Common Carriers—Continuity and Disintegration in United States Transportation Law Part II*

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I. Introduction

A. *The Disintegration of the Law and the Need for Harmonization*

Part One of this article was essentially concerned with rate regulation and the maintenance of the appropriate level of competition by entry, merger and antitrust rules. In evaluating such regulations a primary standard is furnished by what may be called the presumption of uniformity. An appropriate solution as between a railroad and a shipper cannot be deviated from in the law governing other transport modes without a plausible explanation. Different interest groups and administrative bodies involved in legislative and regulatory actions have too often prevented sufficient consideration of the basic need for uniform solutions. Today this need is felt more strongly than ever.[1] The harmonization of divergent rules would restore the coherence to transportation law which has been missing since the common law days. It would also save administrative costs for legal research and, above all, benefit combined transport, which is presently hampered by overlapping agency jurisdictions and contradictory substantive rules and policies.

In light of the foregoing remarks, this article will compare the various solutions adopted by different modal laws to common or similar problems. In analyzing arbitrary deviations from an otherwise common rule, it is important to bear in mind that the presumption of uniformity is only a formal standard. It does not indicate whether the majority or deviating minority rule should be approved as the better one. Although such a substantive appraisal requires further consideration, tentative answers will be suggested which may indicate a direction for future research and reflection.

1. *Tariffs*

Legislation has created a structure of tariff regulations which is surpris-

[1] *See* the statements of a former U.S. Secretary of Transportation and his aides: "There is a need to develop . . . a true transportation law, a law whose principles are applicable to all modes of transportation." Boyd, Ross & Teberg, *New Dimensions in Transportation Law*, 1 Transp. L.J. 1, 17 (1969).

ingly common to all modes of transportation. This commonality seems to provide for a minimum degree of equality among shippers and passengers without overly restricting the carriers' flexibility. There are four essential elements of tariff regulation:

(1) *Publication*. Carriers are required to publish tariffs and make them available for public inspection.[2] While the Shipping Act requires only the latter,[3] publication does not seem any more difficult for shipowners than for other carriers. Publication by ocean shippers, especially if centralized and standardized, would make the information more accessible to inland shippers. As to the contents of tariffs, comprehensive information about all price components as well as classifications, rules, practices and regulations is prescribed by statute for ocean shipping, inland navigation and railroads. Motor and air carriers are required to include non-price elements only after further regulation of the ICC or CAB.[4] The expense of compliance with the publication requirements could be minimized by using approved standardized contracts drafted by trade associations.

(2) *Filing*. All carriers are required to file their tariffs with their respective regulating agency. Where the agency, like the Federal Maritime Commission (FMC) in domestic ocean shipping, lacks the power to prescribe minimum rates, the filing requirement consequently concerns only maximum rates.[5] However, this nexus with rate regulation is only one function of tariff filing. Filing also provides reliable and accessible information about the carrier's business behavior. Such information becomes the more important when an agency lacks direct regulatory powers. In this regard, the limited filing duty of domestic ocean shipping lines, especially in light of their limited publication duty, is subject to criticism. In general, however, the filing requirement would not be necessary if a standardized form of publication provided for easily accessible and comprehensive tariff information.

(3) *Observance*. Although statutes use different language which may solicit divergent interpretations,[6] carriers of all modes are unambiguously required to observe their tariffs. This obligation, combined with the duty to publish tariffs, is the key to tariff regulation. It guarantees the application of rates which have been found reasonable and non-discriminatory by an agency under the present system of rate regulation. Even if the agencies and their regulatory powers were abolished, the observance of tariffs would substantially limit the industry's price discriminating power. If carriers charge a different rate under similar conditions, it must be established by

[2] 49 U.S.C. § 1373(a) (1976); *id*. § 10762(a)(1) (Supp. V 1981).

[3] 46 U.S.C. § 817(a), (b)(1) (1976).

[4] 49 U.S.C. § 1373(a) (1976); *id*. § 10762(a)(1) (Supp. V 1981).

[5] 46 U.S.C. § 817(a), (b)(1) (1976).

[6] 46 U.S.C. § 817(a), (b)(3) (1976); 49 U.S.C. § 1373(b)(1) (1976); 49 U.S.C. § 10761(a) (Supp. V 1981).

public tariff. A carrier will therefore always take into account the effects that a tariff change might produce if generally applied. In some cases, by a special agency authorization, carriers are excused from complying with their published tariffs. In surface transportation, this exemption applies only to contract carriers who operate on a more individual basis.[7] In domestic ocean shipping, the FMC may allow common carriers to charge more than their established tariff rates after ten days public notice.[8]

(4) *Notice of tariff changes*. The inherent virtue of tariff regulation is supported by provisions which require carriers of all modes to give public notice of proposed tariff changes. Changes become effective thirty days after notice, unless the supervising agency exercises its discretion and shortens this period.[9] Thus, carriers are not at liberty to grant special rates for single occasions and withdraw them afterwards. Here again, the legislation regarding domestic ocean shipping does not contain any rule about tariff changes; thus, it does not fit the general pattern. Rather, it provides for exceptional deviation from established tariffs and thereby fosters carrier flexibility. There is no obvious reason for this difference; accordingly it should be replaced by the general approach.

As a whole, tariff regulation reduces the carrier's ability to adjust his price and service standards to whatever the market will bear under the given circumstances, and thereby furthers the equality of shippers and passengers vis-a-vis the same carrier. However, there remains one very effective device for the carrier to achieve price discrimination. Nothing prevents carriers from writing classifications into tariffs which are so precise that they concern only one shipment or only one shipper.[10] Agencies or courts willing to suppress these practices will face great procedural difficulties, but they possess and should exercise a wide discretion to rebut such classifications as arbitrary, artificial and unreasonable.

2. *The Duty to Serve*

The ancient common law duty of common carriers to serve every applicant has been codified in all modal laws.[11] However, the various statutes differ in language and they provide little information about the scope of the obligation. The Shipping Act is particularly unclear. It prohibits the refusal to carry only in the context of retaliatory actions; however, there can hardly be any doubt that the refusal to carry is unlawful regardless of the carrier's

[7] 49 U.S.C. § 10761(b) (Supp. V 1981).

[8] 46 U.S.C. § 817(a) (1976).

[9] 46 U.S.C. § 817(b)(2) (1976); 49 U.S.C. §§ 1373(c), 10762(c)(3), (d) (Supp. V 1981).

[10] *See* Mansfield, *Federal Maritime Commission*, in The Politics of Regulation 42, 53 (J. Wilson ed. 1980) (referring to ocean shipping classifications as "frozen veal cut in three-inch cubes").

[11] *E.g.*, 49 U.S.C. §§ 1374(a)(1), 11101(a) (Supp. V 1981).

motives in the absence of a legitimate excuse.[12] Also, it is difficult to understand why air carriers should be subject to the duty to serve only in domestic and not in foreign transportation. These legislative gaps are undoubtedly filled by the more comprehensive common law rule.

In this area, the problem is not the individual rejections of shippers or passengers, but the shortages of capacity in rail and air transportation. The lack of capacity has always been regarded as a sufficient excuse for the refusal to carry. If it were not for the duty to carry and the basic policy objective of making transportation generally available, the shortage of transport capacity would not differ from supply shortage in any industry and no agency would be obligated to intercede. Both the ICC and the CAB, however, have felt constrained to remedy existing scarcities, though they approach the issue differently. While the ICC may try to overcome the deficiencies by requiring rail carriers to enlarge their capacity at least temporarily,[13] the CAB administers shortages by allowing embargoes and overbooking.[14] In this comparison we may disregard overbooking because it is a counterpart of the special form of airline reservations which do not bind the passenger. But the different handling of capacity shortages by the agencies must be noted and deserves further study.

3. *The Carrier's Liability*[15]

The key elements in every liability system are the basis of liability, the amount of recovery and the possibility to change the respective rules of law by agreement of shippers and carriers. Other important facets are the time span of liability under the various modal laws and specific exceptions. Short time limits and the venue for litigation often discourage potentially successful claims.

In the absence of tariffs, the liability for cargo loss and damage of railroads, trucks and domestic air carriers is strict, save for the classical common law exceptions. In domestic ocean shipping, this principle is upheld, but the Harter Act excludes errors of master and crew in the management and navigation of the vessel, thus creating a peculiar blend of non-liability (even for negligence) and strict liability.[16] The international conventions governing foreign shipping and aviation have adopted the non-liability exception and changed the basic rule from strict liability to fault liability with a reversed burden of proof.

Restrictions on tariffs provide that no limitations of the carrier's liability

[12] *Compare* 46 U.S.C. § 812 (1976) *with* 46 U.S.C. § 834 (1976).

[13] *See generally* Basedow, *Common Carriers—Continuity and Disintegration in U.S. Transportation Law* (pt. 1), 13 Transp. L.J. 1, 23-24 (1983).

[14] *See generally id*. at 38-39.

[15] *See generally id*. at 24-27, 33-34, 39-41.

[16] 46 U.S.C. §§ 190-192 (1976).

are allowed in surface transportation.[17] Through their tariffs, both domestic water and air carriers usually confine their liability to negligence, which is allowed under the Harter Act and at common law. Therefore, there remain two major differences among the modal laws:

(1) The management and navigation or piloting exceptions under the Hague Rules[18] and the Warsaw Convention.[19] These are outdated and have been deleted in later conventions which the U.S. has not ratified.

(2) The strict liability of railroads and trucks as opposed to fault liability with a reversed burden of proof for water and air carriers. In practice, this difference concerns those causes of damage like fire and theft which the carrier may be able to prove without difficulty, but which do not fall within one of the exceptions of strict liability. For example, if a warehouse fire destroys goods, some of which were shipped by railroad, others by barge, the railroad is liable to the shipper for damages while the barge owner may discharge himself from liability.

This result can hardly be explained in terms of intelligible policies. Rather, it appears that a solution can most easily be found by approaching the types of damages individually instead of doctrinally. In cases of uncertainty one might envision a rule under which parties can choose between different liability standards at different freight rates.

As to the amount of recovery granted, the modal laws vary in a similar way. While the trucking, railroad, domestic shipping and domestic aviation legislation affirms or at least does not impair the common law principle of full damages, the international conventions severely limit the recoverable amount in foreign air transportation. Under the Warsaw Convention, full recovery may be obtained only if carrier or crew has acted with willful misconduct.

If the analysis includes contractual or tariff limitations, the cases of full recovery further diminish. Domestic air carriers of property limit their liability to 50¢ per pound. Similar stipulations by surface and domestic water carriers have been upheld only if the shipper was offered full recovery at a higher freight rate. Surface carriers also need ICC approval. On the other hand, carriers in foreign transportation by air and water may extend their liability up to the actual value under agreements with the shipper. While the Warsaw Convention seems to require the carrier to accept a shipper's declaration of value and to negotiate a potential extra charge with him,[20] the

[17] 49 U.S.C. § 11707(c)(1) (Supp. V 1981).

[18] International Convention for the Unification of Certain Rules Relating to Bills of Lading, *opened for signature* Aug. 25, 1924, 51 Stat. 233, T.S. No. 931 (codified at 46 U.S.C. §§ 1300-1315 (1976 & Supp. V 1981)).

[19] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

[20] *Id.*, art. 22, para. 2, 49 Stat. 3000, 3019.

Hague Rules leave the carrier entirely free to make such an agreement.[21] The apparent lack of uniformity of liability would be less troublesome if a higher amount of recovery could always be obtained for a higher rate. This is not always the case. In many sections of foreign shipping or surface transportation there is no such choice. Moreover, where the shipper is faced with this choice, his starting-point varies according to whether the law provides for full or limited recovery in the absence of an agreement between the parties. None of the differences in the carrier's liability has been explained on intelligible grounds. Rather, the differences seem to be the product of a political balance in the respective organizations which sponsor the various rules.

Until more is known about how many carriers and shippers actually view liability as a competitive practice, a common solution for all transport modes can hardly be devised. Also, the average value of cargo or shipments in the various modes should be known before one can consider any numerical liability limitations. Under the present uncertainty, the least detrimental system would be one which enables shippers to choose between different liability and rate combinations. Carriers should be required to offer such different combinations. Such an obligation can probably be imposed more easily under a law which makes the carriers liable for the full amount of damage in the absence of an agreement restricting liability. Carriers will be interested in discharging themselves of liability which causes unnecessary administrative costs for large claim departments and increases their overhead. Under a basic rule of limited liability, there is no incentive to offer higher rates for increased recovery. It should also be noted that under a system of expanded liability there will be a need for provisions which protect carriers against ruinous claims and protect consumers against a choice of rate and liability combinations based upon gross misperception.

4. *The Scope of Application of Regulations: Common Carriers*

Almost no regulation is applicable to all carriers of one mode because of the pervasive distinction between common and private carriers. The borderline between common and private has been drawn in very different ways. Almost all railroad and aircraft concerns are operated as common carriers. Major portions of the trucking and shipping markets, however, consist of private carriers. Different modes performing the same function may be subject to different characterizations. For example, under a voyage charter, the owner of a vessel is a private carrier whereas the owner of an airplane is regarded as a common carrier. A truck owner working under the same conditions may be a contract carrier. Even within the same mode of transportation, the characterization may differ. Tramp ships may function

[21] 46 U.S.C. § 1304(5) (1976).

as private carriers for one purpose while remaining common carriers with respect to liability.

Against this background, the term "common carrier" is little more than a political catchphrase for transport regulation. It is frequently used in statutes and rarely defined. Future legislation should define what the term means in the context of a specific statute or replace the term "common carrier" with "regulated carrier" or another term less burdened with historical connotations.

Apart from these suggestions, it is doubtful whether regulatory statutes should generally focus upon the status of the carrier. For some commercial purposes, the better solution seems to center upon the performed activity. Businesses can more easily recognize the type of commercial operation at hand than the general status of the carrier. The status approach will still be necessary in setting requirements for other purposes such as entry control, financial responsibility and safety regulations. What is retained is the general idea that the scope of a regulation has to be defined in accordance with its purpose and subject matter. Therefore, the statute must use appropriate criteria which may change from rule to rule.

The recent history of transport regulation has given much support to a fundamental reappraisal of rate regulation. Restoring competition is not equivalent to an overall deregulation. There are areas of transportation law which obey different policies than those governing rate deregulation. The last section of this article will investigate whether the present deregulatory movement respects those independent areas of transportation law and whether it has contributed to its needed unification or to further disintegration.

II. The Common Carrier in the Era of Deregulation

Since the 1970's, regulation in general and transport regulation in particular, has faced increasing criticism. Pursuing lines of economic thought developed in the 1960's, first the CAB and then the ICC tried to implement more competitive policies within old statutory frameworks.[22] The deregulatory movement was encouraged during the administration of President Ford, but received its present vigor from the joint efforts of the Carter Administration and Senator Edward Kennedy. These efforts brought about the deregulation of the airline industry in 1978, which was followed by a less drastic decontrol of railroads and trucking in 1980.

Before presenting an overview of the major deregulatory steps in the above mentioned industries, the arguments in favor of and against deregu-

[22] *See* Behrman, *Civil Aeronautics Board*, in The Politics of Regulation 75-77 (J. Wilson ed. 1980) (discussing CAB); Dempsey, *Erosion of the Regulatory Process in Transportation—The Winds of Change*, 47 ICC Prac. J. 303, 316 (1980) (discussing ICC).

lation will be set out. There will follow an assessment of the remaining common carrier duties and obligations.

A. The Arguments For and Against Deregulation

In evaluating the following discussion one must bear in mind that the choice open to the legislature is seldom complete deregulation. Often only a less restrictive alternative to the present regulatory scheme is politically feasible or socially desirable. Therefore, the arguments on both sides have relative weight.[23]

1. The Arguments in Favor of Deregulation

There are essentially four major arguments in favor of deregulation.[24] The first and perhaps the most important in a free enterprise economy is that management rather than government should control a carrier's economic behavior. Under regulatory statutes, however, the price and service decisions of a regulated carrier require more legal analysis than market inquiry. There is the risk that firms will no longer receive their information from the marketplace but primarily from an agency which possesses second-hand knowledge.

The second argument condemns the agencies for their overly protective and paternalistic policy. Indeed, the equal-price-for-equal-distance rule promulgated by the CAB during the Domestic Passenger Fare Investigation reduced price competition between different carriers to zero.[25] In surface transportation, the value-of-service ratemaking policy of the ICC has been extensively used to prevent intermodal competition.[26]

The third argument is a variation on the theme that regulation fosters inefficiencies. For example, the exclusion of air fare competition fostered service competition beyond demand, especially an unnecessary frequency of flights, which drove load factors down. The argument is that deregulation would result in lower rates on the one hand, and in an increase of

[23] Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 547, 578 (1979); McCloy, *Federal Regulation: Roads to Reform*, 66 A.B.A. J. 461, 463 (1980).

[24] *See generally* Rakowski & Johnson, *Airline Deregulation: Problems and Prospects*, 19 Q. Rev. Econ. Bus. 65, 67-69 (1979). For a more thorough discussion see G. Douglas & J. Miller, Economic Regulation of Domestic Air Transport: Theory and Policy (1974); Staff of Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 94th Cong. 1st Sess., Civil Aeronautics Board Practices and Procedures (Comm. Print 1976) (concluding the Kennedy hearings).

[25] The Domestic Passenger Fare Investigation proceedings are contained in CAB Docket 21866. Other protective measures of the CAB are the route moratorium of 1969 and the toleration of the capacity-limitation agreements among carriers in 1971. *See* Behrman, *supra* note 22, at 97-98.

[26] *See generally* Basedow, *supra* note 13, at 22-23.

demand for transportation services on the other. Both would combine to increase carrier profits. The experience of the non-regulated intrastate air carriers in California and Texas supports this argument.[27] It seems, however, that this line of thought is rooted in the transportation of passengers and does not apply to transportation of cargo. In the carriage of goods, regulation undoubtedly imposed some inefficiencies upon trucking. This was not caused by rate regulation, but rather by the prescription of routes which often engendered empty returns instead of allowing the carrier to pick up cargo at a point for which he was not licensed.[28] What happened in the airline industry was an expansion of demand in response to lower prices. This was possible because of the high price elasticity of demand for the transportation of passengers. As to the carriage of goods, however, transportation costs in most situations are so low as compared with the value of the cargo that changes in freight rates are very unlikely to influence the demand for traffic.[29] Thus, rate decreases are not expected to result from the deregulation of the railroads. The main objective with regard to railroad deregulation is to increase railroad revenue.[30] This can be achieved by higher rates in those parts of a system where alternative transportation is not easily available.[31] In trucking, lower rates are more likely to follow deregulation, which would result from increased competition, not higher transport efficiency.[32]

The fourth argument contends that the expansion of activity just described increases overall employment in the transportation industry. While this is plausible with regard to the airlines, such expansion is much less likely in freight transportation.

2. *The Arguments Against Deregulation*

The major argument against deregulation is protectionist. Organized labor has opposed deregulation because it fears lower wages and a potential decrease of overall employment from growing competition. Wage levels in the transportation industries, however, have risen higher under the regu-

[27] *See* Breyer, *supra* note 23, at 588; Mansfield, *supra* note 10, at 91-92.

[28] Hayden, *Teamsters, Truckers and the ICC: A Political and Economical Analysis of Motor Carrier Deregulation*, 17 Harv. J. on Legis. 123, 135 (1980).

[29] Mansfield, *supra* note 10, at 68, refers to a study which calculated the price elasticity of demand for shipping services at −0.13; with respect to surface transportation, a similar argument is made by Dempsey, *supra* note 22, at 313. *Contra*, Rakowski & Johnson, *supra* note 24, at 69 (reporting the case of Texas International Airlines, which reduced its fares about 50% on certain flights in five test markets; the result was a 600% increase in passenger traffic in those test areas).

[30] Staggers Rail Act of 1980, 49 U.S.C. §§ 10707a, 10709(d)(1) (Supp. V 1981).

[31] *See Upward Track—Rail-Rate Increases Due for Early Arrival Thanks to New Law*, Wall St. J., Oct. 14, 1980, at 1, col. 6.

[32] Johnson, *Ready Or Not—Here Comes Transportation Deregulation!*, 46 ICC Prac. J. 352, 353 (1979) (reports a return percentage on invested capital of 19.66% in 1977 in the trucking industry as compared with a 14% average in U.S. industry).

latory umbrella than in unregulated markets. This is so because higher labor costs were accepted as valid reasons for higher tariff filings by the ICC and the CAB.[33]

Opponents of deregulation contend that it will be ruinous for some carriers and drive others into mergers. This prediction has been verified by some post-deregulation mergers in the airline industry.[34] This prediction seems plausible in trucking but would be unverifiable for railroads, with years of government supported mergers behind them.

Other arguments foresee abandonment of small community service in favor of the lucrative markets between major cities and a cutback on safety expenses due to increased competition.[35] Smaller carriers entering the markets abandoned by large carriers will have poorer safety records and will be more difficult to supervise.[36]

B. *The Steps Toward Deregulation*

The deregulatory movement, though most clearly expressed in the several statutes promulgated since the mid 1970's, is not confined to the acts of Congress. Economists had, with an unusual unanimity, favored partial or total deregulation since the 1960's, and an impressive body of literature had broken the terrain.[37] After 1970, inflation due to soaring fuel prices became a major concern, especially for the airline industry. Deregulation promised a partial remedy in the form of lower transportation rates.[38] When deregulation was implemented in the late 1970's, the economy experienced a revival with growing transportation markets. Thus, the risks of detrimental effects, especially bankruptcies due to increased competition, were diminished, and the political opposition declined.[39]

Deregulation started in the airline industry, which is an inherently competitive market because of low entry barriers. The structure of the trucking market, the next object of decontrol, was even more favorable to competi-

[33] Rakowski & Johnson, *supra* note 24, at 69; Hayden, *supra* note 28, at 136-37.

[34] Dempsey, *supra* note 22, at 306.

[35] Though Caves, *Performance, Structure and the Goals of the Civil Aeronautic Board Regulation*, in The Crisis of the Regulatory Commissions 131, 132 (P. MacAvoy ed. 1970), lays stress on the separation of economic and safety regulation in the CAB and in the Federal Aviation Agency, he concludes, "it is not possible to refute the assertion that regulating turnover is a safety measure."

[36] The inadequate safety records of the new commuter lines is well documented. The probability of a fatal accident involving a commuter aircraft was five times that of its regional and national counterparts in 1979. *Fasten Your Seat Belts*, Time, Aug. 4, 1980, at 47.

[37] *See, e.g.*, the collection of articles and excerpts in The Crisis of the Regulatory Commissions (P. MacAvoy ed. 1970).

[38] In September 1974, President Ford convened a "summit conference on inflation" which unanimously recommended deregulation as a means of lowering prices. *See* Behrman, *supra* note 22, at 102-03.

[39] *Id.* at 113-14.

tion. In justifying the withdrawal of government interference, even in the monopolistic railroad industry, Congress found that "today, most transportation within the United States is competitive," and that "nearly two-thirds of the nation's intercity freight is transported by modes of transportation other than railroads."[40] Though it might have been expected that the deregulatory movement would spread to ocean shipping, this has not yet occurred. While there are tendencies to reinforce competition in the ocean liner markets, the toleration or encouragement of the liner conference system by most countries makes unilateral action by the United States a delicate problem. Moreover, it is not clear whether competition or cartelization provides for the more efficient structure. Small amendments focusing on specific conference and carrier practices are therefore more appropriate and likely than an overall attempt at systematic deregulation.[41]

The only common pattern in deregulatory legislation is a relaxation of rate control by the creation of zones of reasonableness. As long as the carriers' charges remain within the respective zones, the power of the agency is minimal. The lowering of legal entry barriers was an essential part of trucking and airline deregulation. Because of the length of rail networks, legislators focused on abandonment of unprofitable routes[42] in deregulating railroads. The thrust of the Staggers Act is the broad permission to contract rates with single shippers which meet specific shipper demands and thereby provide for more efficient use of rail facilities. Though the antidiscriminatory provisions remain almost unaltered, the favor accorded to contract carriage and to discount fares implies that Congress today sees more virtue than harm in discrimination.

1. *Airlines*

Airline deregulation became a serious political issue in early 1975 when the Economic Report of President Ford deplored the inefficiencies brought about by regulation and Senator Edward Kennedy opened hearings on CAB practices.[43] Concurrently, the CAB started to loosen its control.[44] The route moratorium under which the CAB had refused almost all new applications since 1969 was terminated, as were the capacity limitation agreements among carriers competing on a given route which the CAB had authorized since 1971. CAB also withdrew certain operating restrictions on charter carriers. It encouraged rate experiments on various routes which

[40] Staggers Rail Act of 1980, Pub. L. No. 96-448, § 2(3), (5), 94 Stat. 1895, 1896 (included as Congressional Declaration of Findings at 49 U.S.C. § 10101a (Supp. V 1981)).

[41] Schmeltzer & Weiner, *Liner Shipping in the 1980's: Competitive Patterns and Legislative Initiatives in the 96th Congress*, 12 J. MAR. L. & COM. 25, 27 (1980).

[42] 49 U.S.C. §§ 10903-10904 (Supp. V 1981).

[43] Rakowski & Johnson, *supra* note 24, at 71.

[44] *See* Behrman, *supra* note 22, at 97-99, 110-11.

generated a surprising increase in demand, but also induced passengers to reroute their journeys so as to profit from the low fare routes. Consequently, the airlines applied for low fare approval on other routes.

The most radical withdrawal from precedent was the policy of "multiple permissive entry," formulated in 1978. Previously, route awards for particular markets resulted from two inquiries: (a) an investigation of the demand for additional service in that particular market and (b) the selection of the carrier who would be best able to meet that demand. The innovation of "multiple permissive entry" left the second inquiry to market forces. If the CAB acknowledged a need for additional service, it would grant route awards to all applicants without requiring them to actually operate on the route. Whether this new policy is authorized by statute remains an open question since deregulatory legislation has totally reshaped entry regulation.

The first legislative step toward decontrol was the deregulation of carriage of goods by air in 1977.[45] Almost hidden in a statute about the war risk insurance of aircraft, the deregulatory provisions initiated in the Senate brought about two major changes:

(1) Creation of a special certificate for all-cargo air service in domestic transportation which can be obtained regardless of "public convenience and necessity" by any applicant who is fit, willing, and able to provide such service. Conditions and limitations which the CAB may impose on the certificate must not concern rates or routes.[46]

(2) Restriction of CAB's authority to regulate rates for both the domestic and international transportation of property, whether by all-cargo aircraft or combination aircraft. The CAB can still alter rates and practices which it finds predatory or discriminatory and order a carrier to discontinue such practices. However, the CAB may no longer prescribe rates or suspend proposed tariffs pending a hearing.[47]

The most spectacular event in deregulation was the Airline Deregulation Act of 1978.[48] This Act restricts government supervision and, for the first time, tries to phase out a regulatory agency entirely. The paramount feature of the statute is the relaxation of several entry provisions. New certificates were previously issued on a "public convenience and necessity" basis; now they merely need be "consistent" with these targets. The burden of proving the inconsistency lies upon the opponent of an application, such as an incumbent carrier.[49] Moreover, no inquiry into the demand for

[45] Act of Nov. 9, 1977, Pub. L. No. 95-163, 91 Stat. 1278. *See generally* 1977 U.S. CODE CONG. & AD. NEWS 3383; L. KEYES, REGULATORY REFORM IN AIR CARGO TRANSPORTATION (1980).

[46] 49 U.S.C. §§ 1301(11), 1388(a)(4), 1388(b)(1)(B)-(2) (Supp. V 1981).

[47] 49 U.S.C. § 1482(d)(3), (g) (Supp. V 1981).

[48] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

[49] 49 U.S.C. § 1371(d)(1)-(3), (9)(B) (Supp. V 1981).

additional service is allowed on so-called dormant routes. Dormancy occurs when a certified carrier holding a route fails to provide service five times a week for at least thirteen weeks of any twenty-six week period. If there is only one carrier on a route, entry is permitted to any carrier who is able to provide service on a first-come-first-serve basis.[50] Under the automatic entry rule, any certified interstate carrier could acquire, without opposition, one new city-pair market a year until 1981. Each existing interstate carrier can protect one city-pair route each year by designating it ineligible for automatic entry.[51] The spirit of the new entry regulation is perhaps most clearly expressed by the provision authorizing experimental certificates of limited duration.[52]

In the area of rate regulation, the major innovation is the concept of a zone of reasonableness. Rates may be increased by up to five percent above the standard industry fare level, except in monopolistic markets, and decreased by up to fifty percent. Within these limits, fares are presumed to be just and reasonable. A further element of liberalization is the containment of the power of the CAB to approve mergers, interlocking relationships and inter-carrier agreements and to confer antitrust immunity.

In order to protect small communities from deregulation, Congress provided that all cities previously served by certified carriers were guaranteed "essential" service for the next ten years. The CAB must either find a carrier willing to serve such cities or subsidize the carrier formerly operating the unprofitable line so that it can continue service.[53]

The International Air Transportation Competition Act of 1979 extended the deregulatory program to foreign air transportation.[54] Like the Airline Deregulation Act, this statute eases entry into foreign air transportation by making it dependent upon mere "consistency" with the public interest.[55] Similarly, the Act provides for zones of upward rate flexibility of five percent and downward rate flexibility of fifty percent, centering upon a "standard foreign fare level" which the CAB periodically adjusts for all city-pair markets.[56] The effect of these and other provisions will largely depend upon

[50] 49 U.S.C. § 1371(d)(5)(A)-(C) (Supp. V 1981). Between July 1978 and July 1979, more than 200 markets were entered under these provisions. Bailey, *Deregulation and Regulatory Reform of U.S. Air-Transportation Policy*, in REGULATED INDUSTRIES AND PUBLIC ENTERPRISE: EUROPEAN AND UNITED STATES PERSPECTIVES 29, 40 (1980).

[51] 49 U.S.C. § 1371(d)(7)(A), (C) (Supp. V 1981). Between July 1978 and July 1979, only 32 markets were entered under this provision. Bailey, *supra* note 50, at 42.

[52] 49 U.S.C. § 1371(d)(8) (Supp. V 1981).

[53] 49 U.S.C. § 1389 (Supp. V 1981).

[54] Pub. L. No. 96-192, 94 Stat. 35 (1980). *See generally* Dubuc & Jones, *Significant Legislative Developments in 1979 in the Field of Aviation Law*, 45 J. AIR L. & COM. 921, 942-51 (1980).

[55] 49 U.S.C. §1371(d)(1)-(3) (Supp. V 1981).

[56] 49 U.S.C. § 1482(j)(6)-(10) (Supp. V 1981).

whether the United States can persuade foreign governments to adopt its competitive aviation policy. There has been some success in this regard in recent bilateral agreements with foreign nations.[57]

2. Trucks

Historically, there has been less regulation in the trucking industry than in the airline industry. Agricultural transport, as well as local carriage within defined commercial zones, has been exempt from regulation, and control over contract carriers has been restricted.[58] The administrative deregulation by the ICC proceeded from these exempt areas, trying to widen them where possible.

One of the important ICC decisions considerably enlarged the commercial zones of cities and the equally exempt terminal areas of motor carriers.[59] Other decisions abolished the restriction imposed on motor contract carrier certificates to serve not more than eight shippers, and allowed private carriers to carry for hire incidentally to the transportation of their own merchandise. Also, the Commission drastically lowered entry barriers. While previous entry regulation tried to avoid any financial harm to incumbent carriers, the ICC recently made it clear that the benefits of heightened competition may outweigh the potential harm to the incumbent certificate holder.[60]

The deregulation of motor carriers of goods was sanctioned and furthered by the Motor Carrier Act of 1980.[61] Without wholly abandoning the industry to market forces, it limited the power of the ICC. Applicants for entry need not now show that service is "required" by public convenience and necessity. As in CAB proceedings, it is up to potential opponents to demonstrate that the new entry is "inconsistent" with public convenience and necessity. The diversion of revenue or traffic from an existing carrier does not in itself prove this inconsistency.[62] Moreover, carriers are entitled to the extension of existing certificates to intermediate points and round trip authorizations which will put an end to the empty back-hauls often required under the former regulations.[63]

In the field of rate regulation, the main innovation is the carrier's right to choose, within certain limits, between ICC and antitrust regulation. If the

[57] *See* Bailey, *supra* note 50, at 49-50 for more details.

[58] *See generally* Basedow, *supra* note 13, at 28-29.

[59] *See* 49 C.F.R. § 1048 (1983) (Commercial Zones); 49 C.F.R. § 1049 (1983) (Terminal Areas). *See also* the preparatory investigation Commercial Zones and Terminal Areas, 124 M.C.C. 130 (1975).

[60] *See generally* Dempsey, *supra* note 22, at 316-17.

[61] Pub. L. No. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 U.S.C.).

[62] 49 U.S.C. § 10922(b)(1)-(2) (Supp. V 1981).

[63] 49 U.S.C. § 10922(h)(1) (Supp. V 1981).

carrier notifies the ICC accordingly, prices which do not deviate by more than ten percent from those of the preceding year may not be attacked by the Commission as unreasonable. If the ICC finds sufficient competition in the particular market, it may increase this flexibility percentage by up to five percent in either direction. But if the carrier chooses to withdraw these prices from rate control by his notification, they are subject to antitrust scrutiny.[64]

Finally, the deregulation of rates has also modified the liability rules.[65] While the basis of liability under the Carmack Amendment remains unchanged, the requirement of ICC approval for released rates on the basis of limited recovery is maintained only for carriers of used household goods. Other carriers may contract at limited liability rates if the value limitation is reasonable and rely either on a written value declaration of the shipper or on a written agreement of the parties. The ICC may require carriers to offer alternative full coverage rates.[66]

3. Railroads

Since the Kennedy Administration, the ailing financial condition of the railroads has kept politicians busy. However, the first major legislative remedy did not come until the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).[67] Under the 4R Act, railroads could lower their rates to the level of variable costs without the interference of the ICC.[68] For an experimental period of two years, Congress enacted a zone of reasonableness for certain tariff classes. Rate modifications of up to seven percent a year could not be suspended by the ICC if the carrier notified the Commission accordingly.[69] Also, a 4R Act amendment cautiously opened the door to rail contract rates by giving a five year validity guarantee to rates for transportation requiring an investment of more than $1 million.[70] This provision was intended to cover situations requiring specialized freight cars, installation of side track and other unusual expenditures.

Deregulation of railroads was accelerated by the Staggers Rail Act of 1980.[71] In the field of rate regulation, it affirms the variable cost level as the lower limit of reasonableness, but maintains a maximum limit only for

[64] 49 U.S.C. § 10708(d) (Supp. V 1981).

[65] *See generally* Basedow, *supra* note 13, at 24-27.

[66] 49 U.S.C. § 10730 (Supp. V 1981).

[67] Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 45 U.S.C. and 49 U.S.C.).

[68] 49 U.S.C. § 1(5)(b) (1976) (repealed 1980).

[69] 4R Act, § 202(e)(2), 90 Stat. 37-38.

[70] Act of Oct. 17, 1978, Pub. L. No. 95-473, § 10727, 92 Stat. 1337, 1339 (repealed 1980).

[71] The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 45 and 49 U.S.C.).

those railroads which the ICC finds to have market dominance.[72] For these railroads, a zone of upward rate flexibility is installed, in the limits of which the ICC must not interfere by the prescription or determination of reasonable rates. Every railroad in a position of market dominance may increase its rates up to a base rate which is defined in the Act and periodically adjusted to cost developments by the ICC. In addition, carriers are entitled to rate increases of six percent per year of the adjusted rate base until 1984 and four percent thereafter.[73] As a compensation for purely inflationary cost increases, the ICC may prescribe a percentage rate increase which must be deducted from the increases mentioned earlier.[74]

The most fundamental change in railroad regulation seems to be the broad allowance of contract rates. Contrary to the law governing other modes of transportation, railroad legislation only allowed special rates to be given to particular shippers with specific needs on the basis that these shippers commit themselves to deliver either a certain volume or a certain percentage of traffic over time to a railroad. Initially, this individualistic and contractual approach to railroad transportation was thought to be a destructive competitive practice[75] and incompatible with the classical principle of shipper equality. But recent experiments under the 4R Act have indicated a strong demand from shippers and potential gains for carriers to be had from such contracts.[76] The Staggers Rail Act of 1980 now requires such contracts to be filed with the ICC, which shall approve them in principle. In the carriage of non-agricultural goods, the Commission may base its disapproval only on discrimination against a port or on the fact that a railroad is no longer able to meet its common carrier duty to serve other shippers because of the special contractual commitment. Once a contract is approved, the ICC may interfere with its performance only in times of war.[77] The result is that contract rates are permitted to take priority over the carrier's legal duty to serve every applicant, and the carrier is exempted from the prohibition against discrimination.[78]

The Staggers Rail Act of 1980 has also relaxed liability requirements. ICC approval for released rates based upon limited liability is no longer required. The statute further offers the alternative of liability agreements in which the shippers agree to deduct certain amounts from liability claims

[72] 49 U.S.C. § 10701a (Supp. V 1981); *see generally* Eckhardt, *Market Dominance in the Staggers Act*, 48 ICC Prac. J. 662 (1981).

[73] 49 U.S.C. § 10707a(b)-(d), (h) (Supp. V 1981).

[74] 49 U.S.C. § 10712 (Supp. V 1981).

[75] *See* Hill, *Contract Rates: Increasing Rail Profitability*, 46 ICC Prac. J. 222 (1979).

[76] The cases reported in *Upward Track—Rail-Rate Increases Due for Early Arrival Thanks to New Law*, Wall St. J., Oct. 14, 1980, at 1, col. 6, stress the shipper demand for punctuality which could not be satisfied under general regulation, but can be met under bilateral contracts.

[77] 49 U.S.C. § 10713(d)(2)(A), (g) (Supp. V 1981).

[78] 49 U.S.C. §§ 10741(f), 11101(a) (Supp. V 1981).

against carriers.[79]

C. Deregulation and the Common Core of Transportation Law

The motivation behind deregulation in the various areas of transportation law was the desire to increase competition. The question is whether deregulation has enhanced or diminished the degree of uniformity in the various problem areas of transportation law.

1. The Procedural Framework of Ratemaking

(a) Zones of rate freedom. Except for the phasing out of the CAB, deregulation of rates has complicated rather than simplified the legal framework of rate regulation. In the airline, railroad and trucking industries there are now zones of rate freedom. As long as rates move within the limits of these zones, they are presumed to be reasonable and may be attacked only on the basis of discrimination or predation. The zones of rate freedom vary considerably from mode to mode with regard to limits, points of reference and the role of the market structure.

The zones of rate freedom use different rate standards as points of reference. The standard industry fare level and the standard foreign fare level introduced by the aviation statutes are essentially the fares for each city-pair and each class of service on two key days in 1977 for domestic flight, and in 1979 for foreign flights. These fares are periodically adjusted to variations in cost per seat-mile for the whole industry. Costs actually incurred by the individual carrier are not considered.[80] The base rate used in the railroad industry is the rate in effect for a given commodity on the first day of a two-year period beginning on October 1, 1980. Periodically, the ICC will publish rail cost adjustment factors by which the base rate may be adjusted.[81] For motor carriers, the point of reference is simply the rate in effect one year prior to the effective date of the proposed rate; in the case of rate cuts, the lesser of this and the rate in effect on July 1, 1980 governs.[82] Two factors determine the reference rate and the scope of rate freedom for the future: (1) costs to the industry, and (2) the carrier's own previous rate modifications. The standard fare levels of the aviation statutes are only adjusted to cost changes. If an airline cuts a rate equal to the standard industry fare level by fifty percent, it does not create a new zone of rate freedom centering on the decreased fare. Rather, the fare has reached the bottom limit of the carrier's zone of rate freedom. Railroads have a new rate every two or five years which is based on the rate they charged on the

[79] 49 U.S.C. § 10730(c) (Supp. V 1981).

[80] 49 U.S.C. § 1482(d)(6), (j)(7)-(9) (Supp. V 1981).

[81] 49 U.S.C. § 10707a(a) (Supp. V 1981).

[82] 49 U.S.C. § 10708(d)(1)(B) (Supp. V 1981).

first day of the relevant period. Consequently, if they use the zone of their upward rate flexibility to the maximum, their permissible future rates will be higher than they would have been had the railroads been content with lesser rate increases. This dependency on previous ratemaking is even more conspicuous in the case of trucking. Surface carriers will make rate changes not only with regard to imminent competitive effects, but also with regard to a zone of rate freedom appropriate to their own business expectations in the long run. Cost variations have a much more attenuated and indirect impact on railroad and trucking rates than on air fares.

Rate freedom has been extended because of the underlying confidence in competition. Market powers are to prevent carriers from reaping monopoly profits. Consequently, the five percent upward rate flexibility for domestic air carriers is confined when the carrier has a market share of more than seventy percent.[83] There is also a limit to the rates railroads may charge when they are in possession of market dominance.[84] The upward extension of the motor carrier's zone of rate freedom beyond ten percent depends upon an ICC finding that there is sufficient competition. This same finding is also required when a motor carrier wants to lower his rates by more than ten percent.[85] The criterion of market power as a prerequisite for larger rate increases seems appropriate because the ability of carriers to set monopoly prices differs from market to market. However, it is highly questionable whether the market share used in aviation law or the size of profits on which the Staggers Act of 1980 bases its inquiry are sufficient indicia of market power. The better solution seems to be that of the Motor Carrier Act of 1980, which entrusts the determination of the competitive environment to the regulatory agency which can consider all aspects of the single case at hand.

(b) Agency powers. Outside the zones of rate freedom, the agencies have the power to reject, cancel or disapprove proposed rates. They can suspend rates pending a hearing, prescribe minimum rates, or fix maximum rates. Used in combination, the latter two powers may result in the prescription of precise rates. This deprives a carrier of any freedom to determine his own rates. In addition to the powers with direct impact on a carrier's charges, agencies have investigatory powers which affect ratemaking more indirectly. The strongest blend of agency powers is the suspension of proposed rates combined with a prescription of minimum and maximum rates. This combination was a classical pattern for the regulation of all surface carriers and for the transportation by air and inland wa-

[83] 49 U.S.C. § 1482(d)(4)(A) (Supp. V 1981).

[84] 49 U.S.C. § 10701a(b) (Supp. V 1981). Market dominance is defined in terms of quotient of revenue and variable cost generated by the transportation under a proposed rate. *See* 49 U.S.C. § 10709(d)(1)-(2) (Supp. V 1981).

[85] 49 U.S.C. § 10708(d)(2)(A) (Supp. V 1981).

terway. The deregulatory statutes have brought about the demise of such plenary agency power.[86] Even after deregulation, the ICC may still intervene if a proposed railroad rate is unreasonably low. In such a case, the ICC may reject the proposed rate or prescribe a rate not higher than variable costs.[87] The Commission may only set maximum rates for railroads which have market dominance. All others are free to raise their rates[88] without review. The regulatory powers of the CAB over air fares in domestic transportation terminated on January 1, 1983.

These facts are evidence of an increasing disintegration of a basic pattern of economic regulation of carriers. In foreign air transportation, the CAB has and will retain the power to reject and cancel rates which it finds unreasonable. It also has the power to suspend rates for one year.[89] In foreign shipping, the Federal Maritime Commission (FMC) may not prescribe rates or suspend proposed rates, but may disapprove rates found "so unreasonably high or low as to be detrimental to the commerce of the United States."[90] The FMC has a tighter grasp on foreign government controlled carriers. It may disapprove their non-compensatory rates as unreasonably low and suspend them for up to 180 days.[91] Different powers are vested in the FMC over ocean carriers in the domestic shipping markets. In this case, the FMC lacks authority to suspend or reject proposed rates and to prescribe minimum rates; it may only prescribe maximum rates.[92] The differences discussed here frustrate all attempts at unification. "Deregulation from within" has demonstrated that the substantive agency policies are more important than the legal garment of powers through which they are expressed, and that they may fundamentally change without a change in the legal framework.

(c) Rate agreements. In the past, all transportation markets have been cartelized under a regulatory umbrella to a greater or lesser extent. While price fixing agreements have been considered to be illegal in other areas, filing requirements and approval by regulatory commissions has afforded antitrust immunity to cartels and their price fixing agreements in the transportation industry.[93]

Rate agreements allow the regulatory agencies to predict the market impact of rate rulings and guarantee the carriers profit levels which are deemed necessary to maintain scheduled services with low load factors.

[86] 49 U.S.C. §§ 10704(b)(1), 10708(b) (Supp. V 1981).

[87] 49 U.S.C. §§ 10701a(C), 10704(a)(1) (Supp. V 1981).

[88] 49 U.S.C. §§ 10701a(a)-(b), 10704(a)(1) (Supp. V 1981).

[89] 49 U.S.C. § 1482(j)(1)-(2) (Supp. V 1981).

[90] 46 U.S.C. § 817(b)(5) (1976).

[91] 46 U.S.C. § 817(c)(1)-(2) (Supp. V 1981).

[92] 46 U.S.C. § 817(a) (1976).

[93] 46 U.S.C. § 814 (1976 & Supp. V 1981); 49 U.S.C. §§ 1382(a), 1384, 10706 (Supp. V 1981).

The deregulatory movement has stressed the harm rather than the inherent virtues of transportation price cartels. Congress and the ICC are convinced that such agreements set rates high enough to protect even the least efficient carrier and thereby deprive consumers of the benefits of price competition.[94]

Under the new statutes, one would hope that a common pattern of price fixing regulation would emerge. Price fixing agreements, discussions among carriers or votes on rates charged for transportation on single line routes on which a particular carrier performs without assistance of other carriers, should be prohibited. As to joint routes, rate agreements should only be permitted among carriers which actually operate on the route. Carriers who operate on a competing joint route should be excluded from price fixing agreements.[95] Unfortunately, the new modal statutes do not adopt a common approach to these issues. In trucking, the prohibition of single line rate agreements has been postponed until 1984 and may be revoked after further study. The Motor Carrier Act of 1980 does prohibit agreement on rates within the zone of rate freedom or based upon limited liability.[96] But the scope of this provision may very well be restricted to single line rates because there must be a means of agreeing on joint rates. While single line rate agreements are illegal in domestic aviation, exceptions are made for agreements relating to foreign flights on the basis of transportation need, public benefit, comity or foreign policy requirements.[97] With the transfer of CAB powers to the Department of Justice in 1985,[98] the exceptions for foreign air transportation may well become less significant because the Department of Justice has a history of deploring the anticompetitive actions of regulatory agencies. In contrast to the airline industry, the price fixing authority of the ocean shipping conferences remain entirely intact.[99]

While the lack of uniformity may be justified on the basis of comity or the relative impotence of unilateral regulation of international activities, Congress should refrain from hammering out specific antitrust rules for each mode of domestic transportation. If the purpose of deregulation is to conform the law of transportation to general business law, the carrier antitrust legislation should not stress the particularities of each mode lest excuses for future restraints on competition be provided.

[94] *See* H.R. REP. NO. 1069, 96th Cong., 2d Sess. 27, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2283, 2309 (regarding the Motor Carrier Act of 1980) [hereinafter cited as House Report I].

[95] *See* 49 U.S.C. §§ 1382(a)(2)(A)(iii), 10706(a)(3)(A), (b)(3)(B)(i), (b)(3)(D) (Supp. V 1981).

[96] 49 U.S.C. § 10706(b)(3)(C)-(D) (Supp. V 1981).

[97] 49 U.S.C. § 1382(a)(2)(A)(i), (iii) (Supp. V 1981).

[98] 49 U.S.C. § 1551(b)(1)(C), (b)(2) (Supp. V 1981).

[99] 46 U.S.C. § 814 (1976 & Supp. V 1981).

2. SUBSTANTIVE CRITERIA OF RATEMAKING

The preceding discussion focused on the extent carriers are free to determine their rates either alone or through price fixing agreements, and by what powers an agency may implement its policies. Now considered are the two criteria by which the actions of the carrier are tested. These are the common law concepts of "reasonableness" and "non-discrimination."

(a) Reasonableness. Regulatory statutes have traditionally required carriers of all modes to charge reasonable rates without defining "reasonableness."[100] When codifying the common law principle, Congress took the position that reasonableness was a function of the particular circumstances of each case or group of cases and not subject to generalization. Specification was, therefore, left to the regulatory agencies. In the modern deregulation statutes, reasonableness is no longer prescribed, or it is specified to mean a certain cost-rate relationship.

These statutes notwithstanding, rates must be reasonable with regard to ocean and inland water carriers, trucks, freight forwarders, pipelines and foreign air transportation.[101] In domestic air transportation this requirement was phased out on January 1, 1983.[102] With regard to rail carriers, only roads with market dominance are required to keep their rates below a reasonable maximum. Other roads may demand "any rate."[103]

This makes it clear that the Staggers Rail Act removes both statutory and common law barriers to unreasonably high rail rates. Shippers will no longer be able to attack such rates either in ICC or court proceedings. A similar conclusion is much more difficult to draw with regard to domestic air carriers. The Airline Deregulation Act declares that the section of the Federal Aviation Act which contains the reasonable rates requirement shall cease to be in effect on January 1, 1983. There is no indication whether any corresponding common law obligation is abrogated. Although the general policy of the Airline Deregulation Act may favor a construction in favor of complete decontrol, the statute has an experimental character[104] which should prevent an overly broad interpretation. In light of such uncertainty,

[100] 49 U.S.C. § 10701(a) (Supp. V 1981) (surface and inland water carriers); 49 U.S.C. § 1374(a)(1)-(2) (1976 & Supp. V 1981) (air carriers); 46 U.S.C. § 817(a), (b)(5) (1976) (ocean vessels). The last provision concerning foreign ocean navigation is the weakest; it only enables the Federal Maritime Commission to prohibit rates which are "so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b)(5) (1976). The other provisions simply prescribe "reasonable" or "just and reasonable" rates.

[101] 46 U.S.C. § 817(a), (b)(5) (1976); 49 U.S.C. §§ 1374(a)(2), 10701(a) (1976 & Supp. V 1981).

[102] 49 U.S.C. §§ 1374(a)(1), 1551(a)(2)(B) (Supp. V 1981).

[103] 49 U.S.C. § 10701a (Supp. V 1981).

[104] This experimental character is evidenced by the motivation for the CAB Sunset provisions articulated in H.R. REP. No. 1211, 95th Cong., 2d Sess. 22, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3737, 3758: "This provision will require the Congress to undertake a thorough review

the common law requirement of reasonable rates should be maintained as a safeguard which the courts may employ in cases of apparent abuses of rate freedom. Of course, such use must not intrude into the zone of rate freedom now acknowledged by statute. However this question is finally resolved, future deregulatory legislation should take a clearer stand on the common law rules.

Some statutes have defined the lower limit of what is reasonable in terms of a cost-rate relationship. The rail rates above variable costs are "conclusively presumed not to be below a reasonable minimum." If they fall short of covering variable costs, they are "presumed to be not reasonable."[105] In order to profit from a similar presumption of reasonableness, motor carriers have to "cover total operating expenses" plus a reasonable profit.[106] Finally, an analogous formulation requires foreign state "controlled" ocean carriers to charge rates which are "fully compensatory" of the carrier's costs.[107]

None of these provisions allow the economic ideal of pricing at marginal costs. This may be because the calculation of marginal transportation costs poses insurmountable difficulties in most instances. While such difficulties can be overcome, a carrier may rebut the statutory presumptions and set his rates at marginal costs. Usually, a carrier will be allowed to lower his rates only to the variable or total cost level. Here, it is difficult to understand why rail rates are related to variable costs while truck rates have to cover total costs. Of course, the difference between variable and total costs is much larger for railroads than for trucks because of the comparatively low overhead for trucks. This observation merely explains the difference without justifying it.

One may ask whether the presumption of reasonableness in favor of rates covering variable costs could be adopted as a general rule applicable to all modes of transportation or at least to the remaining regulated carriers. Once the railroads are free to shift from value-of-service to cost-of-service ratemaking there is no need to prevent other surface carriers from doing the same. The necessity of protecting inefficient rail rates against intermodal competition is no longer present. Cost-of-service ratemaking could also be applied to shipping and to foreign aviation in accordance with the fifty percent downward rate flexibility zone[108] and an air fare level covering variable costs.

of the CAB and the functions it performs, and to determine whether the agency should be continued in the same or modified form."

[105] 49 U.S.C. § 10701a(c)(1)-(2) (Supp. V 1981). This statute is more complex than the formulation in the text.

[106] 49 U.S.C. § 10701(e) (Supp. V 1981).

[107] 46 U.S.C. § 817(c)(1)-(2) (Supp. V 1981).

[108] *See supra* note 56.

(b) Discrimination. Discrimination appears in different forms such as rates, tariff classifications and volume rebates. It may be directed against shippers or groups of shippers and against regions and industries as well as transit points, ports and connecting carriers. Whenever there are different rates for services generating equal costs there is discrimination.

This discussion focuses on rate discrimination against shippers. Its main negative effect is subsidization of shippers or passengers paying lower rates by those paying higher rates for equal service. This discourages high rate paying shippers, while stimulating shipping from low rate customers. It should be noted, however, that price discrimination provides for a more efficient use of transportation equipment to the extent that discount rates generate new traffic, thereby increasing load factors.

Common law traditionally has been sensitive to the inequalities created by price discrimination.[109] Moreover, all regulatory statutes contained provisions prohibiting rate discrimination against persons, places, ports and descriptions of traffic.[110] Most of these provisions did not specify any particular rate practices as discriminatory per se. The long-and-short-haul clause of the Interstate Commerce Act is an exception which requires railroads to charge rates higher for longer than shorter distances on the same route.[111] The CAB required an even more rigid proportionality of rate and distance in the Domestic Passenger Fare Investigation. This requirement became obsolete after the deregulation of air fares. Because distance is not a reliable indicator of transportation costs, rate-distance ratios cannot provide a basis for ratemaking in all modes of transportation. It is basically the rate-cost relationship which tells us something about discrimination. When cost calculation is possible, discrimination is ascertained by the comparison of cost-rate. Distance-rate relations should only be employed when cost cannot be calculated due to high fixed and joint costs. This argument furnishes some justification for the isolated existence of the long-and-short-haul provision in railroad law. Unlike other modes, the railroads own their whole infrastructure and they must have a means of apportioning these costs. Since there is no unambiguous way of allocating the overhead, the costs of individual transport operations can be calculated only approximately. A distance-rate relationship may, therefore, be appropriate as an indicator of rate discrimination in this context.

Deregulatory statutes have modified the prohibition of rate discrimination in two respects. On January 1, 1983, the Federal Aviation Act lost effect with regard to domestic aviation.[112] This again poses the problem whether the common law principle is meant to be affected by the abroga-

[109] *See generally* Basedow, *supra* note 13, at 13-14.

[110] 46 U.S.C. § 816 (1976); 49 U.S.C. § 1374(b) (1976); *id.* § 10741(b) (Supp. V 1981).

[111] 49 U.S.C. § 10726(a)-(b) (Supp. V 1981).

[112] 49 U.S.C. § 1374(b) (1976); *id.* § 1551(a)(2)(B) (Supp. V 1981).

tion. Contrary to the case of reasonable rates, the answer should be affirmative. Congress clearly favors the use of discriminatory rates, such as discount fares, which are viewed almost unanimously as a step toward transport efficiency. The Staggers Rail Act has declared the prohibition of discrimination to be inapplicable to contract rates. The enlarged possibilities for contract carriage, which can also be observed in trucking legislation,[113] reflect Congress' altered view of price discrimination. High load factors and individual service are valued more than the equality of shippers.

3. *Tariffs*

The four essential elements of tariff regulation are publication, filing, observance and notice of change.[114] Prior to deregulation, tariff regulation was the most common feature in transportation law. Deregulation has challenged the validity of the theory that tariff regulation has an independent importance in transportation law even in the absence of direct rate regulation.

The creation of zones of rate freedom has barely affected tariff regulation. One might have expected that all regulations regarding tariffs within the zones of reasonableness would have been eliminated. Presumably, customers would be sufficiently protected if tariffs were filed with the ICC so that the Commission could determine their consistency with remaining rate regulation. Customers could also be protected by requiring the carrier to publish the legal limits of his rate freedom. Neither of these amendments has been enacted. The only impact of rate freedom on tariff regulation is the new rule in air law which provides that tariff changes which exceed the minimum or maximum of the zone of rate freedom become effective only after sixty days' notice; changes within the zone of freedom require only thirty days' notice, as they did prior to airline deregulation.[115]

With regard to railroads, notice periods have been shortened to twenty days for increases and ten days for cuts. Because this provision is entitled "Efficient Marketing"[116] it suggests that the former thirty day period did not allow carriers to react to market demand as quickly as necessary. If this is true, the solution could be extended to other regulated carriers. However, recent legislation has increased rather than decreased the number of notice periods which a shipper employing different transportation modes must contemplate when he evaluates the reliability of tariffs. The former standard 30 day period has been replaced by: (a) 10 and 20 days for railroads, (b)

[113] 49 U.S.C. § 10713 (Supp. V 1981) (railroads); 49 U.S.C. § 10528 (Supp. V 1981) (trucks).

[114] *See supra* text accompanying notes 2-10.

[115] 49 U.S.C. § 1373(c)(1)-(2) (Supp. V 1981).

[116] Staggers Rail Act of 1980, § 216, 49 U.S.C. § 10762(c)(3) (Supp. V 1981).

60 days for air carriers beyond the limits of their rate freedom, and (c) 30 days for other carriers.

Deregulation of the airlines challenges our theory of the independent virtues of tariff regulation. The Airline Deregulation Act simply terminates all tariff regulations in domestic aviation as of January 1, 1983.[117] It can be argued that this provision is both inappropriate and logically incoherent with other provisions of the same statute. It is difficult to see why the total abrogation of rate regulation should entail an equally total abrogation of tariff regulation. Rather, the increased rate freedom of carriers enhances the need for protection of the patrons against the carriers' notably high price discriminating power. Unlike demand for most goods and services, the demand for transportation is tied to a specific time and place. This gives carriers a temporary monopoly power, even in an otherwise highly competitive market. Therefore, tariff publication cannot be attacked by the assertion of the competitive structure of the airline industry. It helps to protect the shipper and passenger precisely in those inevitable moments when competition proves ineffective. The counter-argument that the publication of tariffs favors interdependent pricing is not convincing. If carriers benefit from interdependent pricing they will voluntarily publish their rates.

4. *The Duty to Serve*[118]

Only two changes have affected the duty to serve since the start of deregulation. The Staggers Rail Act permits special contracts between a railroad company and individual shippers to take priority over service to the general public. If the carrier's capacity is exhausted by such contracts, there is still no violation of a duty to serve every applicant.[119] The ICC is to consider the railroad's capacity before approving a special contract. Approval is to be based on the carrier's ability to fulfill his duty to serve the general public.[120] Priority for contract shippers is necessary because, if the contract shippers ranked below general shippers, the investment which special contracts usually engender would be wasted. In some cases, however, the economic losses imposed upon the general shippers by the unavailability of railroad transportation could outweigh the waste of resources provoked by a breach of the carrier's special contracts. Moreover, the efficiencies of contract performance may be too small to justify the foreclosure of transportation to the general public by a few contract shippers. It is important to note that only the Staggers Act gives a clear priority to special contracts. The Motor Carrier Act of 1980 allows common and contract

[117] 49 U.S.C. § 1551(a)(2)(A) (Supp. V 1981).

[118] *See supra* text accompanying notes 11-14.

[119] 49 U.S.C. § 11101(a) (Supp. V 1981).

[120] 49 U.S.C. § 10713(d)(2)(A)(i), (f) (Supp. V 1981).

carriage on the same vehicle but remains silent as to the appropriate priority.

The second change is the repeal of the requirement that domestic air carriers provide air transportation authorized by their certificates.[121] It is unclear whether this applies only to the statutory duty to serve within the limits of the certificate or also to the common law duty within the limits of the carrier's holding out. Prior to deregulation, a carrier could only hold out his services within the limits of his certificate. With the abolition of route certificates, the common law standard of the carrier's holding out will regain importance. It can be argued that both the language and the position of the sunset provision in the context of the abolition of entry regulation[122] show the intention of Congress to abrogate only the statutory duty to serve. This solution is a counterbalance to the remaining monopoly power of air carriers, particularly in small markets.

5. *The Carrier's Liability*

The modal laws have varied considerably with regard to both the basis of liability and the amount of recovery for cargo loss and damage.[123] Deregulation has ended the brief period of strict liability by divesting the CAB of its power to prescribe tariff regulations. Decontrol has also impacted on the amount of recovery by modifying the liability provisions of the Interstate Commerce Act through the Motor Carrier and Staggers Rail Acts of 1980.

Before deregulation, carriers could limit their liability in exchange for lower rates on approval of the ICC. This was inefficient because it imposed the risk and the insurance costs on the carrier even where the shipper was the cheaper risk bearer and willing to accept the risk for a rate release.[124] The requirement of ICC approval has, therefore, been cancelled for rail and motor carriers. Motor carriers of household goods and the non-motor and non-rail ICC carriers are still subject to approval as are pipeline carriers, express carriers, sleeping-car carriers and freight forwarders.[125] The question then arises as to why the members of this group require ICC approval for released rates and why rail and motor carriers do not. With regard to motor carriers of household goods, the legislative materials simply reserve the question for later consideration.[126] This apparent inattentiveness on the part of the legislature has affected previous uniformity.

[121] 49 U.S.C. § 1551(a)(1)(F) (Supp. V 1981).

[122] 49 U.S.C. § 1551(a)(1) (Supp. V 1981).

[123] *See supra* text accompanying notes 15-21.

[124] House Report I, *supra* note 94, at 25-26 (motor carriers); H.R. Rep. No. 1035, 96th Cong., 2d Sess. 59, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4004 (railroads) [hereinafter cited as House Report II].

[125] 49 U.S.C. § 10730(a) (Supp. V 1981). Water carriers are subject to the Harter Act.

[126] *See* House Report I, *supra* note 94, at 25.

While both motor and rail carriers are now free to offer lower rates for limited recovery regardless of ICC approval, the respective rules differ in some points. The declared or agreed value has to be reasonable in trucking, whereas this requirement was explicitly abandoned in the Staggers Act in order to "assure greater flexibility" for the parties.[127] If the bargain of the parties was not influenced by unequal power, no value can be called unreasonable. The requirement of a reasonable value only makes sense in cases of unequal bargaining power where it may help the shipper reject rate-liability combinations which provide for a minor rate reduction and a major reduction in liability coverage. The total freedom of the Staggers Act comes down to the permissibility of such practices.

The pro-rail bias could perhaps be tolerated if rail carriers still offered full coverage rates. Under the new legislation, the ICC may require motor carriers to offer full coverage rates as an alternative to released rates. However, the Staggers Act does not contain a similar provision.[128] The Staggers Act notwithstanding, it is suggested that railroads are required to offer full coverage rates as a matter of law and not of ICC discretion. The statute provides that all ICC carriers "shall" establish rates for the transportation and service they provide.[129] This is a requirement of full coverage because carriers are required to pay the actual loss damages. The permissibility of released rates at limited liability does not impair this principle.[130] Against the background of this construction of the Interstate Commerce Act, it is the Motor Carrier Act which departs from the common terrain and makes the obligation to offer full coverage rates a matter of ICC discretion.

6. *The Scope of Transportation Regulations*

An interesting innovation is the use of market power as a new criterion for the application of certain rules. We have observed that the scope of the various new zones of rate freedom depend upon the market power of the carrier.[131] This reflects a recognition of the fact that many transportation markets are intrinsically monopolistic while others can sustain intense competition.[132] Therefore, the degree of rate regulation concerning the duty to serve and the prohibition of discriminatory and predatory practices could be tied to the market power of the respective carrier. In monopolistic and oligopolistic markets such regulations are necessary, though they may be

[127] *See* 49 U.S.C. § 10730(b)-(c) (Supp. V 1981); House Report II, *supra* note 124, at 59.

[128] *Cf.* 49 U.S.C. § 10730(b)-(c) (Supp. V 1981).

[129] 49 U.S.C. § 10702 (Supp. V 1981).

[130] 49 U.S.C. § 11707 (Supp. V 1981) (released rates flow from subsection (c)).

[131] *See supra* text accompanying notes 80-85.

[132] In a comment on the Airline Deregulation of 1978 in H.R. Rep. No. 1211, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3737, 3745, drafters explain that upward rate flexibility is foreclosed to carriers with a high market share "because actual and potential new entry is needed as a check on abuses of upward rate flexibility."

dispensed with in more competitive markets without detrimental consequences. The determination of market power would have to be left to administrative discretion; but the heavier administrative burden in some areas may be outweighed by the liberalization in the competitive markets.

III. Conclusion

The law of common carriers developed three basic doctrines which distinguished it from general business law: (1) the carrier's duty to serve every applicant, (2) the prohibition against unreasonable and discriminatory rates and practices, and (3) strict liability. The crisis befell these rules when transportation became a mass enterprise in the course of industrialization. Courts had more and more difficulty determining the reasonableness of rates and the permissible level of discrimination. Passengers and shippers were unprotected because they could not avoid monopolistic railroads and cartelized shipping companies. This explains why the three decades after enactment of the Interstate Commerce Act in 1887 saw an uncurbed regulatory fever affecting all traditional and many new aspects of transportation law with regard to the railroads. This era of repressive regulation discouraged railroad investment to the point where equipment decayed. About 1920, general policy shifted from the oppression of carrier power to the weighing of shipper and carrier interests. This protective or even promotional regulation rose to its peak in the 1930's when motor carriers, water carriers and air carriers were all regulated, partially to protect the railroads from intermodal competition, but partially to contain intramodal competition.

During the last two decades the theory that an ever more refined network of administrative rulings can shape an industry has yielded to deregulation. Recent statutes express a fundamental shift in policy towards competition in the transportation markets. Unfortunately, policy makers have recognized only part of the regulatory burden which they purport to take off the shoulders of the transportation industry. They fail to recognize the unwarranted burden of a lack of uniformity among the modal laws. Lack of uniformity jeopardizes agreements between carriers of different modes, distorts the information about the various available transportation alternatives and complicates administrative and court proceedings. Where regulation is as meticulous as in the fields of transportation law, uniformity becomes a primary need. While deregulatory statutes have reduced agency powers, they have also contributed to a further increase in disparity of modal rules affecting the common problems.

Future legislation should avoid the errors of the past in two ways. First, legislative proposals should constantly be compared with existing regulations in other modes affecting the common problems. If one of the existing formulations serves the same purpose as the proposal, the latter should be redrafted in terms of the existing law. Legislators should ask whether a specific modal bill may be extended to other modes. Some provisions of the deregulatory statutes contain generally recognized principles and could easily be adopted by other modal laws. This would help prevent future unwarranted disparities and would preserve uniformity where it still persists. Second, positive reunification of existing modal rules should be undertaken. Apart from defining common concepts on which future modal laws could turn, a model transportation act should be drafted which would provide a basis for a future unification of the modal statutes. This second step would put into effect the legal prerequisites for the pledge of former administrations to create an integrated transportation system. A pledge such as this gave rise to the Department of Transportation fifteen years ago.[133] In many respects, this pledge is still unfulfilled.

[133] *See supra* note 1.