THE INTERSTATE COMMERCE COMMISSION — THE LAST TWENTY-FIVE YEARS

ROBERT S. BURK*

MR. BURK: You will all be happy to know that this is the last 25 years. The program, our part of the program, will soon conclude here.

In 1962, the Commission celebrated its 75th anniversary. It was a grand celebration. As Commissioner Minor noted a little earlier, Mr. Justice Frankfurter spoke to the assemblage in high praise of the Commission. He called it, "A blend of preserving, furthering and encouraging private incentive with due regard for effective, informed representation of the public interests where, as in all aspects of transportation, private enterprise closely touches the national well-being."

The President issued a laudatory proclamation and Congress joined in the acclaim with a Joint Resolution.

Today, 25 years later, despite the similar proclamation and resolution, the President is calling for abolition of the Commission, and the Chairman of the House Commerce Committee has branded it "brain dead".

Now, how does an institution go from effective, informed representation of the public interest to brain dead in 25 years?

That is my story to tell this morning. I have only 15 minutes to tell it, so much must be omitted. But what I'm going to try to do is capture the essence, to give you the flavor of the times that led to this end. Or is it a new beginning? We shall see.

In my view, the 25 years can be broken into three periods. The first I

* General Counsel, Interstate Commerce Commission

call the endless summer years of 1962 through 1977, when life was good — or was it?

Then came the volcano years of 1978 through 1983 when deregulation erupted all across the landscape.

And, finally, the Tower of Babel years of 1984 to date, when one wonders what voice in the cacophony to listen to.

First, the endless summer, when the warm sun shone on us lawyers and our lives were good, real good. A couple of vignettes will suffice.

I was trying a motor carrier authority application case in Arizona, putting on strings of witnesses in town after town, day after day, all to prove a need for my client's service.

In Cottonwood, I had reserved the Ace Steak House for the hearing and they had separated the room from the bar, with a folding partition.

Now that's where I learned an ICC procedural rule found in no law books. While questioning a witness, I was interrupted by a protestant's lawyer who moved we adjourn under the Pocatello Rule. I didn't know what he was talking about.

The Examiner checked his papers and said you're right, this is the 100th witness. Motion granted. Whereupon, he rolled back the partition and ordered me to buy drinks for the whole mob.

Now you can be sure that I always remembered the Pocatello Rule after that and I never again got caught putting on a 100th witness.

As indicated by my previous story, it was up to applicant's attorney to reserve suitable hearing rooms. The following real letters — I'm not making these up, ladies and gentlemen, these are actual real letters. They were addressed to Chief, ICC, Judge Bamford. And they're from an ICC docket. You may go and read them.

They're revealing of these times I'm speaking of.

I will call the lawyers Smith and Jones to protect the guilty. The first letter states, and I quote:

> "Mr. Jones, the attorney for applicant in the above matter, is a most devious individual. He has done everything conceivable to inconvenience the opposition when handling an applicant's case. I have had trouble with Mr. Jones before, but he has finally outdone himself. In checking with the Ambassador Hotel located in Chicago, I was advised that the oral hearing in this case has been set in the bathroom."
>
> "With this kind of harrassment, it is my opinion that the rights of my protesting client have been violated and that the Commission cannot obtain a fair record of a hearing held in a bathroom.
>
> I respectfully request that the hearing in this matter be moved out of the Ambassador bathroom."
>
> To which Mr. Jones replied, and again I quote:
>
> "I have received a copy of a letter from Mr. Smith in which he states that

I'm a most devious and uncooperative individual. These malicious and libelous statements, while entirely true, are irrelevant."

"Having been in numerous cases with Mr. Smith and knowing how he handles himself at hearings, the bathroom is the only appropriate place to hold a hearing where he is involved."

Well, it was fun and games and lots of money, but what did we lawyers produce?

Well, for example, in 1964, we produced 472,000 pages of transcript, and we filed 260,000 pleadings.

Why? What was going on?

Well, in the motor carrier area, shippers couldn't get service or reasonable rates, and the carriers couldn't get authority to compete.

In one landmark case during this period, the Commission refused to grant frozen food authority and insisted that the carriers apply separately for frozen berries or frozen fruits or frozen vegetables.

In another famous case, the Commission decided on whether authority was required for chicken, depending on whether it was cut up, precooked or cooked, frozen or refrigerated, breaded and/or battered or marinated.

Well, you can see what this would lead to, and it did. Much criticism. Stung by the criticism of lack of service and rate problems, the Commission reported in 1972 that it granted 4,371 out of 5,945 motor carrier applications. It argued that interstate trucking is not closed to expanding services and operations, new entrants or reasonable competition.

But what it granted were bits and pieces. In that very same report to Congress it confessed that only one grant of motor carrier authority was for what it labeled, and I quote, a "unique single line, highly expedited, experimental transcontinental operation". Just one transcontinental operation as an experiment.

During this same period the Commission complained bitterly to Congress that illegal carriage, like a strain of virus adapting to antibiotics, is employing new disguises and devices for the evasion of regulation.

Well, given what was going on, is it any wonder?

If the motor carrier area was bad, the rail area was worse. Rate and division cases went on interminably without results. A merger wave resulted, born out of a desperate attempt to rationalize plant and stave off disaster. The failing northeastern railroads embraced each other and crashed in the Penn Central bankrupcty.

Curiously, as if with a death wish, the railroads fought all the way to the Supreme Court against the Commission's directive to open their doors to TOFC.

In a monumental exercise in futility in 1971, the Commission noted

the public outcry of complaints of terminal delays, interchange delays, erratic delivery and car shortages of more than 15,000 cars a day, and in Ex Parte 265, it ordered the railroads to correct deficiencies and report quarterly on the remedies taken.

Of course, nothing changed and conditions worsened.

Then, in 1976, Congress enacted the Railroad Regulatory Reform Act ("4R Act") the forerunner of the Staggers Act of 1980.

Now what was the Commission's response? Well, in their report to Congress that year, the Commissioners opined, and I quote, "The legislative guidelines that emerged confirm the congressional consensus against endorsing deregulation as a means of providing adequate protection for the public interest."

How wrong they were.

This would be a good point in our story to go back to Mr. Justice Frankfurter and his remarks in 1962 at the 75th anniversary. He said, "Institutions do not die; they commit suicide."

How right he was.

And so, in the period of 1978 through 1983 in a violent upheaval, the old institution with its Pocatello rules and its illegal carriage viruses did, in fact, die.

First, a new breed of Commissioner appeared. They were committed to reducing regulation and fostering competition in the industry. In their 1978 report to Congress, the new Commissioners pronounced the Commission to be committed to the philosophy of increased competition and said the new Commission would continue to encourage competition in the transportation industry, substantially removing barriers to entry and greatly reducing burdensome regulations.

They did just that. In the motor area, the Commission was granting 96.7 percent of new authority applications by the end of 1979, and the number of applications had soared to 10,000 a year.

In addition, by rulemakings and landmark decisions, such as the one permitting private carriers to engage in for-hire transportation, the doors to free competition were thrown wide open.

In the rail area, the Commission exhorted the railroads to become more market-oriented and use their freedom under the 4R Act for innovative marketing and pricing.

To assist in that direction, the Commission declared contract rates not to be illegal per se and encouraged their use.

Fresh fruits and vegetables were deregulated and many, many more actions were taken.

But these explosive changes did not satisfy everyone. Indeed, many were outraged. The Chairman of the Senate Commerce Committee told

the Commission privately at Reston that they were like a Frankenstein monster lurching around the countryside uncontrolled. Publicly he said, "We are mad as hell, and we are not going to take it anymore." He ordered the Commission to stop and let Congress decide on how much and what sort of deregulation should occur.

On the rail side, the general criticism was just the opposite. It was that deregulation was too little and too slow.

I would like you to hear this from a 1979 speech.

> The bewitching charm of deregulation is the potential for annihilation of that wretched center of anachronistic tyranny, the ICC. Congress could electrocute it. That's a pleasant thought. But in all equity, for its iniquity through the years, the Commission deserves the same treatment it tried on the railroads, slow death.
>
> Let's let it, the ICC, expire in, say, five years.

Now, who said that? Well, it was a vice president of the Association of American Railroads.

Can you imagine an ARR spokesman saying that today?

And so, goaded from all sides, including by the Commission's own deregulatory initiatives, Congress acted in 1980. They gave us the Motor Carrier Act of 1980 and the Staggers Act. Now there's no one here who is not completely familiar with what has transpired since.

You all have views of those events, and I know they vary widely. No anecdotes or critique from me will change anyone's mind about that.

But there are a few points I should make on this occasion.

First, it used to be that the Commission would hear policy views presented civilly by essentialy three organizations — the ARR, the ATA and NIT League.

Now, in addition, we have, just for instance, the National Small Shippers Traffic Conference, the Transportation Brokers Conference, the National American Wholesale Grocers Association, the American Public Power Association and the National Rural Cooperative Association, the Consumer Federation of America, Western Fuels Association, Consumers United for Rail Equity, Pro-competitive Rail Steering Committee, The Coalition for Rail Fairness and Competition, and on and on and on and on. They all have their congressional spokesmen, and many have Administration spokesmen, and everyone is yelling at everyone else.

That is why I call this the "Tower of Babel" time. Who should the Commission listen to, if it can hear anyone over the general uproar? And what of the level of debate? "Brain-dead" speaks for itself. Or how about responding to an opponent's position paper with "one of the most outrageous, irresponsible and insulting things I've ever seen a professional organization do."

Now wouldn't it be nice if we could restore reasoned civil debate?

Doesn't the importance of the subject, the future of our national transportation system, merit that?

Well, where are we now on this 100th birthday? Where has the new Commission and the new legislation brought us since 1980?

Freight transportation costs as a percentage of GNP fell from 8 percent to 7 percent in five years. That's a savings of $40 billion. At the same time, the railroads have grown much stronger in financial health. Even Conrail has prospered enough to return to the private sector. The motor carrier industry is no longer a closed shop and the entry of thousands of new carriers have eliminated the service and rate problems that were the source of such bitter complaints in the 1960s and 1970s.

Are there problems? Certainly. Competitive access, for one. Differential pricing, which is okay now, as opposed to cross subsidization, which is not, if anyone can figure that out.

Of course, there are others all being loudly and bitterly argued.

What of the future? Well, the President and many supporters say the Commission should ride off into the sunset, but even many of its critics, such as CURE, in the words of their congressional sponsor, say the Commission should be restored to its mission as a watchdog.

Who will prevail? Certainly, I don't know. All I can say, in the immortal words of TV anchormen everywhere, is "Stay tuned. There is much more to come."

Thank you.

MR. CLEARY: Thank you very much, Bob Minor and all the panelists, Bob Burk, George Chandler, Bob Calhoun, and certainly Bea Aitchison. It was interested, I think, stimulating and sets a little tone for the rest of the days events.

We are, obviously, running a good deal behind time, so I think we will move immediately to our next panel. If you can stay with us, I think it will be very stimulating, on the question of the courts and the administrative process.

I would ask you all, if you could, to sit down. I recognize it is a great temptation to chat with friends, but we do have a distinguished panel here this morning, and I would like to continue with the activities.

The next panel is on the subject of the development of administrative law and the ICC, their evolution.

We are truly honored to have the panel with us today that Betty Jo Christian will introduce, but my pleasure is to introduce Betty Jo.

I have known Betty Jo since the days when she was at the Commission as an attorney in the General Counsel's Office. She became Associate General Counsel, and then she became a Commissioner during the years 1976 to 1979. I get a little overwhelmed when I see these creden-

tials, as I referenced Bob Minor's. Betty Jo was a graduate of the University of Texas, and a true Texan she is, summa cum laude.

All loyal Texans. She not only got a summa in the undergrad school, but she decided to repeat in law school. Of course, she had a distinguished service with the Supreme Court of Texas as a law clerk, before she came to Washington to join the Interstate Commerce Commission.

I have had the personal pleasure and deep challenge of having Betty Jo on cases that I have been on the opposition, and indeed, it tests your mettle, and you have a very worthy opponent.

It is a great honor to introduce Betty Jo Christian.