

## FACULTY COMMENT

*Editor's Note:* This issue of the *Journal* marks the inaugural appearance of a Faculty Comment. We hope this contribution and others will incite further debate on matters of topical interest in the transportation field among scholars and practitioners. Such Comments, however, will only reflect opinions of the authors. In our next issue, Professor Robert M. Hardaway of the University of Denver College of Law will respond to Professor Dempsey with a Faculty Comment entitled: Transportation Deregulation 1976-1984: Turning the Tide.

### Transportation Deregulation — On a Collision Course?\*

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\* Based on testimony delivered by the author before the Senate Transportation Committee of the Colorado State legislature, the Iowa Transportation Commission, and a series of papers presented during 1983 before a number of seminars and conferences, including the 9th Annual Meeting of the Shippers National Freight Claims Council, Inc., at Orlando, Florida, the Organizational Meeting of Forward America, Inc., at Little Rock, Arkansas, the 25th Annual Meeting of the National Conference of State Transportation Specialists, at Reno, Nevada, the Annual Meeting of the Interstate Carriers Conference (Refrigerated Division) of the American Trucking Associations, Inc., at Durango, Colorado, the Annual Meeting of the Iowa Motor Truck Association at Fort Dodge, Iowa, and the Annual Meeting of the Colorado Motor Carriers Association at Colorado Springs, Colorado.

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## I. INTRODUCTION

One can only observe with fascination that the transportation industry has come full circle, from its genesis in an unrestrained laissez faire economic environment, through almost a century of comprehensive governmental regulation of entry, rates and other corporate activity, and now back to the unconstrained free market. The excesses of the marketplace preceded regulation, and those excesses have reappeared under deregulation.

This article will examine where the great American transportation experiment has been, where it is, and where it appears to be going. It will begin with an analysis of the events which led our nation to establish a regime of economic regulation upon the transportation industry. It will then examine the metamorphosis toward deregulation, and evaluate the results of reducing governmental controls of entry and pricing in the aviation and motor carrier industries. These impacts fall generally into five categories: (1) economic decline of the industry; (2) diminution of safety; (3) discrimination in pricing; (4) deterioration of service; and (5) erosion of carrier liability for loss and damage. Because the rail experiment in deregulation differs in significant respects from motor and air carrier deregulation, it will be explored separately. Finally, this article will summarize and evaluate the political forces which now seek to swing the pendulum away from the grand experiment in deregulation and toward some moderate form of responsible economic regulation.

## II. THE GENESIS AND METAMORPHOSIS OF REGULATION

A civilization which does not learn from its history is doomed to repeat it. Throughout recorded history, transportation has consistently been perceived as an industry imbued with a particular public interest. Indeed, long before colonization of the American continents, the common law of England (resting upon foundations established by Roman law) treated certain sectors of the industry as "common carriers," and subjected them to an obligation to serve the public without discrimination in service or pricing.<sup>1</sup> American courts embraced this concept in its common law, and endorsed the legal creature of bailments, under which common carriers were obligated to treat goods entrusted to them with the highest degree of care.

In the United States, congressional interest in regulating transportation was stimulated by the excesses of the railroad industry in the late 19th century. Rail carriers were charging exorbitant rates in their monopoly and oligopoly markets, and predatory rates in their competitive markets. Small communities served by only a single rail line were forced to pay whatever the market would bear; for this they often received poor service, even when they were closer to destination markets than large communities.<sup>2</sup>

It was at first the state governments which attacked the abuses of the rail industry.<sup>3</sup> Such abuses included the bribery of public officials,<sup>4</sup> the

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1. See W. AUGELLO, *FREIGHT CLAIMS IN PLAIN ENGLISH* 479-496, A122-A126 (2d ed. 1982); Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 429 (1979). See also Dempsey, *Congressional Intent and Agency Discretion — Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHI. KENT L. REV. 1, 48 n.211 (1981).

2. See Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in Regulated Industries*, 65 CORNELL L. REV. 303, 313-14 (1980).

3. See W. AUGELLO, *supra* note 1, at 433-36.

4. Bribery of public officials included the efforts of the directors of the Union Pacific to confer large blocks of stock to congressmen and Vice President Schuyler Colfax. S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 730-31 (1965). In order to promote transcontinental rail interests, Collis P. Huntington effectively bought the California legislature and bribed numerous congressmen. *Id.* at 732.

Railway builders and owners, like James J. Hill, [entrepreneur of the Great Northern Railway] had the point of view of a feudal chieftain. Members of state legislatures were their vassals, to be coerced or bribed into voting "right" if persuasion would not serve. In their opinion, railroading was a private business, no more a fit subject for government regulation than a tailor's shop. They were unable to recognize any public interest distinct from their own. In many instances the despotism was benevolent; and if a few men became multimillionaires, their subjects also prospered. But Collis P. Huntington, Leland Stanford, and their associates who built the Central and controlled the Southern Pacific were indifferent to all save considerations of private gain. By distributing free passes to state representatives, paying their campaign expenses and giving "presents" to their wives, they evaded taxation as well as regulation.

These exactions and abuses were long tolerated by Americans, so imbued were they with laissez-faire doctrine, so proud of progress, improvement, and development, and so

sale of worthless securities,<sup>5</sup> and rate and service discrimination between places and persons.<sup>6</sup> The pricing irregularities were perhaps the most sig-

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averse from increasing the power of government. Thus it was not until 1887 that the federal government first attempted to regulate railroads and break up trusts.

*Id.* at 763-64.

5. The Erie Railroad competed with the New York Central at the time, and Vanderbilt wanted to control the competing line. He quietly began purchasing stock to gain control. However, the Erie was owned by Jim Fisk, Daniel Drew and Jay Gould, who got wind of the takeover attempt and began issuing watered stock. Said Fisk, "If this printing press don't break down, I'll give the old hog all he wants of Erie." Although Vanderbilt had himself issued watered stock from time to time, he was taken. Both sides bribed New York legislators and judges in the ensuing struggle over control of the Erie. As a result of such stock manipulation, the Erie was unable to pay dividends for half a century. See N. PLATT & M. DRUMMOND, *OUR NATION FROM ITS CREATION* 444-45 (1964).

Jay Gould subsequently gained control of the Union Pacific and led it to purchase the inflated stock of other rail carriers he controlled. These actions naturally injured other stock investors and the public, for the carriers found it necessary to maintain high rates in order to pay dividends on these inflated stock issues. H. BRAGDON & S. MCCUTCHEN, *HISTORY OF A FREE PEOPLE* 427 (1967).

6. The economic environment of the transportation industry in the 19th century has been described as follows:

Power railroad companies expanded rapidly, and by the latter decades of the century, they dominated the transportation of America's goods. Regional commercial and financial interests contributed to the rapidly expanding network of rail line connecting major cities.

The profit opportunities realized by rail companies in many of those market areas often attracted new railroad competitors who, from time to time, would initiate rate wars to attract traffic from the original lines. Competition of this type soon drove out profits for all carriers in the market, and this led to efforts to pool traffic or divide markets to reestablish monopoly profit levels. A dissatisfied member of such a pooling arrangement might resume a rate war to reattract traffic from other railroads serving the same points. Intermediate points served by only one railroad were captive and, therefore, did not benefit from the price-cutting activities. Accordingly, a railroad rate structure evolved in which rates were generally low, but unstable, between major points served by competing railroads (or in competition with water carriers) and high between points over which shippers had no alternate transportation. One side effect of this rate structure was the accelerated construction of branchlines to very small markets, since traffic that originated at those points did not need to be included in the pooling arrangement.

To complicate matters further, railroads found that by providing rebates, or kickbacks, to selected customers, they could also capture business from competing companies. These practices resulted in different shippers paying varying prices for the same service.

Thus, the transportation market of the late 19th century left almost everyone dissatisfied. The railroads tried to avoid the constant rate wars, rebates to favored shippers, or low rates. Farmers wanted lower rates and protection against discriminatory rate practices. Shippers in competitive markets wanted greater rate stability and assurances that they would not be placed at a competitive disadvantage relative to those shipping the same product from the same or other origins.

DEP'T OF TRANSPORTATION, *A PROSPECTUS FOR CHANGE IN THE FREIGHT RAILROAD INDUSTRY* 115-118 (1978) [hereinafter cited as *PROSPECTUS*].

One former ICC Commissioner has succinctly summarized the market abuses which led government to regulate the rail industry:

Turning to the 19th century, we find widespread rail abuses which led to the creation of the present system of rate regulation. The post Civil War railroad expansion was a period characterized by instability of rates, discriminations, destructive competition, and rebates and passes. The practice of granting passes consisted of nothing more than allowing certain shippers the privilege of riding free — a privilege which came to be

nificant in convincing Congress of the need to regulate this industry. Preferred shippers enjoyed special rates, underbilling, and rebates.<sup>7</sup> Although cities served by several rail carriers enjoyed a generous level of competition and relatively low rates, those which were only served by a single rail carrier paid comparatively high rates, even when they were closer to destination.<sup>8</sup>

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looked upon by every large shipper as almost a vested right. A rebate was a portion of the transportation charge which a carrier would secretly refund, particularly in order to secure the traffic of a certain shipper. This not only discriminated against the other carriers in competition for the same traffic, but had the effect, in many cases, of placing the shipper's competitors at a distinct disadvantage. Because the larger carriers could offer larger rebates, and because the larger shippers could offer more incentives to induce rebates, both the small carriers and the small shippers suffered while business became more concentrated.

Rate cutting played havoc with shippers and carriers alike, in localities where rail competition still existed. Rates were often made secretly or subject to change without notice, with the result that ordinary contracts between shippers and receivers became a risky undertaking. Discriminatory rates favored one locality and worked hardships to another; individual shippers were favored at the expense of their rivals.

Brewer, *Regulation — The Balance Point*, 1 PEPPERDINE L. REV. 355, 365-66 (1974) (citations and quotations omitted).

7. Examples of rail carrier abuses of their monopoly position included the following:

[I]t cost shippers more to send certain goods from Poughkeepsie, New York, to New York City, where there was no choice but the New York Central Railroad, than all the way from Chicago, where the Pennsylvania and Erie railroads competed with it for traffic. The New York Central also charged higher rates in winter, when the Erie Canal was frozen, than in summer, when it was open. Sometimes competing lines kept up rates artificially by a practice known as pooling, whereby companies made agreements to fix rates and divide the profits according to a prearranged formula. Still another abuse was the practice of favoring big shippers over small by granting rebates.

H. BRAGDON & S. MCCUTCHEN, *HISTORY OF A FREE PEOPLE* 427 (1967).

One of Standard Oil's principal weapons was the rebate (a discount on railroad charges). In 1872 the company made a secret agreement with the railroads running out of Cleveland by which the rates on its products would be from 25% to 50% below those charged other companies. In order to see that the railroads were not tempted by higher rates into carrying its competitors' oil, Standard Oil had the railroads pay it a "drawback" on every barrel of competitors' oil shipped. Standard Oil was also furnished with the waybills telling the destination of competitors' oil. . . .

This agreement gave Standard Oil such an advantage over all other Cleveland refineries that within three months all but five of them were forced to sell out. Once in control of oil refining in Cleveland, Standard Oil moved rapidly toward a national monopoly. It did this by forming an alliance of the strongest companies and ablest men in the oil business, and by gaining control of the transportation of oil.

*Id.* at 391-92.

8. Rail rates vacillated wildly prior to regulation.

The years of explosive building were also years of chaotic rates. While shipping costs on balance decreased during the eighties, it often took a very discerning eye to recognize the long-range benefits. What the farmer and local merchant did see was an exceptionally erratic rate pattern, now up, now down, seeming to follow no logic beyond the caprice of a distant magnate. As a matter of course railroad executives compensated for a low return on competitive through traffic by adjusting their charges at all noncompetitive points. Sometimes month by month, almost always without notice, townsmen received insulting reminders of their utter helplessness before the fiat of an unknown czar. The railroads, in the cautious phraseology of the first Interstate Commerce Commission, had "determined at pleasure what should be the terms of their contractual relations with others . . . , [terms] which intimately concerned the commercial, industrial and social life

As a result, transportation prices were frequently higher on a shorter haul than those on a longer haul on the same line in the same direction.

An example of such excessive competition was that practiced between the Erie and the New York Central railroads on traffic between Chicago and New York. After a series of rate reductions which lowered the price of shipping cattle to less than \$1.00 per car, Jim Fisk (President of the Erie), purchased all the cattle available and shipped them aboard the New York Central.<sup>9</sup> Discrimination by railroads between large and small shippers also prompted Congress to promulgate legislation in 1887 creating the nation's first independent regulatory commission, the Interstate Commerce Commission (ICC).<sup>10</sup>

By the 1930's, motor carriers had become a major mode of freight transportation. During the Great Depression, cutthroat competitive practices became so excessive that the industry suffered severe economic losses; highway safety was impaired; service became undependable; and rate wars were rampant.<sup>11</sup> Congress added motor carriers to the federal regulatory scheme in 1935.

Among the additional reasons which convinced Congress to enact legislation in this field were the need to stabilize economic conditions in the motor carrier industry, and to eliminate cutthroat competition. During the Great Depression there was an oversupply of transportation facilities and intensive competition among truckers. Such competition was depressing freight rates excessively and causing an alarming level of bankruptcies. It was feared that continuation of such unrestrained market forces might well lead to an eventual loss of service and/or higher prices for small shippers and small communities, while the surviving carriers concentrated on high-revenue "cream" traffic.<sup>12</sup>

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of the people." Far more than a decade's averages, that feeling of impotence set the townsman's view of his enemy.

R. WIEBE, *THE SEARCH FOR ORDER* 48 (1967).

9. A former Congressman summarized the high level of price competition which existed between carriers serving common points as follows:

Rate wars became rampant, each carrier trying to underbid the other with little regard for cost considerations. Much traffic was carried at a loss in the hope that the fierce competition would drive the other carriers out of the business leaving the entire field to the victor, who could then make its own terms with the shipper.

Thus, it was reported that in the late 1860's, cattle were moved from Buffalo to New York City for \$1.00 per car. . . . It has even been reported that in the late 1870's cattle were carried free of charge from Chicago to Pittsburgh and for \$5.00 per car from Chicago to New York.

Harris, *Introduction*, 31 *GEO. WASH. L. REV.* 1 (1962). See M. FAIR & J. GUANDOLO, *TRANSPORTATION REGULATION* 4 (8th ed. 1979).

10. See W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 16 (7th ed. 1979).

11. O'Neal, *Price Competition and the Role of Rate Bureaus in the Motor Carrier Industry*, 10 *TRANSP. L.J.* 309, 316 (1978).

12. See Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 *TRANSP. L.J.* 91 (1976). See Baker & Greene, Jr., *Commercial Zones and Terminal*

Congress added airlines to the regulatory scheme only three years later with the establishment of another independent federal regulatory agency, today's Civil Aeronautics Board (CAB). This legislation was promulgated for many of the same reasons which led Congress to enact the Motor Carrier Act of 1935, including the desire to avoid the deleterious consequences of cutthroat and excessive competition, and thereby enhance economic stability, safety, and the sound growth and development of this young industry.<sup>13</sup> Further, the CAB was given jurisdiction over the interstate airline industry in order to relieve its perilous economic condition and ensure safe, dependable, nondiscriminatory air transportation between the nation's cities.

That the public has a strong interest in the provision of safe, adequate, dependable and non-discriminatory transportation is reflected in the extent to which American government today contributes to its existence beyond economic regulation — the construction of highways and canals, the distribution of mail, and the provision of urban mass transportation and intercity rail passenger service. If there is no public interest in transportation, should not these contributions of government be left to the free market? One suspects that the nation's arteries would become clogged in chaos if the marketplace were to dictate who would build highways and deliver the mail, and who (if anyone) would shuttle passengers between their homes and work, and at what price. A nation's economy cannot grow and prosper without a healthy and vibrant transportation system to serve it. To say that the marketplace can satisfy all the needs of a diverse nation is to ignore the existence of a strong and unique public interest in assuring the provision of safe, adequate, dependable and non-discriminatory transportation to its citizens. Nothing is so stagnant as a commodity that cannot move from its point of manufacture to its market, at a just and reasonable price, within a reasonable time, and within reasonable limits of safety.

### III. THE BENEFITS OF REGULATION

Regulation brought to the transportation industry the stability essential to its growth and prosperity, thereby enabling the nation to enjoy a high level of safe and dependable service at reasonable rates, without discrimi-

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*Areas: History, Development, Expansion, Deregulation*, 10 *TRANSP. L.J.* 171 (1978). See also *Origins*, *supra* note 1, at 506-09.

13. This author has elsewhere described, in considerable detail, the reasons prompting Congress to enact the Civil Aeronautics Act of 1938. See Dempsey, *The Rise and Fall of the Civil Aeronautics Board — Opening Wide The Floodgates of Entry*, 11 *TRANSP. L.J.* 91 (1979) [hereinafter cited as *The Rise and Fall of the Civil Aeronautics Board*]; Dempsey, *The International Rate and Route Revolution in North Atlantic Passenger Transportation*, 17 *COLUM. J. TRANSNAT'L L.* 393 (1978).

nation between shippers or communities, large or small.<sup>14</sup> Transportation enjoyed a generous level of healthy competition without concentration — an economic environment unequaled in almost all other major American industries.

Prior to deregulation, more than 16,000 regulated motor carriers and perhaps as many as 100,000 unregulated motor carriers served American shippers.<sup>15</sup> The eight largest motor carriers accounted for only 14% of the industry's total revenue. In contrast, the eight largest steel manufacturers controlled 65% of that industry's revenue; the eight largest cigarette manufacturers were responsible for 100% of cigarettes inhaled by Americans; and the four largest automobile manufacturers accounted for 97% of that industry's revenues. In stark contrast, the annual gross revenues of 80% of regulated trucking companies was less than \$50,000.<sup>16</sup> Under regulation, more than forty motor carriers competed in the Minneapolis-Chicago market, and more than seventy carriers "fought it out" in the New York-Boston market.<sup>17</sup> Only two American industries enjoyed less concentration than did the motor carrier industry — miscellaneous machinery, and feminine wearing apparel.<sup>18</sup>

A former ICC Chairman has summarized the benefits of economic regulation as follows:

[Transportation] regulation provides a basis for determining and assuring minimum levels of service to all parts of the country at a reasonable rate; even if the demand for trucking services in small towns or intercity areas, or by small shippers, would not justify the same level of service at the same level of rates. By so doing, regulation promotes the economic development of less populated areas. Regulation, by preventing unjust discrimination, can prevent large ship-

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14. Professor Wagner has pointed out that:

Regulation brings with it a certain stability in achievement of transportation objectives with little discrimination among the various customers (shippers), individual carriers, and basic geographic areas; and rates are kept within reasonable limits.

Regulation affords opportunity to gain rate equity among various shipper groups in different geographical areas and between commodities. And discrimination is lessened.

Certain shippers are forced to employ a limited number of carriers. Such "captured" shippers are potential victims of price gouging if regulations are removed. Regulation offers protection from being charged unreasonable rates and builds confidence in knowledge of the applicable rates. Without regulation, no shipper is certain of transportation costs, thereby creating confusion in both traffic and accounting departments. Carrier selection decisions are also more difficult.

Wagner, *Exit of Entry Controls for Motor Common Carriers: Rationale Reassessment*, 50 ICC PRAC. J. 163, 172-73 (1983).

15. ICC ANN. REP. 99-100 (1980).

16. Kilpatrick, *Facts Can Shift the Gears on Trucking Deregulation*, Wash. Star, Nov. 16, 1980, at A-26.

17. Prior, *Trucking Deregulation — A Detour to Disaster*, N.J. Bus., Aug. 1979, at 19-23.

18. SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, REPORT ON MOTOR CARRIER REFORM ACT OF 1980, S. REP. NO. 641, 96th Cong., 2d Sess. 103 (1980) (statement of Bennett Whitlock) [hereinafter cited as SENATE REPORT].

pers and large carriers from exercising their market power to compel preferential treatment, where that treatment is not justified by lower costs. The regulatory role adds a measure of stability to the industry by providing a forum for the discussion of changes. Also, it can operate to reduce concentration in the industry by affording a measure of protection to smaller carriers.

Those are significant virtues and they can be realized only if the Government plays a role in allocating economic resources through the regulatory process.<sup>19</sup>

In essence, economic regulation of transportation sought to insure the protection of public interest values which might not find a high priority among businesses operating in a free market:<sup>20</sup> (a) the provision of an adequate

19. *Id.* at 80 (statement of A. Daniel O'Neal).

This country, prior to the movement for deregulation, possessed an excellent transportation system, envied throughout the world. It was subject to controls which afforded the public with responsive transportation at reasonable, sensible rates. During the 30 years I have been involved in transportation, there has never come to my attention an instance when a shipper of general freight could not obtain service for its traffic. Rates were fair and, generally, nondiscriminatory and nonpreferential, and shippers could readily determine what their competitors were being charged. Carriers, under this system, were permitted reasonable profits, sufficient earnings to afford equipment replacement programs and to obtain efficient vehicles, and the costs of this transportation, historically, were at levels below that of the inflation experienced in our national economy.

D. Baker, *Deregulation: Where We Were; Where We Are; Where We're Going* (May 23, 1983) (unpublished address before the Western Traffic Conference, Monterey, Cal.).

20. The free market model depends ultimately on the assumption that the free market will best satisfy public values through the instrumentality of the invisible hand. Yet the evidence is overwhelming that public values and the goals of firms diverge sharply . . . . [T]he enormous volume of fraud that the F.T.C. and various federal, state, and local bodies have uncovered points to the inescapable conclusion that when profits and sales goals conflict with public values, the latter must yield in business calculations. . . . [P]rofits and growth are the supreme values for corporations. If firms' discretion were further enlarged through the operation of the freemarket principle, we might expect that in some areas their derelictions would expand correspondingly, even if some market distortions attributable to regulation disappeared.

A. STONE, *ECONOMIC REGULATION AND THE PUBLIC INTEREST* 267-68 (1977).

[T]he ballot of the market place does not provide to man an adequate means of protecting and promoting his interests. . . . [I]n spite of the multitude of individual ballots, continuously cast, there are grave limitations on the capacity of the economic vote:

1. It cannot provide many common services desired by all or by significant groups.
2. It cannot correct abuses and injustices in the operation of the economic system.
3. It cannot deal successfully with the interrelationships and the interdependencies within the economy.
4. Money is the usual means of economic balloting and the lack of it deprives many of the ability to vote.

. . . . Man has turned to politics and to creation of the administrative state because his ballot in the market place did not satisfy all of his interests.

C. McGowan, *Address to the Association of American Law Schools* (1979), *reprinted in* W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 24-25 (7th ed. 1979).

The existing regulatory system provides for the allocation of resources in the motor carrier industry, not only on the basis of market forces, but also in an attempt to secure certain social objectives. The marketplace allocates resources based on dollar votes cast by consumers in the marketplace. A regulatory system will allocate resources in part

level of service at reasonable rates throughout the nation; (b) the prevention of price or service discrimination between communities or shippers, large or small; (c) the establishment of economic and service stability for the industry and the public it serves, and (d) the reduction of carrier concentration, and concomitantly, the protection of smaller competitors.<sup>21</sup> Regulation conferred upon common carriers both a benefit and a burden. It coupled the opportunity to serve with an obligation to serve, at rates not higher than those deemed by government to be just and reasonable, non-

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based on real votes cast by consumers in the legislative and political process. The marketplace will, theoretically, produce the most efficient economic system. But economic benefits are not necessarily the same as social benefits. . . .

Motor carrier regulation provides a basis for determining and assuring "minimum levels" of service to all parts of the country at a "reasonable rate," even if the demand for trucking service in small towns or inner city areas would justify the same level of service at the same level of rates. By so doing, regulation promotes the economic development of less populated areas. Regulation, by preventing "unjust discrimination," can prevent large shippers and large carriers from exercising their market power to compel preferential treatment, where that treatment is not justified by lower costs. A regulatory role adds a measure of stability to the industry by providing a forum for the discussion of changes by all affected parties. It can operate to reduce concentration in the industry, by affording a measure of protection to smaller carriers.

Those are significant virtues, and they can be realized only if the government plays a role in allocating economic resources through the regulatory process.

*Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 56 (1979) (testimony of ICC Chairman A. Daniel O'Neal).

In their book, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE*, Susan and Mark Tolchin have written:

The goal is not a plethora of regulations; quantity does not guarantee quality. The goal is government protection against abuses that threaten our health, safety and lives. Without a shift to constructive policy making in the regulatory arena, the rush to deregulate is a high-risk gamble for the politicians who have championed its cause. It is a theory without a vision, without humanity and without conscience — a false panacea that will create more problems than it cures — and it should finally be recognized as such.

For regulation is the connective tissue of a civilized society. As technological and scientific advances lead us into unknown worlds with unimaginable dangers, society needs more protection, not less. This means more government regulation, intelligently crafted, skillfully managed and sensitively enforced. It means a new appreciation of government's role, born of a new sophistication in public attitudes.

*For the Record*, Wash. Post, Oct. 19, 1983, at A26.

21. The Constitution evidences the drafters' strong belief that there was a need to encourage and regulate commerce in order to ensure an unrestricted flow of essential goods and services. The transportation industry's essential role in the development of commerce and industry was an important reason for its early regulation. Under the regulatory scheme of the Interstate Commerce Act, protection of the public interest has been the dominant focus of policy development. That Congress deemed it necessary to regulate the transportation industry manifested a belief that competition alone would not adequately serve that public interest. Congress also believed that eliminating the discrimination in transportation prices and services, which had stifled competition among communities and shippers, would enhance competition in the remainder of the economy.

Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of this Endangered Species*, 32 Am. U.L. Rev. 335, 369 (1983) (citations omitted).

discriminatory and nonpreferential.<sup>22</sup> It did this by creating a marketplace environment characterized by a healthy level of competition between a large number and wide variety of safe, efficient and dependable common carriers, who bore a responsibility to serve the public equitably. It was by no means a perfect system. Among its principal faults were a higher level of service competition than might exist without regulation, some inefficiencies in terms of empty backhauls, and some measure of regulatory lag (*i.e.*, unnecessary time consumed as a result of bureaucratic lethargy).<sup>23</sup> Nevertheless, by the mid-1970's the Interstate Commerce Commission had taken important steps to reduce these inefficiencies;<sup>24</sup> and the Department of Transportation began to characterize it as "the finest transportation system in the world . . . [one which] moves more people and more goods usually at less cost and . . . with greater ease than any other nation or group of nations."<sup>25</sup>

#### IV. THE RISE OF DEREGULATION AND DARWINIST ECONOMICS

Deregulation of transportation formally began in the late 1970's with President Jimmy Carter's appointment of economist Alfred Kahn to the position of Chairman of the Civil Aeronautics Board.<sup>26</sup> As CAB Chairman, Kahn began interpreting the Federal Aviation Act liberally, diminishing entry barriers and encouraging vigorous pricing competition.<sup>27</sup> Shortly thereafter, President Carter appointed Kahn's colleague, economist Darius Gaskins, to be Chairman of the Interstate Commerce Commission. Legislation solidified the deregulatory momentum in the airline industry. With the strong support of President Carter and Senator Ted Kennedy, Congress

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22. See Ferris, *The Role of the Common Carrier*, in G. DAVIS, *TRANSPORTATION REGULATION: A PRAGMATIC ASSESSMENT* 12-16 (1976).

23. See Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 WAKE FOREST L. REV. 729, 771-72 (1977).

24. *Id.* at 744-53. Dempsey, *Erosion of the Regulatory Process in Transportation — The Winds of Change*, 47 ICC PRAC. J. 303, 313-15 (1980).

25. SENATE REPORT, *supra* note 18, at 80.

26. Actually, the political momentum for transportation deregulation began in the Ford Administration several years before. See P. MACAVOY & J. SNOW, *REGULATION OF PASSENGER FARES AND COMPETITION AMONG THE AIRLINES* (1977). Moreover, Senator Edward Kennedy, who chaired the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, initiated the effort in the U.S. Senate by holding widely publicized hearings on airline deregulation during 1976. See *Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 3 (1975). See generally Edles, *The Strategy for Regulatory Change*, 49 ICC PRAC. J. 626, 627-30 (1982). Another catalyst for deregulation was Ralph Nader's study group's critical report on the ICC, R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION* (1970).

27. See *The Rise and Fall of the Civil Aeronautics Board*, *supra* note 13.

promulgated the Air Cargo Deregulation Act of 1977,<sup>28</sup> and the Airline Deregulation Act of 1978.<sup>29</sup> Motor carrier regulation was amended two years later, with the enactment of the Motor Carrier Act of 1980.<sup>30</sup> Finally, the regulatory regime for railroads was further liberalized in 1980 with the promulgation of the Staggers Rail Act of 1980.<sup>31</sup>

28. Pub. L. No. 95-163, 91 Stat. 1278.

29. Pub. L. No. 95-504, 92 Stat. 1705. For a succinct review of the role of Senator Edward Kennedy and his staff in promoting deregulation of the airline industry, see Clark, Jr., *Some Lessons From Airline Deregulation*, Wall St. J., Nov. 22, 1983, at 35.

Columnist Carl Rowan noted that airline deregulation enjoyed widespread political support at the time such legislation was promulgated:

Note clearly that the chaos of airline "deregulation" is a bipartisan folly. In 1978, the Senate Republicans voted for it 31-0 and Senate Democrats approved it 49-9. In the House, Republicans, voted 118-3 and Democrats 245-5 for a "free enterprise" air travel system.

Rowan, *We Goofed — Let's Regulate Airlines Again*, Chi. Sun-Times, Oct. 10, 1983, at A25.

30. Pub. L. No. 96-296, 94 Stat. 793. Additional motor carrier legislation has been subsequently promulgated — the Household Goods Transportation Act of 1980, and the Bus Regulatory Reform Act of 1982.

31. Pub. L. No. 96-448, 94 Stat. 1895. Recent federal legislation has also limited the jurisdiction of state governments over intrastate transportation.

The Transportation Act of 1920 first gave the ICC authority to raise intrastate rates that were so low as to constitute a burden on interstate commerce. The Supreme Court ruled in 1958 that an intrastate rate could not be raised by ICC simply because by itself it was not compensatory. Rather, the entire structure of intrastate rates had to be shown to be inadequate before the ICC could adjust any one rate. The Transportation Act of 1953 reversed that decision. The Act directed the ICC not to consider the totality of intrastate operations in evaluating individual intrastate rates. Further, it permitted the ICC to institute an investigation of an intrastate rate whether or not the rate was considered by a State authority.

The 4R Act modifies the authority of the ICC to adjust intrastate rates in two respects. First, the 4R Act requires a railroad company to file a request for a rate increase with the appropriate State agency, and the agency is given 120 days to decide the matter before it could be considered by the ICC. Second, the ICC is, after that time, empowered to raise an intrastate rate to the level charged on similar traffic moving in interstate or foreign commerce. This section assures that if a railroad company cannot raise intrastate rates to interstate levels through the appropriate State agency, the ICC will be able to make the adjustment without undue delay.

PROSPECTUS, *supra* note 6, at 124.

Under the Staggers Rail Act of 1980, a state may exercise jurisdiction over intrastate rail transportation, 49 U.S.C. § 10501(b)(1) (Supp. V 1981) only if it submits the standards and procedures it employs in exercising such jurisdiction to the ICC, *id.* § 10501(b)(2), and the ICC certifies such standards and procedures as being consistent with those employed by the ICC, *id.* § 10501(b)(3). Such certification shall last five years, *id.* § 10501(b)(4). In adding this provision to the Staggers Act, it was the intent of Congress "to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals." H.R. REP. No. 1430, 96th Cong., 2d Sess. 106, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4110, 4138.

The Bus Regulatory Reform Act of 1982 provides that intrastate passenger fares of interstate carriers may not be restricted by state law or regulation. Additionally, the ICC is given jurisdiction to determine that an intrastate rate for service over an interstate route is predatory, and to prescribe the applicable rate.

Under the new legislation, an intrastate rate is presumed to constitute an undue burden on

Deregulation was portrayed as offering to Americans the best of all possible worlds. Barry Bosworth told us it would save consumers some \$8 billion, a figure subsequently endorsed by Messrs. Kahn and Kennedy.<sup>32</sup> It was to give us a healthier, happier, more efficient industry — one which would provide the public with the wide range of price and service options dictated by consumer demand.<sup>33</sup> It would reduce meddlesome governmental intervention in the marketplace, and eliminate regulatory lag and empty backhauls.<sup>34</sup> Many of the deregulatory zealots must have seen themselves as high priests of economic truth, for they could envision no acceptable religious order than one of *laissez faire*. To arguments that many carriers would go bankrupt, they responded with platitudes of Economic Darwinism: "the strong and efficient would survive." To arguments that small and remote shippers and communities would receive poorer but more expensive service, they told us that "this was the way the invisible hand of the marketplace worked." Its proponents astutely exploited the popularity of the appropriate buzz words — the *free market*, *less government*, and *competition*.<sup>35</sup> Deregulation began to sound as beautiful as "motherhood, apple pie and Chevrolet."

Unfortunately, "[g]iving up government will require us to resubmit to the evils we had decided to prevent."<sup>36</sup>

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interstate commerce if it (a) reflects a general increase less than the most recent general increase on interstate traffic, (b) is lower than the comparable interstate rate, or (c) fails to produce revenues exceeding the variable costs of providing the service. States must act within 120 days on the intrastate rate proposals of interstate carriers. Increase proposals which are denied by a state may be appealed directly to the ICC, which has 60 days to act.

The Airline Deregulation Act of 1978 preempted all state jurisdiction over air carrier economic regulation, and vested such authority in the Civil Aeronautics board. Hence, the states may no longer exercise jurisdiction over air passenger transportation.

32. *Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 359, 374-75 (testimony of Sen. Edward Kennedy). Some contended that unnecessary governmental regulation of transportation was costing the American public \$16 billion annually. *Id.* at 425 (testimony of Rep. Millicent Fenwick).

33. See A. FRIEDLAENDER, *THE DILEMMA OF FREIGHT TRANSPORT REGULATION* 164 (1969).

34. See Wilson, *The Goals of Transportation Policy*, in *THE FUTURE OF AMERICAN TRANSPORTATION* 23 (E. Williams, Jr., ed. 1971).

35. Former ICC Chairman O'Neal noted that deregulation is a "buzz word, the mere mention of which causes brows to furrow, minds to cloud, and lips to quiver." Anderson, *The Motor Carrier Authorities Game*, 47 *ICC PRAC. J.* 22, 23 (1979).

The deregulation effort was truly bipartisan, enlisting the all-out support of such diverse thinkers as Ralph Nader and Milton Friedman, Senator Edward Kennedy and President Gerald Ford. Liberals had climbed aboard the deregulation bandwagon, because they support anything that vaguely seems to favor small over big companies, and conservatives get behind any and all forms of deregulation.

Thayer, *Airline Regulation: The Case for a Public Utility Approach*, 18 *LOGISTICS & TRANSP. REV.* 211 (1982).

36. W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 8 (7th ed. 1979).

## V. THE IMPACT OF DEREGULATION IN AIR AND MOTOR TRANSPORTATION

## A. ECONOMIC DECLINE

Since airline deregulation preceded motor carrier deregulation, let us first examine the airline industry. By 1980, as deregulation began to run its course, airlines broke new economic loss barriers. That year, the airline industry suffered record losses of \$280 million.<sup>37</sup> In 1981, the twelve largest air carriers alone surpassed this threshold by threefold, losing \$641 million.<sup>38</sup> Worldwide industry losses for 1982 were \$900 million,<sup>39</sup> despite the fact that the industry carried 7 million more passengers than it did the preceding year.<sup>40</sup> Losses for the first half of 1983 exceeded half a billion dollars.<sup>41</sup> If you add that to the burden of expenditures in interest payments

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Transportation people, like myself, who are old enough to remember the evils of the free market place as applied to transportation, can see . . . the same ugly pattern begin to develop. Rate wars which, the theorists say, are reducing costs to the consumer, are crumbling the very foundation of our common carrier system. It is sad that the theorists look upon this as a benefit to the consumer, because in the end consumer costs will be painfully higher.

Letter from N. Thomas Harris to Paul S. Dempsey (May 4, 1983).

Historically, economic regulation has been promulgated for the protection of industry. Certain industries deemed to provide essential services have been shielded from the forces of competition. This was done to ensure their economic survival. Without regulatory protection, destructive competition arising out of unique market conditions would have ruined the industry. With the recent interest in deregulation generally, the lessons of the past should be remembered.

Note, *The Staggers Rail Act of 1980: Authority to Compete With Ability to Compete*, 12 *TRANSP. L.J.* 301, 322 (1982).

37. Evans, *Deregulation of Airlines Was Hailed as Blessing, Later Cursed as Harmful*, *Denver Post*, June 22, 1980, at 41.

38. *Airlines*, *FORBES*, Jan. 5, 1981, at 144; Frank, *Airlines*, *FORBES*, Jan. 4, 1982, at 197; Curley, *Decontrol of Airlines Shifts Pricing From a Cost to a Competitive Basis*, *Wall St. J.*, Dec. 4, 1981, at 37; *The Worst Year for U.S. Airlines*, *TIME*, Feb. 22, 1982, at 46; Davis, *The Great Airline Disaster*, *Denver Post*, Feb. 7, 1982; Cuff, *Major U.S. Airlines Buffeted by Fierce Headwinds*, *Denver Post*, May 15, 1982, at 40, col. 1; *Delta Air, TWA Quarterly Losses Are Worst Ever*, *Wall St. J.*, Apr. 23, 1982, at 2; *Western Air Report Gloomy*, *N.Y. Times*, Apr. 2, 1982, at 33; *Fasten Seat Belts*, *NEWSWEEK*, Nov. 5, 1979, at 89. The five largest air carriers lost almost \$790 million during 1981. Holsendolph, *Low-Cost Airline Now Seeks Fare Curb It Once Opposed*, *N.Y. Times*, Mar. 10, 1982, at 1.

39. See *Airlines Lose \$241 Million*, *Denver Post*, Apr. 28, 1983, at 1E, col. 5; *Frontier Shows Wounds From Cutthroat Fares*, *Denver Post*, Apr. 29, 1983, at 1E, col. 5; Meyer, *Searching for a Better Way*, *TWA Skyliner*, Jan. 31, 1983, at 8.

Domestic airline industry losses during this period were as follows:

In 1980 the airline industry suffered its most severe losses in the history of domestic aviation — an astonishing \$280 million. The following year domestic carriers surpassed that record by more than 60%, with losses of \$454.8 million. In 1982 domestic airline losses were an astounding \$733.4 million.

Dempsey, *Affordability, Safety of Airlines May Suffer*, *L.A. Times*, Oct. 11, 1983, at 7.

40. *More Riders, Less Money for US Airlines in 1982*, *J. of Com.*, June 17, 1983, at A2.

41. *Frontier Shows Wounds from Cutthroat Fares*, *Denver Post*, Apr. 29, 1983, at 1E, col. 5; *Airline Profits Are Still On Standby*, *Bus. Wk.*, May 16, 1983, at 35. Although the airline industry enjoyed a 13.2 percent gain in traffic in March, the increase had little positive impact on profitability

on debt, the airline industry's revenues fell more than two billion dollars short of breakeven during 1982. In fact, 1982's airline revenues represented the first year-to-year decline in the industry's history. For more than three years, the industry has suffered operating losses of more than a million dollars a day, or nearly two billion dollars overall.<sup>42</sup> Today, the industry's debt has ballooned to seventy percent of invested capital.<sup>43</sup>

Air New England, Braniff, Continental, El Al, Laker and sixteen other air carriers have entered various stages of bankruptcy since the promulgation of the Airline Deregulation Act of 1978.<sup>44</sup> Carriers such as Air Florida,

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due to the large number of discount fares being offered. As discounts are dropped, industry revenues may grow. Salpukas, *Traffic Is Building at Airlines*, N.Y. Times, July 7, 1983, at D4. However, some analysts assert the contrary. Alfred Norling, an analyst with Kidder, Peabody, recently said:

I don't see the period of intensive competition lessening . . . . The airline industry will probably suffer from disequilibrium for some time, and I see a turbulent, chaotic, unstable situation affecting the strong carriers as well as the weak ones. To project the thesis of a stable industry, one would have to assume the lessening of competition. And that has to come about by attrition — bankruptcy.

Martindale, *The Economy Gets An OK for Takeoff*, OAG FREQUENT FLYER, July 1983, at 38, 39.

42. *Airlines Move to Straighten Out Their Fares*, U.S. NEWS & WORLD REP., May 16, 1983, at 49. Each upward or downward movement of a point in the prime rate represents \$30 million to the industry. See Andrews, *Stop the Air War — We Want to Get Off*, Wash. Post, Apr. 16, 1983, at A26. The Civil Aeronautics Board reported that for the year ending September 30, 1982, our nation's airlines enjoyed a net aggregate loss, after non-recurring items, of \$827 million. Genoese, *The Damage Done by Airline Deregulation*, N.Y. Times, Nov. 3, 1983, at A30.

43. *On a Wing And a Prospectus*, Bus. Wk., Feb. 14, 1983, at 124. Some carriers exceed this industry average significantly. For example, Eastern Airlines lost almost \$160 million between 1979 and 1982, and its debt has grown to 83% of total capitalization. *Why Eastern Is On A Short String*, Bus. Wk., Apr. 11, 1983, at 116.

"Suicide fare wars have bled the industry to a point in which Standard & Poor's now rates airlines as the riskiest investment category in the nation." Duffy, *Deregulation Affects Safety*, Airport Press, Aug. 1983, at 21. Similarly, Frederick W. Bradley, senior vice president of Citibank, expressed these concerns:

The business risk of operating an airline and, therefore, financing an airline, has increased with the U.S. industry's deregulation.

Assuming an economic recovery with modest growth in air traffic, it still appears that the combination of excess capacity and the deregulatory environment that encourages new entrants and breeds price competition will inhibit the ability of some airlines to operate profitably.

*Conference Foresees Airline Struggles*, Av. WEEK & SPACE TECH., Sept. 26, 1983, at 44. Edmond S. Greenslet, vice president of Merrill Lynch, Pierce, Fenner & Smith, agreed with Bradley, anticipating that the airline industry will remain unstable for years. *Id.*

44. *The Worst Year for U.S. Airlines*, TIME, Feb 22, 1982, at 46; *The Last Roundup*, FORBES, June 7, 1982, at 62; *El Al's Anguish*, TIME, Nov. 8, 1982, at 59. Recently, Laker's liquidators instituted a \$1 billion antitrust suit against eight airlines alleging that their predatory practices contributed significantly to Laker's demise. See *Did They Gang Up On Laker?*, NEWSWEEK, Aug. 1, 1983, at 54; Taylor, *Papers in Laker Case Show Struggle Created By Cut-Rate Assault on Established Airlines*, Wall St. J., July 20, 1983, at 29; Carley, *Some Major Airlines Are Being Threatened by Low-Cost Carriers*, Wall St. J., Oct. 12, 1983, at 1; *Bitter, Deadly Dogfights*, TIME, Oct. 10, 1983, at 44; Kilpatrick, *Airline Woes*, The Annapolis Capital, Oct. 4, 1983, at 12; An-

Eastern, Pan Am, Republic, Western, and World, have from time to time been placed on the endangered species list.<sup>45</sup> During 1982, Pan Am sustained operating losses of \$700,000 a day.<sup>46</sup> Even traditionally healthy carriers like Delta are feeling the crunch, by posting its first operating losses since 1947.<sup>47</sup> A number of the nation's large air carriers would be thrown into bankruptcy if the financial institutions holding their long term debt (estimated to be \$10.1 billion for the sixteen largest airlines) demanded timely payment.<sup>48</sup> Prudent bankers, quite simply, are not interested in entering

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*other Airline Price War Is In the Making*, Bus. Wk., Oct. 3, 1983, at 46; *No Break In Turbulence*, TIME, Oct. 17, 1983, at 66; Salpukas, *A Struggle to Survive in the Air*, N.Y. Times, Oct. 2, 1983, at 1; *Airlines in Turmoil*, Bus. Wk., Oct. 10, 1983; Nordlinger, *The Turbulent Skies of Airline Deregulation*, Detroit Free Press, Oct. 10, 1983, at F-1; *Airlines in Turbulence And More to Come*, U.S. NEWS & WORLD REP., Oct. 10, 1983, at 33.

45. *Gibney, Continuing Airline Losses Predicted*, Denver Post, June 21, 1982, at 3C, col.1. See Frank, *Airlines*, FORBES, Jan. 4, 1982, at 197-98; *The U.S. Air-Fare Dogfight*, NEWSWEEK, Apr. 19, 1982, at 69; *World Airways Loss Quadrupled in Quarter to \$13.3 Million*, Wall St. J., May 24, 1982, at 37, col. 1. *Unfriendly Skies*, Wall St. J., Feb. 18, 1982, at 1; *Six Airlines: Gaining a Bit of Altitude*, Bus. Wk., Nov. 15, 1982, at 68; Dubin, *The Fear of Flying That Airlines Must Conquer*, Bus. Wk., Nov. 29, 1982, at 115; *World Airways, Creditors Discuss Recapitalization*, Wall St. J., July 6, 1983, at 12; *Eastern Air Says Banks to Restore \$400 Million Line*, Wall St. J., July 1, 1983, at 4, col. 1; *At Eastern, There's Not Much to Cheer About*, Bus. Wk., Mar. 21, 1983, at 33; *Continental Air*, N.Y. Times, July 29, 1983, at D4. For the twelve month period ending June 1983, Eastern lost \$50 million and Delta lost \$207 million. Feaver, *'We Intend to Survive,' Borman Asserts*, Wash. Post, Oct. 13, 1983, at A2. See also *Republic Plunges Deeper Into the Red*, Bus. Wk., Aug. 1, 1983, at 28; *Republic Air Posts \$43.9 Million Loss for Second Quarter*, Wall St. J., July 28, 1983, at 10, col. 6; *TWA: The Incredible Shrinking Airline*, Bus. Wk., July 25, 1983, at 86; Harris, *Western Airlines and Unions Near Accord In Shadow of Ailing Industry*, Wall St. J., Oct. 7, 1983, at 35; *A Proud Bird Loses Its Wings*, NEWSWEEK, Oct. 3, 1983, at 71; *Eastern Keeps Flying — For Now*, Wash. Post, Oct. 18, 1983, at A16. Most industry analysts appear to agree that under deregulation the nation will eventually have fewer major airlines. See Mayer, *Only the Strongest Airlines Will Survive*, Rocky Mountain News, Oct. 31, 1983, at 60; Nordlinger, *The Turbulent Skies of Airline Deregulation*, Detroit Free Press, Oct. 10, 1983, at F-1.

46. *A Gift From the Airlines*, NEWSWEEK, Dec. 13, 1982, at 108. To some extent, these losses have been offset by sales of its New York headquarters building (\$294 million), and its Intercontinental Hotel Chain (\$368 million). *The Worst Year for U.S. Airlines*, TIME, Feb. 22, 1982, at 46; Cuff, *Major U.S. Airlines Buffeted by Fierce Headwinds*, Denver Post, May 15, 1982, at 11A. During 1982 Pan American lost \$485 million — a new U.S. aviation record. The carrier's immediate cash needs have been satisfied by two public offerings of secured and unsecured notes — debentures and warrants which totaled \$250 million. *Pan Am Chief Sees Bluer Skies*, Newsday, May 11, 1983, at 37. Eastern Air Lines was recently losing \$600,000 a day. Its pilots have tentatively approved concessions in excess of \$100 million over the next two years, concessions for which they are likely to receive as much as 25% of the company's equity. "[W]ithout an end to the cut-throat competition that has devastated the airline industry, Eastern's future remains up in the air." *Eastern's Pilots Buy A Piece of the Airline*, NEWSWEEK, May 23, 1983, at 65. See *Eastern Air's Pay Plan Set for Nonunion Ranks*, Wall St. J., June 6, 1983, at 12.

47. *Airline Woes Catch Up With Delta*, Bus. Wk., Nov. 8, 1982, at 131. Delta has just suffered its first full-year deficit in 36 years. For the fiscal year ending June 30, 1983, its losses totaled \$86.7 million. *Delta Air Posts 4th Period Loss of \$25.5 Million*, Wall St. J., July 29, 1983, at 4.

48. Davis, *The Great Airline Disaster*, Denver Post, Feb. 7, 1982, at 1D.

the used aircraft business; and certainly, calling in the outstanding loans would only result in the acquisition of large fleets of jets which, in this depressed economic environment, would be worth little.<sup>49</sup> These losses have had a ripple effect on aircraft manufacturers such as Boeing, whose earnings have plunged forty-two percent,<sup>50</sup> and Lockheed, which has recently been forced to virtually abandon commercial aviation.<sup>51</sup>

One source predicts that "the number of major airlines will probably be reduced to five or six within the next five years as one or two more go into bankruptcy or merge operations with other air carriers."<sup>52</sup> Another adds that the "airline industry under deregulation is on a course where competition is being wrung out by the creation of an oligopoly of a few remaining large airlines; the public is not being served by this process."<sup>53</sup> Unemployed workers of Braniff and twelve other airlines have applied for economic relief under the special provisions of the Airline Deregulation Act of 1978, alleging that airline deregulation is the cause of widespread industry unemployment.<sup>54</sup> The CAB reports that since December of 1979 more than 40,000 full time airline employees have lost their jobs.<sup>55</sup> At least one commentator has described the promulgation of the Airline Deregulation Act of 1978 as perhaps "the worst disaster in history for the U.S. airline industry."<sup>56</sup> Another suggests that "some common-sense approach should be figured out that would prevent deregulation from becoming, in effect, a hunting license that enables established companies to pick off the competition. . . . [A]n untrammelled free market is not necessarily synonymous with the public interest."<sup>57</sup>

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49. *Braniff: First to Fall?*, Denver Post, June, 1982.

50. *The Worst Year for U.S. Airlines*, TIME, Feb. 22, 1982, at 46; Sing, *Braniff Fall Worries Boeing*, Denver Post, May 18, 1982, at 1F.

51. *Can Lockheed Fly On Defense Alone?*, Bus. Wk., Dec. 21, 1981, at 42. Declining sales have also led to the cancellation of DC-10 production. See Sing, *McDonnell Douglas Ends Production of DC 10 Jets*, Wash. Post, Aug. 4, 1983, at C5.

52. Gibney, *Continuing Airline Losses Predicted*, Denver Post, June 21, 1982, at 3C, col. 1. Braniff's Chief Executive Officer, Howard Putnam, noted:

I think within five to seven years you will have no more than five [out of a current eleven] trunk airlines. Then you will have a whole bunch of Southwest Airlines-type carriers that start out from scratch and work to keep costs in line. As decreed by the law of the jungle, only the strong will survive.

Martindale, *The Economy Gets An OK for Takeoff*, OAG FREQUENT FLYER, July 1983, at 38, 39.

53. Rowen, *Airlines: Competing to the Death*, Wash. Post, Nov. 11, 1982, at A27, col. 2. See notes 217-220 *infra*, and accompanying text.

54. Holsendolph, *Act to Help Jobless in Industry*, Denver Post, May 18, 1982, at F1.

55. Burkhardt, *Airlines, Unions Split on Decontrol Results*, J. of Com., June 16, 1983, at A2. During the first 18 months of airline deregulation almost 22,000 employees lost their jobs. CIVIL AERONAUTICS Bd., AIRLINE EMPLOYMENT SYSTEM OPERATIONS OF MAJORS AND SHORT HAUL NATIONALS, 1978-1981 (1981).

56. Davis, *The Great Airline Disaster*, Denver Post, Feb. 7, 1982, at 1D.

57. Rowen, *Airline Deregulation Comes Back to Haunt*, Wash. Post, Mar. 14, 1982, at G4, col. 4.

Since enactment of the Motor Carrier Act of 1980, several hundred motor carriers have gone bankrupt, out of business, or have otherwise discontinued operations.<sup>58</sup> Dun and Bradstreet reported that almost 400 motor carriers declared bankruptcy during 1980 alone, more than twice the number of the preceding year.<sup>59</sup> These figures represent only a small percentage of trucking companies which have actually gone out of business, for many have closed their doors without declaring formal bankruptcy.<sup>60</sup> Carriers which have gone "belly up" accounted for more than \$3.2 billion in annual revenues and 65,000 jobs.<sup>61</sup> Among the established top-100 carriers which have "bitten the dust" of insolvency are Cooper-Jarrett, Eazor Express, Gordon Transport, Hemingway Transport, Johnson Motor Lines, Jones Motor Co., Motor Freight Express, Spector-Red Ball, T.I.M.E.-D.C., and Wilson Freight Co.<sup>62</sup> Many additional carriers would likely join the ranks of the formally bankrupt were it not for well intentioned (but poorly conceived) legislation promulgated in 1980 which radically increased carrier liability for withdrawal from or termination of ERISA multiemployer pension plans.<sup>63</sup>

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58. American Trucking Ass'n., TRUCKLINE, Dec. 15, 1982, at 1.

59. Maynard, *Trucks Losing Fiscal Race*, Atlanta Const., Nov. 20, 1981.

60. *The High Toll of Quitting the Trucking Business*, NEWSWEEK, Nov. 23, 1982, at 53.

61. American Trucking Ass'n., TRUCKLINE, Dec. 15, 1982; Lewis, *Edited Account of Enforcement Conference Released by ICC*, TRAFFIC WORLD, Dec. 27, 1982, at 13. Motor carriers accounting for 16% of industry revenues have gone bankrupt since deregulation was inaugurated. Dr. Irwin H. Silberman has predicted that carriers accounting for another 28% of revenues are also candidates for bankruptcy. *Oversight Hearings on the Implementation of the Motor Carrier Act of 1980 (P.L. No. 96-296) Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 98th Cong., 1st Sess. (Sept. 21, 1983) (statement of Irwin H. Silberman). In 1976, the revenue market share of the 10 largest motor carriers was 37.9%. As deregulation was intensified, that percentage steadily grew, so that by 1982, these carriers accounted for 48.5% of industry revenues. *Id.*

62. R. Roth, *Economic and Financial Conditions of the Regulated Motor Carrier Industry 5* (unpublished monograph, 1983). Economist Irwin H. Silberman explained the causes of the shakeout: "The precarious position of the industry has developed primarily as a consequence of the interaction of deregulatory pressures (both administrative and regulatory) with the effects of the current severe economic downturn." REGULAR COMMON CARRIER CONFERENCE, TRUCKING DEREGULATION/ECONOMIC RECESSION: THE FACTS! 2 (1983).

Two large carriers have recently been added to these impressive obituaries. Maislin Transport (with annual revenues of some \$200 million) and IML Motor Freight (with revenues of \$100 million) have entered Chapter 11 proceedings. One of the major leaders of independent owner operators has predicted that an additional 25 to 50% of such carriers will likely go bankrupt if the Surface Transportation Act of 1982 is not modified. Siegel, *ICC Paves Road to Ruin for Truckers*, Wall St. J., Oct. 6, 1983, at 26. Additionally, he has suggested that we "get rid of those 'free market freaks' that remain at the ICC and get back to responsible regulation." *Id.*

63. The Employee Retirement Income Security Act was promulgated in 1974. Pub. L. No. 93-406, 88 Stat. 437 (1974). The 1980 Amendments to the Multi-Employer Pension Plans, by imposing extraordinary termination or withdrawal liability upon regulated motor carriers, have (a) effectively prevented motor carriers from leaving the industry, (b) deterred carriers from buying or selling their assets, (c) deterred carriers from relocating their industries, and (d) deterred lenders

Moreover, the number of independent truckers has dwindled from 300,000 in the late 1970's, to just 100,000 today.<sup>64</sup> Many of the nation's remaining independent truckers, who initially welcomed deregulation, are now having second thoughts, and are calling for a reintroduction of responsible regulation.<sup>65</sup>

*De facto* deregulation of the motor carrier industry began with the liberalized approach of the Interstate Commerce Commission in 1977 and 1978, when the ICC began issuing operating authority more broadly defined, from a commodity and territorial perspective, than ever before. The nation's economic recession did not begin until 1979. Yet, every leading economic indicator shows that the industry has progressively suffered virtually every year since 1977. For example, return on equity for motor carriers was cut in half from 15.27% in 1977, to 7.51% in 1981. For the first nine months of last year, it was merely 3.88%. In contrast, the return on equity for all manufacturers was 14.5% in 1977, rose to 16.45% in 1978, and

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from loaning money to motor carriers. H. Aitken, ERISA and MPPAA: The Effects of Withdrawal Liability On Motor Carriers (July 29, 1983) (address before the 16th Annual Transportation Law Institute at Copper Mountain, Colo.) For example, the sale of T.I.M.E. - D.C. to East Texas Motor Freight Line, Inc., was prevented because the former's withdrawal liability was estimated to be \$30 million. *Id.* The net effect of the 1980 amendments is that many carriers, effectively precluded from selling, buying, moving or going out of business, are cannibalizing their assets.

64. Richards, *Independent Truckers Who Hailed Deregulation Reconsider As A Rate War Rages and Taxes Rise*, Wall St. J., Mar. 31, 1983, at 50.

65. The leader of one association of such truckers noted that "[a] first, a lot of independents thought deregulation looked like the land of opportunity . . . now it looks like annihilation." *Id.* A prominent California attorney summarized the problem in these terms:

Presently, the compensation being paid to a large percentage of the owner-drivers is insufficient to permit them to properly conduct their operations or continue in business. An owner-driver's typical long line compensation today is 74 to 82 cents a loaded mile, and 50 to 60 cents for deadheading, when performed at the request of the authorized carrier. A low, but a compensation that will permit an ownerdriver to barely survive, should be about 85 to 92 cents per loaded mile for a west coast operation, and 95 cents to \$1.05 per loaded mile for a transcontinental service. To survive at the lower existing rates, an owner-driver is compelled to violate speed laws, hours of service, and driving regulations, and to cover these violations, he must keep a minimum of two log books. He cannot afford to properly maintain his equipment or suffer any downtime while so doing, for the vehicle must be operated to generate an income and he must forego necessary safety measures. Excessive highway speeds are required, such as a recent traffic violation, reported to me, of an owner-driver who received a ticket while driving his 75,000 pound loaded tractor and trailer across Nevada at a speed of 107 miles per hour. When these operators must replace an engine or a wornout vehicle, it will be their demise, for they are not receiving adequate compensation to recover replacement costs or depreciation and, in fact, are living on their depreciation. Because the equipment dealers have repossessed so many units of the owner-driver, these drivers find it is very difficult to obtain credit and must pay premium prices for the equipment they do purchase. And, if these problems do not finish off such an operator, the approximately \$2,000 per year tax increase that will be imposed upon them by the recently passed Surface Transportation Act should do it. The loss of a large percentage of these owner-operators under the present conditions is inevitable and predictable, and there will be a resulting reduction of available truckload service to the shipping public.

D. Baker, *supra* note 19, at 9-10.

fell to 13.54% in 1981 — a much less steep dive than that experienced by the motor carrier industry.<sup>66</sup> The motor carrier industry today enjoys the lowest profit margin of all major American industries, with the exception of iron and steel.<sup>67</sup> The operating ratio of motor carriers (defined as total carrier operating expenses divided by gross freight revenues) grew from 94.76% in 1977 to 98.29% in 1982.<sup>68</sup> Carrier debt has risen significantly during this period. The debt to equity ratio rose steadily until 1981, from 55% in 1977 to 77% in 1980.<sup>69</sup> Interest as a percentage of carrier income grew from 15% in 1977 to 70% for the first nine months of 1982.<sup>70</sup> Curiously, these trends parallel the issuance of operating authority by the ICC. In 1977, 16,606 common carriers held certificates of public convenience and necessity; by 1982, 24,037 carriers had been issued operating authority.<sup>71</sup> 1982 has been described as the "worst year in history for the I.C.C. regulated motor carriers. The previous low point was in 1960 when the industry achieved an operating ratio of 97.48 — approximately one point better than at present — and a profit margin of 0.83% — 66% better than at present."<sup>72</sup> The ICC reports that during 1982, net income for the nation's top-100 carriers fell 78% to \$64.3 million, and the rate of return on shareholder's equity fell to a paltry 2.9%.<sup>73</sup>

Net carrier income has fallen 42% since the promulgation of the Motor Carrier Act of 1980.<sup>74</sup> The *Atlanta Constitution* noted that the nation's "\$48 billion regulated trucking industry is in the midst of a major shakeout, the dimensions of which are unprecedented, and thus, unpredictable."<sup>75</sup> The *Wall Street Journal* reported that: "A bankruptcy epidemic is sweeping American business, and there is no letup in sight. . . . Transportation deregulation is contributing mightily to the failure rate."<sup>76</sup> *Forbes* characterized the contemporary economic demise in transportation as a "cruel restructuring."<sup>77</sup>

As was noted in *Dun's Business Review*:

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66. R. Roth, *Economic and Financial Conditions of the Regulated Motor Carrier Industry* 4 (unpublished monograph, 1983).

67. *Id.* at 2.

68. *Id.* at 3, 4.

69. In 1981, the carriers enjoyed a one-time tax write off which reduced the ratio to 60%. *Id.* at 6.

70. *Id.* at 6.

71. *Id.* at 9.

72. *Id.* at 3.

73. Interstate Commerce Comm'n, Press Release (Apr. 11, 1983).

74. Rosenak, Address Before the Motor Carrier Lawyers' Ass'n, Washington, D.C. (Jan. 8, 1983).

75. Maynard, *Trucks Losing Fiscal Race*, *Atlanta Const.*, Nov. 20, 1981.

76. Petzinger, Jr., *Business Failures Hit Post-Depression High, Tide Expected to Swell*, *Wall St. J.*, May 24, 1982, at 1.

77. Frank, *Airlines*, *FORBES*, Jan. 4, 1982, at 198.

After nearly two years of deregulation under the 1980 Motor Carrier Act, the trucking industry is in turmoil. Following the pattern set by the airlines, competition among truckers has intensified to an unprecedented degree, new carriers have been entering the business at a record rate, and fierce price wars have erupted. Heavy losses have already forced a number of trucking firms into bankruptcy—the beginning of what is expected to be a severe industry shakeout.<sup>78</sup>

Why is the industry unhealthy? Proponents of deregulation point to poor management, rising fuel prices and the recession, arguing that deregulation did not contribute appreciably to the current industry crisis.<sup>79</sup> Melvin Brenner, a former vice president for TWA and American Airlines, has responded to these allegations as follows:

1. The slide of airline earnings started at the very time that deregulation became a fact (*i.e.*, 4th quarter of 1978), and that preceded by many months the jump in fuel prices and the recession.
2. This industry previously experienced the impact of a steep jump in fuel prices plus a recession in the mid-1970s, following the Arab oil embargo. But there was not then the special element of deregulation, and the airlines came through with only a brief, limited financial setback.
3. Granting that Braniff's problem can partly be blamed on its own in-temperate over-expansion, the same charge cannot be leveled at the many other airlines which are also in deep financial trouble.

Airline economics have much in common with the traditional "public utility," for which it has long been recognized that the public is best served with some containment of normal marketplace forces. That is why regulation was adopted in the first place. That is why every other country in the world still regulates its air transport system. And that is why a Canadian parliamentary committee has just completed a review of the U.S. experience with deregulation, and concluded that Canada should not abandon regulation.<sup>80</sup>

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78. The combination of less tonnage, increased hauling capacity and lower prices has affected profits. Total net income for the 98 Class I carriers fell from \$311.6 million in 1979 to \$284.2 million in 1980. Murray, *Turmoil In Trucking*, *Dun's Bus. Rev.*, May 1982, at 75.

79. Shifrin, *Adams, Kahn Clash on Hill on Air Policy*, *Wash. Post*, Dec. 10, 1981, at D16. The Civil Aeronautics Board has argued that the principal causes of growing unemployment in the airline industry are (a) the general state of the economy, (b) fuel price increases, (c) interest expenditure increases, (d) airline income decreases, (e) fleet reequipping with more fuel efficient and larger aircraft, (f) the grounding of DC-10s, and (g) the Professional Air Traffic Controllers Organization strike in 1981. *CAB Plans Employee Reduction Hearings*, *Av. WEEK & SPACE TECH.*, May 9, 1983, at 33.

80. Brenner, *Airline Deregulation Is Clipping Carrier's Wings*, *Wall St. J.*, May 24, 1982, at 21. Professor Frederick Thayer summarized some of the problems of airline deregulation in these terms:

The advocates of deregulation, including most of the major media, pointed to discount fares as evidence of success, resolutely ignoring financial losses and extremely high fares on non-vacation routes. They even refused to acknowledge the new form of cross subsidy; to some extent, business travelers were covering the costs of tourist travelers, a cross-subsidy less justifiable than any other.

The basic problem remains as simple as ever. The airlines, whatever their initial

If indeed high fuel prices and the recession are the principal causes of the industry's woes, then certainly the current economic upswing and the degeneration of OPEC will save the day.<sup>81</sup> For every penny by which the price of aviation fuel falls, United Airlines alone saves \$14 billion.<sup>82</sup> A 10% reduction in the price of aviation fuel will save the industry a hefty \$1 billion.<sup>83</sup> But one suspects that this is only a part of the story.

The industry's principal problem is excessive rate wars.<sup>84</sup> Deregulation of entry brought a host of new entrants to many heretofore healthy markets.<sup>85</sup> By January of 1983, 49,726 new certificates for motor carrier operating authority had been granted by the ICC; this included certification

image as luxury travel for the pampered rich, are as much a public utility as a city bus company, and must be rearranged into a coordinated system which somehow abolishes head-to-head competition. Americans, unfortunately, are very slow to learn.

Thayer, *supra* note 35, at 227, 230.

Proponents of deregulation often blame the failures of deregulation on the recession and fuel prices. While this reasoning seems plausible on the surface, the facts tell a much different story.

Passenger traffic was actually up in 1982, the most severe year of the recession. But during 1982, the airline industry lost nearly \$1 billion. According to Daniel May, president and CEO of Republic Airlines, revenue passenger miles for the twelve-month period preceding October 1982 were 16 percent higher than the twelve-month period preceding the passage of the Deregulation Act. Clearly, the recession is not the only culprit.

The airline industry suffered from the fuel price increases following the Iranian Revolution and the Iran-Iraqi war. But over the two-year period from May 1981 to April 1983, the price of fuel dropped 17.2 cents, saving the industry \$1.51 billion. Unfortunately, those savings did not show up on the balance sheet of the embattled airlines; they were all sunk into debilitating fare wars.

A brief look at history shows that from 1973 to 1976, a similar four-year period with an oil price shock and a major recession, the airline industry had net income of more than \$1 billion for the four years.

Duffy, *Deregulation 5 Years Later*, OAG FREQUENT FLYER, Oct. 1983, at 54, 56.

81. See *The Humbling of OPEC*, TIME, Feb. 7, 1983, at 42.

82. *The Unrigging of Oil Prices*, NEWSWEEK, Mar. 7, 1983, at 64.

83. *Oil Price War*, U.S. NEWS & WORLD REP., Mar. 7, 1983, at 24; *Keeping 'Em Up Is Costing Less*, OAG FREQUENT FLYER, July 1983, at 29.

84. See *Deregulation Breeds an East Coast Air War*, Bus. Wk., Jan. 26, 1981, at 30; *The Worst Year for U.S. Airlines*, TIME, Feb. 22, 1982, at 46. Julius Maldutis, vice president of Salomon Brothers, predicts that airline rate wars will continue to plague the industry for three reasons: (1) new airlines' start-up costs are two-thirds lower than those of established carriers; (2) although 93 new aircraft will be delivered during 1983, old planes are generally not being retired; and (3) airline travel agents have been deregulated. *Banker Claims Air Fare Wars Will Continue*, J. of Com., May 18, 1983, at A2.

Some analysts maintain that no matter what the economy does, no matter how healthy some airlines grow, fare wars are a certainty. As long as some carriers need cash to meet interest payments and payrolls, and as long as upstarts continue to claim their niches in the marketplace, somebody will always be willing to slash prices.

Before the year is out, the stronger airlines could decide to end the bloodletting once and for all by starting fare wars designed to force weaker trunks and entrants out of the marketplace forever. That could bring about one more year of deeply discounted air travel, then a long period of the kind of "price stability" the airlines want so badly.

Martindale, *The Economy Gets An 'OK' for Takeoff*, OAG FREQUENT FLYER, July 1983, at 38.

85. Cuff, *Major U.S. Airlines Buffeted by Fierce Headwinds*, Denver Post, May 15, 1982, at 11A.

of 13,806 new carriers.<sup>86</sup> Similarly, more than thirty new air carriers have entered the airline industry.<sup>87</sup> Since transportation is an industry inherently vulnerable to overcapacity, (for an empty seat or a partially filled trailer is an instantly perishable commodity) unconstrained entry must necessarily lead to distress-sale pricing in those markets in which competition is excessive.<sup>88</sup> Thus, motor carriers filed more than 115,000 independent rate ac-

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86. Rosenak, Address Before the Motor Carrier Lawyers Ass'n, Washington, D.C. (Jan. 8, 1983); *ICC Chairman Tells Senate Panel He Favors Early Sunset of Agency*, TRAFFIC WORLD, Dec. 20, 1982, at 27, 64. The ICC has also largely expanded the ability of private carriers to engage in common carriage. See, e.g., Leasing Rules Modifications, 132 M.C.C. 927 (1982); Lease of Equipment and Drivers to Private Carriers, 132 M.C.C. 756 (1982). See Farris & Southern, *Federal Regulatory Policy Affecting Private Carrier Trucking*, 49 ICC PRAC. J. 503 (1982); Borghesani, *Motor Carrier Regulatory Reform and Its Impact on Private Carriers*, 10 TRANSP. L.J. 389 (1978). As of June 1, 1983, the ICC had certificated 25,342 carriers. This represents a 43% increase in the number of carriers holding operating authority since promulgation of the Motor Carrier Act of 1980. The Commission gave some 870 carriers nationwide authority, effectively deregulating them from an entry standpoint until the end of time. See *Oversight Hearings on the Implementation of the Motor Carrier Act of 1980* (P.L. No. 96-296) Before the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 1st Sess. (Sept. 21, 1983) (statement of George Ziglich, American Trucking Ass'n).

87. See *Upstarts In the Sky*, Bus. Wk., June 15, 1982, at 78; *Deregulation Sketches New Patterns for the Airlines*, CHRISTIAN SCI. MONITOR, Dec. 30, 1982; *Real People, Real Profits*, TIME, Apr. 4, 1983, at 62.

These new air carriers are responsible for less than five percent of market. Martindale, *Victims of History*, OAG FREQUENT FLYER, Dec. 1983, at 49, 50. Indeed, the Air Transport Association estimates that the new carriers are responsible for only 2.4 percent of the total traffic. Salpukis, *Airlines Adapt to Decontrol*, N.Y. Times, Dec. 8, 1983, at D1. Former CAB Chairman Alfred Kahn predicts that their market share will never likely exceed "5% of the total travel." Richards, *CAB's Ex-Chairman, Alfred Kahn, Looks At Airline Industry He Helped Deregulate*, Wall St. J., Oct. 4, 1983, at 35.

88. As former CAB Chairman Secor Browne has noted, the principal reason for deteriorating profits is that "although, like other unregulated industries, airlines suffer from recession and inflation, there has been destructive price competition, and overcapacity — that is, too many seats are chasing too few bottoms." Brenner, *Recontrol Air Fares*, N.Y. Times, Apr. 14, 1982, at 16. See also Rowen, *Airlines: Competing to the Death*, Wash. Post, Nov. 11, 1982, at A29.

Professor Frederick Thayer portrays the overcapacity problem under deregulation as follows:

The basic case is easily made for price and capacity regulation of public transportation systems. Suppose, for example, I wish to fly from New York to Los Angeles. Traditionally, three major airlines have offered me seats on flights scheduled in close proximity to meet peak travel demand. In Milton Friedman's already classic phrase, I was "free to choose" one of the three, thereby leaving the other two with empty seats. The 1978 U.S. policy of deregulation encouraged four additional airlines to offer service on the same route. I now have greater "freedom to choose" (seven alternatives), but the result is six empty seats. This problem is inherent to any transportation system organized to provide "head to head" competition, because the service being offered cannot be held in inventory awaiting other customers; service is destroyed by competition itself. It follows that the greater the direct airline competition, the greater the number of empty seats, the more fuel wasted in moving them about, and the higher the cost per passenger actually moved.

There is no way to deal with the empty seat problem except by limiting the capacity (flight frequency) on any single route. In principle, the problem can be minimized only by eliminating direct competition altogether. If a transportation system is to be so operated, a case can be made for public supervision of safety and prices. This is the classic outline of any industry defined as a public utility.

tions with the ICC during 1981, and more than 180,000 during 1982.<sup>89</sup> The proliferation of discount airline fares has undoubtedly driven many travel agents to seek psychiatric assistance.

### B. DECLINING SAFETY

Serious questions arise as to whether an unhealthy industry can be a safe industry.<sup>90</sup> One of the dangers of poor or nonexistent profits for an industry such as transportation is the natural tendency of management to curtail costs; among those which can be significantly diminished are maintenance costs, including mechanic's wages, spare or replacement parts, and idle vehicle time lost during inspection and maintenance.<sup>91</sup> Unsatisfactory profits in the rail industry led it to defer maintenance on equipment and trackage, leading in turn, to a repeated series of derailments, often causing loss of human life.<sup>92</sup> One of the nation's major air carriers was repeatedly

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Thayer, *supra* note 35, at 211.

Available seat miles, one measure of capacity, for example, actually increased from 425 billion in 1981 to 439 billion in 1982.

In an effort to fill those empty seats the industry resorted to heavy discounting. The number of passengers who traveled on discount fares soared from 57 percent in 1980 to 78 percent in 1982. During the first six months of this year that percentage rose to 85.

The analysts and executives agree, however, that deregulation did accelerate the trend toward discount fares. As new carriers began flying in key markets across the country, their main strategy for attracting customers was lower fares. And the result was often bitter fare wars.

Salpukis, *Airlines Adapt to Decontrol*, N.Y. Times, Dec. 8, 1983, at D1. The overcapacity in the airline industry has been studied by Merrill Lynch, which concluded that by the end of 1982, the world fleet consisted of 6,100 transports, of which 900 would not be needed if the aircraft were operated at a 65% load factor and full utilization. *Conference Foresees Airline Struggles*, Av. WEEK & SPACE TECH., Sept. 26, 1983, at 44.

89. ICC Chairman Tells Senate Panel He Favors Early Sunset of Agency, TRAFFIC WORLD, Dec. 20, 1982, at 27, 64. The ICC in Ex Parte No. MC-165 also recently exempted contract carriers from the tariff filing requirements of the Interstate Commerce Act. This decision was appealed to the D.C. Circuit Court of Appeals on June 13, 1983; as of the date of this writing, the appeal is still pending.

90. One of America's major daily newspapers discussed the issue in these terms:

[T]his is a dangerous time for the airline industry.

Airlines have been pulled apart by deregulation and cut-throat fares, by high fuel costs and low passenger loads. The new pressures have punished the carriers, which lost more than \$1 billion in the last three years. And they are still hampered by an unfinished air traffic control system, because half of its 14,000 controllers aren't fully qualified.

The airlines and the regulators have to recognize these stresses. They should be aware that these pressures increase the risk of human error and mechanical error. . . .

For the airlines today, maximum safety requires maximum regulation.

*Safe Skies Require Strict Regulation*, USA Today, May 12, 1983, at 10A.

91. Columnist Hobart Rowen characterizes the problem in these terms.

An articulate and well-informed minority understands that the free-market issue is a phony when it comes to deregulation of transportation. Unless somebody cuts corners on services, or safety, deregulation doesn't lower prices, overall, to the consumer.

Rowen, *Airline Deregulation Doesn't Work*, Wash. Post, Apr. 8, 1982, at 26.

92. Professor Golbe's study established that profitable railroads have fewer accidents per mile

cited by the FAA for safety violations prior to its bankruptcy.<sup>93</sup>

Twenty-six percent of the nation's airline fleet is already obsolete, and there will be a major need to reequip during the next decade.<sup>94</sup> The cost of a moderate size jet is \$20 million.<sup>95</sup> Without investor confidence, the airlines cannot finance the aircraft they need.<sup>96</sup> Although many existing aircraft are obsolete and should be replaced, since the enactment of the Airline Deregulation Act of 1978, cancellations for newly ordered aircraft have grown more than 300%.<sup>97</sup> Professor Frederick Thayer of the University of Pittsburgh reminds us that "safety always has suffered when airlines were largely unregulated."<sup>98</sup> Indeed, he notes that "deregulation is both inefficient and dangerous."<sup>99</sup> It "threatens to give us the worst of all worlds, a combination of many exorbitant fares (to cover empty seats) and a decline in safety."<sup>100</sup>

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than do unprofitable railroads. Golbe, *Product Safety In a Regulated Industry: Evidence From the Railroads*, 21 *ECON. INQUIRY* 39 (1983).

93. Gonzales, *Airline Safety, A Special Report*, *PLAYBOY*, July 1980, at 140, 209.

94. Gibney, *Continuing Airlines Losses Predicted*, *Denver Post*, June 21, 1982, at 3C, col. 1. Julius Maldutis, Jr., Vice-President of Salomon Brothers, estimates that 524 of the 2,005 planes operated by the nation's top 12 carriers are obsolete. *Id.*

95. Brenner, *Recontrol Air Fares*, *N.Y. Times*, Apr. 14, 1982, at 16.

96. Welling, *The Airline's Dilemma: No Cash to Buy Fuel-Efficient Jets*, *Bus. Wk.*, Sept 27, 1982, at 65.

97. Air Line Pilots Ass'n, Press Release (June 15, 1983). Testifying before the House Subcommittee on Aviation, ALPA President Henry A. Duffy remarked, "Economics and safety cannot be separated." Under regulation, "[a]n additional margin of safety [was established] by exceeding, not just meeting Federal Aviation Administration minimums." But under deregulation, the airline industry "has consistently degenerated to the point of acute anemia." Duffy noted that there are certain industries, such as aviation, "where the pressures of the marketplace and the spirit of free competition are at cross purposes with the national interest." *Id.*

98. Thayer, *The Lowest Fare is Not the Safest*, *Wash. Post*, May 1, 1982, at A21. "Aviation has had a long-established axiom, dating back to the days when 'barnstormers' often slept under their aircraft wings, that the first thing to go when cost cutting begins is some maintenance — and consequently some safety." Reiss, *Airline Cost Cutting Has Bearing On Safety, Too*, *Youngstown Vindicator*, June 26, 1983, at B-14.

99. Rowen, *Airline Deregulation Doesn't Work*, *Wash. Post*, Apr. 8, 1982, at A27.

100. Thayer, *The Lowest Fare is Not the Safest*, *Wash. Post*, May 1, 1982, at A21.

The eroding federal role in protecting passenger safety has been described as follows:

FAA's safety function has been affected in a very direct and visible way by deregulation. Because of the growing number of carriers, general aviation inspectors are being used to monitor commercial air carriers. This problem is compounded by the fact that the Civil Aeronautics Board (CAB) is using only a rubber-stamp safety-fitness test for new entrants. CAB is relying on FAA to catch the board's mistakes, and FAA is strapped for manpower.

The pressure of record losses will not go away. Every airline manager is faced with cost/benefit determinations that must be made in the pressure-cooker atmosphere of an industry dominated by news of bankruptcies, real and threatened.

Orders for new, safer, more efficient aircraft are canceled. And the airlines continue to fly old and tired aircraft that should be replaced.

Duffy, *Deregulation 5 Years Later*, *OAG FREQUENT FLYER*, Oct. 1983, at 54, 56. Similar concerns were raised in an editorial appearing in the *Washington Post*:

Professor Daryl Wyckoff of Harvard University argues that there is a

[B]udget cuts have reduced the number of FAA safety inspectors by one-fourth. These are the federal employees who monitor the airlines' maintenance and cockpit procedures for safety problems.

Before deregulation, many airline officials and others argued that deregulating prices, routes and entry into the industry would encourage airlines to let cost competition spill over into safety areas. The federal safety agencies, it was said, would not be able to fight effectively the tide of economic incentives unleashed by competition. Airline officials insist, as you might expect, that they don't cut corners on safety. But which are we to believe: the predictions of danger made years ago or the reassurances offered today?

The statistics show that airline accidents have been declining for years. On that there is no argument. The harder question is whether the combination of several current trends might not lead to serious problems in the longer run. Those trends include the FAA budget cuts, the economic pressure on airline wages and operating costs and the increasing technical complexity of the equipment itself.

*Safe In the Skies?* Wash. Post, Dec. 3, 1983, at A18.

Among the instances when the FAA has discovered safety violations involve (a) Air Pennsylvania, which shut itself down on March 5, 1983, before the agency could impose \$18,000 in fines for more than 30 safety violations; (b) Aeramerica, which was grounded in 1982 for operating unsafe aircraft, (c) Guy-America Airlines, which was fined \$50,000 on February 17, 1983, for various safety violations. "If any link can be established between financial distress and safety degradation, the bottom 100 constantly recycling commuter carriers referenced above certainly look like prime examples of this relationship." *Review of Airline Deregulation and Sunset of the Civil Aeronautics Board (The State of the Airline Industry Under Deregulation), Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. 512 (1983)* (statement of Henry A. Duffy, President, Air Line Pilots Ass'n, Int'l). However, the FAA seems to have a reputation of imposing sanctions against only the grossest and most conspicuous of violators. Although aircraft having nine or fewer passengers have a 20 times greater accident rate than those carrying 30 or more passengers, the FAA has been accused of diluting the safety standards for such commuter aircraft. *FAA Bends Rules, Says ALPA*, FLIGHT INT'L, Nov. 26, 1983, at 1409. Congressman Elliott H. Levitas (D.-Ga.) has expressed serious reservations over the performance of the agency:

I'm disappointed in the dismal record of the FAA in regulating aircraft safety. Legislative action will have to be taken unless the agency acts soon. But, I'm afraid, its too little and too late now.

*Quotelines*, USA Today, Nov. 3, 1983, at 8A. Other recent concerns have been expressed as a result of the allegedly poor piloting and maintenance procedures of Air Illinois:

The discoveries have heightened concerns about the safety of some financially weak, inexperienced regional airlines that have been assuming a larger role in the nation's passenger service since Congress approved airline deregulation in 1978.

The trend toward small regional airlines taking over routes once flown by major carriers is continuing at the same time that the Federal Aviation Administration, which regulates airline safety, is reducing the number of its inspectors as a result of the administration's budget-cutting efforts.

Major trunk airlines, dropping unprofitable routes, no longer serve 166 American cities. Those cities still have passenger service, however, provided by small carriers, usually flying propeller planes.

Feaver, *Air Illinois Crash Raises Questions About Small-Airline Safety*, Wash. Post, Nov. 28, 1983, at A3; see also Witkin, *Illinois Air Crash That Killed 10 Is the Subject of a Special Inquiry*, N.Y. Times, Nov. 28, 1983, at B11; Feaver, *Continental Flight Misses the Runway*, Wash. Post, Nov. 10, 1983, at A12; Getschow, *Continental Air Jet Lands by Mistake on Denver Taxiway*, Wall St. J., Nov. 10, 1983, at 18. Although government statistics evidence a decline in airline fatalities in recent years, "the experts express some concern that airlines might . . . take risky shortcuts amid

definite correlation between motor carrier regulation and safety.<sup>101</sup> His study noted that regulated carriers have a safety and compliance record significantly superior to that of unregulated motor carriers.<sup>102</sup> These findings confirm those in an independent study commissioned by the Department of Transportation which also concluded that unregulated carriers are less safe than regulated carriers.<sup>103</sup> In recent years more than 10,000 highway deaths have resulted from accidents involving medium and heavy commercial vehicles. Such accident fatalities are growing at twice the rate of increased truck miles traveled.<sup>104</sup>

A less healthy industry will likely introduce the public to more intriguing aspects of aircraft maintenance than American Airlines' engine pylons, Air Florida's wing de-icing, Frontier's landing gear, Air Canada's flammable interiors, or Eastern's oil plugs, rings and gaskets.<sup>105</sup> Must we wait until a school bus full of children is obliterated by an out-of-control semi, with faulty brakes and bald tires, before our public officials recognize that an unhealthy industry is likely to be an unsafe industry?

### C. PRICING DISCRIMINATION

Professors Wagner and Dean predicted that deregulation would have the following effects:

Pricing could become increasingly unstable if regulations were lessened.

Regulation sometimes is credited with ensuring nonpredatory pricing. It is thought that minimum rates provided under a regulated environment prevent or seriously limit a carrier from pricing under cost and, correspondingly, forcing competition out of the marketplace or reducing service levels. Moreover, regulation may better provide for rate equity for various shipper groups among commodities and between geographical regions. It can reduce discrimination.

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financial trouble." Karr, *Safety Debate Rages in the Airline Industry As Unions Claim Ailing Carriers Take Risks*, Wall St. J., Oct. 18, 1983, at 35.

[T]he inescapable conclusion is that an airline cannot spend money it doesn't have to maintain and improve its safety equipment and procedures. In other words, the economic chaos brought on by deregulation will, sooner or later, erode the safety of our commercial air transportation system.

Duffy, *Deregulation Affects Safety*, AIRPORT PRESS, Aug. 1983, at 21.

101. MOTOR CARRIER REFORM ACT OF 1980: REPORT OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, S. REP. NO. 641, 96th Cong., 2d Sess. 85, 100 (1980).

102. *Id.*

103. *Id.*

104. *Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 339 (1979).

105. "A rash of dangerous incidents on USA airlines is worrying passengers, airline personnel and government officials. Belly landings, stalled engines and fire on planes have come in rapid-fire succession." Levine, *Is Flying Getting More Dangerous?*, USA Today, June 16, 1983, at 3A. Witkin, *Air Canada Tightens Fuel Check*, N.Y. Times, July 27, 1983, at A19; Witkin, *Airliner Ran Out of Fuel After Two Metric Errors*, N.Y. Times, July 30, 1983, at 6.

Additionally, it may provide a means by which price-gouging can be controlled better.<sup>106</sup>

Prior to deregulation, there was some measure of cross-subsidization within the transportation industry. While carriers were allowed to serve specified lucrative routes, they were also required to serve geographically related less lucrative or marginal markets as well. Carriers were expected to internally cross-subsidize losses or meager profits in their small community service with their healthier earnings in lucrative markets, and to provide just and reasonable rates to both. Deregulation was designed to end such cross-subsidization.

Actually, cross-subsidization seems merely to have been reversed in direction, rather than eliminated. Today, carriers extract higher rates from small communities to cross-subsidize the losses they are suffering as a result of the intensive competitive battles they are waging for market dominance between larger communities.<sup>107</sup> Radically intensified entry, coupled with effectively deregulated ratemaking have made it possible for carriers to charge predatory rates in competitive markets (or to large shippers), and cross-subsidize such losses with excessive, discriminatory rates in oligopoly markets (or to small shippers).

While prices have become lower for large shippers or in densely traveled corridors, prices have risen substantially in less competitive markets.<sup>108</sup> As an example, transcontinental air fares recently fell to \$99, one

106. Wagner & Dean, *A Prospective View Toward Deregulation of Motor Carrier Entry*, 48 ICC PRAC. J. 406, 413 (1981) (citations omitted).

107. See Rowen, *Airlines: Competing to the Death*, Wash. Post, Nov. 11, 1982, at A27.

108. *Fares Fair?*, TRANSPORT TOPICS, May 24, 1982, at 18.

Senator Mark Andrews (R.-N.D.) noted that "since deregulation air fares across the country have gone up 112 percent. The consumer price index went up 46 percent during the same period." Transcript of CBS News Face the Nation, Oct. 2, 1983, at 12. Hence, the aggregate impact of fare changes since deregulation has been a higher increase than that of the rest of the economy.

Long haul flyers may get cheap fares because of excess competition but shorter hauls cost more and some cities have lost service altogether.

What this adds up to in the end is a greater tendency for higher fares overall for everyone — business and leisure travelers.

Seybold, *Airline Deregulation — Is It Good or Bad?*, Boston Sunday Globe, Nov. 6, 1983, at T-1.

One traveler described the problems of discrimination he encountered in air service as follows:

I recently had to make an emergency flight to Indianapolis from Los Angeles. Would you believe that the cheapest fare was \$369 each way while, at the same time, you could fly all the way to the East Coast from Los Angeles for anywhere from \$149 to \$160 each way?

According to my atlas (and my calculator) this means that the flight to Indianapolis and back cost me about 230% of the Los Angeles-to New York City fare even though, on a round-trip basis, I covered 26% less distance. I call this either gouging, or your typical East Coast/West Coast bias against mid-America. To add insult to injury, of course, there is no way in the world you can fly *directly* to Indianapolis from Los Angeles. The

way.<sup>109</sup> You may remember that World Airways begged the Civil Aeronautics Board to put an end to predatory pricing in that market.<sup>110</sup> World argued that its \$142 fare was not compensatory, even though it was among the most cost effective carriers in the industry.<sup>111</sup> To World's pleas, the CAB turned a deaf ear.

Although a one way transcontinental air passenger ticket recently cost \$99, a flight between Washington and Omaha cost \$287. Flights between Seattle and Orlando cost \$326 round trip while round trip transportation between Seattle and Phoenix costs \$437.<sup>112</sup> US Air charged its passengers \$24 more between Buffalo and Albany than if they remained on the same plane and flew the 100 additional miles to Boston; the carrier was free to impose a premium rate between Buffalo and Albany because it has no competition in that market.<sup>113</sup>

Recently, it cost \$77 to fly between New York and Miami, but \$168 to fly 500 fewer miles, between New York and Myrtle Beach, SC.<sup>114</sup> TWA charged \$201, or 29¢ a mile, between Peoria and Wichita; American charged \$255, or 23¢ a mile, between Lubbock and Dayton. Compare these rates with those charged in competitive markets, such as the \$90 charged by American, or 10¢ a mile, between Chicago and Dallas, or the TWA rates of \$129, or 6¢ a mile, between Chicago and San Francisco.<sup>115</sup> Since deregulation, air passenger fares between points in California have doubled, on the average.<sup>116</sup> Air fares have increased 116.6 percent in small and medium sized communities since deregulation, while average

airlines' idea of "direct" is to cool your heels for a couple of hours somewhere along the way — in either Chicago, St. Louis or Louisville.

I know that the airlines are in trouble, and it seems to me that this blatant price discrimination in favor of West Coast/East Coast traffic is symptomatic of the shortsightedness that is wrecking the industry — and it couldn't happen to a nicer bunch of folks.

Campbell, *Airline Prices Going On Flights of Fancy*, L.A. Times, Oct. 20, 1983, at 15.

109. *A Gift From the Airlines*, NEWSWEEK, Dec. 13, 1982, at 108.

110. Holsendolph, *Low-Cost Airline Now Seeks Fares Curb It Once Opposed*, N.Y. Times, Mar. 10, 1982, at A1; *World Airways Loss Quadrupled in Quarter to \$13.3 Million*, Wall St. J., May 24, 1982, at 37.

111. Hayes, *The Plight of World Airways*, N.Y. Times, Mar. 11, 1982, at 106.

112. *A Gift From the Airlines*, NEWSWEEK, Dec. 13, 1982, at 108.

113. *The U.S. Air-Fare Dogfight*, NEWSWEEK, Apr. 19, 1982, at 69.

114. *The Worst Year for U.S. Airlines*, TIME, Feb. 22, 1982, at 46.

115. Curley, *Decontrol of Airlines Shifts Pricing from a Cost to a Competitive Basis*, Wall St. J., Dec. 4, 1981, at 37.

[I]n July 1980, a citizen of Tulsa, Okla., paid \$230 to fly to Los Angeles, or 18 cents a mile, while fare was enabled a New Yorker to fly to Los Angeles for \$99, or 4 cents a mile. Today the Tulsa passenger pays \$279 to go to Los Angeles while the New Yorker pays \$179.

Rowan, *We Goofed — Let's Regulate Airlines Again*, Chi. Sun-Times, Oct. 10, 1983, at A25.

116. W. Augello, *The Deregulation Disaster* (unpublished monograph, 1983). Ironically, it was the experience of California and Texas intrastate carriers to maintain scheduled service at rates significantly below those of their federally regulated interstate counterparts which was emphasized by deregulators to support federal deregulation of air carriage. See Kahn, *Applying Economics to*

U.S. fares have increased only 48% during the same period.<sup>117</sup> This "twilight world of airline economics" is beginning to be described by consumers as "outrageous," "unfair," "chaotic" and "nightmarish."<sup>118</sup>

In the absence of regulation, less competition almost always means higher fares. When Sir Freddie Laker's airline went bankrupt, transatlantic fares were increased sharply by the surviving carriers.<sup>119</sup> When Braniff went bankrupt, American and Delta raised fares dramatically in markets radiating from Dallas (Braniff's former hub). When Continental abandoned and TWA reduced service in the Chicago-Los Angeles market recently, United and American raised fares sharply.<sup>120</sup> Hence, whatever benefit some communities now enjoy in terms of air fare bargains may "disappear once competition is extinguished."<sup>121</sup>

The business traveler pays several times the rate of the individual seated next to him, and both enjoy less leg room.<sup>122</sup> Flights are cancelled or chronically overbooked, schedules are changed, and routes are obliterated.

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an *Imperfect World*, 2 REG. 17 (1978). See G. DOUGLAS & J. MILLER III, *ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT* 178 (1974); Edles, *supra* note 26, at 628.

117. DOT's *View of Airline Deregulation Challenged by Small Cities, Labor, TRAFFIC WORLD*, June 20, 1983, at 16. Richard B. Keinz, assistant commissioner of the aeronautical division of the Minnesota Department of Transportation, also testified before a subcommittee of the House Public Works Committee that:

It is clear that the objectives of Congress are not being met for many cities and isolated areas. The experience of many cities since the enactment of the Airline Deregulation Act has been a vicious cycle in declining traffic, declining service and rising fares. In part this has been due to a weak economy which has affected these cities and the airlines serving them. To a great extent, however, it has been the result of deregulation.

*Id.*

118. *Airlines Move to Straighten Out Air Fares*, U.S. NEWS & WORLD REP., May 16, 1983, at 49.

One major newspaper recently published an editorial which described the nation's airline industry as in a "state of crisis," with the result that major carriers are undergoing bankruptcy and reorganization as the "Darwinian process" reaches "full throttle." The editorial goes on to call for "an immediate federal review of the growing airline dilemma before it does indeed balloon into a crisis of national proportion." *The Airlines' Patchwork Crisis*, Seattle Post-Intelligencer, Oct. 2, 1983, at A30.

Inconsistent, unreliable, erratic service at prices which vary monthly from ridiculously low to prohibitively high is hardly in the public interest. Neither the business nor the pleasure traveler finds a hint of health in the current air passenger transportation scheme created by Mr. Kahn.

Kissinger, *CAB's Ex-Chief Encounters Turbulence*, Wall St. J., Oct. 12, 1983, at 32.

119. See *Laker Collapse Facilitates North Atlantic Fare Rises*, AV. WEEK & SPACE TECH., Feb. 15, 1982, at 31.

120. *Airlines*, FORBES, Jan. 5, 1981, at 144.

121. Rowen, *Airline Deregulation Comes Back to Haunt*, Wash. Post, Mar. 14, 1982, at G4, col. 1.

122. A number of major American corporations have grown increasingly dissatisfied with the inconvenience and cost of commercial air service, and have responded by purchasing their own aircraft:

Commercial trips often involve delays while waiting for flights, switching planes or traveling from airports located far from city centers. And the costs rise if employees are forced to stay overnight because air service is limited.

ated without notice.<sup>123</sup>

Motor carrier competition for the traffic of large shippers or densely traveled markets has created a phenomenon which *Distribution* magazine labels "The Great Trucking Wars."<sup>124</sup> Regional discounting and large shipper discounting has become very pronounced in the trucking industry.<sup>125</sup> One wonders whether such pricing discrimination would have been permitted in an environment of responsible economic regulation. Justice William Douglas, although a vigorous proponent of the free market, characterized the U.S. Supreme Court's position on the issue when he wrote the majority opinion in *Georgia v. Pennsylvania Railroad*:

Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets.<sup>126</sup>

#### D. SERVICE DETERIORATION

Service to small communities has deteriorated significantly. During the first year of deregulation, 260 cities lost air service.<sup>127</sup> During the first two years of deregulation, 40% of our nation's airports lost service.<sup>128</sup> Two hundred communities lost 50% or more of the service, measured by seats,

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Byrne, *Kimberly-Clark Seeks to Turn Its Shuttle From Wisconsin to Atlanta Into An Airline*, Wall St. J., July 6, 1983, at 27.

123. *The U.S. Air-Fare Dogfight*, NEWSWEEK, Apr. 19, 1982, at 69.

124. *Great Trucking Wars*, DISTRIBUTION, Nov. 1982, at 30.

125. *Id.* Ernest R. Olsen noted that:

[W]e now have . . . in trucking . . . the same wild climate that existed prior to 1935. . . . Almost anyone can secure authority, charge what he wishes, and operate legally or illegally at will, with little risk of penalty. Large established carriers are getting larger; small and weak carriers are dropping out in substantial numbers. . . . LTL carriers will eventually identify the areas in which they have market monopoly and will act accordingly. Small shippers should be properly armed. . . . The small producers can forget about the railroads; they will serve only volume shippers in the future. . . . The large shipper will command added attention among truckers, with new power to demand reduced rates, as well as special deals.

*Policing of Abuses of Economic Power*, TRAFFIC WORLD, May 23, 1983, at 6.

126. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945).

127. CIVIL AERONAUTICS BOARD, REPORT ON AIRLINE SERVICE 43-50 (1979). See GENERAL ACCOUNTING OFFICE, THE CHANGING AIRLINE INDUSTRY: A STATUS REPORT THROUGH 1981, at 17 (1982).

128. Berry, *Speakers in 'Great Debate' in Detroit Differ in Appraisals of Deregulation*, TRAFFIC WORLD, Nov. 30, 1981, at 18. Between November 1, 1978, and May 1, 1981, 74 communities lost all their previously enjoyed certificated service. CIVIL AERONAUTICS BOARD, COMPETITION AND THE AIRLINES 135 (1982). Declines in federal subsidies will contribute to a further reduction in small community service. *Id.* at 144.

they previously enjoyed.<sup>129</sup> Over 100 communities lost all their scheduled service in just the first two years of deregulation; it had taken ten years for a comparable number of communities to lose such service prior to deregulation.<sup>130</sup> Service in less populated states has eroded demonstrably since deregulation.<sup>131</sup> Much of the air service which remains for small communities is provided at taxpayer expense;<sup>132</sup> the federal government paid \$113 million in air passenger subsidies during fiscal year 1981.<sup>133</sup> Curiously, no such subsidies will be paid to ensure that small communities receive a rea-

129. Brenner, *Recontrol Air Fares*, N.Y. Times, Apr. 14, 1982, at 16.

The Civil Aeronautics Board admits that major airlines have reduced the number of city pairs which enjoyed nonstop service prior to deregulation. *Airlines Decreasing Nonstop Service*, Airport Press, Aug. 1983, at 10.

The fact is that the deregulation of airlines has ignored one of the fundamental precepts of any modern society, i.e., that transportation is so vital to communities and regions that its adequate maintenance cannot be left strictly to the whims of the marketplace.

The zealots who successfully lobbied for deregulation misled Congress into believing that removal of "public utility" licensing of air service would have only minor effects on the air route map. For example, the Kennedy subcommittee of the Senate was persuaded that, with deregulation, route abandonment by the major trunk carriers would affect "routes that, at the very most, account for one-half of 1 percent" of airline traffic.

The clock cannot be turned back to 1978. But this does not preclude some reasonable modification of deregulation so as to overcome its more serious defects. A first step must be a willingness to stop whitewashing this new regime and to face objectively all its consequences — the bad as well as the good.

Brenner, *Commodities Imperiled by Airline Deregulation*, N.Y. Times, Dec. 5, 1983, at A18.

130. Havens & Heymsfeld, *Small Community Air Service Under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 641, 673 (1981).

As of September 14, 1983, frequency of service had increased for 302 communities, remained unchanged for 15, and decreased for 351. Among this 351, 106 have lost all scheduled service, and 44 have lost more than 50% of the service they previously enjoyed. Rowen, *Reiterating the Case for Airline Regulation*, Wash. Post, Oct. 9, 1983, at G1. See *Officials Criticize Essential Service*, AV. WEEK & SPACE TECH., Aug. 22, 1983, at 26.

131. See Duffy, *In Wyoming, You Can't Get There From Here*, Denver Post, May 14, 1982, at 1D.

Service has declined in numerous Essential Air Service markets as well. In Kentucky, for example, available seats departing from Essential Air Service Communities have declined 61.3 percent since deregulation. In Missouri, available seats at Essential Air Service cities are down 27.6 percent and nonstop destinations have dropped from 30 to 24. And in Nebraska, departures in Essential Air Service Communities have dropped 53.9 percent since deregulation. There are numerous other examples of the loss of service.

This drop in service greatly discriminates against the individual traveler to and from small cities. Because fewer connecting flights are available to and from smaller cities, travelers are often forced to wait or take other modes of transportation, losing both time and money.

In addition, service reductions inhibit growth in those smaller communities. What business wants to locate in a city that has intermittent air service at exorbitant rates? Cutting off the air lifeline from smaller cities effectively cuts off their growth potential.

Duffy, *Deregulation 5 Years Later*, OAG FREQUENT FLYER, Oct. 1983, at 54, 58.

132. See 49 U.S.C. § 1389 (Supp. V 1981).

133. Chapman, *Airlines Soon Will Find It Difficult to Retain Scarce Subsidy Funds*, TRAFFIC WORLD, Sept. 6, 1982, at 33. This federal subsidy program for small community service is sched-

sonable level of motor carrier service at nondiscriminatory rates, even though 65% of America's communities are completely dependent upon motor carriage for freight transportation.<sup>134</sup> Further, scheduled air carriers have frequently been replaced by commuter carriers. Recent statistics indicate that a passenger stands a 300% greater chance of losing his life on a commuter carrier.<sup>135</sup>

A similar result is occurring in the motor carrier industry. The *Wall Street Journal* reported that intrastate deregulation in Florida cost many small communities their scheduled bus service.<sup>136</sup> Since November 1982, one of the nation's largest bus companies has petitioned forty-three states for permission to eliminate service to more than 1,300 points;<sup>137</sup> one of its senior executives acknowledged that deregulation had enabled it "to cut out 90-95% of our small towns."<sup>138</sup> Intrastate motor carrier transportation was deregulated in Florida on July 1, 1980, principally because the two houses of the state legislature failed to agree on a bill designed to extend its

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uled to end in 1988. It is likely that deterioration of such service will further accelerate after subsidy termination.

134. MOTOR CARRIER REFORM ACT OF 1980: REPORT OF THE SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, S. REP. NO. 641, 96th Cong., 2d Sess. 85 (1980).

135. Panetta, *Commuter Airlines: Taming the Wild Blue*, COLO. BUS., Nov. 1979, at 17. Tom Binford, airport manager at Laramie, Wyoming, characterized the problems small and remote communities have faced with commuter airlines:

We've had lots of airlines start up, but they don't seem to last long. Usually an airline is started by some furloughed pilot who mortgages his home, puts a down payment on a plane and goes into business. But in the main, they're undercapitalized and poorly managed and don't last.

Duffy, *In Wyoming, You Can't Get There From Here*, Denver Post, May 14, 1982, at 1D.

136. Ubinas, *Bus Deregulation Gains Favor, Worrying Small Towns, Small Operators and Elderly*, Wall St. J., Aug. 2, 1982, at 17.

137. Baker, *supra* note 19.

The tragedy is that the people who do and must ride the buses are dependent upon and usually have no other means of obtaining transportation. They are the older, senior citizens who no longer are economically or physically able to own or operate automobiles. Young people and school children, who must depend upon bus transportation. Economically disadvantaged persons, who cannot afford to own or operate automobiles. Businesses in small cities that must have transportation available to attract and keep employees. Persons not owning automobiles that require bus service to visit their doctors, obtain medical services, seek employment, visit relatives or friends.

*Id.* at 5-6.

For Greyhound, airline deregulation has meant increased competition from new low-cost air carriers, which have undercut bus fares on routes of 100 to 250 miles, important runs for the bus industry. Bus deregulation has meant fare wars with Trailways Inc., Greyhound's main competitor, and it raises the specter of fare wars with other competitors.

Bus deregulation also means Greyhound can raise fares and eliminate unprofitable runs.

Serrin, *How Deregulation Allowed Greyhound to Win Concessions from Strikers*, N.Y. Times, Dec. 7, 1983, at A22.

138. *Id.* Interstate deregulation of bus operations has also resulted in a deterioration of service for small communities. See Cox, *Bus Service Loss Isolates Julesburg*, Denver Post, Mar. 14, 1983, at 6A.

life beyond its pre-ordained termination under sunset legislation.<sup>139</sup> Florida thereby became the first state in the nation to deregulate trucking.<sup>140</sup> In the year preceding deregulation, state agencies received thirty-four complaints regarding household goods transportation. But in the first month of deregu-

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139. Since deregulation, at least one shipper has complained of serious service deficiencies: In Florida we have ample equipment only when produce and fresh fruit is not available to be hauled by the independent owner/operator. Utilizing this type of service is inconsistent and cannot be depended on and requires a great deal of time to obtain . . . as we have to determine if proper insurance is maintained . . . [and whether the carrier's equipment is adequate and safe].

. . . I did not have [these problems] when I was dealing with reputable and reliable truck lines who [had the ability] to offer service on a year round basis and who operated in a professional manner. Since deregulation some of our regulated carriers have stopped offering service to some areas. Now we have to beat the bushes to cover some of our shipping points.

Southern Legislative Conference, Transportation Committee Meeting, New Orleans, La. (Aug. 30, 1982) (statement by Gene Sears).

140. Florida deregulated intrastate transportation on July 1, 1980, as a result of the natural progression of its Sunset legislation; Maine's legislature enacted a deregulation statute which became effective on January 1, 1982; Arizona deregulated on July 1, 1982, by plebiscite. INTERSTATE COMMERCE COMM'N, DEP'T OF TRANSP., REPORT TO CONGRESS ON UNIFORM STATE REGULATIONS 106 (1982). Wisconsin enacted deregulation legislation which became effective on October 1, 1982. WIS. STAT. ANN. § 194.23 (West Supp. 1983-1984). Neither Delaware nor New Jersey have ever imposed any meaningful regulation of intrastate motor carriage. ARIZ. DEP'T OF TRANSP., INITIAL IMPACTS OF MOTOR CARRIER DEREGULATION IN ARIZONA 4 (1983) [hereinafter cited as INITIAL ARIZONA IMPACTS].

Professors Freeman and Beilock have prepared surveys which analyze the perceived impact of motor carrier deregulation upon Florida and Arizona shippers, receivers and carriers for 1981 and 1982. See Freeman, *Motor Carrier Deregulation in Florida; A Preliminary Analysis*, 14 TRANSP. L. INST. 133 (1982); Freeman & Beilock, *An Analysis of Arizona and Florida Motor Carrier Deregulation and the Implications for State Regulatory Change*, 15 TRANSP. L. INST. 13 (1983) [hereinafter cited as *Arizona and Florida Deregulation*]. Their conclusions indicate that a large majority of Florida and Arizona shippers and receivers during this period perceived deregulation as having increased competition; since deregulation, they have experienced lower rates and improved service. *Arizona and Florida Deregulation*, *supra*, at 14-15, 18. Private carriers also supported deregulation in these two states. *Id.* at 15. In light of the fact that during these two years the nation suffered its most severe recession since the Great Depression, it is not surprising that the excess capacity generated by lower demand for transportation and increased entry generated by deregulation would enhance competition, lower rates and ensure an abundance of service for all shippers. Whether this will continue to be true in the long run is unclear.

Carriers were, however, less enthusiastic about the continuation of deregulation. Most agreed with the shippers' perception that deregulation had created additional competition. A growing number of Florida carriers saw both rates and profits tumble as a result of deregulation, to the point that now a majority favor a return to a regulated environment. *Id.* at 16. Forty-four percent of Arizona's carriers now favor a return to regulation, while only 37% favor continued deregulation. *Id.* at 18. However, a larger number of household goods carriers in both states tended to view deregulation as enhancing their ability to increase their rates and enjoy correspondingly higher profits. *Id.* at 16, 18. Professors Freeman and Beilock hedge their findings with the qualification that it is, as yet, too early to draw any final conclusions concerning the wisdom of intrastate deregulation. INITIAL ARIZONA IMPACTS, *supra*, at 3, 8.

Since deregulation in Arizona, at least three sectors of the motor carrier industry have been the subject of increased consumer complaints: household goods, taxicabs and ambulance service.

lation alone, forty-four such complaints were filed, involving services defi-

The latter assessed such outrageous charges that in November 1982, voters approved a proposition which would restore regulation of ambulance services and charges. *Id.* at 51.

Seventy-six percent of Wisconsin's motor carriers opposed deregulation. Among small carriers (*i.e.*, those with five or fewer power units), 82% opposed deregulation. One opponent characterized deregulation as follows: "All it will do is squeeze out the small guy, put a lot of junk on the road, and in a couple of years there will be no small truckers. And the big outfits will be able to charge rates you wouldn't believe." Among motor carriers which favored deregulation, many indicated that no regulation was preferable to the irresponsible regulatory approach which had theretofore characterized Wisconsin state government. *Wisconsin Deregulation Bill Sparks Controversy, Heads for Assembly*, TRAFFIC WORLD, Feb. 15, 1982, at 36-38. Deregulation was also opposed by Wisconsin's largest and most influential business organization, the 2,800 member Wisconsin Association of Manufacturers and Commerce. Rix, *Dreyfus Pressured to Veto Trucking Deregulation Bill*, Wis. St. J., April 28, 1982.

Trucking deregulation in Wisconsin was opposed less enthusiastically by larger carriers. Thus, only 54% of those carriers having more than 25 power units opposed deregulation, and 39% favored it. When the vote was called in the Wisconsin Assembly, the bill was heavily supported by urban legislators, and opposed by rural legislators. R. Westley, *Wisconsin Motor Carrier Deregulation: Strange Bedfellows Make Politics* 19 (address before the Motor Carrier Lawyers Ass'n in Washington, D.C., January, 1983). Since motor carriers have been deregulated in Wisconsin, bus lines have dropped or sharply curtailed service to many rural communities. Rix, *Bus Deregulation Means Some Service Cuts*, Wis. St. J., Sept. 26, 1982; Thomson, *Busline Freedom Has Fares Jumping Up and Down*, Capital Times, Oct. 2, 1982, at 19; *Some Bus Routes Dropped After State Deregulation*, Wis. St. J., Oct. 6, 1982, at 5. One Wisconsin attorney recently summarized the deterioration of passenger service as follows:

[I]f I interpret [the informal data I have been able to acquire] correctly it appears that Greyhound abandoned 80 Wisconsin points, virtually none of which had alternative service, and added 8 points, most of which already had some existing service. Some of the points abandoned by Greyhound were picked up by other carriers. I continue to hear rumors about other service cuts, but without the regulatory machinery it is difficult to follow these as you well know.

Letter from Richard A. Westley to Paul S. Dempsey (Aug. 3, 1983).

However, 34 states continue to impose economic regulation of motor carriage similar to that practiced by the ICC prior to the promulgation of the federal Motor Carrier Act of 1980. *Arizona and Florida Deregulation*, *supra*, at 26.

In Colorado, deregulation opponents successfully defeated sunset of the state's Public Utilities Commission and a series of bills brought before the Transportation Committees of the state legislature seeking to deregulate various sectors of the industry.

California had been toying with various notions of diluted motor carrier regulation until the results of a state commissioned study were published in late 1981 on the effects of intrastate service and pricing of deregulating the airline industry. Federal preemption of the state's jurisdiction under the Airline Deregulation Act of 1978 caused fares to rise between 30 and 70% during the first two years of deregulation. Many small communities lost scheduled service, to be replaced by smaller feeder lines, several of which recently entered bankruptcy. See CAL. PUB. UTILS. COMM'N, AIRLINE DEREGULATION IN CALIFORNIA (1981).

Recently, things seem to have turned sharply away from deregulation in California. For the first time in two decades the state PUC set two matters for oral hearing. *PUC Sets Cases for Argument*, CALTRUX, May 16, 1983, at 1. Further, the state Democratic party adopted Resolution 49B, calling upon the government to implement its regulatory responsibilities in a responsible manner, and condemning the imposition of transportation deregulation in an "arbitrary, haphazard, and inconsistent manner unaccompanied by reasoned arguments for its imposition."

In Arkansas, a national grass roots political organization (*i.e.*, Forward America) comprised of motor carriers and shippers was recently established, among whose purposes are to:

ciencies, excessive pricing, and loss and damage claims.<sup>141</sup>

### E. EROSION OF CARRIER LIABILITY

Since deregulation was inaugurated, many air carriers have sharply limited their liability for loss and damage. Such unilaterally imposed limitations have been quite imaginative. Prior to airline deregulation, shippers uniformly had nine months and nine days to file a loss or damage claim. Today, the industry imposes at least four different time limits, some as short

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Preserve regulated transportation at both the state and federal level by petitioning Congress to reexamine the grand experiment in the economic theory of deregulation embarked upon by the ICC; and, to foster the recognition by Congress of the historically tested principal that responsible economic regulation of transportation is essential to assure responsible freight service for the public at non-discriminatory rates.

FORWARD AMERICA, STRONG LEADERSHIP TO COMBAT THE CRISIS ON OUR HIGHWAYS 1 (1983). See Butler, *New 'Forward America' Group Is Now Forming to Fight 'Anti-Truck' Move*, TRAFFIC WORLD, May 2, 1983, at 14.

Although the National Association of Regulatory Utility Commissioners (NARUC) unanimously adopted a Model Act based largely on the federal Motor Carrier Act of 1980, there has been little movement for its adoption by the several states. Professors Freeman and Beilock have summarized the principal reasons for such inertia as follows:

[T]here is no great outpouring of sentiment at the state level for change and many state commissioners view the federal policy as an unproven experiment. State legislators and regulators are particularly concerned with the effect that deregulation would have on the common carrier obligation and the service received by small and isolated communities or businesses.

Freeman & Beilock, *State Regulatory Responses to Federal Motor Carrier Regulation*, 35 U. FLA. L. REV. 56, 67 (1983).

141. As one Florida government official recently lamented:

The moving complaints began to mount. Consumer's inclinations to seek the cheapest price, not realizing that he was dealing with a totally deregulated industry, created a healthy climate for the overnight growth of two men in a pickup style of a van line. In many cases the deal was entirely oral. No written contracts. The companies had no insurance, no blankets, no ropes, no experience at moving furniture. But worse, neither could these moving companies even be located two weeks later when an irate customer filed a complaint to seek redress for a badly damaged piano, a torn mattress or the missing box of dishes. Sometimes our most diligent searches couldn't find any trace of Gonzales & Son Moving Co., when in truth it was only a telephone number and a classified ad in the newspaper.

. . . In one case a man moved from Houston, Texas, to Gainesville, Florida, for some \$2100. His furniture was offloaded in Gainesville while his house was being finished in a small community about 40 miles away. Two months later his furniture was reloaded on a similar truck owned by the same firm and he was charged \$1900 for a forty mile move. The reason — the interstate move from Texas came under the ICC pounds per mile price rules; the intrastate move from Gainesville to that small town was the deregulated move.

. . . [A] recent study [indicates] that some moving van lines have raised their prices; one admits to 40%. He says, "We're going to make all the money we can before the state puts regulation back in."

Statement of Jack Schumaker, Staff Counsel to the Florida Commission of Agriculture, to the Council of State Governments, Southern Legislative Conference, New Orleans, La. (Sept. 1, 1982).

as 120 days, depending upon the carrier employed. Moreover, two air carriers even insist on the filing of a "notice of intent" to file a claim, one within fifteen days and the other within thirty. Before deregulation was inaugurated, shippers had two years in which to file a suit; two air carriers have now cut this "statute of limitations" in half. Prior to deregulation, shippers had two years in which to file overcharge claims; today there are at least five different time limits, some as short as 180 days.<sup>142</sup> Similarly, the time limits for bringing suit on an overcharge claim have been reduced by some carriers to as little as 180 days, in contrast to the pre-deregulation rule of two years and six months from disallowance.<sup>143</sup>

One year before deregulation the CAB concluded an exhaustive investigation in which it determined that liability limits on domestic air transportation were unconscionable and archaic, and should therefore be raised from 50¢ per pound to the standard established by the Warsaw Convention of \$9.07 per pound.<sup>144</sup> But with the promulgation of the Air Cargo Deregulation Act of 1977, air carriers were freed from these requirements. Eleven carriers have since reduced their liability limits to 50¢ per pound. Fourteen have taken a further step by multiplying the 50¢ limitation by the weight of the package lost or damaged.<sup>145</sup> Prior to airline deregulation, excess value charges were limited to 10-15¢ per \$100 of excess value declared; since deregulation, twenty-nine carriers have increased these charges to 40¢ per \$100. If you combine the new 50¢ per pound ceiling on liability with the increase of excess valuation charges to 40¢ per \$100, the aggregate net result is a 3900% increase.<sup>146</sup> Unsophisticated shippers are ordinarily unaware that such provisions have been unilaterally inserted by carriers in their bills of lading until they are faced with a lost or damaged shipment. They tend instead to select a carrier on the basis of price and service, at least until they are faced with a catastrophic loss.

## VI. THE RAILROADING OF AMERICA

Widespread marketplace abuses by the railroads served as the initial catalyst for the introduction of economic regulation of transportation in the

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142. *What's Happened to Liability Coverage?*, HANDLING & SHIPPING MGMT., Dec. 1982, at 13-14.

143. W. Augello, *The Deregulation Disaster 2* (unpublished monograph, 1982).

144. *Investigation of Liability Claims Rules and Practices*, CAB Order 76-3-139 (1976); CAB Order 77-3-61 (1977).

145. W. Augello, *supra* note 143, at 3.

146. *Id.* See *Erosion of the Regulatory Process in Transportation*, *supra* note 24, at 309-10. See generally Berry, *Many Topics Covered at 16th Annual Motor Transportation Law Institute*, TRAFFIC WORLD, Aug. 8, 1983, at 27-28; Butler, *Trucking Industry Seeks Uniformity In Claims Liability for All Modes*, TRAFFIC WORLD, July 18, 1983, at 27.

United States in the late 19th century.<sup>147</sup> At least up to now, this article has been somewhat silent as to the deleterious impacts of deregulation with respect to the railroad industry and the shippers it serves. Because the experience of rail carriers has been significantly different than those of air and motor carriers, the author has chosen to treat them separately.

Of course, all modes of transportation share a common economic characteristic — they involve the movement of passengers and commodities between designated points. But of the three modes here discussed, rail transportation more closely satisfies the definition of a natural monopoly,<sup>148</sup> at least for certain types of commodities and geographic regions. Certainly, there is some competition between the motor and rail modes with respect to truckload, box-car, and trailer-on-flatcar long-haul service. And, where time is a factor, some competition exists between air and motor carriage for less-than-truckload traffic. But for large shipments of bulk commodities, rail carriers enjoy a virtual monopoly.

Thus, the price of rail transportation would have to be exceptionally high before Wyoming coal shippers would find it feasible to replace 100-car unit coal trains with a convoy of trucks having an equal capacity, not to mention the associated fuel consumption and highway repair costs. Similarly, the cost of rail carriage would have to be enormously high before Nebraska grain shippers would find it feasible to air lift or catapult their grain to market. And the price of rail movements would have to grow to astronomical proportions before such shippers would find it feasible to lay their own tracks, and build their own railroads to compete with carriers determined to exact monopoly profits. Long before any of these things happened, consumers of coal (*i.e.*, public utilities) would find it feasible to import coal from abroad (they now are); and grain shippers would find the world market for their exports declining (they may well be). Both impacts may further exacerbate our nation's balance of payments deficit.

Although deregulation has significantly increased air and motor carrier competition by flooding markets with new entrants and greatly increasing the territories they may serve and the commodities they may haul, it has had no such effect on railroads. Indeed, there is significantly more aban-

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147. The call for regulation of railroads, like that for most utilities, arose because the public perceived that competition was imperfect. Many believed that railroads, like gas and electric companies, were natural monopolies, where the market in a given area could best be served by one supplier. But, in the absence of competition, that supplier had to be regulated.

Railroad regulation is older than antitrust regulation, and, in fact, all modern administrative law flows from the ICC model for regulation of railroads. Regulation of the rail lines began in the states, principally the Granger areas where the local elevator and the farmers served by it were dependent upon rail freight service.

Thoms, *Clear Track for Deregulation — American Railroads, 1970-1980*, 12 *TRANSP. L.J.* 183, 186 (1982).

148. *Id.*

donment<sup>149</sup> and merger activity than entry in rail transportation, further reducing the number of actors in the nation's rail oligopoly. Professor William Thoms notes that "[r]egulatory freedom for railroads meant freedom to merge, freedom to abandon trackage, and freedom to change (usually raise) rates."<sup>150</sup>

After more than a decade of serious and comprehensive merger activity, the nation is today left with but seven major rail carriers, which together are responsible for 85% of revenue ton miles.<sup>151</sup> In the northeast, Conrail is the only major carrier, itself the result of a 1973 merger between the Penn Central and five smaller railroads<sup>152</sup> (the Penn Central was the product of the 1968 merger between the Pennsylvania and New York Central).<sup>153</sup> South of Conrail there are but two large remaining railroads — the CSX and the Norfolk Southern. The CSX is the product of the 1980 merger between the Chessie and the Family Lines<sup>154</sup> (the Chessie resulted from the 1963 merger of the Chesapeake and Ohio, the B&O and the Western Maryland; the Family Lines resulted from the 1971 merger of the L&N and the Seaboard Coast Line — the latter a product of the 1967 merger between the Seaboard Air Line and the Atlantic Coast Line).<sup>155</sup> The CSX enjoyed net income of \$367.7 million during 1981 on revenues of \$5.4 billion.<sup>156</sup> The Norfolk Southern is the result of a 1981 merger between the Norfolk & Western and the Southern, whose combined earnings that year

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149. See, e.g., *Chicago and Northwestern Transp. Co. — Abandonment — Between Clintonville and Eland, WI*, 363 I.C.C. 975 (1981); *Conrail Abandonment in Jeannette, PA*, 366 I.C.C. 384 (1982); *Chicago and North Western Transp. Co. — Abandonment — Between Mason City and Kesley, IA*, 366 I.C.C. 373 (1982); *Chesapeake & O. Ry. — Abandonment — Between Shanistee and Bay View, MI and Between Traverse City and Rennies, MI*, 366 I.C.C. 53 (1981); *Louisville & N.R.R. — Abandonment Between Bruceton and Rose Hill, TN*, 366 I.C.C. 1 (1981). Rail carriers' freedom under deregulation to abandon branch lines has deprived a number of mid-western grain elevators of rail service. Samuelson, *Competition's Mixed Effects*, Wash. Post, Oct. 18, 1983, at E1.

150. Thoms, *supra* note 147, at 210.

151. Feaver, *Major Railroads Poised for Transcontinental Mergers*, Wash. Post, June 19, 1983, at F1. These are 1981 figures, the last full year for which industry wide data is available. A revenue ton mile constitutes a ton of freight carried one mile. *Id.*

152. The five carriers were the Central of New Jersey, the Lehigh and Hudson River, the Lehigh Valley, the Reading and the Erie Lackawana. See Wilson, *Cloudy Future for Conrail*, Philadelphia Inquirer, Aug. 21, 1981, at 26; Roberts, *Conrail Gets Another Chance*, MODERN RAILROADS, Aug. 1981, at 54; Salpukas, *Turnaround at Conrail*, N.Y. Times, Dec. 4, 1981, at 36.

153. A smaller railroad is being assembled by Timothy Mellon, who purchased the Maine Central, the Boston & Maine and the Delaware and Hudson. Together these railroads traverse almost 4,000 miles. See Guilford Transp. Indus., Inc. — Control — Delaware and Hudson Co., 366 I.C.C. 396 (1982); Harkavay, *Mellon to Complete Rail Purchases by Summer*, Boston Sunday Globe, Nov. 1, 1981, at 63.

154. CSX: *Railroading for Fun and Profit*, Bus. Wk., Nov. 1981, at 51.

155. See *Florida East Coast Ry. v. United States*, 250 F. Supp. 903 (M.D. Fla. 1966).

156. See CSX, *supra* note 154, at 51.

totaled \$500 million on revenues of \$3.59 billion.<sup>157</sup>

In the west, there are four large railroads, the Burlington Northern, the recently merged Tri-Pac (or PacRail), the Southern Pacific, and the Atchison, Topeka and Santa Fe. The Burlington Northern resulted from a 1980 merger between the BN and Frisco (the BN resulted from a 1970 merger between the Great Northern, the Northern Pacific, the Chicago, Burlington & Quincy, and the Spokane, Portland and Seattle).<sup>158</sup> Its 1981 earnings were \$223 million on revenues of \$3.9 billion. Today, it serves twenty-five states and two Canadian provinces, from the Pacific Northwest to the Florida panhandle, from the Prairies to the Gulf Coast.<sup>159</sup> The Tri-Pac merger of 1982 brought together even a larger system with the merger of the Union Pacific, Western Pacific and Missouri Pacific.<sup>160</sup> The Santa Fe and Southern Pacific have announced plans to merge to form the nation's third largest railroad. The merged holding companies will have combined assets exceeding \$10 billion.<sup>161</sup>

The *Washington Post* recently predicted that these seven railroads will likely be merged into as few as three during the next several years:

Over the next decade, a combination of mergers driven by intense competition between trucks and railroads will result in a few — probably three — super railroads. Dozens of small branch lines, operated by private owners or state governments, will provide feeder service.

Railroad experts in government, the industry and the financial world are in unusual agreement on that scenario, although most of them would discuss the matter only if they were not identified.<sup>162</sup>

As has been indicated, deregulation for railroads has in many instances enhanced the ability of rail carriers' ability to raise their rates. However, Congress recognized that not all freight is competitive; in promulgating the Staggers Rail Act of 1980, it did not intend to subject captive shippers to the rigors of the marketplace.<sup>163</sup> Hence, jurisdiction over reasonableness of rates was left in the ICC under circumstances where market dominance is deemed to exist.<sup>164</sup> However, the ICC has significantly di-

157. See *Norfolk Southern Corp. — Control — Norfolk and Western Ry. Co.*, 366 I.C.C. 171 (1982); Salpukas, *I.C.C. Allows Formation of A Giant Carrier*, N.Y. Times, Mar. 26, 1982, at 31, col. 2; Wayne, *A Surprising Move by N. & W.*, N.Y. Times, Sept. 3, 1981, at 26; Fingleton, *No Panty Hose*, FORBES, Nov. 9, 1981, at 135.

158. See *Burlington Northern, Inc. — Control and Merger — St. Louis-San Francisco Ry.*, 366 I.C.C. 862 (1983).

159. See *A Railroad For the Long Haul*, FORBES, Apr. 27, 1981, at 120-26.

160. *Union Pac. — Control — Missouri Pac.; Western Pac.*, 366 I.C.C. 458 (1982).

161. Paul, *Freight Transportation Is Being Transformed In Era of Deregulation*, Wall St. J., Oct. 20, 1983, at 18.

162. Feaver, *Major Railroads Poised for Transcontinental Mergers*, Wash. Post, June 19, 1983, at F1.

163. See Note, *supra* note 36, at 308.

164. *Id.* at 311-13; 49 U.S.C. § 10709 (Supp. V 1981).

luted its jurisdiction over market dominant traffic by promulgating broad exemptions over TOFC/COFC service,<sup>165</sup> boxcar service,<sup>166</sup> and export coal,<sup>167</sup> as well as its philosophical flirtation with Ramsey pricing.<sup>168</sup> Shippers of market dominant traffic have become increasingly dissatisfied with the rail rate decisions of the ICC. One group which appears to have been adversely affected with rate increase and jurisdictional limitation decisions<sup>169</sup> are shippers of coal. Specifically, coal shippers have alleged the

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165. Improvement of TOFC/COFC Regulation, 364 I.C.C. 391 (1980). TOFC is "trailer on flat car;" COFC is "container on flat car."

166. Exemption from Regulation — Boxcar Traffic, 367 I.C.C. 424 (1983); see 50 ICC PRAC. J. 499 (1983).

167. Railroad Exemption — Export Coal, 367 I.C.C. 570 (1983); see *ICC Eyes World Market Competition In Deregulating Export Coal Moves*, TRAFFIC WORLD, June 13, 1983, at 7.

168. A rate scheme similar to that of differential pricing (a notion approved in *San Antonio, Tex. v. United States*, 631 F.2d 831 (D.C. Cir. 1980)) is Ramsey pricing. Rail carriers have suggested that the ICC adopt the principles developed by British economist Frank Ramsey in assessing whether rail rates are just and reasonable. Under Ramsey pricing, shippers are charged a rate which encompasses the variable cost of providing the service, plus a share of fixed costs inversely proportional to the shipper's elasticity of demand for service. Hence, a shipper of coal which enjoyed the alternatives of either coal slurry pipelines or barge transportation in addition to rail service would receive a lower rail rate than would a similarly situated shipper without such transportation alternatives.

The ICC has estimated that 78% of rail costs are "variable," and 22% are "fixed." It is argued that Ramsey pricing will benefit all shippers, because price-elastic shippers will bear some of the fixed costs which, in turn, will reduce the fixed cost burden for price-inelastic shippers, and theoretically, will result in lower rail rates for the latter.

169. The Commission has proposed guidelines in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines — Nationwide*, 364 I.C.C. 360 (1980), which would further reduce its role in policing rail rate increases for captive shippers. Essentially, the guidelines provide that rail carriers are free to raise their rates for market dominant traffic up to 14% annually above inflation, unless (a) such rates would exceed the "stand-alone cost" of serving the shipper, (b) such increases are attributable to inefficient rail management, or (c) the rail carrier has achieved revenue adequacy.

"Stand-alone cost" is defined by the ICC as the cost which would be incurred by the shipper if he was forced to serve himself. The reproduction of service capabilities (e.g., construction of track, purchase of locomotives and cars) is measured by the current cost of producing equipment or facilities with equivalent capabilities.

Managerial efficiency is insisted upon by the Staggers Rail Act, which encourages rail carriers to earn adequate revenues under "honest, economical and efficient management." 49 U.S.C. § 10704(a)(2) (Supp. V 1981). Consideration of this criterion is also suggested by the Long-Cannon amendment to the Staggers Act. The Long-Cannon amendment provides that, in determining whether to investigate a rate, the Commission must assess (a) the amount of the railroad's traffic that does not contribute to going concern value (i.e., variable costs), and the carrier's efforts to minimize it, (b) the traffic which contributes only marginally to fixed costs and the extent to which such rates can be raised, and (c) the impact of the rate increase upon national energy and rail transportation policies. 49 U.S.C. § 10707a(e)(2)(B) (Supp. V 1981).

Congress has insisted that the ICC assist the railroads in achieving revenue adequacy. 49 U.S.C. §§ 10704(a)(2), 10707a(e)(2)(3)(iii) (Supp. V 1981). The ICC has addressed the criteria relevant to its determination of "revenue adequacy" in Ex Parte No. 393, *Standard for Revenue Adequacy*, 358 I.C.C. 844 (1978); 359 I.C.C. 270 (1978); 361 I.C.C. 79 (1978); 362 I.C.C. 199 (1980). The Commission concluded that adequate revenues are those which allow rail carriers to earn a return on investment equal to the current cost of capital, so that they would be able to

following deleterious impacts of rail deregulation:

1. Rapid increases in rates for hauling coal, including increases of nearly 15 percent in 1980 and 1981, increases that are far more than necessary to account for inflation.
2. U.S.-produced coal is less competitive with other fuels in domestic markets, slowing the conversions from foreign oil to domestic coal.
3. U.S.-produced coal is less competitive in international markets because of high rail rates, with foreign customers increasingly turning to other nations for their supplies.
4. Many U.S. coal mines have been closed and there is high unemployment among coal miners. Nationally, 32 percent of miners were unemployed during the first quarter of 1982. Unemployment has ranged as high as 60 percent in southern West Virginia and western Pennsylvania, a situation due to a large extent to a general down turn in business, but also affected negatively by ICC rulings.
5. Major coal-hauling railroads have become highly profitable and have been increasingly diverting their capital into other industries, such as real estate, other forms of transportation, and natural resources, a matter which indicates that railroad revenues are significantly in excess of amounts required to recover costs of providing railroad services, including a reasonable rate of return from captive traffic.<sup>170</sup>

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compete with other firms for available sources of financing. Once a carrier has achieved revenue adequacy, the Commission will more closely scrutinize rate increases for market dominant traffic.

The standards adopted by the ICC for determining market dominance have been criticized as a decision which seriously erodes captive shipper protection by injecting the question of geographic and product competition into evidence as to the existence of market dominance in transportation. Whether a shipper could obtain a commodity from a different source or could substitute a different commodity for the freight at issue simply has no bearing on whether there is effective transportation competition for certain movements.

J. Lema, Remarks Before Conference on Coal Transportation (Arlington, Va., 1983). The ICC's recent efforts in this area have been characterized as follows:

The I.C.C. proposed that the railroads should be permitted to charge 15 percent per year more than presently unreasonable rates for coal traffic — above inflation — until a railroad is revenue adequate and possibly beyond. These increases are to be limited only by the utilities' purported "option" to build its own railroad. That is nothing less than total deregulation, because it would set the upper limit at precisely the level at which a shipper would go elsewhere. The I.C.C. has set out to tell the monopoly railroad how best to set an optimum monopoly price.

The I.C.C. is proposing to turn the clock back 100 years and once more let the robber barons loose on the captive traffic. On its centennial anniversary the I.C.C. will have as its most recent legacy the attempt to recreate the very monopoly conditions which it was established to control 100 years ago.

M. Foldes, Post-Staggers Act, I.C.C. Actions and Shipper Initiatives (address before Conference on Coal Transportation, Alexandria, Va., 1983).

During the past four years, mine prices for coal increased only half as much as the bureau of Labor's Producers Price Index (PPI) for all commodities. During the same period, rail rates for coal increased one and a half times the PPI — this during a period of severe recession in the American economy. J. Lema, Remarks Before Conference on Coal Transportation (Arlington, Va., 1983).

170. Letter from 27 Coal Company Chief Executive Officers to President Reagan, app. 2-3 (May 25, 1983), *infra* note 229. This letter is reproduced in its entirety, *infra* note 229.

At the risk of over generalizing, the net effect of railroad deregulation seems to be a more desirable economic environment from the perspective of most rail carriers, and a less desirable one from the perspective of most captive rail shippers. Professor Friedlaender noted in her 1969 treatise on the subject that this might well be a result of deregulation:

To the extent that regulation prevents railroads from exploiting their potential monopoly position with respect to noncompetitive bulk commodities, deregulation should lead to increased rates and concomitant reductions in the incomes of the producers of these commodities. This would particularly affect the western farming and mining interests. Furthermore, insofar as rate competition would end the existing discriminatory pricing policies on which many past locational decisions have been based, additional producers would probably be hurt. The millers and small coal producers are especially vulnerable in this respect. Since the present blanket rate structure tends to discriminate in favor of rural and suburban areas, deregulation might also lead to rate increases in these areas.<sup>171</sup>

#### VII. THE RESPONSE OF GOVERNMENT . . . OR ABSENCE THEREOF

Certainly, government has had both the jurisdiction and the opportunity to prevent these deleterious effects of excessive competition. The relevant regulatory agencies, the Civil Aeronautics Board and the Interstate Commerce Commission, were vested with such comprehensive authority in order to protect the public interest. This protection of the public was deemed essential to moderate the fundamental objective of enterprises competing in the private sector — the accumulation of wealth.<sup>172</sup> Both agencies have tended to abdicate their essential purpose in recent years.

Despite repeated and vigorous arguments that the CAB should constrain excessive entry and predatory pricing, the agency consistently refused to do either. It has instead insisted that "[i]n healthy competition, producers who are inefficient or make bad decisions may fail, but efficient and well-managed producers can operate profitably . . . . [Bankruptcies] can serve a useful purpose . . . by eliminating the inefficient or imprudent operator . . . ." <sup>173</sup> In response to the economic demise of the industry, former CAB chairman Alfred Kahn responded: "it's destructive and it's cruel, but that's the way the market functions."<sup>174</sup> The Reagan administra-

171. A. FRIEDLAENDER, *supra* note 33, at 165. In all fairness, however, it must be admitted that Ann Friedlaender has long been a proponent of transportation deregulation.

172. See *Cost of Not Regulating*, Wash. Post, Nov. 24, 1981, at A17.

173. Oakland Service Case, 43 Fed. Reg. 24,083, at 24,092 (1978).

174. Comments like these have generated considerable controversy for Dr. Kahn:

Said Mr. Kahn, about airline deregulation and presumably with a straight face: "There's a lot of turmoil, but that's what we intended."

Are not times hard enough that it seems slightly (at least) off the wall to suggest that creating turmoil across a key industry (let alone the inconvenienced passengers) is a good thing to do?

tion has taken much the same approach as its Democratic predecessors, embracing economic Darwinism. Murray Weidenbaum, Reagan's Chairman of the Council of Economic Advisors, said: "The success of individual companies is not a concern to the marketplace — there is no assurance that any particular company is going to survive."<sup>175</sup>

But if World Airways asks the CAB to restrain the "disastrous and completely irrational fare wars"<sup>176</sup> of less than \$100 in the highly competitive transatlantic market, and alleges that at \$142, World itself was not even breaking even, one becomes highly suspect of the agency's wisdom of pursuing its deregulatory approach. Certainly, World Airways must be among the most efficient in that market, for its variable and fixed costs are lower than the industry average. If World fails, it will likely not be because, as the CAB insists, it is inefficient or imprudent (unless imprudence is measured by efforts to compete fairly in densely traveled corridors), but it will be because World hasn't the deep pocket of the industry giants to be able to withstand the vicissitudes of the economic cycle, and the predatory pricing practices of its larger competitors. The death of efficient, but shallow pocketed carriers may well be the result of the CAB's blind adherence to the purported virtues of the philosophy of deregulation.<sup>177</sup>

Unfortunately, the Interstate Commerce Commission has adopted much the same approach, issuing operating authority to thousands upon thousands of applicants who have demonstrated little more than the ability

Letter from Bert Cowlan to the Editor, *Wall St. J.*, Oct. 18, 1983, at 33.

The world's finest air transportation system is in a state of utter chaos. This does not speak as badly for Prof. Kahn as it does for the gullible clowns in Washington who heeded his ridiculous suggestions. The consumer has only begun to reap the "rewards" of deregulation.

Letter from Len Morgan to the Editor, *Wall St. J.*, Oct. 18, 1983, at 33.

175. Rowan, *Airline Deregulation Comes Back to Haunt*, *Wash. Post*, Mar. 14, 1982, at G1.

[E]conomists preach that bankruptcies are good in a free market because they eliminate the inefficient operators. This textbook theory overlooks the total cost of bankruptcies. Taxpayers eventually bear much of the cost through the loss of taxes paid by the bankrupt, the cost of unemployment and welfare benefits paid to discharged employees, etc. The public also pays in the form of higher interest rates necessitated by the losses suffered by the banks. Creditors lose and pass along their losses to consumers in the form of higher prices on their goods and services.

These considerations fail to account for the more important cost of bankruptcies — the human pain and suffering experienced by the officials, employees and stockholders of bankrupt companies. How long will the public condone an economic theory which encourages and fosters such tragedies?

Augello, *supra* note 143, at 9-10. Recently, the Reagan administration announced that it would oppose efforts to re-regulate the airline industry. Schwartz, *Re-regulate Airlines? It Won't Fly*, *Dole Says*, *Wash. Times*, Oct. 27, 1983, at 4B.

176. Brenner, *Recontrol Air Fares*, *N.Y. Times*, Apr. 14, 1982, at 16. These efforts by Edward J. Daly, Chairman of World Airways, were particularly interesting inasmuch as World had initially supported airline deregulation. See Saipukas, *Labor Distress At the Airlines*, *N.Y. Times*, Oct. 14, 1983, at D2.

177. See *The Rise and Fall of the Civil Aeronautics Board*, *supra* note 13.

to fill out an application form. In a landmark decision, the ICC concluded that "competition which forces an existing carrier out of business" may be desirable, for "it is preferable to replace an inefficient operator with a more efficient one and promote the introduction of innovative services or prices."<sup>178</sup> Survival of the fittest seems to be at the very heart of Darwinist economics embraced by deregulation advocates. Again, the manifest tragedy of deregulation is that many efficient carriers with shallow pockets must die, for they will find themselves unable to withstand the vicissitudes of the downward cycle of the market and the predatory pricing of their larger competitors.<sup>179</sup>

The Motor Carrier Act of 1980 in no way diluted the traditional statutory opposition to discrimination. Moreover, it introduced a statutory prohibition against predation into motor carrier rate regulation, proscribing excessively low rates which are predatory. However, the ICC has recently taken actions which erode the concept of nondiscrimination in carrier ratemaking.

Among such recent ICC initiatives is a rulemaking proposal which would eliminate the general prohibition against publishing rates restricted to named shippers, receivers and locations.<sup>180</sup> This rule would effectively shift the burden of proving unlawful discrimination to opponents of the filed tariffs through rate protests and formal complaints, a burden they may well find impossible to satisfy. Further, the ICC recently declined the opportunity to establish standards to govern the filing of discount rates.<sup>181</sup> Petitioners had argued that the widespread rate discounting in the industry was causing a significant loss of business and jeopardizing the financial viability of much of the motor carrier industry.<sup>182</sup> They also argued that such discounting was inconsistent with the national transportation policy of establishing reasonable rates without unreasonable discrimination or unfair or

178. *La Bar's Extension — Mountaintop Insulation*, 132 M.C.C. 263, 272 (1980).

179. In the matter of predatory pricing, we are aware of one major carrier whose owner has given the carrier management advice that they have available the sum of \$3,000,000.00 with the advice . . . "if you lose it — ok — but be sure to establish greater market share." When they, and others, have attained dominant market share what will be the end result in pricing? The answer is obvious.

We have recently noted two motor carrier bureau proposals with the sole justification for a proposed increase — "to recoup monies expended in discounts." Shortly thereafter, other bureaus also filed similar increases. No doubt noting the stupidity of such a justification, they cleaned up their language to "profit improvement." Why are we playing games?

What is the role of the Commission Office of Consumer Protection? Who will speak for the consumer, for it is they who eventually pay the cost?

Letter from Joseph F. Queenan to Paul S. Dempsey (Apr. 25, 1983):

180. 47 Fed. Reg. 28,430 (1982) (to be codified at 49 C.F.R. pt. 1310) (proposed June 30, 1982).

181. *Petition for Declaratory Order — Lawfulness of Volume Discount Rates by Motor Common Carriers of Property*, 365 I.C.C. 711 (1982).

182. *Id.*

destructive practices,<sup>183</sup> and alleged that "these rates, if they are not related to costs, must necessarily discriminate unfairly between shippers, contrary to the national transportation policy and the specific prohibition of 49 U.S.C. section 10741."<sup>184</sup> Moreover, the ICC has approved the filing of literally thousands of individual tariffs embracing a wide range of discount tariffs, including introductory discounts of up to 50% to open a new territory, aggregate tender discounts or allowances and volume discounts, discounts specifically limited to named facilities, commodities, or shippers, and blanket discounts.

A review of history inevitably leads one to the strong impression that such activities would never have been tolerated by the agency in prior years. On April 5, 1962, the Interstate Commerce Commission celebrated its seventy-fifth anniversary as an independent regulatory agency. At the formal ceremonies, one of our nation's most brilliant jurists, Supreme Court Justice Felix Frankfurter, delivered an extemporaneous speech — an address which became, due to illness, his last. Frankfurter noted that his first years as a lawyer had been devoted to practicing before the ICC, the next twenty-three years as a professor of law were spent lecturing about the ICC, and the last twenty-three years as a jurist were devoted to lecturing to the Commission. Hence, he was intimately familiar with more than a half century of the agency's activities.

Frankfurter has observed that in the seventy-five years of the history of the Interstate Commerce Commission, the agency "had an unblemished character, and has been manned on the whole by men of high competence."<sup>185</sup> He proceeded to praise the agency's integrity:

It has maintained not merely formal independence, but actual independence of word and deed, and has been a laboratory demonstration of how economic problems may be worked out by trial and error. Finally, by virtue of all these considerations, the Commission has been a pacemaker, a model, for the subsequent commissions which, in turn, have been created in response to economic and social demands in their fields of activity.<sup>186</sup>

Frankfurter noted that during its first seventy-five years the Commission had dealt with the issues it confronted pragmatically rather than dogmatically, "distrusting all absolutes, whether of private enterprise or government control." Can the same be said today? Is the ICC still that bastion of unblemished character, striking competence in government,<sup>187</sup> and independence

183. See 49 U.S.C. § 10101(a)(4) (Supp. V 1981).

184. 365 I.C.C. at 712.

185. F. FRANKFURTER, *THE INTERSTATE COMMERCE COMMISSION* 243 (1962).

186. *Id.* at 244.

187. Frankfurter said:

In the first place, the Commission illustrates, throughout its life, unblemished character. . . . I don't merely mean character in the crude sense of the word, but character in its largest, affirmative sense — character meaning a fastidious regard for responsibility, a

from political influence?<sup>188</sup>

ICC Commissioner Frederic Andre recently remarked that bribes and unlawful rebates should be encouraged, for they constitute "one of the clearest instances that the free market is at work."<sup>189</sup> Several members of Congress responded by asking for his resignation.<sup>190</sup>

The Chairman of the Board of the American Trucking Associations recently criticized the Commission because, he said, since deregulation "the ICC virtually encouraged abusive pricing — if not predatory pricing — within the industry. We have to say very clearly that it's not the recession, but the ICC's . . . cavalier implementation of provisions that do not exist in the legislation passed by Congress."<sup>191</sup> One coal industry representative has vigorously attacked ICC efforts to deregulate rail ratemaking:

The shortest and most accurate summary of what the I.C.C. appears to be doing is that it wishes to put itself out of business and is therefore attempting totally to deregulate all traffic, monopoly or otherwise. This it has been attempting to do by subverting each of the major goals of the Staggers Act designed to benefit and protect shippers.<sup>192</sup>

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complete divorcement between public and private interest, and all other concomitants of a true and worthy conception of public duty. Alas, that cannot be said of all public bodies, but it can be said that this Commission throughout its seventy-five years has had a career of unblemished character.

Secondly, I would say we are here to celebrate as striking a manifestation of competence in government as any I know of in the three branches of government. With all respect for each of those three branches . . . my deep conviction is that . . . this Commission has as high a record of competence as any . . . of the other three branches of government.

*Id.* at 236-37.

188. Frankfurter noted:

Thirdly, it is a necessary condition, before a Commission can effectively act, that it be independent. I do not mean independence because the statute says it shall be independent . . . but because Commissioners actively assert independence when the occasion calls for independence.

*Id.* at 239. Of course, Frankfurter spoke prior to the Reorganization Act of 1969, which vested in the President the power to designate which of the Commissioners shall be Chairman. Reorg. Plan No. 1 of 1969, 3 C.F.R. 1066 (1971), reprinted in 5 U.S.C. app. at 1128 (1982).

189. Lewis, *Edited Account of Enforcement Conference Released by ICC*, TRAFFIC WORLD, Dec. 27, 1982, at 13.

190. *Id.*

191. Butler, *Abuse in High Places Hit by ATA for Exorbitant Taxes on Industry*, TRAFFIC WORLD, Feb. 21, 1983, at 19.

192. M. Foldes, *Post-Staggers Act, I.C.C. Actions and Shipper Initiatives* (address before Conference on Coal Transportation, Alexandria, Va., 1983). These views appear to be widespread throughout the coal industry. Indeed, the industry has specifically complained of the following ICC actions:

1. Promulgated a definition of "rail market dominance" which had the effect of making it nearly impossible for a shipper to demonstrate the need for ICC review of rail rates. That definition was recently overturned and remanded to the ICC by the U.S. Court of Appeals for the Fifth Circuit. However, the ICC has petitioned the Fifth Circuit to rehear the case. The Court has granted the ICC's petition.
2. Issued an unrealistic definition of railroad "revenue adequacy," which definition re-

Shortly after the promulgation of the Motor Carrier Act of 1980, one of the nation's leading transportation attorneys characterized the ICC's failure to satisfy the legislative mandate as follows:

It is obviously the intent of the Commission to avoid balancing the competing interests, avoid the necessity of showing of broad public need for broad applications, and attempt to utilize the Congressional policy with respect to elimination of restrictions in a manner inconsistent with the Congressional intent.<sup>193</sup>

Numerous attorneys have argued, and several federal courts have concluded, that the ICC has not followed the wishes of Congress in implementing recently enacted legislation.<sup>194</sup> Both the Fifth and Ninth U.S. Circuit Courts of Appeal have been faced with an Interstate Commerce Commis-

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sults in the absurd outcome that only two relatively small railroads are considered "revenue adequate" despite the evident high profitability of most major coal-hauling railroads.

3. Proposed a differential pricing scheme in which a grossly disproportionate amount of a railroad's fixed costs are borne by coal shippers.

4. Proposed on February 24, 1983 a plan for determining maximum reasonableness for rates for hauling coal, which would allow railroads to impose a "bounty" on coal traffic of 15 percent each year above inflation.

5. Refused to carry out in any serious way the requirements of the Long-Cannon amendment in the Staggers Act, which amendment called upon the ICC to see to it that railroads move to eliminate traffic that was not paying its fair share (non-compensatory traffic) and to avert cross subsidization of competitive traffic by captive movements. Failure to eliminate non-compensatory traffic causes shippers of commodities such as coal to pay excessive rates.

6. Adoption of a railroad-proposed inflation index, which overstates the railroads' cost increases by completely disregarding gains made in a railroad's productivity and efficiency, and, therefore, discourages efforts to achieve such gains.

7. Allowing upward adjustments in rates because of higher costs, while not requiring downward adjustments when railroads' costs decrease.

8. Proposed regulations on March 3, 1983, which deregulate coal export traffic, even though much of this traffic is "captive" to the railroads.

Letter from 27 Coal Company Chief Executive Officers to President Reagan, app. 1-2. (May 25, 1983). See *infra* note 229.

193. ASS'N OF ICC PRACTITIONERS, EASTERN TRANSPORTATION LAW SEMINAR 51 (1980) (address of Alan Serby). More recently, he noted:

A trucking industry already characterized by serious overcapacity and underutilization, has become the beneficiary of a regulatory policy designed and administered to further increase capacity.

The specific intent of present members of the Interstate Commerce Commission, in connection with entry policy, is to grant each and every application filed with the Commission whenever and wherever possible, and to the broadest extent available.

A. Serby, Motor Carrier Operating Rights and Wrongs, 1982 (Jan. 6, 1983) (address before the Motor Carrier Lawyers Ass'n, Washington, D.C.).

194. See, e.g., Dempsey, *supra* note 1. As Justice Felix Frankfurter noted in the "Steel Seizure" cases:

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952). Professor Donald Harper noted the possibility that the ICC might proceed with *de facto* deregulation, despite the contrary intent of Congress, when the Motor Carrier Act of 1980 was promulgated:

sion not only determined to act *ultra vires* with respect to congressionally delegated authority, but to contumaciously ignore judicial decisions attempting to identify perimeters within which the Commission may lawfully act.<sup>195</sup> Confronted with a defiant agency, both circuits have been forced to take the additional extraordinary step of issuing writs of mandamus insisting upon compliance with their judicial decrees.<sup>196</sup> The leaders of the American Trucking Associations, the Teamsters Union, the Motor Carrier Lawyers Association, the National Motor Freight Traffic Association, and the Owner-Operators Independent Drivers Association of America jointly submitted a forceful plea to Congress to stop these *ultra vires* activities:

In our view, the ICC thwarts the will of Congress and violates the law. In so doing, the ICC exacerbates the deteriorating condition of the trucking industry, contributes to unemployment, and fosters volatile, unlawful rate practices.<sup>197</sup>

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A critical aspect of the Act of 1980 is how the ICC interprets its various provisions and how efficiently the Commission works. The success or failure of the Act will be largely determined by the Commission. As in any regulatory system, the persons performing the regulating are more important to its success than the law upon which the regulation is based.

As to interpretation of the Act by the ICC, although the Act of 1980 is more specific in what Congress wants done than most other transportation regulatory legislation has been, there is still room for considerable "interpretation" by the ICC. Should the Commission choose, it can interpret the new law in such a way as to produce almost total deregulation of entry, even though beyond the intention of Congress. If the oversight provision of the Act does not protect against this, the determination of the future of economic regulation of motor trucking will be left by default to the ICC.

Harper, *Entry and the Motor Carrier Act of 1980*, 12 *TRANSP. L.J.* 51, 70 (1980).

195. See *American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 659 F.2d 452 (5th Cir. 1981); *Amador Stage Lines, Inc. v. United States*, 685 F.2d 333 (9th Cir. 1982); *Central Forwarding, Inc. v. Interstate Commerce Comm'n*, 698 F.2d 1266 (5th Cir. 1983). See also *Ritter Transp., Inc. v. Interstate Commerce Comm'n*, 684 F.2d 86 (D.C. Cir. 1982); *Steere Tank Lines, Inc. v. Interstate Commerce Comm'n*, 666 F.2d 255 (5th Cir. 1981).

196. See, e.g., *American Trucking Ass'ns v. Interstate Commerce Comm'n*, 669 F.2d 957 (5th Cir. 1982); *American Trucking Ass'ns v. Interstate Commerce Comm'n*, 673 F.2d 82 (5th Cir. 1982).

197. Letter from Bennet C. Whitlock, Jr., Jackie Pressler, Harold D. Miller, Jr., James Harkins, and Mark Perry to Bob Packwood (June 29, 1983). This letter is reproduced, *infra* note 231. A similar letter was recently sent by Duncan McRae, Sr., Chairman of Forward America, to every member of Congress. Among the conclusions it reached are the following:

[T]here are many of us who do not believe the problems besetting the industry today are necessarily caused by the Motor Carrier Act of 1980. Rather, the problems are created by the fierce determination of the D.O.T. and the present members of the I.C.C. to deregulate the motor carrier industry through administrative fiat. Members of the trucking industry, by and large, do not believe it was the intent of the Congress to summarily deregulate trucking in the Motor Carrier Act of 1980. However, the present membership of the I.C.C., all of whom are avowed and professed deregulators, are effectively deregulating and/or dismantling the trucking industry under the guise of *interpreting* the Act.

With all due respect, it appears to me that the I.C.C. and the D.O.T., in concert, are prostituting the true intent of the Motor Carrier Act of 1980 and that the Congress is abdicating its responsibility when it allows the Executive Branch to usurp its Constitutional authority in this area.

Letter from Duncan McRae, Sr., to 435 Congressmen (July 4, 1983). Representative Robert A.

It was the intention of former CAB Chairman Alfred Kahn to so "scramble the eggs" (by deregulating comprehensively and expeditiously through the vehicle of administrative fiat) that no one would ever be able to put them back into their shells again. It is no secret that if an agency decides to perform its functions irresponsibly, those members of the public which have traditionally benefited from regulation will ultimately view deregulation as a lesser vice than irresponsible regulation, and themselves call for the death of the beast which has devoured the benefit of the regulatory burden. This, unfortunately, is the point at which many of the nation's airlines now find themselves.

The deregulation zealots appointed by Presidents Carter and Reagan to the Interstate Commerce Commission may have mortally wounded that Grand Old Lady at 12th and Constitution Avenue. With wrecking balls of steel they attacked her very foundation, determined to crush her into rubble, and sew the ground with salt so that nothing would ever grow there again. At that seventy-fifth birthday party for the ICC mentioned earlier, Justice Frankfurter, perhaps prophetically, addressed the possibility that the agency might one day end, not with a bang, but with a whimper:

It is a very wise man who said that institutions do not die, they commit suicide. And you can commit suicide by just ceasing to have life. I hope, and I have the highest confidence, that the Interstate Commerce Commission will remember the other part of the phrase of Ecclesiasticus, "Let us now praise famous men, and our fathers that begat us" and continue to live in the spirit of the men who preceded them. Continue to live in their spirits with reference to your problems and seventy-five years from now there will be an even more appreciative audience and nation grateful to the Commission for its achievement.<sup>198</sup>

ICC Chairman Reese Taylor, Jr. recently informed the Congress that he would favor sunseting the agency he heads.<sup>199</sup> The agency already has suffered a reduction in the size of its staff to only two thirds the 2,100 individuals it employed five years ago.<sup>200</sup> Further, Chairman Taylor has made it clear that, irrespective of his personal beliefs on the nature and course of the agency's demise, he plans to "fully support whatever the administration proposes" in the nature of legislation.<sup>201</sup> Again, can the ICC still be characterized as a bastion of unblemished integrity, competence,

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Roe (D.-N.J.) charged that "the ICC has failed miserably in its responsibility [to carry out the will of Congress]. Its actions and policies show that it's hellbent on destroying the trucking industry." *ICC Likely Target of Broad Probe In Implementing Motor Carrier Act*, TRAFFIC WORLD, Apr. 11, 1983, at 17.

198. F. FRANKFURTER, *supra* note 185, at 245.

199. *ICC Chairman Tells Senate Panel He Favors Early Sunset of Agency*, TRAFFIC WORLD, Dec. 20, 1982, at 27. See also *Sunset of ICC Expected To Be Sought by Administration in Next Congress*, TRAFFIC WORLD, Sept. 27, 1982, at 105.

200. *ICC Enters 1983 Poised for Debate Over Limits To Its Jurisdiction*, TRAFFIC WORLD, Jan. 10, 1983, at 19.

201. *Id.* at 20.

and independence?<sup>202</sup> As Frankfurter said, institutions do not die, they commit suicide. The CAB committed suicide by strongly supporting the Airline Deregulation Act of 1978, which scheduled the agency's self-destruction in 1985. Similarly, the ICC may not live to enjoy its centennial celebration in 1987.

#### VIII. CONCLUSIONS

The benefits of responsible economic regulation of transportation included the provision of an adequate level of service at a reasonable price to all communities and shippers, no matter how large or small. The industry enjoyed healthy competition without industry concentration.

Excessive entry coupled with the abdication of governmental oversight over predatory ratemaking and other unlawful practices (and, yes, the recession as well) have created an economic environment in which the current series of cutthroat rate wars become inevitable. *Newsweek* summarized the intense problems faced by the airline industry as follows:

Since the Carter Administration began to ease Federal restrictions on the troubled U.S. airline industry in 1977, numerous unprofitable routes have been abandoned. Service has deteriorated, and the airlines are frantically manipulating fares up and down to attract business and to satisfy shareholders nervous about their mounting financial losses. The desperation tactics make air travel more complicated and, since they defy reason, they have brought some big carriers dangerously near financial collapse.<sup>203</sup>

Thomas G. Plaskett, vice-president of American Airlines, described the contemporary economic environment in these terms: "Deregulation has encouraged the concentration of services on major, dense routes, and this has led to excessive, destructive competition and over-capacity. . . . We find it difficult to reconcile such destructive competition with the overall public interest."<sup>204</sup> Richard Ferris, Chairman of the Board of United Airlines,

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202. In 1977, the Senate Committee on Government Affairs concluded that "[f]or much of the past fifteen years, neither the White House nor the Senate has demonstrated a sustained commitment to high quality regulatory appointments." STAFF OF SENATE COMM. ON GOV'T AFFAIRS, 95th CONG., 1ST SESS., STUDY OF FEDERAL REGULATION xxxi (Comm. Print 1977).

[T]he Interstate Commerce Commission . . . was, formerly, widely considered the most eminent and effective of all the federal agencies. Past Commissioners, such as Joseph Eastman, Clyde Aitchison, Howard Freas, Rupert Murphy, and others, were experienced, dedicated and revered regulators, who created, molded and developed our renowned national transportation system. But with the enactment of the Presidential Reform Act of 1969, the Chairman, and the Commission itself, fell under the control of the President and his staff, and became a political animal. This condition has been aggravated by the predetermined regulatory philosophies of the latest appointees to the Commission, and their headlong rush to deregulate transportation. And if this means that they must disregard the governing laws, courts, Congress, or anyone else to do so, so be it.

D. Baker, *supra* note 19, at 10.

203. *The U.S. Air-Fare Dogfight*, NEWSWEEK, Apr. 19, 1982, at 69.

204. *Speakers in 'Great Debate' in Detroit Differ in Appraisals of Deregulation*, TRAFFIC WORLD, Nov. 30, 1981, at 18.

admitted that "[r]estructuring an industry as large as ours means shake-outs, fallouts, irrational behavior, and a topsy-turvy marketplace."<sup>205</sup> His counterpart in Western Airlines, Neil Bergt, noted that "[a]irlines are out there cutting each other's throats and bleeding to death."<sup>206</sup> Similarly, Eli Timoner, chairman of Air Florida, remarked: "It's like lemmings throwing themselves off a cliff. There's no logic to it at this point. It's unbusinesslike."<sup>207</sup> James Worsham, president of Douglas Aircraft Co., said: "The airlines are on a kamikazi path . . . ." He suggested that a blue ribbon panel of airline executives be established to work closely with Congress to solve the industry's problems.<sup>208</sup> One major daily newspaper summarized the contemporary problems of the deregulated airline industry as follows:

Airlines have less room for differentiation [than do department or grocery stores]. . . . They tend to match each other in convenient departures. That leaves little to fight about except ticket prices, and so far they've been pricing themselves to destruction.

That has lowered many fares. But it has created a bewildering world where some passengers pay twice as much as a seatmate, and more for short haul routes than transcontinental flights. Service to many smaller cities is vanishing. The public has cause to join airline employees in hoping order returns to the chaotic skies.<sup>209</sup>

Although initial airline price competition generated additional price sensitive travelers, lower rates for freight will not have the corresponding effect for carriers of commodities, for the freight transportation industry is relatively price inelastic.<sup>210</sup> Nor is an unhealthy transportation industry likely to

205. Sterling, *Will Truckers Follow the Airlines' Lead?*, *GO WEST*, July 1982, at 6.

206. *Id.*

207. *The Worst Year for U.S. Airlines*, *TIME*, Feb. 22, 1982, at 46.

208. Mayer, *Uncertainty Clouds Future of Airlines*, *Rocky Mountain News*, Apr. 17, 1983, at 98. However, it must be recognized that many air carriers have concluded that no regulation at all would be preferable to the existing governmental environment, or reregulation. As United's Chairman, Richard J. Ferris, noted, "the egg of deregulation has been well scrambled and there is no way to unscramble it." Burkhardt, *Airlines, Unions Split on Decontrol Results*, *J. of Com.*, June 16, 1983, at A2. See *U.S., Carrier Officials Oppose Reregulation in Spite of Losses*, *AV. WEEK & SPACE TECH.*, June 6, 1983, at 51. United, the nation's largest air carrier, has long been a vigorous proponent of airline regulation.

E.H. Boullioun, senior vice president of Boeing, characterized the impact of airline deregulation as stretching the system "beyond the breaking point." He predicts that the market disruptions engendered by deregulation will likely continue indefinitely. *Boeing Official Cites Dangers of Deregulation*, *Wash. Post*, Oct. 26, 1983, at D10.

209. *Braniff: First to Fall?*, *Denver Post*, June, 1982.

210. Cook, *Transportation*, *FORBES*, Jan. 8, 1979, at 56. Nevertheless, even the temporary attributes of airline deregulation may not be repeated in the surface transportation of commodities. As has been indicated, the passenger market is price elastic — lower prices may generate demand from discretionary travelers. However, in the aggregate, the commodities market is almost totally demand-inelastic with respect to the use of transportation services. Between carriers and modes there may be some demand elasticity, but the total market, at any point in time, is virtually finite.

be a safe industry, leading to unnecessary loss of equipment, commodities and, unfortunately, human life. Furthermore, such intensive competition is limited to high density markets, creating inevitable price discrimination against small shippers and small communities. In oligopoly or monopoly transportation markets, rates have risen substantially. Undoubtedly, the incentives for locating industry in rural America will be diminished, while the incentives for locating in urban locations will be correspondingly increased. Urban America seems to be turning its back on the "outback."<sup>211</sup> Moreover, the ripple effect of discriminatory rates upon the American economy will constitute an additional contribution to the economies of scale that large industries already enjoy, thereby exacerbating an environment in which most American industries ultimately become highly concentrated, while smaller competitors struggle, fail or are absorbed into the conglomerate giants. Thus, smaller industries will pay higher prices for transportation serv-

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Hence, while air passenger deregulation led to price competition which, in turn, enabled air carriers to fill seats which might otherwise have flown empty, deregulation is unlikely to fill empty areas in motor carrier trailers or rail boxcars.

211. Clearly, there is more at stake than the sanctity of the laws of the marketplace. There is a public interest in assuring that the fundamental ingredients of economic growth are abundant in all regions of our nation, so that the fruits of such growth might be enjoyed by a larger segment of the population. This is, of course, a distribution of wealth concept. A geographic disbursement of economic growth offers the potential for a more equitable distribution of regional growth rates. Moreover, by removing industry from the concentrated urban areas where the industrial revolution was born, the quality of life might ultimately be improved as workers, following industry like a magnet, enable population to become more geographically disparate.

Like communications and energy, transportation is a fundamental component of national, regional, and local economic development. If any of these vital components is deficient, either from a qualitative or quantitative standpoint, investment in industrial plant will not be forthcoming and existing industry may relocate elsewhere. Traditionally, it has been thought that these essential industries were too important to be left to the rigors of the marketplace.

Several of these industries were natural monopolies (e.g., the early railroads, telephone, telegraph, gas, and electric companies, and to some extent, television and radio), which if unregulated would produce in lower quantities and at higher prices than would industries in a competitive market. Regulation seeks to substitute what is lacking in the marketplace by insisting that such natural monopolies produce at a lower price and higher volume than they otherwise might.

Recognizing this distinction, virtually every major industrial nation on the planet treats these industries in a manner significantly different from the rest. In most, the industries are owned and operated by the state. In transportation, most of the rail, motor, barge, and air carriers are socialized, even in Western Europe.

In the United States, the services of transportation, communications, and energy have largely been performed by the private sector, with government serving the role of a vigorous regulator of a wide variety of activities, weighing and balancing the public interest against what would otherwise be the economic laws of the market place. The government plays a dual and perhaps schizophrenic role — on the one hand, it seeks to stimulate the inherent economics and efficiencies of the regulated industries; on the other, it seeks to protect the public from the abuses which these industries might otherwise perpetrate. For the most part, the United States has been able to avoid nationalizing these industries, for private ownership thereof has, on the whole, proven successful. The major exception is rail passenger service.

Dempsey, *supra* note 24, at 311.

ices, while their larger competitors enjoy relatively lower shipping costs; consumer costs will likely reflect such discrimination.

The prolongation of contemporary rate wars will force even more carriers into bankruptcy or merger, ultimately leading to an economic environment in which there will likely be few effective competitors, particularly in those sectors of the industry (e.g., less-than-truckload transportation) where entry costs are relatively high.<sup>212</sup> Hence, the structure of the transportation industry will come to more closely resemble every other major mature American industry. *Forbes* magazine predicted that, in the short term:

deregulation will bring a rash of new competition into the trucking business: competitors who will price-cut their way into the market and set off a wave of mergers that will transform trucking into a far more concentrated business than it is now. The short haul and regional truckers may well be squeezed out and the big national companies — outfits like Yellow Freight, Roadway Express, Consolidated Freightways and McLean Trucking — will come to dominate the industry.

... [L]ong-term deregulation of trucks and rails . . . [will] only lessen competition in trucking, encourage prices to rise and could further weaken the railroad industry.

... If the aim of deregulation is to bring freight rates down, the result may

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212. The critics [of regulation] seem to misunderstand or consciously avoid one of the traditional objectives of motor carrier regulation: although reasonable rates for the industry as a whole may result in higher profit margins for the larger, more economically efficient carriers, they also protect small, marginally efficient carriers. Protection of small carriers, the preservation of diversity, and the willingness to pay the incremental additional price have all contributed to the fundamental foundations of motor carrier regulation, and have preserved a healthy competitive structure. To turn this practice against . . . the industry, without first addressing the underlying value judgment that "smallness" should be protected for its inherent value in stimulating innovation in service and price and "largeness" must be restricted for its inherent risks in stifling such economic attributes, is to undermine the traditional objectives of regulation without ever stating an acceptable justification for such a radical change in course.

Dempsey, *supra* note 21, at 371.

Professors Wagner and Dean predict that:

To the extent that smaller, less efficient carriers are forced out of business, larger, more efficient companies increasingly may dominate motor carriage. The result may move the industry toward a greater degree of imperfect competition as several large firms dominate. . . .

An open-door entry regulation policy may invite a new type of trucker — inexperienced, overconfident, and opportunistic. Many fear an influx of people with little capital, poor or used equipment, and little education coupled with high expectations. Whether such carriers fill a service void is questionable. Although these carriers often cut rates to gain business initially, failures frequently have resulted due to a lack of managerial expertise or cost control; prior to that time, however, there is often less need awareness for safety and service.

One effect of deregulation is that carriers may lessen service to smaller areas and concentrate on the more lucrative, urban centers.

Wagner & Dean, *supra* note 106, at 415 (citations omitted).

be . . . to reduce rather than enhance competition.<sup>213</sup>

In the words of *Dun's Business Review*, we are witnessing a "severe industry shakeout." During the "shakeout," many Americans employed by carriers, and many stockholders of or lenders to transportation businesses will be expected to pay the price of the grand experiment in deregulation.<sup>214</sup> Many U.S. air and motor carriers will not survive the transition. The experience of deregulation in both Australia and Great Britain was that following a limited period of intensive competition and carrier bankruptcies, the less-than-truckload sectors of the motor carrier industry became oligopolistic in character.<sup>215</sup> Professor Garland Chow's study reveals that deregulation in Australia created an economic environment in which only four major motor carriers survived.<sup>216</sup> Many industry experts predict that the ultimate result of transportation deregulation in the United States will be sharply increased industry concentration. As has been indicated, the *Washington Post* predicted that during the next decade rail mergers will reduce the number of our nation's railroads to as few as three.<sup>217</sup> Horizontal integration may well result in the creation of enormous multimodal carriers. Pointing out that

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213. Cook, *Transportation*, FORBES, Jan 8, 1978, at 58-59.

214. It seems to me that everything that is a product or a service must be paid for by society. If we are talking about the transportation of goods or the transportation of people, we are talking about individuals or companies paying for that transportation not only as individuals but as members of society. If at a particular time or season in our economy through the forces of deregulation or simply because of the era, a group of people pay less for the transportation of goods or services than these services are "worth," they or someone else in society must pay the extra cost. The people involved may pay by the receipt of shoddy or even dangerous transportation service. They may pay for it indirectly by contributing as taxpayers to government subsidies. They may pay for it as members of society by living with the very expensive process of entry into the business world, cut throat pricing, and bankruptcy.

. . . In the bankruptcy process members of society pay. Creditors lose the money which they have given to the transportation company. Bondholders or stockholders of the company lose and all of those losses are spread often among groups of people who can least afford to accept that loss. People whose pension funds have been invested in a company like Braniff lose or small suppliers who have extended credit for tires, gasoline, and many other forms of service and goods. And finally, society pays when there is an elimination of the competitive force of the small and medium size businesses and conglomerates or large corporations take over.

. . . The most searing statement which I felt you made was the advocacy by the deregulatory people of the intermodal transportation concept. "Intermodal" is simply another word for the control of transportation services by the railroads or ultimately by corporations which own railroads, and if that occurs, no amount of legislation will reverse process. We will be stuck with an expensive and totally inefficient transportation system within the United States. God Help Us!

Letter from Richard H. Suddath to Paul S. Dempsey (Apr. 26, 1983).

215. Chow, *Economic Regulation of Motor Freight in Foreign Countries*, 47 ICC PRAC. J. 44, 45 (1979).

216. *Id.*

217. Paul, *Freight Transportation Is Being Transformed In Era of Deregulation*, Wall St. J., Oct. 20, 1983, at 1.

The key to the railroads' strength is that they have far more cash and fixed assets than other types of carriers, and far less internal competition. While the number of truckers

carriers such as CSX Corporation (itself the product of the 1980 merger between the Chessie and Seaboard Coast Line Railroads) have begun trucking companies, purchased natural gas pipelines, is expanding its aircraft services operations, and is acquiring a barge company, the *Wall Street Journal* predicts that "[o]ver the next few years, a handful of giant companies are expected to evolve, each offering global door-to-door service."<sup>218</sup> It went on to point out some of the dangers of such accentuated concentration:

Some observers fear that if a handful of multimodal companies come to dominate the transportation industry, a lack of competition could inflate freight rates.

... [T]he newly powerful rail industry has shown that it is capable of running roughshod over potential competition, a circumstance that has some shippers and elected officials demanding that railroads' power be curbed. Ultimately, with fewer competitors, the United States will likely enjoy higher rates and poorer service than that which existed prior to deregulation.<sup>219</sup>

The airline industry, too, is likely to become more concentrated as deregulation progresses. "Experts say the shakout may continue for another five or ten years, with only three big carriers ultimately serving domestic routes and just one U.S. line carrying international travelers."<sup>220</sup> Ultimately, with fewer competitors, the United States will likely enjoy higher rates and poorer service than that which existed prior to deregulation.<sup>221</sup>

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proliferate, the number of railroads shrinks, with the outlook for no more than six to 10 major rail systems serving the U.S. within five years.

*Id.* at 18.

218. *Id.* As an example of rails' enormous political and economic clout, the article pointed out the industry's success in defeating a congressional proposal to promote coal slurry pipeline construction. "Most coal companies are 'captive' to a single railroad and wanted coal slurry pipelines so as to create a competitive situation." *Id.*

219. *Id.*

220. *The Airlines Hit a Dwindraft*, NEWSWEEK, Oct. 10, 1983, at 66. Other commentators have affirmed the move toward concentration: "[E]conomists predict that by 1990 there will be four or five giant airlines and a host of specialized, although not necessarily tiny, ones." *A Painful Transition For the Transport Industry*, Bus. Wk., Nov. 28, 1983, at 83. See Byrne, *United's Expansion on West Coast Threatens Future of Small Airlines*, WALL ST. J., Nov. 16, 1983, at 33.

221. In 1980, this author predicted that transportation deregulation would proceed through three stages:

In the first, price and service competition are increased, carriers become innovative and imaginative in the types of price and service combinations they offer, and consumers thereby enjoy lower priced transportation. Carriers are free to maximize their profits by leaving unprofitable markets and investing their equipment in more lucrative ones. In the airline industry, lower prices initially generated increased passenger traffic, thereby enabling air carriers to fill seats which might have otherwise flown empty. As has been indicated, air carriers left many of the small, remote, isolated communities of our nation and transferred their aircraft to the more heavily traveled markets. Passengers in these dense markets enjoyed intense pricing and service competition. Airlines generally enjoyed higher profits, at least during stage one.

As a result of the *de facto* deregulation of entry by the ICC, with a massive increase

Many are now beginning to argue for the reintroduction of some moderate form of responsible economic regulation.<sup>222</sup> The president of one of

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in both the percentage of applications granted and in the number of applications filed, the motor carrier industry also finds itself in stage one of deregulation. New entrepreneurs are entering the industry, freight prices are being reduced drastically, and less-than-truckload carriers are beginning to lose truckload "cream" traffic to expanded contract carriers and new operators. The larger carriers are likely to respond with their own competitive prices and to reduce service in the less lucrative markets. The first stage is the one to which deregulators point to demonstrate the attributes of deregulation.

The second stage is an embarrassment to deregulators. This is the stage in which the airline industry now finds itself. Because of excess capacity and unrestrained price and service competition, air carrier profits have plummeted; indeed, the industry is experiencing the worst losses in the history of aviation. In order to retrieve some of their operational losses, carriers have begun to raise prices drastically in all but the dense, highly competitive markets in which they may wish to preserve their market shares. Thus, airline fares rose 34 per cent from June of 1979 to March of 1980, an increase which far exceeds the increase in the price of fuel as well as other operational cost increases. [Economist Michael Evans] has succinctly summarized the market effects of deregulation upon the airline industry:

"In the short run, deregulation does indeed seem to be the promised land. Prices rise more slowly, productivity increases, service expands, and everyone is happy. However, after the initial euphoria, it turns out that profits are not really increasing after all.

As a result, rationalization of the route structure begins, which turns out to mean price-cutting on primary routes, coupled with higher prices and less service on secondary routes.

When this happens, the gain in productivity slows or even reverses, thereby negating much of the benefits of deregulation. We end up with no improvement, or even higher prices and lower productivity in that industry."

The continued inability of many carriers to balance their sheets due to the intensive competition they are forced to endure under deregulation will force many carriers to float "belly up" in bankruptcy. This will occur with greater frequency in both the airline industry and the motor carrier industry. During the second stage, prices will continue to be set at reasonable levels in highly competitive markets, and will continue to grow at unreasonable rates in monopolistic or oligopolistic markets. Service will begin to deteriorate in both.

Stage three of deregulation will constitute the ultimate transportation system with which the nation is left. The carriers which have suffered most during stages one and two will, by this point, have gone bankrupt, leaving many markets with very little competition. A monopolistic or oligopolistic market structure will result in high prices, poor service, and little innovation or efficiency. Potential entrants, having witnessed the economic calamity of destructive competition, may be unwilling to enter so cutthroat an industry. Because the economic barriers to entry are greatest in the airline, railroad, and less-than-truckload motor carrier industries, concentration will be greatest here. Small communities will receive poorer service and/or higher rates than they enjoyed under regulation. Small shippers are likely to receive poorer service, poorer liability protection, and/or higher rates than larger corporations. Much of the industry, particularly small carriers, may be unhealthy, leading to some question as to stability of service. In the end, the industry structure created by the free market may be much less desirable than that which was established under federal economic regulation.

Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 *TRANSP. L. INST.* 121, 172-75 (1981) (citations omitted).

222. Columnist Hobart Rowen has vigorously called for a reintroduction of regulation: "Transportation is not just any old business. Basically, it's a public utility, which has to be regulated in the public interest. It's time to re-regulate the airlines." Rowen, *Airline Deregulation: A Bankrupt Policy*, *Wash. Post*, Sept. 29, 1983, at A21. Columnist Carl Rowan echoed these concerns:

It is crucial to America's economic and social well-being, and surely its security, that we have an airlines system that can be relied upon in peace and war.

Congress deregulated our airlines just enough to perpetrate a disaster. Can it admit

our nation's largest air freight forwarding companies conceded "with great reluctance . . . that the task (of restoring the air transportation industry to economic balance) can best be accomplished through the reintroduction of moderate government regulation of route entry. . . . We can, by judicious reapplication of regulation, correct excesses that now debilitate us all so extensively."<sup>223</sup> Not only carriers are criticizing the grand experiment in deregulation. The Executive Director of the Shippers' National Freight Claims Council, describing deregulation as a "dismal failure," urges the reintroduction of responsible regulation, saying:

The obvious solution is to start anew with a sound regulatory policy, carefully administered by transportation-oriented experts instead of economists, and to reinstate air transportation as a public service requiring reasonable prices and service for all citizens and communities on a non-discriminatory basis.<sup>224</sup>

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to an error, and reverse its action of 1978, when so many of its members voted for a debacle? Let us pray.

Rowan, *We Goofed — Let's Regulate Airlines Again*, Chicago Sun-Times, Oct. 10, 1983, at A25. One CAB Staff Member has prepared an impressive analysis of the relevant financial and statistical data, and concluded that:

The evidenced structural changes have caused and will continue to cause a higher required overall fare level, generally poorer passenger service, and allow significant price discrimination. It is further evident that fares are not cost-based, and that the industry is becoming less productive and failing to share the expected efficiency gains.

. . . Large short-term consumer gains are coupled with tremendous operating and capital losses by the industry. Improved service quality in some markets is offset by lower quality service system-wide. Increased service competition has lowered unit productivity, increasing cost with little gain in efficiency. So far, I do not believe the gains can be shown to outweigh the losses.

Unfortunately, there seems to be little reason to expect the promised benefits of deregulation to come to fruition.

Letter from David B. Richards to James J. Howard and Nancy Landon Kassebaum (Aug. 20, 1983); see *CAB Staffer Tells Congress Deregulation Is A Failure*, Commuter Regional Airline News, Oct. 10, 1983, at 1; Rowen, *Reiterating the Case for Airline Deregulation*, Wash. Post, Oct. 9, 1983, at G1.

Senator Mark Andrews (R.-N.D.) has recently introduced a bill, S. 2047, to provide some measure of stabilization for airline rates. See *Deregulating America*, Bus. Wk., Nov. 28, 1983, at 80.

223. Malkin, *Second Thoughts*, HEREFORD'S NORTH AMERICA, June-Nov. 1982. See also Berg, *Needed: A Return To Regulation*, TRAFFIC WORLD, Nov. 1, 1982, at 42.

224. Augello, *supra* note 143, at 10.

A major survey of 309 traffic executives of *Fortune* 500 companies evidenced little enthusiasm for air cargo deregulation. *Is Airline Deregulation Working?*, Air Com., Sept. 21, 1983, at 1, 4.

The returns clearly showed that air cargo deregulation has failed to win the broad, unqualified shipper enthusiasm that had been taken for granted by its early proponents.

Although 45 percent cast their vote in favor of deregulation, a large minority (34 percent) preferred a return to some form of regulation. Considering the fact that 21 percent of the 302 respondents had still not made up their minds on the issue, it can be seen that substantially less than half may be regarded at this time as staunch supporters of deregulation.

*Id.* at 6.

An airline labor leader recently asserted that "judging from the destructive impact on airline profits, the declining level of passenger safety and convenience, and the overwhelming burdens placed on airline employees, I can only conclude that deregulation has been a disaster."<sup>225</sup> Academicians are also beginning to join the ranks of those calling for responsible regulation of transportation.<sup>226</sup> Professor Jerold Muskin notes that:

Transportation, as a principal part of the community's physical distribution infrastructure is too important to leave to the uncertain (at best), or perverse (at worst), performance of the free market. . . . The argument that the unconstrained marketplace necessarily functions to produce improved results for our nation is simply wrong. It is a doctrinaire shibboleth. One need not look for examples of market failures that must be cured by government intervention. Highway common carriers stripped of rules, responsibilities and rights, it is submitted, fit into this category.<sup>227</sup>

Similarly, Professor Frederick Thayer argues:

Free market mythology is so entrenched in the U.S. that neither liberals nor conservatives are yet disposed to admit that it is time to begin again. If ever there was a need for a national commission to develop a sensible regulatory system, and to link together the domestic, international, and even military

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As the . . . survey . . . appears to indicate, air cargo deregulation has been less than a howling success. Two thirds of the Fortune 500 traffic/distribution executives surveyed reported not having been stimulated by deregulation to the point where they increased their air freight usage. Thirty-four percent want regulation; another 21 percent are undecided.

*Id.* at 38.

225. DOT's *View of Airline Deregulation Challenged by Small Cities, Labor*, TRAFFIC WORLD, June 20, 1983, at 16-17. This statement was made by Linda A. Puchala, President of the Association of Flight Attendants, before a subcommittee of the House Committee on Public Works and Transportation. She went on to say:

As part of the struggle to survive harsh competition in the deregulated skies, the industry has extended its cost-cutting efforts not only to reducing labor costs, modifying route structures, and trimming passenger service such as food, ticketing, and baggage handling. The airlines are also cutting costs in ways that passengers don't see — ways which reduce the level of safety.

*Id.* at 17. See Serrin, *Deregulation Called Disaster for Airline Industry*, N.Y. Times, Oct. 5, 1983, at B7; Sawyer, *Six Air Unions Urge a Return to Regulation*, Wash. Post, Oct. 5, 1983, at A1; *Air Unions to Ask for 'Re-Regulation' of Ailing Industry*, Wall St. J., Oct. 5, 1983, at 14; *Why Airline Pilots Are Becoming 'Street Fighters'*, Bus. Wk., Oct. 31, 1983, at 127.

226. See, e.g., *Prevention of Transportation Disintegration*, TRAFFIC WORLD, Apr. 4, 1983, at 1; *Experts on Freight Claim Issues Offer Advice in SNFCC Conference*, TRAFFIC WORLD, Apr. 4, 1983, at 19; *National Trucking Lobby Formed To Unmask Anti-Truck Activities*, TRAFFIC WORLD, May 30, 1983, at 23; *End of Deregulation Experiment, Reintroduction of Some Rules Urged*, TRAFFIC WORLD, Aug. 1, 1983, at 21; *Take Another Look at Deregulation*, Air Com., Nov. 28, 1983, at 30; Pitts, *Future of Airlines Worries DU Prof.*, Denver Post, Oct. 3, 1983, at 9A; Dempsey, *Affordability, Safety of Airlines May Suffer*, L.A. Times, Oct. 11, 1983, at 7; Dempsey, *Stormy Skies of Deregulation*, Chi. Tribune, Oct. 14, 1983, at 19; Dempsey, *Airline Deregulation's Hostile Skies*, Denver Post, Oct. 17, 1983, at 3B.

227. Muskin, *The Physical Distribution Infrastructure*, TRANSP. Q., Jan. 1983; *Deregulation And The Free Market*, TRAFFIC WORLD, Jan. 10, 1983, at 3.

aspects of air transportation, the need is now.<sup>228</sup>

Twenty-seven of the chief executive officers of the nation's coal companies recently informed President Reagan that they were "gravely concerned about actions and decisions of the Interstate Commerce Commission that have been taken in the name of railroad deregulation." They asked the President "to appoint to vacant positions on the Interstate Commerce Commission individuals who would recognize, as Congress did by passing the Staggers Rail Act, that adequate protection for captive shippers must be continued."<sup>229</sup> The coal industry, the electric utility industry

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228. Thayer, *supra* note 35, at 228.

[T]hose who undermine our transportation system are changing the kind of country we have, and changing it for the worse. As deteriorating transport raises internal trade barriers, we will move toward a Balkanized economy. A Balkanized economy means reduced efficiency, reduced competitiveness in world trade, and restricted opportunity as we give up the economies of scale created by our continent-wide "common market." We take this common market for granted, but we forget how rare an achievement it is in the fragmented, tribalized march of human history. To preserve this achievement, we must learn to do our "competition" analyses on a much larger scale, recognizing that sometimes we have to sacrifice a measure of competition in one sector (such as transportation) in order to maximize competition in the economy as a whole. Above all, we must steer a course between taking our transport network for granted, on one hand, and capriciously tinkering with the underpinnings that give it stability and predictability on the other hand.

What I'm talking about is pretty well summarized by a phrase every schoolchild knows: "one nation indivisible."

Letter from Mark J. Andrews to Paul S. Dempsey (Nov. 23, 1983).

229. This letter is reproduced in its entirety:

May 25, 1983

The President  
The White House  
Washington, D.C. 20050

Dear Mr. President:

As chief executive officers of major coal companies, strong advocates of the free market, and supporters of your economic policies, we are writing to ask that you use your appointive powers to remedy serious shortcomings at the Interstate Commerce Commission. We are gravely concerned about actions and decisions of the Interstate Commerce Commission that have been taken in the name of railroad deregulation, but which are inimical to the interests of coal producers and users and prejudicial to our mutual objective of less regulation by government.

The attached summary document notes the recent ICC decisions and outlines their effects on coal producers, coal users, and consumers of electricity and steel.

The 1980 Staggers Rail Act was intended to reduce railroad regulation in order to assist rail carriers in achieving revenue adequacy by allowing them greater flexibility in pricing their services. However, the Act specifically preserved regulatory protection for rail shippers in situations where competitive market forces are inadequate to ensure reasonable transportation charges. With this assurance of captive shipper protection, the coal industry, which is the principal provider of cargo to the major railroads, strongly supported the Act.

Implementation of the law by the ICC has ignored captive shipper protection to such an extent that the desirability of reduced regulation of the railroads is now open to serious question. As strong supporters of economic deregulation, we have reached this conclusion reluctantly, but we have yet to find an acceptable alternative when competition is inadequate to prevent abuses of market power.

and the mineworkers have vigorously supported the promulgation of correc-

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One action that you can take to restore balance in these matters is to appoint to vacant position on the Interstate Commerce Commission individuals who will recognize, as Congress did by passing the Staggers Rail Act, that adequate protection for captive shippers must be continued and that reduced regulation of the railroads is feasible only where sufficient competition exists to ensure reasonable rates.

Sincerely,

Robert H. Quenon  
President and Chief Executive Officer  
Peabody Holding Company, Inc.

Nicholas T. Camicia  
Chairman and Chief Executive Officer  
The Pittston Company

Otes Bennett, Jr.  
President and Chief Executive Officer  
The North American Coal Corporation

S.O. Ogden  
President  
Sunedco Coal Company

J.L. Marvin  
President  
Anaconda Minerals Company

C.K. McArthur  
Senior Vice President  
Utah International Inc.

William G. Kegal  
President and Chief Executive Officer  
Rochester & Pittsburgh Coal Company

John M. Farley  
Vice President — Raw Materials,  
Purchasing & Traffic  
Jones and Laughlin Steel Corporation

Michael K. Reilly  
President  
Zeigler Coal Company

Herbert E. Jones, Jr.  
Chairman of the Board  
Amherst Coal Company

Leo C. Smith  
President  
Coastal States Energy Company

Anthony Digiovanni  
Chairman and Chief Executive Officer  
Barnes & Tucker Company

Gordon Bonnyman  
President  
Blue Diamond Coal Company

Robert F. Kropp  
President  
Midland Coal Company

Enclosure

B.R. Brown  
Chairman and Chief Executive Officer  
Consolidation Coal Company

Richard M. Holsten, Jr.  
President  
The Pittsburg & Midway Coal Mining  
Company

W.S. White, Jr.  
Chairman and Chief Executive Officer  
American Electric Power Company, Inc.

James G. Randolph  
President  
Kerr-McGee Coal Corporation

Garry N. Drummond  
Chief Executive Officer  
Drummond Coal Company

Hugh W. Evans  
President  
Old Ben Coal Company

J. L. Jackson  
Executive Vice President and President,  
Coal Unit  
Diamond Shamrock Corporation

Ronald E. Sieling  
President  
Eastern Associated Coal

W.E. Cotter, Jr.  
President — Energy Group  
National Steel Corporation  
Jesse L. Koontz  
Vice President Natural Resources Group  
W.R. Grace & Co.

Thomas V. Falkie  
President  
Berwind Natural Resources Company

James R. Thomas II  
Chairman  
Carbon Industries, Inc.

C. Lynch Christian, Jr.  
President  
Imperial/Milburn Colliery Company

tive legislation.<sup>230</sup> And, in a forcefully worded letter,<sup>231</sup> the leaders of the

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230. Byrne, *Shippers, Small Railroads, Waterways Assail ICC on Deregulation Actions*, *TRAFFIC WORLD*, Aug. 1, 1983, at 15.

231. This letter is reproduced in its entirety:

June 29, 1983

Honorable Bob Packwood, Chairman  
Committee on Commerce, Science,  
and Transportation  
United States Senate  
Washington, DC 20510

Dear Senator Packwood:

The undersigned associations and organizations represent a cross-section of trucking companies, trucking employees, owner-operators, and motor carrier lawyers. We are united in our concern for the viability of the national transportation system and those it employs and the bleak prospects for the future absent a dramatic, prompt change in the regulatory policies and practices of the Interstate Commerce Commission.

In our view, the ICC thwarts the will of Congress and violates the law. In so doing, the ICC exacerbates the deteriorating condition of the trucking industry, contributes to unemployment, and fosters volatile, unlawful rate practices. The ICC refuses uniform administration and enforcement of the Motor Carrier Act of 1980. It has no discernible policy towards rates and entry, the two principal areas of its regulatory responsibility. We are convinced Congress must intervene now with strong affirmative action to compel the ICC to administer the statute in accordance with its terms and the intent of Congress.

Each organization signing this letter has its own individual complaints about the ICC's failure to administer the Act. The agency's non-enforcement impacts each group in different ways and in varying degrees. The major areas of dissatisfaction evolve from the following ICC practices, among others:

1. Condoning illegal, discriminatory rates;
2. Failing to adopt a comprehensive ratemaking policy;
3. Allowing virtual free entry without regard to public demand or carrier fitness; and
4. Suspending the common carrier duty to serve.

The ICC justifies its chosen path of administration, declining to exercise its statutory powers, with the facile bureaucratic cop-out: market-place forces are better regulators than Commissioners. We recognize Congress intended to increase competition. It did so, however, in a precise, controlled way. The Motor Carrier Act of 1980 eases entry barriers and adds flexibility to the rate-making freedom of the industry. It does not eliminate all regulation or relieve the ICC of its statutory responsibility to regulate in the interest of the public. The ICC's philosophy of non-regulation may support reductions in its annual operating budget, but it demonstrates a blatant disregard for the will of Congress.

Efforts by private parties in the courts to compel the ICC to carry out the intent of Congress have proven expensive, time-consuming, and therefore impractical solutions. Even when lawsuits are successful, the ICC subverts judicial directives by narrow construction or simple refusal to obey. In recent months, plaintiffs have had to return to court on two occasions to obtain "writs of mandamus" to compel the ICC to adhere to the terms of the courts' prior orders.

The undersigned organizations individually have complained to Congress about the do-nothing policies of the ICC. Each group has testified before committees of the House and the Senate regarding the ICC's failure to administer the Act. The latest round of testimony occurred during the 1982 Oversight Hearings. Congress has heard our testimony, but present conditions continue unabated. The ICC finds solace if not encouragement in the passivity of Congress. The time has come for Congress to act and to act quickly with force and effectiveness to put the ICC back on track. If the ICC does not terminate its illegal regulatory posture, a viable national motor carrier system will be permanently damaged.

Each of us has a stake in the preservation of a viable national motor carrier system. We focus your attention on the current attitude and practices of the Commission which

American Trucking Associations, the Teamsters Union, the Motor Carrier Lawyers Association, the National Motor Freight Traffic Association, and the Owner-Operators Independent Drivers Association of America, strongly urged Congress "to act and to act quickly with force and effectiveness to put the ICC back on track." Like the tribes of Afghanistan, these organizations may agree on very little, save this: the identity of their common enemy (*i.e.*, the deregulatory zealots who brought them economic chaos out of order), and their determination to drive this occupying army out of the nation's capital.

The time has come to reexamine the grand experiment in the eco-

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jeopardize the system's survival in the hopes Congress will recognize the seriousness of the problem. We seek only fair, even-handed enforcement and administration of the Act. Let the chips fall where they may. Congress created the ICC to carry out its mandate as embodied in the Interstate Commerce Act, not to subvert the very statutory directives it is entrusted to enforce. By refusing to administer the Act, the ICC violates the Congressional trust; its expenditure of appropriated federal funds constitutes a fraud on the American public.

We look forward to your response to this letter. We request your advice on what congressional action would aid in compelling the ICC to administer the Act as Congress intended.

Sincerely,

THE AMERICAN TRUCKING ASSOCIATIONS,  
INC.

By (Bennett C. Whitlock, Jr.)

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS OF  
AMERICA

By (Jackie Pressler)

MOTOR CARRIER LAWYERS ASSOCIATION

By (Harold D. Miller, Jr.)

NATIONAL MOTOR FREIGHT TRAFFIC  
ASSOCIATION, INC.

By (James Harkins)

on behalf of The Eastern

Central Motor Carriers Association, Inc.,

Central & Southern Motor

Freight Tariff Association, Inc.,

Central States Motor Freight Bureau, Inc.,

New England Motor Rate Bureau,

Middle Atlantic Conference,

Midwest Motor Freight Bureau,

Niagara Frontier Tariff Bureau,

Pacific Inland Tariff Bureau,

Rocky Mountain Motor Tariff Bureau, Inc.,

Southern Motor Carriers Rate Conference, Inc.

OWNER-OPERATORS INDEPENDENT  
DRIVERS ASSOCIATION OF AMERICA

By (Mark Perry)

*See Truck Groups Complain to Congress About ICC's Administration of Act*, TRAFFIC WORLD, July 4, 1983, at 47.

conomic theory of deregulation, for it seems not to have fulfilled the promises of its proponents. The time has come to compare marketplace performance since deregulation with the strong parallels which existed prior to regulation, lest we repeat an unfortunate history — a history from which our forefathers learned that responsible economic regulation of transportation was and is essential in order to protect the public interest.