

THE ICC AND THE TRANSPORTATION DEREGULATION STATUTES

WILLIAM K. RIS, JR.

MR. RIS: Thank you. I appreciate that. Actually, I wasn't planning on telling any jokes, but my memory was jogged, and I have to tell my favorite Congressional hearing story, if you don't mind.

This was a Commerce Committee hearing on trucks; I'm not sure whether it was oversight or not, but I am sure there are some people in this room who were there. It was when Senator John Warner was a freshman on the committee. He had just recently been appointed to the committee. We had a witness who came from way, way out of town. He was not very well versed in Congressional etiquette, and he apparently didn't know who the senators were, and he certainly didn't know who John Warner was. But he did know that if he was asked a tough question, he had a stopper — a cute joke — that he would use in order to stall for some time.

As it worked out, Senator Warner had just gotten up and left the room, and this poor gentleman who was all there by himself without benefit of counsel, got a very tough question. He wanted to stall for time, so he used the little joke that he had come prepared with. He said, "Well, Senator," — it was Senator Cannon who was asking the questions — "Senator, I'm sorry. I kind of feel like Elizabeth Taylor's seventh husband. I know what I'm supposed to do, but I don't know how to make it interesting." Well, this is true. Absolutely true. I don't know if any of you remember that day.

All I can say is, I've never seen so many senators fall to the floor so fast. The laughing must have gone on for three minutes. He must have

thought he was the best joke-teller that had ever been born. It was incredible!

Anyway, I will try to be as brief as possible, although I realize that time limits are very much like speed limits. You can go five, ten minutes over — no. I'm glad that Jan talked about rail issues, so that I won't have to. It's good news. It will cut down my remarks, and also I don't know anything about them. So that's very good news.

I would like to talk about 1980, that's my assigned topic here. What happened? Why did it happen? And as you know, there's a cliché in this town that making laws is very much like making sausage. It's a process you don't want to see up close, especially if you like either one of them. Whether it is appetizing or not, however, passing laws is an enormously complex process. There is actually an analogy that I think is less entertaining, but more apt. Passing a major controversial piece of legislation is like sending a rocket to the moon. And when I say that, what I am talking about is all of the things that have to work precisely together, to get a rocket through a very narrow window in space to get into the right orbit at the right time. So it is with major pieces of legislation. The only difference between rocketry and legislation is the rocketry is 99 percent science and 1 percent chance, and legislation is just the opposite.

My point is that the legislation of 1980 did not come out of the blue. It was the end product of a long series of events and actions that began more than two decades earlier, many of which had little or nothing to do with the ICC or surface transportation regulation itself.

In my very brief time, I want to try to highlight a few of these things. In so doing, I am really doing injustice to the subject, because it is far more complex than this. But in preparing these remarks, I realize actually as I look back on this that without me the whole process would never have taken place.

So I would like to begin with my own very considerable and essential role, but it is not what you think. Back in 1975, just fresh out of law school, I got my first job — real job — at the Civil Aeronautics Board. Now when I came to Washington to take this job, I didn't know CAB from FAA, ICC, ITC, FTC — they all sounded alike. I didn't know what I was going to do, and I quickly discovered when I got there that new attorneys at the CAB were broken in by being given only the most obscure and unimportant cases.

So there I was. I found myself contemplating whether to support Air Ecuador's request for a charter flight to Toledo and other momentous requests, when all of a sudden one day, one of the cases given to me, a junior attorney, was a request for an exemption to use large aircraft by an obscure cargo operator named Smith, who had an airline called something like Express Something. Oh, yes — Federal Express.

This is a true story. I was told by my supervisors, this is a backburner issue. We're not sure who this guy is. We think it's a front for Flying Tigers. We know he can't afford these planes. We've got to protect the shippers. We've got to protect this guy against his crazy proposal. Don't worry about it. So it went to the back of the pile. And like a good bureaucrat, I waited, and I pondered, and I deliberated, and I studied. No one asked for the papers, except for an occasional plea by the guy's attorney, and weeks turned into months, and months turned into years. Now if I had acted quickly and if the application had been approved, no telling what would have happened. I was willing to wait. The CAB was willing to wait. But Fred Smith and Federal Express were not willing to wait.

They went to Capitol Hill and they complained about the bureaucratic intransigence, and they were right. The other airlines didn't seem to care much. They were getting out of air cargo at that time. It wasn't that important to them, so that at the end of the 1977 congressional session, without much fanfare, Congress passed the Air Cargo Deregulation Act as a reaction to the intransigence of those faceless bureaucrats at the CAB.

That was the beginning of series of deregulation bills that would soon include passenger airlines and would move on to trucks and buses and trains and freight forwarders. It was a critical icebreaker. Without Fred Smith, who knows what would have happened?

The point of this is that I urge you not to underestimate the importance of the airline deregulation legislation as a precursor of what happened in 1980. It was very important. By the time 1980 came along, you have to remember that the House Public Works Committee and the Senate Commerce Committee had been through three hard years of deregulation debate and markups and action. It took countless hearings and 23 executive sessions for the Commerce Committee to mark up the Airline Deregulation bill, and so by the time truck legislation came along, there was no regulatory rhetoric on either side that the members of this committee had not heard *ad nauseam*. Small community service, small shippers, cutthroat competition, safety, and consumer protection. The players may have been different, but the rhetoric was the same,

Meanwhile the economy was playing a major role in the development of the legislation in 1980. Again, a matter of chance and a matter of fate. The fact was that the economy was doing well between 1978 and 1980. Airline travel had increased dramatically, profits and fares were up. And so looking at the airline industry, Congress came to the conclusion that deregulation worked. Had the economy been going down, it might have been different but it wasn't. Another matter of fate and chance.

That fact made motor carrier and rail regulation or deregulation easier. The congressional committees were less gunshy. A new chairman

was appointed at the CAB, Fred Kahn. He became a media figure, an articulate spokesperson for deregulation. In addition, during the airline debate, key members of Congress became educated about regulatory issues and impassioned advocates of deregulation. Again, a key element for what would happen in 1980. In particular, Senators Kennedy, Packwood, Stevenson and Schmidt became ardent proponents of deregulation, and I would throw Senator Cannon into that category in a more low-keyed role.

On the House side, people like Representative Alan Erdahl played a key role, and played a similar function.

The airline legislation also brought together an extraordinary alliance of groups on the outside from the private sector, a coalition that remains together even today, with groups so diverse as Ralph Nader's Congress Watch and the National Association of Manufacturers. Strange bedfellows having suddenly found themselves on the same side. It was and remains a unique potent force in the debate.

Now to some extent, the fight in Congress was a fight between the trucking industry and its customers, and as in most of those fights, the customer eventually is going to win, because the customer pays the bills. Part of the battle was driven by the pressure of technology and productivity, and again, something to take into account, events outside the Commission in the real world. What was going on was that corporate America was beginning to recognize that the transportation component of the goods it produced throughout the country was more important than it had ever realized.

As a huge continent competing with island nations, U.S.-produced goods require many more shipments from raw goods to finished products over much longer distances than imports with which they compete. So transportation is enormously important, and distribution managers were being asked both to reduce costs and find more rapid and reliable service. A regulatory system designed in 1935 simply wasn't able to meet that kind of a demand.

The issue of collective ratemaking brought another element to the debate — the academic community. It was anti-trust issues that that drew Senator Ted Kennedy into the debate as early as 1975. He had gone to his staff seeking an issue on which he could be both pro-free enterprise and pro-consumer. Deregulation was a natural. Working with only a thread of legitimate jurisdiction, one thing that John Kinnaird and I can agree upon, from his base in the Judiciary Committee, Senator Kennedy managed to prod the Commerce Committee and the Senate into action on both airlines and trucking. Had he turned his attention to a different issue, who knows what would have happened?

In 1976, another critical event occurred. A peanut farmer moved into

the White House. Now he may not have succeeded in many other areas, but on the issue of deregulation, he was unsurpassed. And I really think, and I didn't mean that in a derogatory sense, I think being a peanut farmer was a real issue here. The man understood transportation. His business depended on transportation, and he also happened to know that you could move goods from one place to another on trucks that were not regulated, because his products were exempt. The the fact is, Jimmy Carter was personally committed to deregulation. His personal interest and enthusiasm was conveyed to the very top officials in the White House and DOT.

I remember Neil Goldschmidt, the Secretary of Transportation, telling that wonderful story about the first time he went in to talk to the President, after he had just been appointed. He had a list of 14 things he wanted to do as Transportation Secretary. President Carter, he says, took the list and penciled in at the top: (1) trucking deregulation; (2) railroad deregulation.

The personal involvement of President Carter was a very critical element. In probably his most important act, President Carter looked around this building to find the most wild-eyed, irresponsible, and uncontrollable member to elevate to the position of chairman. Naturally, he settled on our moderator today, A. Daniel O'Neal.

Dan O'Neal is the Jerry Rubin of deregulation. Eight years ago, he was thought to be the devil himself, and the industry is buying services from him. I think it's wonderful.

Actually, looking back, Dan O'Neal looks about as radical and dangerous as Willard Scott.

Dan had the audacity to do two unthinkable things. One was to review seriously the Rate Bureau agreements. The other was to develop the concept of master certificates.

Now I don't know many people on Capital Hill who had a good idea of what a master certificate was. In fact, I don't even know if Dan had a good idea of what a master certificate was. Frankly, I forget. But one thing was sure, this madness had to end. Which brings us to the final piece of this broadly written puzzle, and one that sometimes we forget.

For the trucking industry, represented by ATA and the Teamsters, the number one priority for 1979, as far as I'm aware, and John can correct me, was legislation to stop Dan O'Neal. In other words, they wanted a bill. Once there was consensus among both the pro-regulation forces, namely, the truckers and the Teamsters and the pro-deregulation forces, namely everybody else, that legislation was desirable, the die was cast.

There was reference this morning to the October 1979 speech that Senator Cannon delivered to the Commissioners. It was a tough speech.

It was widely remembered for his statement about being mad as hell and not going to take it any more. But the real importance of that speech was that Senator Cannon announced that he and Chairman Biz Johnson of the House Public Works Committee had agreed they would pass legislation by June 1, 1980. That artificial, self-imposed deadline took on a life of its own. It was applauded by the trucking industry. It was quietly applauded by the shippers. It became almost magical. At that point, legislation seemed unstoppable.

What I think people in the industry did not know at the time was that Senator Cannon had already decided that the direction in which he wanted to go was towards deregulation. Later in 1980 — and I feel compelled to mention this, because it is a matter of the public record — when certain members of the Teamsters Union were indicted for attempting to bribe Senator Cannon, he became even more resolved to stay the course. He did not shift. He just became more resolved to stay the course.

Again, events and personalities meshed precisely during the consideration of the bill in the Senate. Three absolutely key provisions in the Senate Commerce Committee were passed by one vote each. Had just one voted changed, the legislation would have been vastly different.

Finally, let's not forget that there were two houses of Congress involved here, my friend and colleague Jack Fryer is going to discuss his viewpoint from the House perspective. The House Public Works Committee was a very, very key player here. People tend to focus a lot on the Senate side. I think it is fair to say that the House Public Works Committee was more sympathetic to the views of the trucking industry than was then Senate. Nevertheless, this was the same committee that was a partner in passing airline deregulation and was a willing player here.

Last point. The final compromise was the last key to what's happened in the past few years. To greatly simplify the debate, there were two main issues — entry and ratemaking. The Trucking Association felt that collective ratemaking was the number one thing they wanted to preserve. The Teamsters felt that entry controls were the number one thing they wanted to preserve. When the balance tipped, it was in favor of collective ratemaking, more of that was preserved than entry. I think the ATA won on the politics, but the Teamsters were right on the policy. Entry was more important.

Thank you very much.

MR. O'NEAL: Well, thank you, Will. That was really well done, and I really didn't think it was that expensive either.

For your benefit, I thought I ought to recognize the fact that Senator John Warner just stepped into the room.

There is another point of view on what happened. We have with us John Kinnaird. I've know John for a long time. We used to have Chinese lunches together back in the '60s. He probably has thought a little bit about what we were eating at those lunches and wondered if maybe the food shouldn't have been changed somewhat, given what has happened subsequently.

John is what I consider to be a real Kentucky gentleman. He was a professional lobbyist, and I would say one of the best, if not the best that I have ever run into on Capitol Hill. He, like Jan, has gone off to someplace that I could not spell without being able to read it here and can't pronounce very well, but it is something called Rosteau Plantation down in Pawley's Island, South Carolina.

John was a fighter pilot in World War II. He earned a law degree at the University of Kentucky. He practiced law in a small town in Kentucky for many years. He was involved in state and local government in the State of Kentucky. He practiced before regulatory commissions and before state and federal courts. He has been active in the National Association of Regulatory Utility Commissioners in many other areas. He was an officer with Consolidated Freightways. He was a partner in a law firm, Ray, Cross, Kubel & Kinnaird.

In 1967, he became special counsel to the president of the American Trucking Association and began a very fruitful career as a very successful lobbyist. He is retired now and lives down in South Carolina, as I said, on an old rice plantation on the Waccama River, and he's taken up some different activities. He's the president of the Waccama Muzzle Loading Rifle Association, and chairman of the board of the Pawley's Island Litchfield Rescue Squad. He didn't put it in here, but I found out he's also a member of the Sierra Club. Can you believe that? He's also a member of the — I think he said the League of Women Voters; is that right, John? One of the few male members of that organization, at least in South Carolina.

John Kinnaird.