The Bus Regulatory Reform Act of 1982 and Federal Preemption of Intrastate Regulation of the Intercity Bus Industry; Where Has It Come From? Where Will It Lead?

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Thomas Jefferson is generally credited as the author of the phrase that "government is best which governs least."[1] The authors of the Bus Regulatory Reform Act of 1982[2] [BRRA], at least insofar as the issue of joint Federal-state regulation of the intercity bus industry is concerned, probably had that phrase in mind when they drafted the Federal preemption provisions of the Act. There can be little question that the Interstate

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1. The phrase is attributed to Jefferson, but it has never been found in his writings. It is placed in quotations and referred to as a "motto" H. THOREAU, CIVIL DISOBEDIENCE (1849).

2. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in scattered sections of 49 U.S.C.) [hereinafter cited as BRRA].

Commerce Commission [ICC] in its interpretation and implementation of the Act must have had Jefferson's phrase foremost in its thoughts.

Whatever Congressional intention may have been when it included the several Federal preemption provisions in the BRRA, the implementation of the Act by the Commission has effectively eradicated former state responsibility for the regulation of intrastate regular route bus service, historically one of the more important of the state regulatory functions.

Congressional authorization of the preemption of intrastate regulation by the ICC is based upon well established legal concepts. Though the Federal right to preempt state regulation is nothing new, the actual implementation of the Federal preemption provisions in the BRRA by the Commission is cause for serious questioning by all observers of the bus industry. The extent to which the ICC has used this law effectively to deregulate the intercity bus industry has gone far beyond the hopes and/or fears of those who observed the enactment of this legislation. To the extent that the implementation of such Federal preemption provisions is a presage for future Congressional and Commission action, it is as well a matter of concern for all interested in any form of motor carrier transportation.

I. PREEMPTION PROVISIONS IN THE BUS ACT

To some extent, the BRRA was the bus industry's own version of the earlier Motor Carrier Act of 1980,[3] which Act had altered significantly historic strict Federal regulation of the trucking industry by replacing restrictive regulation with a new emphasis upon increased competition, expansion by existing carriers, and entry by new carriers.[4] The major difference between these two examples of regulatory reform legislation is to be found not in the provisions governing transportation regulation by the ICC—the BRRA carries forward most of the free entry and promotion of competition policies of the MCA—but rather in the explicit recognition that state regulation of intrastate bus service imposed unreasonable burdens upon interstate carriers who also operated intrastate service, and, therefore, state authority to regulate those carriers should be replaced by more "enlightened" Federal regulation.

To reach such a conclusion, one need go no further than Section 3 of

3. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. (codified in scattered sections of 49 U.S.C.) [hereinafter cited as MCA].

4. One of the many cases involving a review of ICC action under the MCA included the observation that:

> The principal goals of the legislation . . . are to promote greater competition by allowing easier carrier entry, to simplify and expedite the certification process, and to lessen restrictions on motor carrier operation. Gamble V. ICC, 636 F.2d 1101, 1103 (5th Cir. 1981).

the BRRA which is entitled "Congressional Findings," and which includes within it the observation that:

> [H]istorically the existing Federal and State regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources and opportunities for minorities and others to enter the motor bus industry: [and] that State regulation of the motor bus industry has, in certain circumstances, unreasonably burdened interstate commerce.[5]

Those Congressional findings led to the decision to carve out a separate portion of the National Transportation Policy, redefined in Section 5 of the BRRA to address the problem that would be solved through the solution of Federal preemption of state regulation. In addition to the platitudes which constitute most of the National Transportation Policy, Congress inserted a new section dealing strictly with passenger transportation:

> [I]n regulating transportation by motor carrier of passengers (A) to cooperate with the states on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objectives of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiative enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory action.[6]

The Federal-state "cooperation" promised in Part (A) to "encourage" the states to follow the Federal lead is revealed in Part (B) and especially in Part (C) to be little more that a cudgel to bring into line those states which for reasons of their own otherwise would not have seen the wisdom of the Federal deregulation scheme and welcomed it with open arms.

Rather than treat each of the Federal preemption provisions in the BRRA in the order that they have been placed in the Act itself, it is illustrative to begin with Section 17 of the Act. Section 17 is entitled "Discriminatory State Regulation of Rates and Practices," and as the title indicates this section and its specific provisions illustrate much of the Federal philosophy of preemption. Section 17(d) of the BRRA states in no uncertain terms:

> It is the sense of Congress that each state should revise its standards and procedures (including timing requirements) for rates, rules, and practices applicable to intrastate transportation provided by motor common carriers of passengers so as to conform to such standards and procedures for rates, rules and practices as are applicable to interstate transportation provided by such motor carriers of passengers not later than 2 years after the effective

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5. BRRA, *supra* note 2, § 3.

6. BRRA, *supra* note 2, § 5 (codified at 49 U.S.C. § 10101(a)(3) (1982)). That portion of the National Transportation Policy dealing with motor carrier transportation in general, in subsection (a)(2), was also modified to include reference to "passengers" and "consumers" in addition to the former reference to "shippers" and "receivers".

date of this section.[7]

Section 17 establishes specific provisions limiting the right and the ability of states to continue to regulate the central element of intrastate bus transportation "by a motor carrier of passengers providing transportation subject to the jurisdiction of the Commission."[8] Under the established procedures, an intrastate carrier with some claim to status as an interstate carrier[9] does have the obligation to make a request concerning any rate, rule, or practice first to the appropriate state regulatory agency. If the state agency "has not acted finally (in whole or in part)" within 120 days of the filing, the carrier can (and in practice usually does) immediately turn to the ICC to appeal the state action or inaction. The ICC must take "final action" on any such request not later than 60 days after the filing[10], in effect creating a 180 day period within which the carrier is assured of a final decision regarding its request.

That decision, under the presumptions imposed by the BRRA, is generally favorable.[11] It is presumed that the challenged state practice imposes an unreasonable burden upon interstate commerce if the ICC finds that:

(1) [T]he carrier will be charging a lower rate for intrastate transportation than that for interstate transportation;

(2) the carrier does not receive revenues exceeding variable costs for providing such transportation;

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7. BRRA, *supra* note 2, § 17(d), not codified, note following 49 U.S.C. § 11501 (1982). In Section 19 of the MCA, *supra* note 3, under the title "Uniform State Regulations," the sense of Congress was expressed as follows:

> Congress hereby declares and finds that the individual State regulations and requirements imposed upon interstate motor carriers regarding licensing, registration, and filings are in many instances confusing, lacking in uniformity, unnecessarily duplicative, and burdensome, and that it is in the national interest to minimize the burden of such regulations *while at the same time preserving the legitimate interest of the State in such regulation*. (emphasis added).

The BRRA does not express the same concern for the rights of the states.

8. BRRA, *supra* note 2, § 17 (codified at 49 U.S.C. § 11501(e) (1982)). Regulations implementing this Section appear at 49 C.F.R. § 1143 (1983). *See also* Procedures For Review of Intrastate Bus Rates, 133 M.C.C. 10 (1982) and Procedures for Review of Intrastate Bus Rates, 133 M.C.C. 47 (1983).

9. There may be some question as to who is and who is not a qualifying carrier. For example, must the intrastate and interstate routes be identical for this section to apply? *See* text accompanying note 59, *infra*.

10. BRRA, *supra* note 2, § 17 (codified at 49 U.S.C. § 11501(e)(3)(A) (1982)).

11. This writer is unaware of any cases in which the petitioning carrier has been unable to receive permission from the ICC to achieve the desired results on the merits of its case. Numerous examples are cited in the text. One close observer of the bus industry found that as of October 14, 1985, carriers had filed 62 such petitions. Sixty were approved; two were denied on procedural grounds; one was pending. Testimony of Norman Sherlock, President, American Bus Association, before the Surface Transportation Subcommittee, House Committee on Public Works and Transportation, U.S. House of Representatives, October 22, 1985. The few "unfavorable" ICC decisions were rendered on procedural grounds. *See* note 52, *infra*.

(3) the state agency hasn't acted (in whole or in part) within 120 days of the carrier's request;

(4) the carrier's intrastate rates are less than those of other interstate carriers operating within that state, despite the application of recent general rate increases.[12]

Although the foregoing presumptions are described by Congress as "rebuttable," no state has yet been successful in challenging such presumptions, regardless of the evidence that it has amassed and presented.

Also included in Section 17 is a provision that specifically prohibits states or political subdivisions from imposing any rules or regulations pertaining to scheduling or fare reductions on intrastate service over interstate routes (excluding commuter operations).[13]

Of equal importance to the bus industry is Section 16 of the BRRA, which established a new section of law, 49 U.S.C. § 10935. This Section imposes a significant burden upon those seeking to block a discontinuance or reduction of regularly scheduled service. A request for a discontinuance will not be granted if evidence is presented which shows "that such discontinuance or reduction is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce" for interstate route authority awarded prior to the BRRA. For those carriers awarded regular route authority following the enactment of the BRRA, objectors to the discontinuance must show that "continuance of the transportation would not constitute an unreasonable burden on interstate commerce." This objector's burden can be met "only if discontinuance or reduction of such transportation is not consistent with the public interest and the interstate and intrastate revenues from such service under reasonable pricing practices are not less than the variable costs of providing the transportation proposed to be discontinued or reduced."[14]

This portion of the law also includes a time frame within which the ICC must issue a final decision.[15] Section 16 includes a prohibition di-

12. BRRA, *supra* note 2, § 17 (codified at 49 U.S.C. § 11501(e)(2) (1982)). This section has been interpreted most thoroughly in Commissioner of Transp. v. United States, 750 F.2d 163 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2019 (1985). *See* text accompanying note 34, *infra*.

13. BRRA, *supra* note 2, § 17 (codified at 49 U.S.C. § 11501(e)(5) (1982)).

14. BRRA, *supra* note 2, § 16, (codified at 49 U.S.C. § 10935(e)(1)(A) (1982) and 49 U.S.C. § 10935(e)(2)(A) (1982)). Regulations implementing this Section appear at 49 C.F.R. § 1169, *See also*, Preemption of State Regulation of Regular-Route Exit-Motor Passenger Carriers. 133 M.C.C. 20 (1982).

15. Under this section, the state is permitted 120 days within which to act. If it does not act and the carrier petitions the ICC, the Commission must issue a final decision within 90 days. In any event, for a discontinuance or reduction in service, the ICC may order the carrier to continue intrastate transportation for a period not to exeed 165 days, beginning on the date the carrier files its petition with the ICC.

rected to states and political subdivisions against instituting discriminatory regulations similar to those mentioned in Section 17 of the Act.[16]

The other major preemption provision appears in Section 6, the "entry" section of the BRRA. Here, the ICC may issue a certificate authorizing the provision of regular route transportation entirely in one state where the applicant has held interstate authority over the same route at the time of the enactment of the BRRA.[17] The ICC may also issue a certificate if such interstate authority is to be issued following the effective date of the BRRA.[18]

Additional provisions of Section 6 address the carrier's obligations under intrastate authority issued by the ICC. Generally, such transportation "shall be deemed to be transportation subject to the jurisdiction of the ICC," although the carrier must also comply with various state requirements.[19] A carrier has an opportunity for relief from requirements when they become an "undue burden on interstate commerce."

The "restriction removal" section of the BRRA[20] does not explicitly remove restrictions from intrastate regular route certificates by removing intermediate point restrictions from interstate certificates. The BRRA does nonetheless effectively eliminate the "closed door" problem identified by Congress.[21]

The foregoing provides a backdrop to the BRRA's operation. The BRRA allows Federal preemption of state regulation while providing an opportunity for the states to refute the presumptions appearing in the Bus

16. BRRA, *supra* note 2, § 16 (codified at 49 U.S.C. § 10935(h) (1982)).

17. BRRA, *supra* note 2, § 6 (codified at 49 U.S.C. § 10922(c)(2)(A) (1982)). Regulations implementing this Section appear at 49 C.F.R. § 1168 (1982). *See also*, Applications for Operating Authority—Motor Passenger Carriers, 133 M.C.C. 62 (1982). The breadth of this Section was interpreted by the ICC in Funbus Systems, Inc.—Intrastate Operations—Petition for Declaratory Order No., MC-C-10917 (I.C.C. served Jan. 8, 1985).

18. BRRA, *supra* note 2, § 6 (codified at 49 U.S.C. § 10922(c)(2)(B) (1982)). Regulations implementing this Section appear at 49 C.F.R. § 1160.70 *et seq.* *See also*, Applications for Operating Authority, *supra* note 17.

19. BRRA, *supra* note 2, § 6 (codified at 49 U.S.C. § 10922(c)(2)(D), (E), (F) (1982). The carrier first establishes "initial rates, rules, and practices" applicable to the intrastate transportation under ICC standards. No later than 30 days after the carrier begins to provide intrastate transportation, it must "take all action necessary to establish under the laws of such State rates, rules, and practices applicable to such (intrastate) transportation."

20. BRRA, *supra* note 2, § 7 (codified at 49 U.S.C. § 10922(i)(4) (1982)). Regulations implementing this Section appear at 49 C.F.R. 1165. *See also*, Removal of Restrictions from Authorities of Motor Carriers of Passengers—Intermediate Points, 133 M.C.C. 35 (1982).

21. S. REP. No. 411, 97th Cong., 2d Sess. 9 (1982) *reprinted in* 1982 U.S. Code. Cong. & Ad. News. [hereinafter cited as Senate Report]. An additional State barrier causing economic difficulties for carriers has been the "closed door" policy. Frequently, carriers operating under interstate certificates have been denied authority to pick up or drop off passengers traveling between intrastate points over the carrier's interstate route.

Act.[22] Challenge of the rebuttable presumptions thereby allows the states to maintain a semblance of state regulation. The backdrop before which all of this is to take place is none too subtle; in the terms of the statute, the "action of the Commission under this section [ICC authority over intrastate transportation] supercedes State law or action taken under State law in conflict with the action of the Commission."[23]

Assuming, at first, that the ICC's regulatory powers under the BRRA are exercised reasonably,[24] the most interesting question raised regarding Congressional delegation of such broad powers over intrastate regulation to the ICC seems to be "Can they do that?"[25]

II. CONGRESSIONAL POWER TO PREEMPT CERTAIN STATE REGULATION OF INTRASTATE TRANSPORTATION

Congressional power to delegate authority to the Interstate Commerce Commission so as to allow the ICC to preempt state regulation of intrastate activities is vast and well grounded in precedent. The only remaining issue of interest in this area is the definition of the outer limits of that power. Congressional power under the Commerce Clause of the Constitution[26] knows very few limits.

The Federal preemption provisions of the BRRA have seemingly been drawn with great care to stay well within the permissible limits of Congressional delegation of such power. As the past is generally prologue, so is the history of Federal preemption of state regulation of intrastate transportation prologue to the provisions of the BRRA.

To approach this issue from an historical perspective one must begin with the *Shreveport Rate Case* of 1914.[27] In *Shreveport*, the Supreme

22. For rate preemption under § 17 of the BRRA, "the State could, however, protest at the ICC and argue that the State action was reasonable." Senate Report, *supra* note 21, at 28.

23. BRRA, *supra* note 2, § 17, amending 49 U.S.C. § 11501(f) (1982) to apply to passenger carriers.

24. It is well known that the reasonable exercise of discretion by an agency interpretation of facts under the appropriate enabling statutes will not be upset by judicial review. *See generally*, 5 B. MEZINES, J. STEIN, J. GRUFF, ADMINISTRATIVE LAW, ch. 51 (1984). The Commission's exercise of its powers under the BRRA is described in Section III *infra*. In the eyes of almost all courts called upon to review the ICC's actions, the ICC has exercised the powers bestowed upon it in a reasonable manner.

25. This question is borrowed from the title of a well known ICC publication of an earlier era of regulation, "Hot or Exempt, Can They Do that?" (On file in office of the Transportation Law Journal)

26. U.S. Const. art. I, § 8 cl. 3, provides Congress shall have the power "to regulate commerce with the foreign nations and among the several States . . ." The limits of the vast Congressional power to preempt state regulation of intrastate commerce are explored in this section of the article.

27. Houston E. & W. Texas Ry. v. United States, 234 U.S. 342 (1914) [hereinafter cited as *Shreveport*].

Court dealt with a rail rate case prior to any statutory basis for ICC preemption of state regulation. The only intrusion into state regulation that existed at the time was a general prohibition in the Interstate Commerce Act [ICA] against unjust and unreasonable rates. The argument was raised by the challenging party "that Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic."[28]

The Court's resolution of the issue flowed from an identification of "the complete and paramount character of the power confided in Congress to regulate commerce among the several states," a power so great that "It is of the essence of this power that, where it exists, it dominates."[29]

Congressional power to regulate intrastate commerce, according to the 1914 pronouncement by the Court, was vast:[30]

> Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercises of its constitutional authority, and the state, and not the nation, would be supreme within the national field. . . .[31] This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.[32]

The language of *Shreveport* is quite compelling, particularly where the intrastate activity has an apparent effect on interstate commerce.[33]

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28. *Id.* at 350.

29. *Id.* at 350. "[C]ongress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce."

30. *Id.* at 351.

> [C]ongressional authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance . . . The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care.

31. *Id.* at 351-52.

32. *Id.* at 353.

33. Not everyone necessarily agrees. In challenging ICC decisions under the BRRA, several states have conceded that the ICC has jurisdiction, although they argue on the basis of the doctrine of North Carolina v. United States, 325 U.S. 507, 511 (1945), in which it was stated that Congress can preempt state regulation, but the justification for the use of federal power "must

When *Shreveport* is considered in light of one of the more recent appellate court decisions in the area, that of *Texas v. United States*[34] it appears that *Shreveport* was only the tip of the iceberg. The *Texas v. United States* case deals with a new challenge to the Staggers Rail Act of 1980[35] which, according to the reviewing court, instituted "a major reallocation of regulatory authority between the Federal and State governments."[36] This major reallocation whose propriety was strongly affirmed by the court is significant in that it constituted a departure from the previous "division of regulatory jurisdiction between the ICC and the states [in which] the ICC exercised the role of limited review over intrastate rate-setting."[37] Prior to Staggers, ICC jurisdiction over intrastate rates was called into play only where "a rate, classification, rule or practice established by a state regulatory agency caused unreasonable discrimination against or an unreasonable burden on interstate or foreign commerce," or when a rail carrier had filed for an intrastate rail increase and the state authority did not act on the proposal within 120 days of the filing.[38]

The *Texas v. United States* case before the 5th Circuit Court involved the Staggers Act preemption concept which effectively completely eliminated state regulation of intrastate rail service where interstate transportation is by any stretch of the imagination involved, unless the state agreed (and the Commission believed it) to regulate intrastate rail rates and practices according to ICC policies. The analysis used by the Court in upholding this far-reaching Federal preemption provision illustrates on just how strong a footing the Bus Act preemption provisions rest.

Where Congress acts under the Commerce Clause a reviewing court has a limited role. Under the accepted analysis, "the court must defer to a Congressional finding that a regulated activity substantially affects inter-

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clearly appear" in the ICC's [subsequent] decision. At least two courts have rejected the argument that *North Carolina* imposes some special burden on the ICC when it preempts state regulation under the BRRA. Commissioner of Transp. v. United States, 750 F.2d 163 (2nd Cir. 1984), *cert. denied* 105 S. Ct. 2019 (1985); Pennsylvania Pub. Util. Comm'n. v. United States, 749, F.2d 841, 847 (D.C. Cir. 1984). From the decisions, *North Carolina* seems almost an abberration in the development of Federal preemption case history. Its significance is limited only to its facts. One court calls the *North Carolina* standard obsolete. Utah Power & Light Co. v. ICC, 747 F.2d 721, 736, (D.C. Cir. 1984). Nonetheless, those challenging Federal preemption find *North Carolina* one of the few remaining straws to grasp.

34. State of Texas v. United States, 730 F.2d 339 (5th Cir. 1984), *cert. denied* 105 S. Ct. 267 (1984).

35. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 49 U.S.C.).

36. *Texas v. United States*, 730 F.2d at 345.

37. *Texas v. United States*, 730 F.2d at 348.

38. *Id.* The statutory provisions in the Interstate Commerce Act formerly appeared at 49 U.S.C. § 11501(b)(1) (1982) before they were amended by the Staggers Act. The "unreasonable discrimination" and "unreasonable burden" terminology is, in effect, a codification of *Shreveport*, *supra* note 28.

state commerce as long as there is any rational basis for such a finding."[39]

The *Texas v. United States* court was aided in its identification of the necessary "rational basis" by finding that the information presented to Congress during the formulation of the Staggers Act warranted the preemption policy that was adopted, and further, there was clearly "a reasonable connection between the regulatory means chosen—preemption of independent state regulation—and the asserted objective."[40]

With respect to the BRRA, Congress had before it specific examples of overburdensome state regulation. Specific examples of this included: unopposed intrastate rate increase proceedings which were held without hearings (one hearing lasted 245 days and another lasted 359 days); taking 4 years to unsuccessfully prosecute an intrastate application to remove a "closed door" restriction; and evidence of a general level of intrastate rates that were 30% to 40% below that of comparable interstate rates.[41] The means of achieving the desired results—regulation of intrastate carriers which already held interstate authority—was clearly a logical one, and one thoroughly established in the philosophy of transportation regulation. Moreover, the means used were those in which the "rational basis" for finding an effect on interstate commerce was readily satisfied by virtue of the existence of an interstate certificate.

Following the court's analysis in *Texas v. United States* would logically result in virtually an automatic affirmation of the Congressional delegation of power for intrastate regulation under the BRRA, on the basis of the *Shreveport* analysis. Such a result follows, since the choice of regulating only that portion of intrastate transportation over an interstate route, which effectively gives states the right of first refusal to regulate in an enlightened manner, seems to satisfy all of the *Shreveport* requirements. However, the BRRA preemption is on even stronger footing. The *Shreveport* analysis is far too narrow when read in terms of a modern analysis of the Commerce Clause. In the words of the 5th Circuit, "For over forty years now, the Supreme Court has held that a purely intrastate activity may be regulated by Congress as long as the cumulative effect of the activity substantially affects interstate commerce."[42]

In response to the petitioner's argument seeking to limit the reach of the Staggers Act, the *Texas v. United States* Court concluded, "It is sim-

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39. *Id.* at 340.

40. The Staggers Act, as enacted, has been termed a "compromise," in which Congress rejected an initial attempt to oust states from any regulatory role. *Utah Power & Light*, 747 F.2d 721, 733. Congress has yet to see just how far it might reach under the "rational basis" test.

41. Senate Report, *supra* note 2, at 8-10.

42. *Texas v. United States*, 730 F.2d at 349. (Citing Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U.S. 264, 276-77 (1981)).

ply not true that Congress can regulate intrastate commerce only to protect interstate commerce from unreasonable burdens."[43] Congress can, if it so desires, regulate any transportation activity remotely connected with interstate commerce.[44]

The remainder of the *Texas v. United States* case dealt with the imaginative arguments used by the plaintiffs to attack the expanded preemption provisions of the Staggers Act. Such "new" preemption provisions are a departure from the earlier, accepted provisions.[45] The earlier provisions are analogous to the provisions that were carried forward into the BRRA. Thus, there seems to be little doubt that Congress can delegate power to the ICC to regulate intrastate transportation in some instances.

A carrier seeking to take advantage of ICC procedures must comply with certain requirements before it can come before the ICC. The carrier must comply with the following: it must be an interstate carrier; must first go to the state regulatory agency governing the intrastate transportation to be performed; and must provide an opportunity for the state regulatory agency to oppose the relief requested by the carrier from the ICC. All of these provisions are such important safeguards under this type of Federal preemption statute that they certainly would preclude a challenge to the claim of improper Congressional delegation of power.[46] Further, the *Texas v. United States* court concluded:

> [Under the Commerce Clause], Congress exercises a power that "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." Gibbons v. Ogden, 1824 22 U.S. (9 Wheat.) 1, 196, 6 L. Ed. 23. Because of the plenary nature of the commerce power and because of the primacy accorded federal law by the supremacy clause, the balance of interests between the federal and state governments is an inappropriate consideration in determining whether a federal act is a valid exercise of the commerce power.[47]

Congress, has the power to delegate; it has seemingly delegated power to the ICC with deference to the legitimate interests of the states in regulating purely intrastate transportation which has no effect on interstate commerce. Under the appropriate delegation, how has the Commission implemented its preemption powers under that legislation?

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43. *Texas v. United States*, 730 F.2d at 350.

44. *Id.* at 350 n. 19, "The only activities that are beyond the reach of Congress are, those which are completely within a particular state which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

45. *See* text accompanying note 38, *infra*.

46. *Id.*

47. *Texas v. United States*, 730 F.2d at 351.

III. ICC PREEMPTION IN THE INTRASTATE RATE AREA

The greatest number of petitions to the Interstate Commerce Commission arising out of the Federal preemption provisions contained in the BRRA are those concerning requests to raise intrastate rates.[48] This is not altogether surprising given the litany of problems that carriers experienced when they sought to raise intrastate rates under the prior dichotomy that characterized Federal-state regulations. According to the Senate report accompanying the BRRA, major passenger carriers (Greyhound in particular) continued to apply for intrastate rate increases despite significant delays encountered in the prosecution of such requests. At the same time, some of the smaller carriers experienced a "chilling effect," deciding that the voluminous data and great expenditures of time required successfully to prosecute an intrastate rate increase coupled with the likelihood of achieving only limited relief was a greater cost than the benefit of ultimately raising intrastate rates.[49] Presented with the apparent invitation to raise intrastate rates to the level of or close to those of interstate rates,[50] a number of carriers first submitted their application to the regulatory agency of the state in which intrastate operations were being conducted and then immediately petitioned to the ICC to seek some parity between intrastate and interstate rates.

Section 17 of the BRRA established the procedure for raising intrastate fares without regard for the recalcitrance traditionally exhibited by many states regulatory agencies.[51] Although the statute seems to include a number of limitations and at least suggests that the results of a carrier's appeal of a state action to the ICC is not a foregone conclusion, to the best of this writer's knowledge, no request for the ICC to raise intrastate rates under 49 U.S.C. § 11501(e) has been denied.[52] What appeared in

48. By October 1985, 46 interstate exit petitions had been filed, compared to 62 intrastate rate petitions, *supra* note 11.

49. Senate Report, *supra* note 22, at 8-9.

50. Senate Report, *supra* note 21, at 10. One study found that on a per mile basis intrastate fares were at least 30% lower than comparable interstate fares. "An Analysis of Intercity Bus Fares Under Varying Competitive Conditions" U.S. Department Research and Special Programs Administration, Transportation Systems Center.

51. BRRA, *supra* note 2, pertinent provisions enacted as 49 U.S.C. § 11501(e) (1982). It might be said more accurately that these procedures were enacted with full regard for the racalcitrance historically exhibited by the states.

52. In at least one instance, a carrier's petition for review was dismissed for being premature. The carrier's initial request to the state resulted in the issuance of a final action at least 3 months prior to the effectiveness of the BRRA. Peter Pan Bus Lines—Massachusetts Dept. of Pub. Util., No. MC-C-10848 (I.C.C. served May 12, 1983) [hereinafter cited as Peter Pan—Massachusetts]. Peter Pan ultimately returned to the ICC and was awarded the intrastate increase it sought. Peter Pan Bus Lines Review of a Decision of the—Massachusetts Dept. of Pub. Util. No. MC-C-10908 (I.C.C. served June 5, 1984). In another instance, a request was denied for lack of jurisdiction, because the carrier didn't provide the minimum information required under the

the statute to be limitations upon the preemptive power of the ICC under this section of the law has in practice proven to be non-existent.

A random sampling of ICC decisions dealing with intrastate rate appeals highlights some of the issues being considered by the ICC when such appeals first came before that agency. A threshold jurisdictional issue is a determination of those carriers who can take advantage of the invitation to appeal an unfavorable state decision to the ICC. The statute provides that this relief is available to any "motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title."[53] It would certainly seem that this relief is limited only to those carriers conducting *regular route* transportation subject to ICC jurisdiction, although this issue does not seem to have been raised.[54] It is clear that despite the extent of the supplicant's interstate activities, even the most minimal interstate service over an intrastate route will result in the ICC's taking jurisdiction of the matter.[55] In one case seeking review where the evidence established that

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state's rules for filing a rate increase. Greyhound Lines—Missouri Pub. Serv. Comm'n., No. MC-C-10851 (I.C.C. served May 26, 1983) [hereinafter cited as Greyhound—Missouri]. The decision was ultimately vacated and the matter dismissed pursuant to court remand in Greyhound Lines, Inc. v. United States, No. 83-7704, (9th Cir. entered April 10, 1984), (decision of ICC served May 31, 1984). *See also*, American Bus Association Statistics, *supra* note 11.

53. 49 U.S.C. § 11501(e)(1) (1982).

54. In an extreme case for example, a carrier which had provided local intrastate regular route service may provide interstate charter and tour service. The jurisdictional threshold of the ICC would presumably have been satisfied, although comparing intrastate regular route rates with interstate charter rates might prove to be an insurmountable burden. Given the ICC's receptivity to granting relief, filing such a petition might be worth the effort. In fact the ICC ultimately granted an increase in intrastate charter rates to carriers conducting interstate regular route (and charter) operations. Greyhound Lines—Railroad Comm'n. of Texas, No. MC-C-10893 (I.C.C. served February 21, 1984) [hereinaftrer cited as *Greyhound—Texas*] and Trailways Lines—Railroad Comm'n. of Texas, No. MC-C-10891 (I.C.C. served January 31, 1984) [hereinafter cited as *Trailways—Texas]*. These awards of intrastate charter authority were affirmed in Texas v. United States, 761 F.2d 211 (5th Cir. 1985).

55. The statutes providing for the ICC's award of intrastate regular route authority over interstate routes speak in terms of "authority" and not in terms of service. 49 U.S.C. § 10922(c)(2)(A)(B). Since a carrier is required to publish the rates it charges over its authorized routes, 49 U.S.C. § 10761(a), and since the ICC has held "that published tariff rates afford an appropriate basis for an effective rate comparison as contemplated by subsection 11501(e)(2)(A)(i)." Kerrville Bus. Co.—Railroad Comm'n of Texas, No. MC-C-10909 at 4 (I.C.C. served November 28, 1984) [hereinafter cited as Kerrville—Texas] the argument is compelling that bare ICC authority, without the performance of interstate service, nonetheless confers ICC jurisdiction over intrastate rates. However, in a recent decision, the ICC claimed a lack of jurisdiction to review a state's denial of a request for an intrastate rate increase. The ICC found that the carrier "makes reference to being an intrastate carrier, but makes no reference to any continuing interstate service or any interstate authority it holds," and concluded that the carrier "is solely an intrastate carrier of passengers [and] [t]herefore, State ratemaking authority over the intrastate rates of this carrier was not affected by the Bus Act." Bloom Bus Lines—Massachusetts Dept. of Pub. Util., No. MC-C-10979 at 2 (I.C.C. served November 21, 1985). This may well be an isolated instance which arose only because an affiliate carrier, not petitioner, was

perhaps as much as 90% or more of the petitioning carrier's revenues were the result of intrastate commuter operations, (and in fact, all interstate route operations were conducted wholly within that state) the Commission observed:

> There is nothing in the statute or legislative history to indicate that Congress intended any different treatment under 49 U.S.C. 11501(e)(1) for interstate carriers who are also engaged in intrastate commuter operations than for interstate carriers who are engaged in non-commuter intrastate operation. Accordingly, the fact that petitioner may be engaged in substantial commuter operations is irrelevant here.[56]

Another significant issue raised by the terms of the statute itself is a determination of what is "comparable interstate transportation" as compared to the intrastate transportation which is the subject of the rate increase. The most frequently used (and the one beyond which the ICC has not proceeded in granting all petitions submitted to it) of the rebuttable presumptions in the statute is that intrastate rates are lower than the rate the carrier charges for comparable interstate transportation.[57] The ICC has gone to great lengths to include most regular route transportation as "comparable" to interstate transportation for purposes of the rebuttable presumption. This is not altogether surprising since the Senate report cited a number of comparisons of the disparity between interstate and intrastate fares, many of which were based on comparable distances rather than identical routes.[58]

In practice, the concept of "comparable" interstate routes has been quite broadly defined by the Commission, which has not limited the com-

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performing interstate services. An interesting twist illustrating the extent of the ICC's perceived jurisdiction occurred in Greyhound Lines—Nebraska Pub. Serv. Comm'n.—Proposed Intrastate Newspaper Rate Increase, No. MC-C-10933 (I.C.C. served September 4, 1984). The ICC's jurisdiction over this petition was never questioned, apparently because 49 U.S.C. § 10922(e)(4) (1982) provides, in part, [that] "A certificate of a motor common carrier to transport passengers shall be deemed to include permissive authority to transport newspapers, . . ." The request to raise intrastate newspaper rates was granted. Requests by Greyhound and Trailways to increase intrastate package express rates were also approved readily by the ICC. *See Greyhound—Texas* and *Trailways—Texas*, *supra* note 54, and affirmed by the Court in *Texas v. United States*, 761 F.2d at 211. The jurisdiction issue was never raised in these cases either.

56. Plymouth & Brockton St. Ry. Co.—Massachusetts Dept. of Pub. Util., No. MC-C-10887 at 4-5, (I.C.C. served December 27, 1983) [hereinafter cited as Plymouth & Brockton—Massachusetts]. This case is also illustrative as one of the few self-imposed limits on ICC jurisdiction. The local Massachusetts Bay Transit Authority [MBTA] initially claimed jurisdiction over a portion of the intrastate route and applicable rates. The ICC decision denied the requested relief "to the extent such [proposed] fares are outside [the D.P.U.'s] jurisdiction," whatever that might ultimately turn out to be. *Id.* at 5. Since the ICC claimed a formal request had not been presented to the MBTA, rather than appeal the ICC decision claiming a lack of jurisdiction, the more prudent course for the practitioner was to file a new petition on the basis of the Transit Authority's inaction after the 120 day statutory period had expired.

57. 49 U.S.C. § 11501(e)(2)(A)(i) (1982).

58. Senate Report, *supra* note 21, at 9.

parison to identical routes. The Commission held that: "The rebuttable presumption in the statute does not require comparison of intrastate rates with interstate rates between the same two points but only for comparable interstate transportation."[59]

Another issue surrounding the application of the rebuttable presumption is the rate which a carrier is charging. In comparing interstate with intrastate rates, the ICC is interested in only the ordinary, regular route rate. In its initial policy, the ICC stated it will not "take into account excursion fares and other discounts applicable to a petitioner's interstate rate structure."[60] The Commission's rationale for that reasoning was expressed in the following terms:

> Promotional-type discount . . . ceiling fares or rates for certain qualifying traffic are generally initiated for promotional or advertising purposes and are frequently effective only for limited time periods. Therefore, we have concluded that such reduced rate options should generally not be considered in making comparisons under Section 11501(e)(2)(A)(i).[61]

Although the ICC was ultimately directed by the court on appeal to consider the rates actually being charged, the court criticized the ICC's policy of completely ignoring excursion fares. The court concluded that, "The application of the [ICC's] policy in actions such as these results in a comparison of rates that does not necessarily reflect the actual rates charged."[62] Presumably, once the ICC considers these excursion fares, it will be accorded some latitude in finding the inevitable burden on interstate commerce.

Although there are other qualifications present in the preemption statute, petitioning carriers generally need to go no further than to demonstrate that an appropriate petition was filed with the state[63] and to show a

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59. Bonanza Bus Lines—Rhode Island Pub. Util. Comm'n., No. MC-C-10886 at 2 (I.C.C. served December 12, 1983). In *Texas v. United States*, 761 F.2d at 211, the court affirmed the ICC's practice of seeking a comparison of rates for service over comparable distances, recognizing that per mile revenues for short trips are inevitably higher than those for longer trips, because of "the influence of costs of ticketing, baggage handling, other station expenses, and other expenses which do not vary significantly (or at least not proportionally) with the length of the trip." *Texas* v. United States, 761 F.2d at 216 (quoting *Greyhound Lines*, No. 10921, at 3) (I.C.C. served April 18, 1984) *aff'd sub nom.* Public Serv. Comm'n. of West Virginia v. ICC, 749 F.2d 32 (4th Cir. 1984).

60. *Trailways—Texas*, MC-C-10891 at 6.

61. *Id.* at 217. The Trailways—Texas decision resulted in a strong dissent by Chairman Taylor arguing at length that the facts in this case showed that Trailways made its arguments on published rates, but it was in fact "charging" lower intrastate rates, and that the rates actually being charged should apply. (Taylor, dissenting in part) (served January 22, 1984).

62. *Texas v. United States*, 761 F.2d at 217.

63. In *Trailways—Texas*, the argument that Trailways did not file a separate state petition and therefore could not appeal the Texas decision was promptly dismissed by the ICC. The ICC dismissed this argument in part because Trailways had actively participated in the case in ac-

disparity between intrastate and interstate rates. After those steps have been completed, success at the ICC is virtually assured.

Many states have devised a number of imaginative defenses against the carrier petitions for review that are directed to the ICC. The result is the same regardless of the defense; if intrastate rates are lower than comparable interstate rates, there is an undue burden on interstate commerce. The state has not overcome the "rebuttable presumption," and the full intrastate increase is allowed by the ICC.

In both earlier and in more recent decisions, the Commission has consistently decided that it need not go beyond a comparison of interstate and intrastate rates. In its most recent decisions, with more than a year and a half of precedent behind it, the Commission has adhered to its interpretation of the BRRA, granting numerous requests with the same expressed rationale.[64]

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cordance with state procedures. Perhaps the philosophy expressed in the following quotation gives the best view of the Commission's view of this issue:

> We can discern no valid reason for requiring the parties to repeat the process simply because Trailways did not technically file its own separate application. Such an approach would also be costly and time-consuming and not in the interest of the parties, this Commission or the public. Accordingly, we conclude that Trailways has requested permission from the [Texas Railroad Commission] to establish a rate and, because its request was partially denied, its petition is properly before the Commission.

Id. at 5.

In another case involving the recalcitrant Texas Railroad Commission, [TRC], the ICC held that even though the petitioning carriers had not presented rate comparison evidence to the state, but only introduced it in the ICC proceeding, the relief sought by the carriers would be granted. The ICC reasoned that since the statutory presumption concerns the effect of a difference in rates, not the reasons for the difference, carriers could present to the ICC evidence of rate comparisons not required at the state level. *Kerville Bus—Texas*, No. MC-C-10979 at 4. It appears that so long as a carrier presents probative evidence to the state concerning the disparity between interstate and intrastate rates, it has met the burden of going to the state, even if the carrier does not present all the evidence the state might require. Another requirement is being certain to file a request with any state agency with any possible jurisdiction over intrastate rates and to name all such agencies in the ICC petition for review. *Plymouth & Brockton—Massachusetts*. In the area of rail preemption a carrier may petition the ICC to review a state administrative proceeding. The doctrine of "exhaustion of administrative remedies" has been raised as a defense, although without success. *Utah Power & Light*, 747 F.2d at 727-29. Since the BRRA includes a specific time limit as part of its jurisdictional standard, the doctrine of exhaustion of administrative remedies would seem to have no application in petitions under the Bus Act.

64. Subsection 11501(e)(2)(A)(i) established a rebuttable presumption that a prescribed rate, rule, or practice applicable to interstate transportation of passengers unreasonably burdens interstate commerce if it results in the carrier charging an intrastate rate which is lower than the rate applicable to comparable interstate service. The record clearly establishes that intrastate regular-route passenger fares, even at the proposed level, are significantly lower than comparable interstate fares and that [Petitioner's] other proposed intrastate rate would merely equal comparable interstate rates and charges. Protestants have not shown any difference in operating conditions, services or costs between intrastate and interstate operations which would justify the disparity in applicable fares and rebut the statutory presumption. This continued rate discrepancy results in subsidization of [Petitioner's] intrastate operations by interstate operations, representing an excessive and undue burden on interstate commerce.

States have presented various arguments in attempting to defeat proposed intrastate rate increases. The ICC has consistently awarded relief despite those arguments. In an early case, the North Carolina Utilities Commission sought to assign responsibility to a carrier for the disparity between intrastate and interstate rates, especially through reference to past internal business practices such as the size of dividend payments to its corporate parent and management bonus incentives.[65] With respect to such internal business practices, the ICC, in this case and in others similar to it,[66] has adopted the concept, that business decisions are best left to the carrier and to its stockholders while carriers are operating in a transportation environment in which the rule of thumb is to "let the market regulate itself."

In responding to a question regarding the responsibility for disparity between interstate and intrastate rates, the Commission replied with a statement which provides a guiding light for future Commission decisions in this area: "Our responsibility under Section 11501 is not to investigate the history of burdens on interstate commerce, but to remove them."[67]

Another novel argument advanced by the North Carolina Commission was that the ICC could not authorize the requested rate increase, because even after the ICC had approved the requested rate increase, intrastate rates would still be lower than comparable interstate rates. The ICC rejected this contention and stated:

> Section 17 of the Bus Act does not mandate immediate equalization of intrastate and interstate rates for services performed by passenger carriers. Rather, it provides a procedure for removal of unreasonable burdens on interstate commerce resulting from depressed intrastate rates. [Petitioner] has stated that it will pursue gradual equalization of rates. This is not an unreasonable approach. The proposed increase will reduce the burden on interstate commerce without unduly disrupting [Petitioner's] intrastate operations.[68]

The state of Alabama argued before the Commission that various op-

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Greyhound Lines—Louisiana Pub. Serv. Comm'n., No. MC-C-10906 at 3 (I.C.C. served May 21, 1984) [hereinafter cited as Greyhound-Louisiana].

65. Carolina Coach Co.—North Carolina Util. Comm'n., No. MC-C-10842 (I.C.C. served April 18, 1983) [hereinafter cited as *Carolina Coach—North Carolina*].

66. Another such case is Jefferson Lines—Missouri Pub. Serv. Comm'n., No. MC-C-10844 (I.C.C. served April 27, 1983).

67. *Carolina Coach—North Carolina*, MC-C-10842 at 8. *See also* Greyhound Lines—Pennsylvania Pub. Util. Comm'n., No. MC-C-10913 at 4-5 (I.C.C. served June 25, 1984) [*hereinafter* cited as Greyhound—Pennsylvania] where the ICC continues to use the same language MC-C-10842 at 9.

68. *Carolina Coach—North Carolina*, *supra* note 65, at 9. In fact, many if not most early cases arising under this section resulted in intrastate increases which remained well below interstate rates. This may well be a vindication of the view that intrastate rates had been unreasonably depressed for so long that they could not be raised in one fell swoop to the level of interstate rates; the increase would be too great for the riding public to accept.

erating ratios indicated that approval of the requested intrastate increase was not warranted. The ICC did not accept this argument and held "[that] [T]he calculation of intrastate versus interstate operating horatios on mixed operations involves arbitrary accounting assumptions . . . . we do not find these calculations sufficiently reliable enough to rebut the statutory presumption raised by the rate discrepancies."[69]

The Georgia Public Service Commission employed the argument that the total equalization of interstate and intrastate rates would result in a very low intrastate operating ratio, while concluding that intrastate rates at the interstate level would be unreasonably high. Once again, the ICC failed to accept the argument, and concerned itself only with the discrepancy between interstate and intrastate rates.[70]

The Missouri Public Service Commission utilized the argument that the petitioning carrier's interstate rates, which were admittedly higher than its intrastate rates, were artificially high by virtue of their being set through the taking into account of improper costs. The ICC observed that a petition under Section 11501 was not the proper forum to raise the issue of the legality of interstate rates.[71] The Missouri Commission appealed the decision to the Commission, in effect asking the Commission "what is a state to do" to rebut effectively the rebuttable presumption in favor or raising intrastate rates. In responding, the ICC suggested:

> To rebut this presumption, respondent is required to demonstrate that intrastate rates which are below those for comparable interstate transportation are nonetheless reasonable. Generally, evidence of distinguishing factors in

69. Greyhound Lines—Alabama Pub. Serv. Comm'n., No. MC-C-10904 at 3 (I.C.C. served May 21, 1984). *Citing* Greyhound Lines—West Virginia Pub. Serv. Comm'n., 133 M.C.C. 382 (1984). In Greyhound Lines—New York State Dept. of Transp., No. MC-C-10885 (I.C.C. served December 12, 1983), *aff'd sub nom.* Commissioner v. I.C.C., 750 F.2d 163, the reviewing court concluded that since the concept of calculating "intrastate versus combined operating ratios involves a number of highly arbitrary accounting assumptions used to allocate revenues and expenses between intrastate and interstate operation," the ICC could reasonably conclude that New York's operating ratio evidence "was unreliable and insufficient" to rebut the statutory presumption. *Id.* at 179. Even more recently, the ICC was highly critical of the operating ratio argument as a means of a state satisfying its burden to rebut the presumption. *Greyhound—Pennsylvania*, MC-C-10913 at 4.

70. Greyhound Lines—Georgia Pub. Serv. Comm'n., MC-C-10855 at 5-6 (I.C.C. served July 5, 1983).

71. Trailways American Buslines and Midwest Buslines—Missouri Pub. Serv. Comm'n., No. MC-C-10856 at 4 (I.C.C. served July 22, 1983) [hereinafter cited as Trailways—Missouri]. Missouri appealed that decision to the ICC, arguing *inter alia*, that since revenues earned from intrastate increases exceed the carriers' cost of service, the presumption in 49 U.S.C. § 11501(e)(2)(A)(ii) (1982) involving a comparison of revenues and variable costs should come into play. The ICC properly held that the first presumption (the disparity between interstate and intrastate rates) was all that was in issue, and that in the absence of a showing that petitioner's evidence is materially flawed regarding the rate discrepancy, or showing that there are special characteristics of intrastate operation that produce lower costs, the presumption is not rebutted. *Trailways—Missouri, No. MC-C-10856 at 4.*

> operating conditions and costs of services associated with providing intrastate as compared with interstate service is the most probative and relevant in establishing the reasonableness of the lower rates.[72]

Though there are further examples which illustrate the futility of states seeking to block the increase in intrastate fares, they are all representative of the same proposition: the Interstate Commerce Commission will not be swayed from its path of infusing its own brand of "deregulation" upon the states. The previous examples relate to rate preemption, the most frequent preemption provision being considered by the ICC, although the philosophy expressed is equally illustrative of the other less frequent appeals to the Commission in which relief is sought from burdensome state regulation in other areas.

Section 16 of the BRRA provides for ICC preemption of requests by carriers to abandon intrastate regular routes.[73] Illustrative of cases under that section is a decision by the Oklahoma Corporation Commission to deny a request to abandon intrastate service, subsequently appealed to the ICC.[74] One of the involved routes had admittedly been dormant for 25 years, yet the Oklahoma Commission argued that approval of the abandonment "would threaten the integrity of the regulatory process."[75] With respect to the other routes, Oklahoma argued that the discontinuance of service would leave some patrons without bus transportation and suggested that the ICC order the carrier to conduct operations in vehicles with limited seating capacity. The ICC found it *not* in the public interest for a carrier to continue unprofitable operations and permitted the petitioning carrier to discontinue intrastate service.[76]

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72. *Trailways—Missouri, supra* note 72, at 2-3. Many states have advanced this argument, but the ICC has consistently found it unpersuasive on the facts. Perhaps there is no factual situation in which the costs of interstate operations are significantly different from those of intrastate operations. In any event, no such facts have yet been presented to the ICC.

73. BRRA, *supra* note 2, § 16, enacted as 49 U.S.C. § 10935 (1982).

74. Missouri, Kansas and Oklahoma Coach Lines—Oklahoma Corp. Comm'n., No. MC-C-36364 (I.C.C. served February 29, 1984).

75. *Id.* at 5.

76. The ICC, in a typical expression of the policies involved, held:

> The proposed discontinuance will leave intermediate points on these routes without bus service, and there are no alternative modes of public transportation available to these points. The question is not, however, merely whether there will be a loss of service—that much is obvious by the mere filing of the exit request. Rather, the statute requires that we weigh, against the disadvantages caused by the loss of bus service to residents of and business in the affected communities, the goals of allowing the most productive use of equipment and energy resources, enabling efficient and well-managed carriers to earn adequate profits and attract capital, and improving and maintaining a competitive privately owned motor carrier system. To that end, it is not in the public interest to require [the carrier] to continue unprofitable operations which jeopardize its ability to provide service on its other routes, by requiring cross-subsidies for more successful operations. Consequently, the question requires a balance between the local interests in support of continuing these services and the policy of the Bus Act that favors exit

The Minnesota Public Utilities Commission appealed an ICC decision which permitted a carrier to discontinue intrastate service. The Court observed that, "the congressional purpose of the Bus Regulatory Reform Act of 1982 was to free interstate carriers from state created impediments that prevented them from abandoning unproductive routes."[77]

Congress included the most qualifications in that portion of the preemption scheme which deals with discontinuance of service. Congress' purpose was to be certain that the ICC did not ignore the needs of local residents who would lose bus service through any authorized discontinuance.[78] One reviewing court, while affirming the ICC's approval of discontinuance over five intrastate routes, disapproved its action authorizing discontinuance over a sixth.[79] The reviewing court required that before authorizing a discontinuance the Commission make independent findings with respect to each of the three standards specified in the statute. The court criticized the Commission's actions as "just such a charade" as Congress sought to avoid in reviewing requests for discontinuances.[80] Considering the context of the Commission's actions in this area and the deference given the Commission by reviewing courts, it seems that even in this case the ICC could have avoided court criticism by expressing its findings more precisely. This case which criticizes the ICC's action under the BRRA is not a criticism of the ICC's rush toward deregulation. It is only a reminder that the Commission must dot most of its "i's" and cross most of its "t's" in reaching its deregulatory result.[81]

In practice, the ICC is utilizing an interpretation of the BRRA which

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from unprofitable routes and the reduction or elimination of cross-subsidies wherever possible.

Id. at 6.

77. Humphrey v. United States 745 F.2d 1166, 1168 (8th Cir. 1984). (footnotes omitted). The ICC decision affirmed by the Court was Greyhound Lines—Minnesota Pub. Util. Comm'n., No. MC-C-1515 (Sub No. 340) (I.C.C. served November 7th, 1983). Another court decision upholding ICC approval of a discontinuance is Auville v. ICC, 747 F.2d 179 (4th Cir. 1984).

78. *See* text accompanying note 14, *infra*. A more recent decision, which includes a thorough examination of the ICC's role under Section 16 of the Bus Act, is illustrative of just how far the ICC will stretch credulity in finding that reasonable alternative service will exist following an abandonment of service by a petitioning carrier, as required by 49 U.S.C. § 10935(g)(2)(C) (1982). Greyhound Lines—New York State Dept. of Transp., No. MC-C-1515 (I.C.C. served August 23, 1985). The decision is also interesting in its consideration of the state's offer of financial assistance, which is one factor to be considered in abandonment cases, under 49 U.S.C. § 10935(g)(2)(B) (1982). The ICC found that in considering the reasonableness of the state's offer of a subsidy for the carrier to continue service, the carrier could reasonably and lawfully include a 10 per cent profit level in its calculations. *Id.* at 21-22.

79. *Pennsylvania v. United States* 749 F.2d at 841.

80. *Id.* at 855.

81. In what might be termed a tacit recognition of regulatory facts of life, the court concluded with the admonition that on remand "the ICC must consider the two, distinct findings required under section 16 of the Bus Act . . . before *granting* Greyhound's exit application." *Id.* at 855-56. (emphasis added).

leads to the granting of relief to any carrier which comes before it, provided there is at least a tenuous link with interstate commerce. The Federal preemption provisions establish a situation in which state regulation, despite its merits,[82] may be readily avoided by an interstate carrier. This leads to the consideration of Federal preemption from a more subjective point of view.

IV. The Public Interest in Federal Preemption

In enacting the BRRA, Congress was responding to severe problems that were facing the intercity bus industry. Other modes of transportation had previously been freed from often over-burdensome regulation. An observer can maintain almost any view of the wisdom of motor carrier regulation (except perhaps a pure "no regulation of any sort under any circumstances" approach) and acknowledge that some reform of state regulation of bus carriers was vital. As an active practititoner in the bus field, this writer would suggest that the horror stories detailed in the legislative history of the BRRA could easily have been expanded upon. The "chilling effect" on small carriers from the extraordinary delays and red tape associated with any modification of service was such that many carriers simply could not survive and at the same time continue to provide responsive service.

Congress, perhaps with a knowledge of those to whom the preemption provisions were directed, the state regulatory agencies, was rather insistent that its scheme of lessened regulation be adopted. The restatement of the National Transporting Policy in the BRRA includes specific directions to the ICC to "ensure that intrastate regulation is exercised in accordance with" the BRRA and further, that the "reform initiatives" enacted by the BRRA "are not nullified by State regulatory action."[83] The statement in Section 17 of the BRRA directs the states to adopt the Federal procedures within two years of the effective date of the Bus Act.[84]

This rather harsh language was included because it was generally recognized in the industry that the states, for the most part, were not in

82. In *Commissioner of Transp. v. United States*, 750 F.2d at 163. New York argued that its policy of permitting Greyhound easily to eliminate unprofitable rates and the fact that Greyhound had substantial monopoly power over many routes meant that the disparity between interstate and intrastate rates was not such a burden on interstate commerce warranting ICC action. The ICC rejected the seemingly meritorious arguments as irrelevant, because they do not address the issue of differences in operating costs or conditions. The Second Circuit agreed with the ICC, observing that, "although these arguments may support the wisdom of regulation in general and the benificence of New York's regulation in particular, they do not significantly relate to the existing disparity between interstate and intrastate passenger fares to rebut the statutory presumption." *Id.* at 171.

83. BRRA, *supra* note 2, § 5, 49 U.S.C. § 10101(a)(3) (1982)).

84. BRRA, *supra* note 2, § 17(d) (not codified, note following 49 U.S.C. § 11501).

any hurry to modify their regulatory philosophy.[85]

The state reaction to the Federal initiative has in many instances been "ostrich-like," taking the position that if the new law is ignored, perhaps it will go away. This has been the reaction of many state regulators since the preemption issues were first raised in pending legislation.[86]

It is admittedly poor practice to consider the argument of a litigant in an appellate brief as an objective argument. However, the comments of Greyhound in an appeal of an increase in intrastate rates awarded by the ICC by the New York Department of Transportation is a reasonable characterization of the philosophy of the states and their regulatory trade association, National Association of Regulatory Utility Commissioners (NARUC). In response to the NARUC *amicus* brief, Greyhound argued that: "Congress intended that the Bus Act limit the States' role in regulating intercity bus companies."[87]

Private discussion with representatives of state Commissions suggests that while there is even more general displeasure at having been preempted by Congress out of a regulatory role, there is even more concern on the part of the state regulators over abuses resulting from carriers that seek to create a tenuous relationship between their operations and

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85. More than three years after the effectiveness of the Bus Act, few states have heeded the Congressional call to modify their practices.

86. The author, delivering a speech before the National Conference of State Transportation Specialists at Louisville, Kentucky, in June, 1982, observed that much of the conversation and presentations were no more than entreaties for the participants not to ignore the deregulatory handwriting on the wall and to lessen state regulation before Congress took responsibility for intrastate regulation of the bus industry away from the states. Few, if any, changes were forthcoming. The author is aware of continuing state arguments seeking to assert state supremacy over the regulation of intrastate transportation in preceedings underway at the time of this writing, including, for example, assertions by the Washington Utilities and Transportation Commission in a matter before the U.S. District Court for the Western District of Washington, in Port of Seattle v. Evergreen Trails, Inc., No. C84-1312M. (W.D. Wash. 1984).

87. Greyhound stated in its brief:

> NARUC presents a generalized and unfocused objection to the Bus Act. It expressed displeasure with the fact that the ICC is now carrying out the mandate of Congress and the provisions of the Act. This generalized expression of displeasure, however, is not tantamount to a legally sufficient basis for opposition. . . Simply stated, NARUC desires to retrieve for the States the primary jurisdiction over intrastate rates which the States had prior to the Bus Act. Having failed to win in Congress the preservation of the status quo, NARUC now seeks to emasculate Section 17 and return to the States, contrary to the Congressional intent, that lost jurisdiction.

NARUC misunderstands or refuses to understand that Section 17, and other provisions of the Bus Act were specifically intended to limit the State's role in regulating intercity bus companies. Brief for Intervenor, Commissioner of Transp. v. United States, 750 F.2d at 163, *supra* note 13 at 25.

NARUC continues to assert a role for the state and federal governments in the economic regulation of motor carriers. *NARUC Task Force Favors Continued U.S. Regulation and Transportation Industry,* TRAFFIC WORLD, November 25, 1985, at 13.

interstate commerce to avoid intrastate regulation when that regulation should in fact be exercised.

Such occurrences have frequently arisen in the entry area when a carrier, which the state believes is unfit, obtains vast intrastate operating authority through the "automatic" entry provisions of the ICC.[88] In *Atlantic City Shuttle and Bus Service, Inc.*,[89] the carrier, domiciled in northern New Jersey, faced the difficulty of obtaining intrastate operating authority to allow it to perform services to and from the gambling casinos at Atlantic City. The carrier filed for regular route authority between Staten Island, New York (immediately adjacent to the State of New Jersey) and Atlantic City, New Jersey.[90] Each of the carrier's routes began at Staten Island and immediately crossed into New Jersey, where the routes traversed almost all feasible highways in the area en route to Atlantic City. Obviously, the carrier sought not only interstate but also intrastate authority.[91] Such a proposal is one of the many examples of the ingenuity of carriers to employ the entry provisions of the BRRA to avoid state regulation.[92]

One cannot help but feel that the ICC has gone overboard in many instances by failing to recognize that the preemption provisions are not "automatic"; rather they place a high burden upon the state agencies seeking to retain jurisdiction over intrastate transportation. Such a high burden should not be equated with the insurmountable burden that the Commission has imposed. The legislative scheme embraced by the BRRA is one in which "Congress expressly declined to issue a blank deregulation check to the Commission; instead it required consideration of . . . distinct statutory standards, . . ."[93] in rendering decisions. Until the states and/or private carriers call to the attention of the Commission a truly unjust case,[94] and form the basis of a reasonable legal argument

88. The author is unaware of any application for additional passenger authority under the BRRA which was denied on its merits.

89. Atlantic City Shuttle and Bus Serv., Inc., No. MC-174190, ICC Register (April 25, 1984).

90. Atlantic City Shuttle and Bus Service, No. MC-174190, ICC *Register* April 25, 1984, at 20-22. Intrastate authority was requested under the entry preemption provision of 49 U.S.C. § 10922(c)(2)(B) (1982). A certificate was ultimately issued.

91. The application required two full pages in the ICC Register to describe its numerous routes.

92. At the same time, this area of apparent abuse is one of the few areas in which the ICC has been required by the courts to proceed with caution. Applications seeking regular route intrastate authority to serve the gaming casinos in Atlantic City, N.J. are mostly transparent requests to perform intrastate "special operations" service. The ICC is barred by 49 U.S.C. § 10922(c)(2)(H) (1982) from awarding intrastate special operations authority. In Hudson Transit Lines v. ICC, 765 F.2d 329 (2nd Cir. 1985), the Court reminded the ICC of its limited power in this one area, while generally affirming its other regulatory interpretations.

93. *Pennsylvania Pub. Util. Comm'n. v. United States*, 749 F.2d at 852 (D.C. Cir. 1984).

94. The Texas Railroad Commission seems especially reluctant to accept Federal preemption jurisdiction. *See* cases involving Texas cited *supra* in notes 35, 55, and 56. Oklahoma's

regarding the ICC exceeding its vast discretion, the floodgates at the ICC will remain open in this area as they have in so many other areas in the current deregulatory era.

Characterizing the ICC's implementation of the BRRA as overly generous must not be equated with a finding that the Commission's implementation is either consistent with or contrary to the public interest. The merits of meaningful transportation regulation, in which there are meaningful limits placed upon carriers for the entry into the market, or exit from that market, and for rates, rules, and regulations, can and are being debated again and again.[95] Classical economic analysis suggests that there will be "winners" and "losers" from any change in the rules of the game. This has been true in motor carrier regulation. Some traditional carriers have been unable to keep pace with changing mores in the bus industry, while others have been able to apply their entrepreneurial talent to provide new and imaginative services where restrictive regulation precluded them before. An industry steeped in lethargy has raced belatedly toward the modern, highly competitive transportation market which exists today.[96] At the same time, the bus industry, like other transportation industries, has been in a state of turmoil, and there is a great deal of uncertainty from day to day as to what service will be available for that consumer.[97]

The same classical economic analysis suggests that we cannot weigh the benefits of the "winners" against the cost to the "losers" and

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argument that a route dormant for 25 years shouldn't be abandoned is, if anything, "outrageous" in the other extreme. *Missouri, Kansas and Oklahoma Coach Lines, supra*, note 74.

95. The current debate is centered in the freight area, probably because those transporting freight and those using their services have had several years during which to try out the "new" regulation. The argument does include the same essential issues present in consideration of the BRRA, namely arguing if "deregulation does . . . strike a balance between carriers and shippers as outlined in various deregulation laws." *I.C.C.—A House Divided and Under Fire*, New York Times, December 9, 1984, at F12-13. NARUC remains a forum for this debate, *NARUC Panels View Truck Industry: Plenty of Questions, Few Answers*, TRAFFIC WORLD, Dec. 2, 1985, at 33-4. One of the first formal, empirical studies in the bus area is a study prepared by the Illinois Commerce Commission entitled ILLINOIS BUS SERVICE SINCE THE BUS ACT: A DIMINISHING INTERCITY NETWORK: (1984). That study's introduction observes, "While it is perhaps too soon to judge the effectiveness of BRRA in revitalizing the industry, the effect of the Act on rural and small city Illinois has been severe, [with] whole areas of nonmetropolitan Illinois . . . taken from the state bus network, without compensating service gains in more populated regions." (unnumbered page—"Introduction"). Illinois, it should be observed, is one of those states most vociferous in its opposition to the concept of Federal preemption.

96. Airline/bus intermodal innovations are described in *Deregulation Fostering National Transport Network*, THE TRAVEL AGENT, Nov. 15, 1984, at 6; new pricing initiatives are described in *Travelways Discounts RT Returns by 10%*, THE TRAVEL AGENT, December 17, 1984, at 4.

97. For example, Trailways announced doubled levels of service on routes between Boston and New York, only a few months after a significant reduction in service over the routes. *Trailways Reduced Fares as Union Takes Wage Cut*, TRAFFIC WORLD, Dec.17, 1984, at 31.

calculate a satisfactory result. The only result of which we can be certain, is that the industry is in a state of change by virtue of the ICC's implementation of the BRRA. The next generation of observers will ultimately determine if the implementation was beneficial or not.

V. WHERE DOES FEDERAL PREEMPTION UNDER THE BRRA LEAD?

In general, the Federal preemption provisions of the BRRA are successful insofar as the ICC and almost every carrier are concerned.[98] In seeking to bring an end to overly restrictive state regulation, the ICC may have gone too far in some instances. However, the states have failed to seize upon examples of exceedingly unjust conduct or results under the BRRA and to bring them to the attention of the Commission or the courts. Interstate Commerce Commission preemption of state regulation of intrastate passenger transportation is here to stay.

With Federal preemption in the railroad industry far more extensive than in the bus industry,[99] the only remaining fertile ground for preemption is in the trucking industry.[100] One can have the same fears as those of any other observer of the transportation industry when it comes to peering into crystal balls. The apparent success of Federal preemption in the bus and rail fields cannot help but thrive in the fertile ground of complaints by property carriers. Property carriers have learned to live with Federal deregulation and presently find the only remaining restrictions are those of a continuing and burdensome regulation of intrastate service by the states.[101]

Whatever the merits, it appears that the surface transportation industry will be operating under the philosophy of "let the marketplace regulate itself" for the foreseeable future. Federal preemption of state regulatory

98. From the author's experience, Greyhound has made extensive use of the relief provisions of the BRRA. Many smaller carriers have made great use of them as well. However, now that the smaller carriers see that the results of this new law include not only relief for them from onerous state regulation but also vast new intrastate competition (and new interstate competition under the liberal interpretation of all of the Bus Act's entry provisions) where none existed before, the BRRA is not necessarily viewed in such glowing terms. Whether the BRRA preemption provisions will be viewed in the future by the majority of independent bus companies as a panacea for their ills is problematical. It is likely that all will agree that the BRRA will be viewed in retrospect as a strong catalyst for change.

99. *See* discussion of rail regulation in Section I, *supra*.

100. "One issue that will have to be resolved before you can have any further deregulation is the issue of federal preemption of the states. You cannot have an essentially deregulated environment on the federal level and a very highly regulated situation at the state level." Chairman Reese Taylor of the ICC, quoted in *The ICC in 1984: Where Has It Been, Where Is it Going?,* TRANSPORT TOPICS, Dec. 17, 1984, at 12, in response to a question asking for his predictions of areas ripe for trucking legislation in 1985.

101. *NIT League World Eliminate All Economic Regulation of Trucking*, TRAFFIC WORLD, Dec. 2, 1985, at 25-6.

power over intrastate transportation is an important element in the current system of "regulation by non-regulation" and is possibly a harbinger of further Federal preemption of state transportation regulation.