation which were so vociferously denounced by advocates of deregulation of motor carriage.

E. Fitness

A threshold qualification for any carrier to receive authority from the ICC is a finding that the carrier is fit, willing and able to perform properly the proposed service and to comply with the provisions of the Interstate Commerce Act.[34] Public need is not enough; there must be some weeding out of carriers whose conduct demonstrates an inability or unwillingness to perform motor carrier operations lawfully. The carrier has the burden of proof in refuting its prior behavior if it is applying for additional authority, despite having formerly been in violation of the Act. Fitness goes to the financial capabilities of the applicant, its willingness to obey the rules of the Commission, and its ability to safely and properly perform the proposed service.[35]

If a shipper needs a proposed service and the ICC denies an application because of lack of fitness, the ICC may grant temporary authority to a motor carrier while questions arising from fitness are resolved. Temporary authority is a useful device by which the ICC awards operating rights for a limited time while certain conditions prevail. A railroad strike or natural disaster might result in temporary authority to motor carriers to provide increased service to an area. In 1979, the ICC granted unrestricted temporary authority to intercity bus operators during a period of acute gasoline shortages.

Permanent authority, on the other hand, is an entitlement that may not be removed without due process being awarded to the licensee. The system adopted by the ICC does not follow the temporary, renewable authority favored by the Federal Communications Commission for broadcasters. Rather, the system represents a permanent entitlement very much like the license a state grants to follow a particular profession.

This operating authority constituted a valuable property right to motor carriers. Many insolvent companies were bought at a good price just be-

34. Dempsey, *supra* note 11, at 759 & n. 134.

35. Associated Transport, Inc., Extension—TVA Plant, 125 M.C.C. 69, 73 (1976).

cause of the worth of the operating authority it held. Upon passage of the Motor Carrier Act of 1980, these operating rights were written off by many companies as having a zero value. The increased competition allowed by the new law resulted in a diminution of the value of these operating rights to near zero.

The scheme envisioned by the Motor Carrier Act encompassed a broad regulation of activities of intercity motor carriers, similar to that of railroads and, later, airlines. The highways may have been built with public moneys, but their use was restricted to carriers lucky enough to have received authority from the ICC. Some of the authority was obtained by applications for certificates of public convenience and necessity, but many carriers trace their origin to the fact that an ancestor was running a truck on the highways in early 1935. Similarly, no rhyme nor reason existed for the awarding of most authority, which was fragmented in nature. The original grants of authority coincided with the territories and commodities handled in 1935. Later grants were awarded when there was public need and where the competitive balance was not upset by the new arrival.

Unlike the railroads, regulation of motor carriers was never total. Private carriage and exempt trucking operations have always accounted for a significant part of the nation's freight traffic. Nonetheless, through mergers (for which ICC authority was necessary), local trucking companies grew to an extent where they could provide coast-to-coast service and be major competitors to the railroads. By protecting carriers from new competition and by keeping rates at a level where profits were guaranteed, the ICC helped assure the emergence of a trucking oligopoly.

IV. Development of the Industry Under Regulation

The lobbying group for the trucking industry is called the American Trucking Associations. The plural form of the name is appropriate, since the motor carrier industry really contains several different industrial groupings and entities, performing all types of different services.

A. Common Carrier Truckers

These include the giants of the industry, the big nationwide trucking companies whose billboard trailers are found on all highways. Common carriers can also be small independent truckers providing a local service which just happens to cross state lines. The largest companies are the carriers of general commodities. They operate semi-trailers, sometimes in double-bottoms (where state laws allow) and sometimes do away with over-the-road trucking altogether, arranging for pickup and delivery and having

intermediate hauling done by the railroads in TOFC[36] service. Common carriers of general commodities follow regular routes and operate by published schedules.

A constraint in the general-commodities trucking business is the necessity for terminals. The terminal facilities may be less elaborate than railroad yards or airport cargo areas, but they are necessary for the transfer of freight from local delivery trucks to the big semi-trailers, classification of freight, handling of small shipments and consolidating shipments to the main destinations. A concern which has been voiced by representatives of small shippers and small communities is that deregulation would allow new entrants to cream-skim profitable traffic, leaving the major carriers with the expense of operating these large terminals for reduced traffic. Physical constraints of terminals also serve to limit the amount of shipments which can be handled at a given location, and may militate against new entries into a market. If the existing terminal cannot or will not handle your trucks, and if you cannot afford to build or acquire your own, you might think twice about serving a particular community. The existence of adequate terminals has the greatest effect on the small shipper; the large concerns which can fill a daily truckload at its plant site may not worry about such considerations.

Large carriers came about because of consolidation of smaller companies with the approval of the ICC. In passing upon a proposed consolidation, the ICC is required to give weight to such matters as the effect of the proposed consolidation upon adequate transportation service to the public, effect on competing carriers, total fixed charges resulting from the transaction and the interest of the carrier employees affected. In 1944, the Commission authorized the formation of Associated Transport, Inc., which embraced most of the major carriers along the eastern seaboard between Massachusetts and Florida.[37]

Motor carriers were first subject to regulation by the Motor Carrier Act of 1935 which included Commission power to immunize transactions from the antitrust laws if "consistent with the public interest." In 1940 Section 5(2) of the Act was enacted[38] which gave the Commission plenary power over consolidations and mergers. Seeking consolidations of terminals and economies of scale, the Commission has favored single-line service and the expansion of major trucking companies in the general-commodity long-haul carrier business.[39] These companies generally own their own fleets of trac-

36. Trailer on flat car. Recently, the ICC has moved to completely deregulate the TOFC (or piggyback) business.

37. McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

38. Now 49 U.S.C. §§ 11343-11346 (Supp. II 1978).

39. Popper & Beabout, *Finance Transactions—Jurisdiction*, 10 TRANSP. L. INST. 1 (1977).

tors and trailers and deal with drivers who are represented by the International Brotherhood of Teamsters.

B. Owner-Operators

At the other extreme from the Associated Transports are the owner-operators. Special provision for owner-operators was not made until passage of the Motor Carrier Act of 1980.[40] As individual entrepreneurs, they owned their own trucks, painted them in decorative color schemes, and operated on irregular schedules. Barred from competing head-to-head with the major trucking companies, owner-operators worked on a number of bases. Some managed to obtain some authority for themselves as contract or even common carriers on limited routes. Some leased their equipment to operators with authority. Others hauled only exempt products, such as agricultural produce. Still others hired themselves out to companies who shipped their own products in interplant hauling, in lieu of private carriage. There were truckers who went through the motions of "buying" the shipment and "selling" it at the other end, so that they could be considered private carriers, handling their own property only. Finally, there was a substantial number of gypsy truckers who operated outside the law, hauling in violation of the Interstate Commerce Act, at whatever rate they could get from a shipper.

With fixed costs to meet, the over-the-road independent trucker was often forced to cut rates low in order to have enough business to make the payments on his truck. He would often write off his own labor as worthless. Owner-operators would also push the hours-of-service law to the maximum without regard to the risks involved.

C. Intrastate Truckers

On a smaller scale than the big interstate trucking companies are the local or intrastate truckers. As operators within a single state, these companies were exempt from ICC regulation, even though many shipments might originate out of state with another carrier.[41] In some cases, trailers might be delivered into a state by one carrier, and delivered to a final destination by an intrastate carrier. Since "commercial zones" and "terminal areas" around major cities were exempt from regulation, a carrier might also be able to deliver and pick up in a neighboring state, if it were within the commercial zone of a city within the state for which it had authority. (Kansas City, KS-MO; Philadelphia-Camden, PA-NJ; Portland-Vancouver, OR-WA are examples).

Although exempt from Federal regulation, intrastate truckers needed

40. 49 U.S.C. § 10922(b)(4)(E) (1980).
41. 49 U.S.C. § 10525 (Sup. IV 1980).

authority from the state in which they operated. Most states had licensing schemes similar to that of the Federal government, calling for certificates of public convenience and necessity and control of rates by the State Public Service Commission or similar body. State regulation of interstate carriers was pre-empted by the ICC in 1935, but the states still retained control over intrastate tariffs filed by these carriers. State regulation is older than ICC regulation, but recently there have been some sunset provisions. In 1979, Florida deregulated all control by the state over intrastate buses and trucks. In that state there is free entry, exit and ratemaking. Other states have considered sunset laws for their motor carrier regulation. State regulation of common carriers cannot be a burden on interstate commerce; i.e. intrastate rates cannot be so low as to discourage the shipment of goods across state lines.[42]

D. Agricultural Trucking

Farmers are one of the greatest users of trucks for hauling their commodities. With grain, the haul is usually to the nearest elevator, while with many so called "truck garden" crops, the haul is to the marketplace by trucks. Farm vehicles were intended to remain in an unregulated state and Section 10526(a)(4) of the Interstate Commerce Act exempts from economic regulation motor vehicles owned and controlled by a farmer transporting his own agricultural products and supplies.[43]

Besides the exemption for farm trucks, agricultural products themselves have always been excluded from the regulatory scheme, no matter who hauls them. No one needs a certificate of public convenience and necessity to haul unprocessed agricultural and horticultural commodities.[44] The ICC has spent a lot of time and effort in determining what commodities come within the intention of Congress to exempt only those agricultural products which are in their raw or, if not generally marketable in their raw state, have been processed solely for the purpose of making them marketable.[45] Truckers, then, could carry these raw agricultural products to market, but the law did not allow a backhaul of a nonexempt product.

Much of the hauling of agricultural products is done by agricultural cooperatives. The larger co-ops have transportation divisions and they function very much as the large interstate truckers. The law allowed co-ops to haul up to 15% of their interstate shipments in non-exempt commodities. Agricultural co-ops, then, seeking a backhaul, would often undercut regular truckers in soliciting business to fill up the empty trailer for gas money. The

42. 49 U.S.C. § 10931 (Supp. IV 1980).
43. 49 U.S.C. § 10526(a)(4) (Supp. II 1978).
44. 49 U.S.C. § 10526(a)(6) (Supp. II 1978).
45. Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 Transp. L. Inst. 121, 144-45 (1980).

Motor Carrier Act of 1980 expanded this non-exempt traffic to 25% of the agricultural co-op's tonnage.[46] During the 1970's, the ICC worried a great deal about the problem of "bogus co-ops", so-called agricultural cooperative organizations that engaged in few marketing activities, but merely sought a backdoor entry into the transportation business.

E. Private Carriage

While driving on the interstate highways, the motorist will notice large semi-trailer trucks marked for retail stores such as Sears and K-Mart. All these are firms which have decided to forgo for-hire carriage and establish their own trucking division to connect their network of stores together. Of the 24.5 million trucks on the highways in 1975, all but a million were operated by private carriers, and even among the big semi-trailer rigs, almost as many are operated by private concerns as by trucking firms.[47] When a shipper operates his own vehicles in pursuit of his own (nontransportation) business, it is clearly as much private carriage as when you or I take our packages home from the department store. The issue has arisen when a corporation leases vehicles (especially from owner-operators) as to whether or not it is engaged in for-hire carriage, which would require authority from the ICC.

The growth of corporate conglomerates has given rise to another question. That question is whether a corporation may haul for its subsidiaries. Generally speaking, a legal entity (such as a corporation) was forbidden to transport for compensation the property of an affiliated, but separate corporation. The Commission did not choose to pierce the corporate veil to find common ownership. This question was answered by the Motor Carrier Act of 1980, which allows intercorporate hauling if there is 100% ownership by the parent corporation of the subsidiary.[48]

This unregulated sector accounted for the bulk of trucking, and few substantial figures were given as to the extent of the industry. Railroads, when complaining about truck competition, focused on the common-carrier industry. The private trucker, who had forsworn common carriage completely, was seldom mentioned.

F. Package Delivery Services

The delivery of parcels is one of the oldest facets of the trucking business. Names like Adams Express and Wells Fargo & Company predated the opening of the West, but were curbed by express statutes instituted to prohibit these companies from competing with the Post Office, which was

46. *Id.* at 147.
47. *Id.* at 124.
48. *Id.* at 126.

granted a monopoly on carrying the mails.[49] The remaining concerns in the express business were merged into the Railway Express Agency, owned by a consortium of railroads, using trains for intercity service and trucks for local delivery.

Railway Express later forsook the parent rails and concentrated on a motor carrier delivery service, using valuable express company rights granted by the ICC. Renamed REA Express, Inc., the company could not survive and was liquidated in the 1970's. Most package delivery service is handled today by United Parcel Service, a motor carrier with operating authority in all 48 contiguous states granted by the ICC.

UPS sees the Postal Service's Parcel Post as its main competition. Presently the Brown Giant has become the carrier of preference for most businesses and is far more efficient and profitable than the Postal Service. Of course, UPS has few of the service obligations of the Postal Service, and is not required to maintain full-service offices in small towns. Thus, the amount of cross-subsidy is reduced to nil. UPS maintains very simple terminal facilities where package shipments are consolidated and placed on trailers. Although, at one time, UPS was exclusively an over-the-road carrier, but with increasing fuel and labor costs, UPS has turned to shipping its trailers on railroad flat cars, and in some instances, maintains entire trains for coast-to-coast UPS movements.

G. *Truck Rental Companies*

Many of the casual movements on the highways are by private individuals driving trucks or hauling trailers owned by U-Haul, Hertz, Jartran, Ryder, or several other truck rental companies. Because the lessee does the driving, controls the movement of the vehicle, and is responsible for damage, this is not considered for-hire carriage. Because auto rentals and their predecessors, the livery stables, were not considered common carriers, truck rentals are also exempt and are considered to be a form of private carriage.

Driveaway and truckaway companies (which haul your own trailer or drive your car to a new destination), however, are considered to be common carriers. Since they hold themselves out to the public as purveyors of transportation, and since they provide the drivers (albeit from a casual list of walk-in drivers in response to ads which read "Drive Free to Florida"), they are as much carriers by motor vehicles as trucking companies, according to the ICC.[50]

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49. Since 1971, the first-class mail monopoly has been vested in the United States Postal Service, which is technically a government-owned corporation.

50. AAACon Drivers' Exchange, so listed in order to be the first in the New York phone book, was the first and largest such firm to receive authority from the ICC.

H. *Moving Vans*

The major moving van companies have licenses from the ICC to operate as "common carriers of used household goods". The structure of the moving van industry is not as monolithic as it might appear. Most of the companies are associations which local agents belong to. When you make a move, an ICC tariff governs what charges are made (despite what the estimate to charges might be), and a local agent arranges the packing and departure. Another local agent at the other end of the line handles the unpacking or storage. Much of the labor used in the packing and moving is not the unionized professional help which you might expect, but casual labor hired by the driver for that day only. Experience with household goods movers was one of the prime horror stories in the Nader Report[51] and eventually led to the Household Goods Transportation Act of 1980.[52]

I. *Specialized Carriers*

This term is used to denote motor carriers who own specialized equipment rather than the traditional tractor-trailer combination. They usually have broad geographical authority, but limited to a certain type of equipment. Some examples of these would be auto and boat transporters or tank trucks used for hauling chemicals or other hazardous substances. Heavy-haulers, which have heavy-duty equipment for moving construction machinery or other oversized loads are often found in the ranks of specialized carriers.

J. *Intercity Bus Lines*

The growth of the bus industry is rather different from the history of trucking, since it is passenger-oriented and has developed into a duopoly, with Greyhound and Trailways the predominant operators. The Greyhound system began in the Iron Range of Minnesota in the 1920's, and expanded through merger with other bus lines until a nationwide system was formed. Trailways was, until recently, a loose association of once-independent bus lines and many former railroad subsidiaries. Protected from antitrust considerations by law and ICC policy, the two were allowed to expand to the extent where they have national pre-eminence today, with a mere differentiated fringe of local operators. Railroad companies, seeking a solution to the problem of passenger operations, once bought heavily into bus companies, but most have sold their interests to Greyhound or Trailways. Some independent companies have flourished, mostly in North and South Dakota,[53] but most operate as feeders with some affiliation with one or the

51. R. Fellmeth, The Interstate Commerce Omission 223-56 (1970).
52. Pub. L. No. 96-454, 94 Stat. 2011 (1980).
53. Bangor and Aroostook is one of the few railroads that still operate their own bus compa-

other national systems.

Bus companies provide a low-cost, labor-efficient, fuel-efficient system of transportation that unfortunately reached its peak in the early 1970's and is fighting to hold on to its share of the market. By using public highways for transport and very rudimentary terminals (except in major cities), the bus companies have been able to avoid the costly infrastructure that plagued railroad passenger service. There were low costs and high depreciation in the industry, since the major expenses were buses and the costs of drivers. Somehow, the Amalgamated Transit Union and other labor organizations were persuaded to allow the driver to do loading and unloading work en route and thus station costs were minimized. Except for major cities, the bus depot could be an agency station, located in a drug store or gas station, with the agent collecting a commission for bus tickets sold. Development of a long-distance motor coach by General Motors (with the engine underneath the passenger compartment and room for baggage to boot) and the increasing mileage of all-weather highways supplied by the taxpayer gave opportunities for the industry to grow.

For all the advantages, bus travel never achieved its full potential in the United States. Vehicles were often cramped and crowded, unlike the more luxurious European coaches. Bus companies, writing off the luxury market, concentrated on cheap transportation and neglected many amenities. A system of mail buses, such as provides service to German small towns, never developed in this country, and most small communities have no access to intercity buses. Worst of all, the bus industry, unwilling to short-haul itself never moved toward a system of intermodal transportation. It is very difficult to switch from bus to rail or bus to air modes in this country, while most other nations regard all modes as part of an integral system.

Today's intercity bus companies derive much of their earnings from charter service or package express. On many carriers, the intercity carriage of passengers is a marginal activity, maintained to keep the franchise.

All of the motor carriers have benefited from the development of superhighways (built at the behest of motorists but maintained to extra strength for truckers). The debate over whether or not truckers pay anywhere near their fair share of highway costs has been raging for over forty years and will probably never reach a consensus. It is true that there has been cost to local communities due to the necessity of widening city streets and in policing additional traffic for motor carriers, but, as a public good, street use has not generally been measured.

Common carriers have an obligation to the shippers to take all traffic

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nies. In North and South Dakota, established firms such as Jack Rabbit Lines, Triangle Transportation and Star Bus Co. operate intercity service, as this area (and northern Minnesota, where Greyhound was born) has not been incorporated into the major bus systems.

rendered on a nondiscriminatory basis. They also act as insurers for the traffic which is in their care. This obligation has been supplied by law on the rationale that the common carrier is in a better position to provide for the shipment than the shipper who has relinquished control of it. Contract carriers have sometimes limited liability by contract; the relationship between large shippers and carriers being on approaching equality of bargaining. With small shippers who use the facilities of UPS, bus express or moving vans there is little or no bargaining power, and contracts of adhesion result. This is one reason given for continually monitoring the activities of carriers who specialize in the handling of small shipments.

In contrast with the rail and air competition, which is governed by the Railway Labor Act,[54] labor relations within the motor carrier industry come under the National Labor Relations Act.[55] Most of the large operators have contracts with the International Brotherhood of Teamsters, while most bus line employees are represented by the Amalgamated Transit Union. Deregulation could expect to meet resistance from these unions, which would fear the entry of non-unionized competitors to jeopardize their wage and benefit scales.

V. Exemptions to Regulation

In addition to the exemptions for private and agricultural transportation, the Motor Carrier Act exempted certain other areas from regulation by the ICC. Within these areas, a more or less free market in transportation flourished.

A. Intrastate Commerce

Not only does the ICC have no jurisdiction over purely intrastate carriers, but it also considers "land-bridge" traffic to be exempt, where traffic is en route between two foreign countries. This not only exempts traffic between Canadian points passing through Minnesota or Maine, but has been held to apply to Canadian traffic going to a United States port for transshipping to Europe.[56]

B. Commercial Zones

Local movements within a municipality and its surrounding commercial zone (the suburbs or contiguous towns) are exempt from regulation.[57] This

54. Act of May 20, 1926, ch. 347, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151-166 (1976 & Supp. IV 1980)).

55. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-66 (1976 & Supp. IV 1980).

56. Dempsey, *supra* note 46, at 127.

57. 49 U.S.C. § 10526(b) (Supp. III 1979).

allows local carriers to serve points within a local area without seeking regulated authority, even if the city is located on a state line.[58] Closely related is the terminal area exemption, by which a line-haul carrier with authority to serve one point may pick up and deliver anywhere within that one community's terminal area.[59] The terms "commercial zone" and "terminal area" are not defined in the statute, but the ICC bases the exemption on the size of a municipality. Thus the commercial zone/terminal area of a town of 2,500 is a circle of 3 miles radius, but the exempt area for a city of 1,000,000 souls or more is 20 miles.[60]

C. *Incident to Air*

Many air freight shipments have a prior or subsequent movement by motor carrier. Most air freight to Milwaukee, for example, is handled through O'Hare Airport and trucked into Wisconsin. The Interstate Commerce Act exempted freight with an immediate prior or subsequent movement by air. Part of the reason for this exemption was that the Civil Aeronautics Board had jurisdiction over surface transportation in connection with air transportation. The two agencies worked out an airport zone limit (similar to the commercial zone), usually of about twenty-five miles from the airport. Within this zone, the CAB had jurisdiction; outside this zone, regulation was the ICC.[61] If there was one waybill for transportation of freight and the motor traffic was within the terminal area, it was all a CAB matter. Then, in 1977, Congress amended the Federal Aviation Act of 1958[62] and, following the spirit of the amendment, the CAB eliminated the tariffs for surface carriers incidental to air. Then the Motor Carrier Act of 1980 extended the exemption by effectively deregulating all traffic with a prior or subsequent movement by air.[63] Apparently there are no geographical limits to this exemption.[64]

D. *Other Exemptions*

The statute also exempts from regulation the transportation of wrecked vehicles, newspapers, school buses, taxicabs and buses operated by hotels and motels, casual transportation, and movements within national

58. An interesting situation occurs when the commercial zone runs up against an international boundary, as in Detroit, El Paso, Buffalo or San Diego. This situation has not been completely settled to anyone's satisfaction. *See* J. Guandolo, *supra* note 24, at 309-11.

59. 49 U.S.C. § 10523 (Supp. II 1978).

60. Dempsey, *supra* note 45, at 131.

61. *Id.* at 131-41.

62. Act of Nov. 9, 1977, Pub. L. No. 95-163, 91 Stat. 1278.

63. 49 U.S.C. § 10526(a)(8)(B) (Supp. IV 1980).

64. Dempsey, *supra* note 45, at 140.

parks.[65] The ICC itself allowed relaxed entry which amounted to deregulation for waste products, in an effort to encourage the use of recyclables.[66]

VI. Pressures for Deregulation

A. *Theoretical Considerations*

By 1970, many commentators had remarked upon the inappropriateness of a utility model of regulation for a possibly competitive industry. Trucking just did not seem to have many of the characteristics of natural monopoly. Minority truckers felt left out of a system where all the goodies were divided up in 1935. The industry no longer seemed to be an infant needing protection.

More to the point was the constant reminder that an agency often is said to be captured by those whom it is supposed to regulate. The agency is confronted with industry representatives every day and tends eventually to see the industry point of view. It views continuance of traditional forms of operation as the *summum bonum* and views outside competition as a threat to the stability of the system.

This point was brought home by the publication of the first report by Ralph Nader's organization. Entitled *The Interstate Commerce Omission*,[67] authored by Robert Fellmeth with the assistance of Ralph Nader's task force on transportation, it called the ICC the administrator of a large cartel of transportation forces, beholden to the railroads and major trucking concerns, and keeping rates artificially high through restriction of competition. Such criticism had been voiced many times before, but mostly from economic or political conservatives. Since Nader was mostly identified with the political left, and espoused government action to correct consumer problems, the report was considered to be an expansion of the consensus in favor of more competition.

The Nader book concentrated on abuses which affected the consumer directly, such as household goods moving and the discontinuance of rail passenger service. But it especially took aim at the lack of competition in the industry. It cited the case of Joe Jones, a black trucker who obtained a loan from the Small Business Administration to enter the trucking business but was unable to operate because of the ICC's refusal to give him authority. Jones drove his truck to Washington and parked it outside the ICC in protest. The *Omission* book cited Jones as an example of the cartelization of trucking.[68]

There had been experience with exempt transportation in such areas

65. *Id.* at 148-49.
66. *Id.* at 149.
67. R. Fellmeth, *supra* note 51, at 119-35.
68. *Id.*

as agriculture, commercial zones, and incident-to-air transportation. Few of the dire consequences predicted had, in fact occurred. Further deregulation would not be occurring in a vacuum; we had models of deregulation in exempt transportation, as distinguished from the totally regulated railroad experience.

The 1970's political climate favored a retreat from regulation. Both Carter and, later, Reagan, were elected on platforms which called for a retreat from regulation, and one could not pick up a newspaper without stories about bureaucratic lag, regulatory inefficiency, or the additional costs incurred by government regulation. Most of this criticism involved agencies responsible for regulation of business practices such as the Occupational Safety and Health Administration, National Labor Relations Board, Equal Employment Opportunity Commission, Environmental Protection Agency and the Federal Trade Commission. Much less frequent was criticism of the utility-type regulatory agencies, but the general distrust of government rubbed off on the transportation agencies as well.

By 1978, Americans had an example of deregulation. The Air Cargo Deregulation Act[69] and the Airline Deregulation Act[70] had been passed, thus creating a sunset law for the CAB. Although there have been many adverse effects on price and service since the passage of these laws,[71] there were enough one-shot benefits with innovative fares by airlines entering new markets to make the idea of deregulation palatable to customers. If air deregulation could bring us Super Saver fares and Freddie Laker, deregulation of surface transportation could only be better.

One of the biggest factors motivating deregulation was the activity of the ICC itself. Its unimaginative utility-type regulation had caused excessive fragmentation of authority and disputes over the nature of commodities to be hauled. With regard to the latter, Representative Millicent Fenwick testified:

> The ICC has 36 categories of exempt and nonexempt products listed under the heading of "Milk and Cream." Buttermilk is exempt, but butterfat and buttermilk with condensed cream are regulated. Concentrated skim milk, and powdered, are exempt, but condensed and evaporated are not.
>
> And believe it or not, Mr. Chairman, manure in its natural state is an exempt commodity but manure, fermented with additives such as yeast and molds, producing a rich liquor which in water solution is used for soil enrichment is not.[72]

Restrictions on routes and backhauls seemed an anomaly at a time

69. Act of Nov. 9, 1977, Pub. L. No. 95-163, 91 Stat. 1278.

70. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

71. Dempsey, *The Rise and Fall of the Civil Aeronautics Board*, 11 TRANSP. L.J. 91 (1979).

72. *Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 1 (1979).

when fuel shortages abounded and Americans were being told to save gasoline. The ICC at one point allowed gateways to be eliminated and shorter routes taken by truckers, so long as they did not shorten the mileage *too* much, so as to upset the competitive balance.

Finally, the idea of competition and the elimination of cartels had great appeal. In areas where there was considerable competition, such as in dataprocessing equipment, telecommunications and even auto rentals, customers had seen the advantages of competition in the marketplace. Where the market was imperfect, the public saw administered pricing and oligopolistic behavior. The old conservative cry of freedom to operate without restraint had never been overly popular; most people do not have much property or business of their own and such liberty was meaningless. But the neo-conservative philosophy that competition serves the public and that government has a penchant for lousing things up struck a responsive chord, and brought on a new willingness to let competition play a part in the regulation of transportation.

B. Economic Considerations

Beginning with the Ford administration and continuing through the Carter regime, inflation became the principal concern of the American political economy. Increased competition was considered to be a weapon to use against the inflationary forces surrounding us. Regulated industries, because of their controlled oligopolistic position, could pass on increased costs of equipment, fuel and labor by going to the appropriate regulatory agency and gaining permission to increase rates.

Increased competition, however, could act as a brake on these automatic cost pass-throughs. Trucking, with relatively low entry costs, seemed to be a good place to introduce more competition. New, trimmed-down operations should have lower fixed costs than the established truckers. In the labor field, increased competition would have a major impact on the industry by undermining the Teamsters' Union's bargaining power. After years of maneuvering, the Teamsters' Union gained great bargaining leverage by arranging for trucking contracts throughout the nation to expire at the same time. The threat of new, non-union competition by owner-operators if deregulation were enacted, would stand as a threat to convince the Teamsters to moderate their demands.

Coincident with the enthusiasm for competition was the rise in popularity of the Chicago school of economics. By the 1970's, the most-read economist was Milton Friedman. Friedman opposed any type of market control as ultimately directed against the consumer and brought upon by the desire of the regulatees to gain government assistance in forming a

cartel.[73] His Chicago colleague, George Stigler, refined Friedman's teachings into an "Economic Theory of Regulation", which demonstrated how groups sought regulation to enhance their incomes.[74]

Professor Richard Posner suggests that regulation of the transportation industry, inasmuch as it preserves certain services which the market would not otherwise produce, is actually a branch of public finance and should be viewed as a tax upon producers. Economist George Hilton called for the complete elimination of the ICC and the treating of the transportation industry like any other business.[75] Hilton predicted that once the ICC was dissolved, the transportation industry would emerge like the hotel-motel business, with some large national chains and some independent operators. Additionally, intermodal companies would rise from the ashes of today's railroads, with strong competition from independent truckers.[76]

To the question, "what will curb the excesses of carriers when regulation goes?", Hilton and the others would calmly answer that the invisible hand of the market place would meet consumer needs. The rollback in transportation regulation is testimony to the strength of the belief that competition, rather than regulation, can better serve the public. Possibly this is not so with true monopolies, (i.e. electric or gas companies) but where competition is possible, the prevailing view was that it should be encouraged.

Economists see certain specific savings if the ICC regulatory scheme was abolished. Costs could be cut by the elimination of gateways and circuitous routes, as well as restrictions on commodities carried and other wasteful practices. Not only was cost to shippers considered, but also energy conservation. Empty backhauls and circuitous routings were seen as contributing to high energy use—a situation that benefited no one, since most of the excess gasoline was just burned up as economic waste. Deregulation was seen as both an inflation-fighting and a fuel-saving move.

C. Political Considerations

By the late 1970's, one industry had been deregulated—air freight. Although prices did not go down, as anticipated, there was an explosion of new entrants to the market, and service competition, as opposed to price competition, resulted.[77] Similar benefits were sought in the deregulation of motor carriage. Visionaries saw service to more localities, and an increased possibility for entry by minorities and others who were willing to get into trucking but had previously been blocked. Competition was an easy concept to sell, and the benefits of freer entry were easily understood. The

73. *See generally*, M. Friedman & R. Friedman, Free to Choose (1978).
74. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).
75. Posner, *Taxation by Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 22 (1971).
76. Hilton, *Ralph in the Roundhouse*, Trains, Nov. 1970, at 44, 45.
77. W. Thoms, Deregulations: The Airline Experience 45-54 (1981).

reverse side of the coin: freedom to raise rates and to exit unpopular markets, was seldom discussed.

The political benefits of deregulation could be easily forseen. Small shippers were often stymied by the insistence on the tariff principle and the inability to hold a carrier to an earlier estimate by estoppel. Everyone was presumed to know the tariff. Large shippers, of course, could dicker in establishing contracts with contract carriers. The new carriers, in order to gain a share of the market, might compete on price. At any case, full deregulation would bring a new environment where there would be no automatic pass-through of fuel or labor cost increases, and thus an incentive to keep those costs down. Furthermore, full deregulation would make rate bureaus and their price-fixing machinery a thing of the past.

Bureaucracy is fair game in all modern nations, and there were perceived political benefits from abolition of another Federal agency. It went along with the war on government waste, and it would eliminate the symbiotic relationship between carriers and regulators. Sunset laws were easily understood by the public, and if deregulation did not work, Congress could always impose reregulation or at least provide minimal service standards for the industry. (It was actually a form of reregulation which carried the day, as there is no sunset law in force for the ICC).

Political moves toward deregulation actually began in the states, which had passed sunset laws for various occupational licensing boards as well as for their regulatory commissions. The typical state sunset law would provide for the demise of regulation unless the legislature renewed the regulators' charter on a periodic basis. In Florida, the legislature could not agree as to what form regulation of motor carriers would take, and the old law was allowed to expire. In Minnesota, motor carrier regulation was taken away from the Public Service Commission and vested in a new independent transportation regulatory agency, but as of this writing the legislature has not appropriated funds for the new body.[78]

The deregulation drive which resulted in the Motor Carrier Act of 1980 was a strange convergence of the left and the right. Theoretical conservatives and libertarians proceeded on the assumption that economic freedom must be pursued and government control limited. On the left, Senator Edward Kennedy (D-Mass.), saw in deregulation an issue that was at once anti-monopoly and anti-government, thus pleasing both ends of the political spectrum. Against this pressure, the centre, composed mainly of the industry itself and the Teamster's Union, could not mass enough support to prevail against the right and left enthusiasts for deregulation.[79] Partial

78. James Hoveland, Remarks at Minnesota Continuing Legal Education Seminar (Nov. 9, 1980).

79. The classical view is that labor organizations support oligopolistic structures for industry

deregulation would codify many of the steps which had already been taken by the ICC in freeing up the industry.

VII. Self-Deregulation by the ICC

Following the publication of the Nader report, there was a decided move within the ICC toward liberalizing entry for motor carriers. Frivolous objections by protestants went unheeded; the Commission began to take a more liberal view about the need for a proposed service. It may have been that ICC commissioners, seeing the handwriting on the wall, moved in the direction of liberalizing entry before Congress abolished the whole works.

Most applications now were handled under modified procedure, which did away with the necessity of a hearing in motor carrier cases unless grave questions of transportation policy were raised or unless credibility of a witness was a factor.

At the beginning of the decade, in these modified procedure cases, the adequacy of existing service was the principal factor considered by the ICC. In 1970 the Commission had so favored incumbents that:

> Once an existing carrier showed it was "fit, willing and able" to move freight for which applicant had obtained shipper support, and once the existing carriers demonstrated that some diversion of their present traffic could result and revenue would be lost, the application would, in all probability, be denied. The presumption weighted heavily that existing carriers were entitled to all the freight they could adequately handle. Once adequacy of existing service and potential diversion of traffic were established, there was literally no course of action or evidence that applicant could present to the Commission to convince it that the proposed authority should be granted. If, for instance, a shipper suggested that it needed more efficient or expeditious service, the Commission would determine whether the shipper truly *needed* the service or whether it would merely be a convenience.[80]

With the decision rendered in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*,[81] the ICC's emphasis began to change to favor competition. *Bowman* saw the Supreme Court upholding the right of the ICC to weigh the benefits of competition against the detriment to existing carriers. It was not a far-reaching decision, but it is generally considered to be the turning point by the ICC in favoring competition.[82] Following the *Bowman* case was the more definite instruction from the District of Columbia Circuit in *P.C. White Truck Line, Inc. v. ICC*.[83] Here the court stated

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inasmuch as it is easier to organize, to keep out non-union competition, and to pass on costs to consumers.

80. Freeman and Gerson, *Motor Carrier Operating Rights Proceedings*, 11 Transp. L.J. 13, 17 (1979).

81. 419 U.S. 281 (1974).

82. Freeman and Gerson, *supra* note 80, at 19.

83. 551 F.2d 1326 (D.C. Cir. 1977).

that under the *Pan American* test the Commission *must* consider competition as a factor in addressing the public need. On remand to the ICC, the Commission decided that increased competition is presumed to be in the public interest, and protestants must be much more specific in pointing out what injury will befall them and the public if the application is approved.[84]

Increased competition went beyond common-carrier truckers. In *Sawyer Transport, Inc. v. United States*[85] it was held that a contract carrier could not be denied a permit solely on the grounds of adequacy of existing common-carrier service to the plant. In *Highland Tours, Inc. Common Carrier Application*[86] the Commission upheld the *Pan-American* criteria, but found that the diversion of traffic created by a one-bus carrier would not be sufficient to severely threaten the mighty Greyhound Lines.

The ICC's new policy toward liberalized entry and favoring competition was set forth in *Liberty Trucking Co., Extension—General Commodities*.[87] Once public need has been demonstrated by an applicant, protestants must show that they can satisfy that need. However, they must go further and assume the burden of demonstrating an interest worthy of regulatory protection from competition. Their burden is to convince the ICC that the newcomer is likely to materially jeopardize the existing carriers' ability to serve the public.[88]

It is not enough for an existing carrier to be harmed by a new entrant, or even to be forced out of business; the loss has to be shown to be injurious to the public as well. *Liberty* was one of the Commission's more controversial motor carrier cases and the industry clamored for reconsideration. In *Colonial Refrigerated Transportation, Inc., Extension—Florida to 32 States*,[89] the Commission denied an application where competition already existed on the route, and the evidence did not show that increased competition would spur carriers toward greater efforts in providing better service. It is clear that, in the past, the ICC was unwilling to make competition the lone criteria for allowing new carriers to enter the system. Now, however:

> All doubt is ended. Despite the Commission's statement that it is not abandoning *Pan-American*, the traditional method for determining the outcome of motor carrier entry applications is no longer operational. Increased competition is now presumed to be in the public interest to a much greater extent than previously articulated. Mere conflicting authority coupled with traffic abstracts

84. P.C. White Truck Line, Inc., 129 M.C.C. 1, 8-9 (1978).

85. 565 F.2d 474 (7th Cir. 1977).

86. 128 M.C.C. 595 (1977), *aff'd sub nom.* Greyhound Lines v. United States, 600 F.2d 999 (D.C. 1979).

87. 130 M.C.C. 243 (1978).

88. Freeman and Gerson, *supra* note 80, at 410-411. The authors point out that even "the spectre of bankruptcy or withdrawal of existing carriers from the relevant market may not be sufficient to overcome the presumed benefits of increased competition to the public."

89. 131 M.C.C. 63 (1979).

showing speculative revenue losses will not suffice to deny an application. The core of *Pan-American* has always been to advance the public interest, but the ICC now holds that this is entirely separate and distinct from protecting existing common carriers from competition. In *Liberty* II, the Commission reaffirmed its earlier position that the benefits of competition and improved service may outweigh even substantial harm to protestants and stated that it "will not deny the public the benefits of an improved service or heightened competition merely to protect the inefficient or to insulate existing carriers from more vigorous competition."[90]

Liberalizing entry requirements was one way that the ICC was moving toward self-deregulation in the 1970's. Other areas included eliminating gateways and authorizing backhauls for operating efficiency,[91] allowing deviation to parallel superhighways for regular-route carriers, experimental deregulation of some commodities and expansion of temporary authority, granting broad geographical limitations and avoiding fragmented grants of authority or unduly restrictive commodity descriptions. The ICC was trying to moderate some of its excesses before Congress did it for them.

VIII. The Motor Carrier Act of 1980

Despite the desires of Freidman, Stigler, Kennedy and others for sunset provisions for ICC motor carrier regulation, it looked by 1980 as if the proposed "trucking deregulation bill" would actually be a compromise bill, which would extend the regulatory scheme but correct some of its abuses. What emerged from the Congress was not a deregulation bill, but a law which provided new standards, not termination, for the ICC.The Congressional finding section states that in some cases existing regulation has been counterproductive, that the ICC should be given explicit direction and well-defined parameters for regulation of the motor carrier industry and that the ICC should not attempt to go beyond the powers vested in it by the Interstate Commerce Act.[92] The Act is not a new departure, but a codification of much of what the ICC had done in the past decade. Politically, it was a product of a compromise between advocates of deregulation and those who favored regulation. No one liked the status quo except for industry spokesmen, who saw the rights for which they had fought or purchased reduced to nothing.

The new Act adds to the National Transportation Policy the promotion of competitive and efficient transportation service in order to (1) meet the needs of shippers, receivers and consumers; (2) allow a variety of price and service options; (3) allow the most productive use of equipment and energy

90. Freeman and Gerson, *supra* note 80, at 413.

91. Dempsey, *Entry Control Under the Interstate Commerce Act*, 13 Wake Forest L. Rev. 729, 746 (1977). *See also* n. 80 at 746.

92. Motor Carrier Act of 1980, § 3, 49 U.S.C. § 10101 (Supp. IV 1980).

resources; (4) enable adequate profits and fair wages; (5) provide and maintain service to small communities and small shippers; (6) maintain a privately-owned motor carrier system; (7) promote minority participation and (8) promote intermodal transportation.[93] These somewhat conflicting objectives show the various interests which were involved in the compromise.

The new Act shifts the burden of proof from the applicant to the protestant and requires the applicant to show (in addition to proving fitness) that his proposed service will serve a useful public purpose and will be responsive to public demand or need. The burden is now on the protestants to show that the service is inconsistent with the public convenience and necessity.[94] This is a drastic change from the former procedure, wherein the applicant had to prove that his service was *required* by public convenience and necessity.

Additionally, the new legislation permits the Commission to issue "master certificates" wherein the findings of public convenience and necessity are made in a rulemaking procedure. True, the Act prohibits the issuance of a master certificate except in certain areas, but in these areas, only the applicant's fitness is an issue. If the Commission finds the applicant fit, willing and able, he will be awarded authority to serve these markets:

a. where a community is not regularly served by another motor carrier.
b. when rail service to a community has been abandoned.
c. movements of U.S. government property (with some exceptions).
d. small shipments (under 100 lbs.).
e. movements of foodstuffs and fertilizers by an owner-operator, provided that the owner-operator remains with the truck at all times.[95]

This amounts to substantial deregulation of these areas. Protests are of no avail in "fitness" applications, and the Act includes standards designed to assure that only protests of substance can be made in other application proceedings. A protestant must have authority to handle the traffic, and actually has handled such traffic within the last year. Motor contract carriers are now prohibited from protesting common carrier applications.[96]

The Commission is directed to eliminate gateways and circuitous route limitations and to remove operating restrictions in certificates. This directive includes: broadening the restrictive categories of goods allowed to be transported, removing restrictions against serving intermediate points, converting all one-way authority to round-trip authority, to eliminate narrow territorial limitations and other restrictions wasteful of fuel, inefficient, or contrary to the public interest. Thus, if a carrier applies, the ICC must re-

93. 49 U.S.C. § 10101(a) (Supp. IV 1980).
94. 49 U.S.C. § 10922(b)(1) (Supp. IV 1980).
95. 49 U.S.C. § 10922(b)(4) (Supp. IV 1980).
96. 49 U.S.C. § 10922(b)(8) (Supp. IV 1980).

form its certificate to provide for a more comprehensive grant of authority.[97]

A greater number of commodities now come within the exempt authority category. Fish and shellfish byproducts not intended for human consumption are now exempt, as are livestock and poultry feeds, agricultural seeds, and plants if transported to a farm or a business selling to farmers. In addition, all incidental-to-air motor freight operations are exempt, so are used pallets, shipping containers and devices, natural crushed rock used for decorative purposes and wood chips.[98]

A new Section 8 permits sellers of food and grocery products to compensate customers who pick up their own products without being guilty of discriminatory pricing.[99] Intercorporate hauling for compensation is permitted for wholly-owned subsidiaries, upon notice to the Commission. This intercorporate hauling is now termed private carriage.[100]

Entry rules are modified for contract carriers by deleting the requirement of a limited number of shippers. The old "rule of eight" is abolished. One-truck companies can obtain master certificates for the carriage of processed foods, and the prohibition against dual operations (common and contract authority) has ended.[101]

Deregulation of trucking is more than simply easing entry into the field. The new Act creates a ten percent zone of reasonableness, within which rates may be raised or lowered without any investigative or suspension jurisdiction of the ICC. The Commission may, on its own, increase this zone an additional five percent. After two years, this zone would be adjusted to account for changes in the Producer Price Index.[102] In addition, there is a new provision for released rates, by which the shipper would get a reduced rate in exchange for reduced exposure to liability by the carrier.[103] This is the first crack in the common-carrier liability which has traditionally been imposed by the ICC. However, it remains to be seen whether the trucking industry will follow the lead of the deregulated air freight industry and shift the insurance burden for loss and damage to the shipper.[104] The Commission is directed to adopt revenue standards which will provide motor carriers a flow of net income, plus depreciation, adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, attract and retain capital "in amounts adequate to provide a sound motor carrier transportation system in the

97. 49 U.S.C. § 10922(h) (Supp. IV 1980).
98. 49 U.S.C. § 10526(a) (Supp. IV 1980).
99. 49 U.S.C. § 10732 (Supp. IV 1980).
100. 49 U.S.C. § 10524 (Supp. IV 1980).
101. 49 U.S.C. § 10923 (Supp. IV 1980).
102. 49 U.S.C. § 10708(d) (Supp. IV 1980).
103. 49 U.S.C. § 10730(b) (Supp. IV 1980).
104. W. THOMS, DEREGULATION: THE AIRLINE EXPERIENCE 47-50 (1981).

United States, and take into account reasonable estimated or foreseeable future costs."[105]

With regard to rate bureaus, the new law prohibits discussion and voting on single-line rates by rate bureaus by 1984. It prohibits rate bureaus from interfering with independent actions, makes rate bureau meetings open to the public, and requires that the bureaus have written authority from carriers being represented for voting purposes.[106] Rate bureaus are not being phased out but it is clear that their activities have been curtailed.

The law makes "lumping" (coercion to employ certain people to load and unload vehicles) unlawful[107] and requires written contracts to be used in the hauling of exempt agricultural commodities.[108] It adopts a mere fitness test for the commission to license brokers, thus virtually exempting transportation brokers (except for household goods) from regulation.[109] Another area of exemption is the issuance of securities by carriers under a $1,000,000 jurisdictional amount.[110] It provides for expedited consideration of pooling arrangements between carriers,[111] and allows a trucker to carry mixed loads of exempt and regulated freight together without either category losing its regulated or exempt status.[112] It also allows freight forwarders to enter into contracts with railroads or water carriers for certain transportation services. Formerly, freight forwarders could contract only with motor common carriers.[113]

As part of the ease of entry requirements, the Commission is authorized to grant temporary authority for up to two-hundred-seventy days and emergency temporary authority for thirty days. Agricultural cooperatives may now haul up to twenty-five percent of their total interstate tonnage in non-exempt commodities, as opposed to fifteen percent of their tonnage under the 1935 law.[114] The Commission is authorized to require co-ops to maintain detailed records with the ICC to ensure that the co-ops comply with the tonnage and other requirements of the statute.

With regard to mergers, the Commission must expedite its procedure. Evidentiary proceedings in motor carrier mergers must be completed within two-hundred-forty days and the final decision must be reached one-hundred-eighty days later.[115] This is intended to speed up merger proceed-

105. 49 U.S.C. 10701(e) (Supp. IV 1980).
106. 49 U.S.C. § 10706 (Supp. IV 1980).
107. 49 U.S.C. § 11109 (Supp. IV 1980).
108. 49 U.S.C. § 10527 (Supp. IV 1980).
109. 49 U.S.C. § 10924(b) (Supp. IV 1980).
110. 49 U.S.C. § 11302 (Supp. IV 1980).
111. 49 U.S.C. § 11342 (Supp. IV 1980).
112. 49 U.S.C. § 10528 (Supp. IV 1980).
113. 49 U.S.C. § 10766 (Supp. IV 1980).
114. 49 U.S.C. § 10529 (Supp. IV 1980).
115. 49 U.S.C. § 11345a (1980).

ings before the ICC.

Some of the criticism of proposed deregulation was raised by advocates of small towns. These smaller communities were afraid that the carriers might ignore them if rates were to be skewed to more profitable areas, as has happened with airlines since deregulation. Congress insisted that the Commission conduct a study of service to small towns (five thousand or less), including an analysis of the common carrier obligation to provide service to small communities, and an evaluation of whatever effect the new law has on small towns. This report was due on February 1, 1982.[116]

Authority to require financial responsibility of all carriers was transferred from the ICC to the Department of Transportation.[117] This has been a feature of virtually every transportation deregulation scheme enacted to date. This independent regulatory commission is stripped of some of its existing responsibilities, either by total abolition or by transfer to the Department of Transportation. The DOT has steadily gained authority since its inception in 1966 and greatly benefitted from the creation of Amtrak and Conrail and the deregulation of air service. Its authority in the regulatory field has steadily increased since its inception in 1966.

The Motor Carrier Act of 1980, however, substantially leaves the ICC intact. It gives new guidance to that agency and exempts a number of areas for service. It makes entry easier, and makes it more difficult for certificated carriers to protect their market share. It may make some operating rights worthless. But it does not abolish the common carrier principle, nor the binding effects of tariff. It keeps in modified form the *Pan-American* test of public convenience and necessity, and preserves the necessary oversight function of the ICC. That agency will still be regulating some forms of motor carriage during its centennial in 1987.

IX. The Household Goods Transportation Act of 1980

A sidelight after the massive deregulation effort of 1980 with regard to motor carriers was passage of the Household Goods Transportation Act of 1980.[118] The dynamics of moving van companies are different from those of carriers of general freight. The shipper is not a business entity, but often an individual householder who is usually inexperienced in dealing wth such companies.

The moving concerns are not geared to single family units but rather to hauling government shipments, often for relocating personnel changing posts in the military, or handling large moves by corporations. Here, the company or government agency has a certain amount of power to wield in

116. Motor Carrier Act of 1980, § 28.
117. Motor Carrier Act of 1980, § 30, 49 U.S.C. § 10927 (Note) (Supp. IV 1980).
118. Household Goods Transportation Act of 1980, 49 U.S.C. § 10734 (Supp. IV 1980).

steering traffic to or from another moving company. Due to their size, these institutional accounts have some equality of bargaining power, and the moving companies are more conscientious about dealing with them.

The companies such as Allied, Mayflower, North American and other national van lines are actually only loosely affiliated with the local agents, and often have not been quick to respond to abuses by such agents. The main consumer complaint has been "low-balling", by which an agent would quote an unreasonably low price in order to gain traffic. Once the shipper signed with the moving company, the tariff principle was strictly applied: no deviation from the tariff was possible, there could be no rebates, and payment must be in cash, cashier's check or certified check. Otherwise the furniture would be carted off to a warehouse, where storage fees would accrue. The customer had no choice but chase around a strange town for his money.[119]

Since household moving affected members of the public at large, the ICC received an enormous amount of complaints. The ICC tried to meet the situation through rulemaking by requiring the shipper to pay an amount more or less equivalent to the estimate, and giving him time to get up the rest of the cash. But the Commission was unwilling to do away with the tariff principle, and further legislation was necessary to deal with the problem.

The Household Goods Transportation Act is a clarification of ICC authority in home moving. It establishes the authority of the ICC to permit carriers to establish rates which are based upon binding estimates and guaranteed pick-up and delivery times.[120] This simple, matter-of-fact statement restores the principle of estoppel to transportation law. The mover can quote an estimate of price and schedule and the company will be bound by it.

This new law establishes the responsibility of the nationwide moving van lines for the acts of their agents. It requires that agents be fit and establishes a tighter control of the arrangement between the agents and the national companies. To this extent it now confers antitrust immunity on certain discussions between agents and the moving companies.[121] Reaffirming the ICC authority to protect consumers, statutory guidelines were established to settle disputes between shippers and carriers. Previously the ICC had balked at the idea of becoming a "small claims court."[122]

The philosophy of the Household Goods Act is the opposite of that of the Motor Carrier Act. Here Congress felt that competition should be cou-

119. Hilton, *supra* n.76. *See generally*, Fellmeth, n. 51.
120. 49 U.S.C. § 10734 (Supp. IV 1980).
121. 49 U.S.C. § 10934 (Supp. IV 1980).
122. Hilton, *supra* n. 76.

pled by increased oversight. Congress also declared that the function of the ICC was to protect the homeowner and small shipper. Evidently the disparity in bargaining position between the shipper and carrier is responsible for the different concern toward moving vans. It also should be remembered that Congress attempted to meet a major criticism that was voiced about the regulatory scheme of the Motor Carrier Act, and enacted a specific consumer-oriented regulatory law.

X. The Bus Regulatory Reform Act of 1982

The Motor Carrier Act of 1980 was applicable only to trucking companies. Buses still remained under the Motor Carrier Act of 1935.[123] This anomaly resulted in buses being the only carrier not substantially deregulated in the last decade.

In 1982, however, motivated by pressures from the bus industry for deregulation, Congress passed and sent to President Reagan the Bus Regulatory Reform Act of 1982,[124] to bring a liberalized regulatory regime to the intercity motor coach industry. The bill was signed into law on September 20, 1982. It is similar to the new trucking law, in that the Commission is authorized to grant a certificate to any person who is fit, willing and able to provide intercity bus transportation, unless the Commission finds that the transportation is not consistent with the public interest.[125] The burden of proof has thus been switched to protestants. The jurisdiction of the ICC is extended to intrastate bus service.[126] "Fitness-only" certificates shall be granted to carriers seeking to serve towns with no existing bus service, or for service substituting for discontinued passenger train or airline service.[127] Protests are limited to carriers actually serving the applied-for route, or those with rival applications.

A rider to the bus deregulation bill prohibits the ICC from granting certificates for bus or truck service to foreign bus carriers unless the President has certified that the applicants' country does not discriminate against U.S. carriers. This was added in response to complaints by domestic motor carriers that U.S. companies were not being given rights to compete in Canadian and Mexican markets, as those countries had not deregulated entry to the motor carrier system.[128]

The Commission has been directed to remove closed-door and other restrictions from existing certificates held by bus carriers. Companies may

123. 49 U.S.C. § 10922(a) (Supp. IV 1980).
124. 128 Cong. Rec. S7699 (daily ed. June 30, 1982). *See also Reagan Signs Bus Reform Measure*, Traffic World, Sept. 27, 1982, at 88.
125. Bus Regulatory Reform Act of 1982, § 6, 49 U.S.C. § 10922(c)(1)(A).
126. 49 U.S.C. § 10922(c)(2)(A).
127. 49 U.S.C. § 10922(c)(4).
128. 49 U.S.C. § 10922(b)(4).

mix charter and regular passengers within the same coach.[129]

Antitrust immunity for rate bureaus is to be whittled down by the Bus Regulatory Reform Act. After January 1, 1983, they may not consider any joint rates. An exception is made for general rate increases or decreases. Carriers are still required to file tariffs and abide by them; and the rate bureaus may still publish tariffs, file independent actions for individual members and provide support services for member carriers.[130]

A 10% up, 20% down zone of reasonableness is established for ratemaking by this Act. One year after the effective date of the act the zone is expanded to 15% increase and 25% decrease and two years after the law goes into effect, the zone increases to 20% up and 30% down. After three years the Commission may no longer suspend a rate on the grounds that it is too high or too low.[131]

A new provision of the law provides that a carrier seeking to discontinue intrastate service may petition the ICC if the state has not acted within 120 days of its petition to state authority. Or if the state has denied the bus carrier's request, the carrier may appeal to the ICC.[132] The public has no such appeal if the state agency grants the request for discontinuance. (This procedure is similar to that found in old section 13(a)(2) of the Interstate Commerce Act, now 49 U.S.C. 10909, pertaining to discontinuance of intrastate passenger trains. With the advent of the Amtrak system and its freedom from regulation, the latter section is of mostly academic interest). In addition, the Commission is authorized to preempt state authority if it finds there is discriminatory state regulation of rates and practices.[133]

The major provisions of the new bus law provide for greater freedom to enter markets, flexibility in setting fares, increased ability to exit markets if the service burdens interstate commerce, preemption of certain state regulatory controls and the elimination of antitrust immunity in the discussion of rates.

The law also provides for labor protection similar to that afforded in the rail and airline industries. Laid-off bus drivers and other employees are put on a preferential hiring list.[134] No substantial displacement allowances are scheduled to be paid to the former employees; evidently, Congress apparently felt stung by the labor protection costs of the Conrail legislation.[135] Nonetheless, some labor protection provisions were necessary to ensure against labor's opposition to the deregulation bill. The major opposition

129. 49 U.S.C. § 10922(i)(3).
130. 49 U.S.C. § 10706(b)(4)(E).
131. 49 U.S.C. § 10708(d)(4).
132. 49 U.S.C. § 10935.
133. 49 U.S.C. 11501(e).
134. Bus Regulatory Act of 1982, Pub. L. No. 97-261, § 27.
135. *See* Thoms, *What Price Labor Protection?*, TRAINS, June 1982, 47.

came mostly from legislators from rural states who rightly feared loss of services to places which had already lost regular-route trucking, railroad branch lines, passenger service, and commercial aviation.

Bus service had not been dealt with in the 1980 law because of such community fears. It was also thought that the bus industry, a duopoly dealing with individual passengers and small shippers, was not conducive to a deregulated environment. Despite the spectre of failures in the airline industry, the spirit of deregulation has continued to roll on, and now the buses will have a go at something approaching a free market. Apparently, if a little deregulation is good, more has got to be better.

XI. Aftermath of Deregulation

The first thing to remember about trucking deregulation is that it did not occur in any degree comparable to the deregulation of air freight and airlines. Permission is still needed to enter the business, to change routes, to add commodities handled, and to raise or lower fares. The only parts of reform in trucking that could seriously be labelled "deregulation" are the increase in exempt areas, the "fitness-only" entry program for small shipments and isolated communities, and the zone of reasonableness for changing rates.

Motor carriage seemed like an excellent area for the opening up of the field to new entrants. Rights-of-way are totally provided by government, with government policing of safety standards and weight limitation. Cost of operation mainly go for purchase of equipment, labor and terminal operations. It is less expensive and less complicated to get started in the trucking business than any other transportation endeavor.

The ICC has gone along with the new law in easing entry to the business. In *Art Pape Transfer, Inc., Extension—Commodities in End-Dump Vehicles*[136] the Commission stated:

> Under the new entry procedure, the applicant must still come forward with some evidence of the utility of its proposed service. It is clear, though, from both the words of the statute and its legislative history, that Congress is 'lessening the burden of proof on applicants and correspondingly increasing the burden on persons opposing the application . . .'.
>
> Once the applicant has made a prima facie case under the relaxed threshold standard, the burden of proof shifts to persons opposing the application to show that the proposed service is inconsistent with the public convenience and necessity. In sum, once the threshold case is established, the statute, as the legislative history indicates, creates a presumption in favor of entry and competition.[137]

136. 132 M.C.C. 84 (1980).
137. *Id.* at 94.

In *La Bar's, Inc., Extension—Mountaintop Insulation*,[138] the ICC went further, saying that:

> Congress, after all, requires us to foster efficiency in motor carrier transportation and there may well be situations in which, considering the transportation industry as a whole, it is preferably to replace an inefficient operator with a more efficient one and promote the introduction of innovative services or prices.[139]

But the changes in entry have not drastically changed the character of the industry. It is true that carriers have written off the value of their operating rights as zero, but this has been largely an accounting gimmick. Despite the opening of the floodgates to new entries, the established carriers have had the benefit of forty-five years of oligopoly, which has allowed them to establish operating patterns and get a headstart on the competition.

There is, of course, much wailing at the bar of the Association of ICC Practitioners and the Motor Carrier Lawyers' Association. Much of the criticism is aimed at the current ICC which, it is claimed, has been overzealous in going beyond the current law in trying to deregulate everything in sight. Motor carrier rate bureaus complain about the uncertainty of the present law and their possible exposure to antitrust sanctions in the future.

Other carriers, notably the railroads, have felt the effect of greater competition as a greater number of motor carrier competitors, and not just the high-rate general commodities carriers, have entered the field. Many of these are former agricultural carriers or co-ops who now find it easier to get backhauls. Their cut rates on backhauls have in many instances been competitive with railroad rates, especially on piggyback traffic.[140]

Further deregulation may have an adverse effect on energy use. More competition means more trucks on the road. This may mean better service, but it also means increased use of diesel fuel. And if freight is diverted from waterways and railways, this can also mean increased use of fuel.

So far, the effects of increased entry on labor organizations have not been adequately demonstrated. All things being equal, unions would prefer an oligopolistic industry with excess profits which could be recaptured through collective bargaining. The Teamsters' Union was an opponent of deregulation and favored a tightly regulated industry. Now the unionized truckers have to face non-union competition, which should have an effect in the upcoming negotiations between the major truckers and their drivers.

There has not been a great downward move in prices to date. Of course, we still are in the theory of an inflationary economy and the independent truckers are still a small force in the industry. As mentioned

138. 132 M.C.C. 263 (1980).
139. *Id.* at 272.
140. TRAINS, Apr., 1980, 32.

above, price-cutting has mainly occurred when an operator is seeking a backhaul for a return move that would otherwise be deadheading. This should become more common now that agricultural co-operatives can haul up to one-fourth their tonnage in nonexempt commodities.

Politically, the outlook for deregulation is tied to the Reagan appointees at the ICC. Authorized at eleven members,[141] the Commission has been neglected by the last three presidents, who allowed its membership to dwindle to five Commissioners. President Reagan has vowed to appoint Commissioners who will uphold the law and not expand on it. He was elected with the Teamsters providing his only significant labor endorsement, and significantly, did not tout deregulation in his campaign as much as did President Carter, who was proud of his record in deregulating transportation.

In the three years since the Motor Carrier Act of 1980 went into effect, the ICC has embraced competition as its watchword. Congress has followed its initiatives for the air, rail and truck industries by substantially deregulating the intercity bus industry. This was done by the passage of a law which essentially duplicates the regulatory role of the ICC toward truckers. With buses, however, Congress extended the deregulation movement to carriers whose clientele is overwhelmingly low-income individuals, small towns, and small package shippers, the very interests least likely to protect themselves and the ones regulation is designed to protect.

The Motor Carrier Act of 1980, the Household Goods Transportation Act, and the Bus Regulatory Reform Act were passed to end what many observers thought were abuses of the regulatory process. Unimaginative utility-type regulation had been applied to an industry with few of the characteristics of natural monopoly. Congress stopped, however, at a complete sunset law, knowing that it is important to retain some type of oversight over the practices of an essential industry.[142] The 1980's will show if competition can coexist with a regulatory framework, and if the public will continue to be well served by our privately-owned motor carriers.

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141. 49 U.S.C. 10301(b) (Supp. IV 1980). Recent legislation has been introduced to reduce the ICC's membership permanently to five.

142. *See*, Lieb, *Regulatory Reform in Transportation*, 49 I.C.C. PRAC. J. 273 (1982).