Clear Track for Deregulation American Railroads, 1970-1980

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I. Introduction

The railroads have been the most intensely regulated of the major transportation modes in the United States. The first major industrial corporations to wield great power, they alternately sought and avoided regulation. Regulation was generally conceived as being necessary to correct abuses of monopoly power, and the Interstate Commerce Commission (ICC) is the oldest of the independent federal regulatory agencies.

The history of ICC regulation has been well documented elsewhere. The scope of this paper is the decade between the Rail Passenger Service Act of 1970[1] and the Staggers Rail Act of 1980.[2] In between, there is a development of a legislative and regulatory consensus that relaxation of regulation is what was needed to save the ailing railroads from bankruptcy, liquidation, or nationalization. During this period, Amtrak relieved the railroads of intercity passenger service, Conrail relieved the railroad industry of the problems involved in operating the bankrupt Northeastern lines, state and local operating authorities relieved railroads of commuter service, bankruptcy courts were given the authority to overrule the ICC on abandonment cases, and the railroads themselves were given self-help to compete more favorably with barges, planes, and trucks.

All these legislative changes involved, to some extent, loosening of regulatory constraints on railroads. The government's financial assistance

1. 45 U.S.C. § 501 (1976).
2. Pub. L. 96-448, 94 Stat. 1895 (1980).

to rail operations has increased, but the current administration is planning to curtail or terminate many of these subventions.[3] Experience of rail deregulation may show us whether or not a freer market can deal with the problems of a declining industry while at the same time preserving that industry's traditional role of providing service to the public.

II. The American Railroad System

Although virtually all the railroads in the world were originally built with private capital, American railroads are unique in that they stayed in private hands. Only the Canadian Pacific Railway shares this unique status. Elsewhere in the world, railroads are run by the state and are administered for public or social benefits very much like highway departments. In the year 1982, America's railroads are facing a regrouping and may emerge from the decade in six major systems, but they are still operated as for-profit entities.[4] The railroads of this country are overwhelmingly dedicated to the carriage of freight. Virtually all intercity passenger service is operated by Amtrak, while commuter trains are the responsibility of state and local governments.[5] Railroads have been prevented from diversifying except for grandfather rights they held before the passage of the Motor Carrier Act of 1935,[6] and few operate any transportation properties other than railroads. Within the freight business, railroads have a captive market in bulk, low-grade commodities; most of the high-rated traffic goes by truck.[7]

A half century ago, railroads had what amounted to a monopoly on passenger and freight traffic. The airline and motor bus had not yet developed as competitors for the long distance market and the interurban electric railway was moribund as a competitor. Trucks were limited by the state of roads in that era and the resurgence of towboating on the navigable waterways awaited the development of the marine diesel engine. For the preceding century, railroads had shaped the transportation pattern and much of the law and politics of the nation.[8]

Railroads were the first large corporations to arise from the Civil War years. Railroads were, and still are, the largest industrial employers in agricultural states. Railroads are tremendous instruments of power, and the men who controlled them in the 19th Century seemed larger than life to

3. Business Week, April 5, 1982, at 75-79.
4. Thoms, *The Urge to Merge*, Passenger Train J., (Aug. 1980) at 20.
5. 45 U.S.C. § 744(e) (1980).
6. Pub. L. No. 255, 49 Stat. 543 (1935).
7. Between 1947 and 1977, rail's share of the total transportation revenue dropped from 70% to 30%. *See* statement of William H. Dempsey, President, Association of American Railroads on Hearings Before Sub. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 5 (1979).
8. *See generally* P. Lyon, To Hell in a Day Coach (1968).

their supporters, detractors, and especially to themselves. "Railroad magnate" became synonymous with "robber baron" in the popular press—from lord of creation and captain of industry the railroad presidents became known as the scourge of the farmer, the blight of small towns, the oppressor of labor, and the foe of passenger and shipper alike.[9]

A. *Why Regulation Began*

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.[10] The ICC arrived on the scene in 1887 as a creature of limited powers. It did not receive authority to control entry, exist and rates until the Twentieth Century.

Slowly, the ICC's authority increased until it encompassed railroads, water carriers, freight forwarders, motor carriers, and for a while, telegraph companies and even Standard Time.[11] But the states always retained some authority. Under the partial abandonment doctrine, although abandonment, even of an intrastate line, was the concern of the ICC, states had jurisdiction of downgrading service or discontinuing some portion of the service, such as passenger trains.[12] The authority of the states continued, although drastically curtailed by Section 13a, added by the Transportation Act of 1958.[13] State authority over railroads was further curtailed by passage of the Staggers Act of 1980.[14] Still, even today, each state has a public utilities or public service commission, or, as it is called in more traditional states, a Railroad Commission, with authority over intrastate rates and services at stations within the state.

Most analysts will tell you that the American railroad system is terribly overbuilt. Much of this stems from the fact that railroads were the only

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9. *See generally* F. NORRIS, THE OCTOPUS (1901).

10. *See* R. SAUNDERS, THE RAILROAD MERGERS AND THE COMING OF CONRAIL, at 29-43 (1978).

11. Much of the ICC's authority has been spun off to other agencies, such as the FCC or the Department of Transportation. *See generally* J. BURBY, THE GREAT AMERICAN MOTION SICKNESS (1970).

12. *See generally* Thoms, *Regulation of Passenger Train Discontinuances*, 22 J. PUB. L. 103 (1973).

13. 49 U.S.C. § 10908 (1980).

14. 49 U.S.C. § 11501 (Supp. IV 1980).

method of practical transportation at the times that the lines were built. Five miles was about the maximum that a farmer could drive to a grain elevator or railroad station and return home with time to do anything else. Without all-weather roads connecting isolated localities, there was no choice but to get a railroad to serve your town. Whole communities went into hock because they were convinced to buy stock in a line which would convert their sleepy burg to another Omaha or Kansas City.

When the Pacific railroad was authorized in Lincoln's administration, Congress specified that the eastern terminus would be on the Missouri, rather than the Mississippi River. Thus, the lone Union Pacific mainline to the west was matched by more than a half dozen lines running from Omaha to Chicago. The financial repercussion from this excess of transportation facilities is being felt to this day.

Yet when a rail line is abandoned, it is gone. In this day and age no one is going to come back and build another one. Therefore, it behooves the body politic to insist upon regulation that at least insures a second look before vital transportation segments are ruptured because one particular management could not make a go of it. This is important because of the nature of the easement that many railroads are built upon. Once the line is abandoned, the land may revert to the underlying farmer. If anyone would want to resume operations, he would have to reacquire the land.

B. Diesel Freight Development

The railroads that did make a go of it handled long-distance freight in great quantities. This was the traffic that caused the erection of giant steam engines—the largest the world has ever seen—and brought even larger electric locomotives to crest the Alleghenies on the Pennsylvania, the Bitterroots on the Milwaukee, the Cascades on the Great Northern. All these fell to the diesel-electric locomotive which, freed of the need for water or wire, could operate in all climates and topography with a minimal crew. Even better, the diesel could be multiplied so that one crew could control the equivalent of five or six engines. Freight trains grew to the hundred-car mark or more. The diesel of course used the same oil that the trucks and barges used, but the virtue of railroads from an energy standpoint is that they can be run with many different fuel sources. The iron horse did without petroleum for one hundred years, and he could do it again if the need pressed us.[15]

The success in moving bulk freight and in operating long-distance freight trains has not been matched in other areas. The United States has

15. American Coal Enterprises, Inc., a research organization for the coal industry, has recently unveiled plans for the ACE 3000, a coal-powered steam turbine locomotive, which it feels will be a replacement for the diesel-electric. TRAINS, May 1982, at 10.

experienced a near-total decline in rail passenger service and virtually all such trains are now operated by Amtrak. Even these may not continue if current Reagan administration proposals are followed.[16] In such a case, the U.S. would be the first major industrialized nation to abandon rail service as a means of intercity passenger transportation.

Hostility toward passenger trains has been a concomitant of railroad policy during the latter half of the Twentieth Century, largely due to the losses which they inflicted on private management. Since 1971, the private railroads have been relieved of the passenger obligation, but they are still the operators of most Amtrak trains (Amtrak owns little track and employs few operating crews and relies on contracts with private lines for operations) and would be glad to see the passenger trains off the line, where they allegedly interfere with freight operations. Passenger trains, being labor-intensive and demand-sensitive, have been a difficult area to operate profitably, as Amtrak has found during its decade of existence.

C. Branch and Short Haul Trains

Other areas which have been problematic for railroads are branch lines and short haul trains. Branch lines handle a low density of freight but still require full train crews and incur maintenance costs. Other casualties of the past two decades have been less-than-carload lot shipments, stock shipments, and railway express. Small parcels, if they do travel by rail, do so in trailers riding on flat cars.

But one of the biggest cleavages in profitability is between the Eastern and Western lines. Western lines have the long haul, few branches, and few congested terminal areas. Eastern lines, which have all of the above, are presently clustered around the government-subsidized Conrail system, which also faces an uncertain future.[17]

The traffic which the railroads can most count on is that where there is no viable alternative. This captive traffic includes coal, trap rock, cement, and other low-rated commodities. There are not enough trucks to move the coal in this country which must move to generating plants, even if the roads could take their weight. Water carriage is an alternative, but the rivers don't run where the coal is. Coal slurry pipelines have been proposed, and they have less offensive externalities than noisy coal trains. But pipelines would be single-purpose operations, which yet might threaten the solvency of multi-purpose carriers like railroads. Also, coal slurry lines require a great deal of water, which is usually absent where coal is mined. Wheat, barley and other grains are also dependent upon the rails for movement to market

16. TRAINS, April 1982, at 13.
17. Phillip's Success has Sneaked in, TRAINS, Feb. 1982, at 6.

at least for shipments over 200 miles. Past that distance, agricultural truckers are hard-pressed to cover costs, even with backhauls.

D. LABOR COSTS

No discussion of the railroad industry today would be complete without mentioning the labor costs of the business. Labor productivity soared after invention of the diesel-electric locomotive with multiple-unit capacity. Longer trains, operated on a less frequent basis, were the watchword of most railroads (with a few notable exceptions like Rio Grande). But some anomalies still remain. Diesel and electric locomotives required a fireman from the signing of the National Diesel Agreement in 1934 until the compulsory arbitration decreed by Congress in 1963.[18] Railroads still maintain such century-old features as the 100-mile day and division between yard and road crews, and carry the burden for labor protection agreements in case of mergers or consolidation when railway workers lose their jobs.[19]

Our railroads have remained in private hands. Even Amtrak and Conrail are technically for-profit corporations, subsidized by the Federal government.[20] The competition is also private, but benefits from public provision of an infrastructure. Buses and trucks operate on public highways and benefit from a regulatory scheme, which, until recently, protected them from excess competition. Barges operate on federally-maintained waterways which were, until 1978, free from user charges. Privately-owned airways utilize the airports and air traffic control systems provided by the public. It has been estimated that the average airline passenger pays about one-quarter of the cost of maintaining such a system on a fully-allocated basis.

Railroads and pipelines are the only forms of transportation that build, own, maintain, and pay taxes on their own right-of-way. Accordingly, railroads incur substantially higher costs for access to markets than the other modes.[21] These higher costs inhibit the industry's ability to implement technological advances.[22]

Thus, there has been a move to shrinkage of rail's fixed plant in this country. Two-thirds of all the rail traffic moves over only 20% of the rail system, while ten percent of the system accounts for less than one-half of one percent of the traffic.[23] Railroads have had to proceed before the ICC before abandoning trackage; no such exit requirements are placed on mo-

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18. *See* Thoms, *The Vanishing Fireman*, 14 LOYOLA L. REV. 125 (1968).
19. *See* Thoms, What Price Labor Protection?, TRAINS, June 1982.
20. 45 U.S.C. §§ 541, 741 (1980).
21. Note, *Proposed Regulatory Reform in the Area of Railroad Abandonment*, 11 TRANS. L.J. 213 (1980).
22. *See generally* F. WILNER, COMPETITIVE EQUITY (1981).
23. ASSOCIATION OF AMERICAN RAILROADS, ECONOMIC REGULATION OF RAIL FREIGHT OPERATIONS 3 (1979).

tor carriers. For a while, the system remained intact, with only redundant branch lines and monstrosities like the Colorado Midland and New York, Ontario & Western (which probably never should have been built in the first place) being abandoned.[24] Suddenly, in the 1980s, we have lost the Rock Island. The Milwaukee Road's transcontinental line now ends in a place called Miles City, Montana.[25] Conrail is to be sold off to the highest bidder.

III. Regulation by the ICC

Washingtonians like to speak of the three great museums along Constitution Avenue: the Smithsonian Institution, the National Archives, and the Interstate Commerce Commission. Approaching its centenary, the ICC, the first of the Federal regulatory agencies, is the model after which most state and Federal agencies have been formed to administer monopolies and oligopolies, control entry and exit, and protect the public against rates that are too high and carriers against rates that are too low.

The original Act to Regulate Commerce of 1887[26] set up the Interstate Commerce Commission as the body to regulate railroads—but in a half-hearted way. Its powers were limited to rate discrimination. Focus was directed at the type of situation wherein John D. Rockefeller conspired with the railroads to give him a lower rate than his competitors and to pay *him* a rebate on each barrel *his competitors* shipped on the railroads. Common law tradition held that just and reasonable rates should be charged by bargemen and other common carriers. However, by the Naughty Nineties, the judicial philosophy was clear that whatever rate had been agreed upon by the parties was the best rate. Professor Richard Saunders takes the story from there:

> The Hepburn Act of 1906 plugged the loopholes of the original act and gave the commission the power to approve maximum rates. The Mann-Elkins Act of 1910 plugged a loophole in the Hepburn Act. The ICC flexed its new muscles over rate-making by denying the railroads' requests for general rate increases in 1911 and again in 1912. . . . The clamor for regulation could not be denied.[27]

On December 29, 1917, President Wilson seized the railroads. It was our first and only experiment with nationalization (except for the Alaska and Panama Railroads). Ownership remained in private hands, but operations were hence to be conducted by the United States Railroad Administration (USRA) for the duration. Under the new administration, the railroads re-

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24. *See* W. Helmer, O&W The Long Life and Slow Death of the New York, Ontario & Western Ry., (1958).

25. The State of South Dakota has now purchased the Milwaukee Road's main line and hired the Burlington Northern to operate it. Trains, May 1982, at 13.

26. Act to Regulate Commerce, approved Feb. 4, 1887, as amended, 49 U.S.C. § 1 (1935).

27. Saunders, *supra* note 10, at 34.

tained their own identies, but through routes and co-ordination were imposed regardless of whether the co-operating routes were former rivals. Wilson's son-in-law, William Gibbs McAdoo, was named chief administrator.[28] Trains were operated as solid units through to their destinations, and many shorter routes were fashioned from once-competing lines. By 1920 the lines had been returned to private hands. The idea of consolidating the railroads stayed alive. USRA, though excoriated for government inefficiency, was often extolled as an example of what consolidated operation could do.

A. *Growth of ICC Regulation*

The thrust of the 1920 Transportation Act was to put together a plan for consolidation of the railroads of the United States. We were not to follow the European countries into nationalization, but we were interested in forming a few major systems. The ICC hired Professor William Z. Ripley of Harvard University to draw up a plan for consolidation of all systems into no more than thirty systems of equal size and power, which would preserve competition, existing routes and channels of trade. Ripley's 24-system model was used as a basis for ICC discussion and was later abandoned.[29]

The Transportation Act of 1920 established entry controls for railroad construction. Subsequently, the Motor Carrier Act of 1935 placed similar controls on railroading's growing rival, the truck. Five years later, the Transportation Act of 1940 brought water carriers under ICC regulation.[30]

The Transportation Act of 1940 did away once and for all with the Ripley plan, or any other type of compulsory coordination of railroads. The Act, however, gave the ICC power to approve mergers, consolidations and control of railroads, immunizing these combinations from prosecution under the antitrust laws.[31]

The Transportation Act of 1958 completed the regulatory scheme by ending the partial abandonment doctrine and transferring to the ICC jurisdiction over discontinuance of passenger trains.[32] Section 13a of the Act allowed the ICC to take jurisdiction if a railroad had received an unfavorable decision on a train discontinuance from a State regulatory commission and to take original jurisdiction if the train operated in two or more states. Under the provisions of this law, over 1000 passenger trains were discontinued with ICC's approval between 1958 and 1970. Upon Amtrak's inception, a

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28. *Id.* at 37.

29. The Transportation Act of 1940 put an end to the mandatory planning responsibilities of the ICC, at the same time facilitating ICC approval of voluntary mergers. 49 U.S.C. § 11341 (1980).

30. 49 U.S.C. § 10501 (1980).

31. 49 U.S.C. §§ 11344 (1980).

32. Thoms, *The Return of Section 13a*, Trains, Jan. 1976, at 12.

moratorium imposed by the Rail Passenger Service Act put an end to ICC discontinuance proceedings.

The Transportation Act of 1958, which also provided for low-interest loans for railroads in financial difficulty, represented the high-water mark of ICC railroad regulation. All the reform bills passed after 1958 moved in the direction of deregulation, rather than further ICC regulation of railroad service.[33]

B. Pattern of ICC Regulation

1. Regulation of Entry

A railroad company must have a certificate of public convenience and necessity before building a line, or taking over and operating an existing line.[34] In addition, if a railroad which is already in operation desires to extend its current line, it must seek a certificate for the extension. Proof of the adequacy of existing service, traffic to be generated, and support of the shipper are necessary for a certificate to be granted. An extension certificate is not, however, required when the line to be built is a mere spur or industrial track.[35] Determining what is a spur and what is an extension has taken up a good deal of the ICC's time. Until passage of the Staggers Act, it was considered to be an extension if a line tapped territory that was currently served by a competitive railroad.[36]

The reason behind such a restriction is to prevent the construction of "nuisance" railroads serving the same area as a parallel line. A good example of such a line was the West Shore Railroad, built parallel to the New York Central from New York City to Buffalo for the very purpose of embarrassing the Vanderbilt interests and persuading them to buy out investors of the competing line. There might be enough traffic in a certain area for one or two railroads, but no more. The oversupply would be a waste of resources. Worse, the traffic might be so diluted that no railroad could make money and all might be abandoned. The newest line to be constructed in this country is the Powder Basin line in Wyoming, built by the Burlington Northern in connection with the Chicago & North Western.[37] Otherwise, this section of the Act has seen very little use in the past decade.

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33. *See generally* G. Hilton, The Transportation Act of 1958 (1970).

34. 49 U.S.C. § 10901 (1980).

35. J. Guandolo, Transportation Law at 1-4 (1973).

36. Texas & Pacific v. Gulf, Colorado & Santa Fe, 270 U.S. 266 (1925).

37. This line opened in 1980 and is the longest new trackage since the 1920s. It is presently under litigation, with the BN charging that partner C&NW is actually a stalking horse for the rival Union Pacific. Presently, only Burlington Northern is operating this spur. *See* Sierra Club v. ICC (D.C. Cir.), *vacated without explanation*, (1978).

2. Regulation of Exit

A railroad may not abandon a line without permission of the ICC, which has to determine that the public convenience and necessity permit the abandonment.[38] The term "abandonment" means ending of all train service over a particular route, after which the railroad is free to rip up the tracks and sell them for scrap or to another buyer; that makes abandonment a very drastic procedure. Current policy is to insure a waiting period during which other railroads or local authorities may bid on the right of way. Meanwhile, the rails remain in place. Usually, it is the railroad which petitions to abandon the line, but a petition may be brought by another party, i.e., a highway department which might want an unused line removed or relocated so it may commence construction.

Discontinuance of service is a much less drastic matter. Although Section 13a of the Act[39] refers to discontinuance or change of schedule of "trains", as a matter of fact, the section has only been used for withdrawal of passenger services.[40] As this field has generally been pre-empted by Amtrak or commuter operating authorities, the ICC has had very little regulation of discontinuance of trains in the last decade.[41]

3. Regulation of Rates

The principle of ICC control of rates is that "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable."[42] Rates are proposed by the carrier and unless the Commission finds them to be unjust or unreasonable, they go into effect with the binding effect of law.

The Transportation Act of 1920 required the ICC to "give due consideration to the effect of rates on the movement of traffic and to the need of revenues sufficient to enable the carriers . . . to provide service." But this was amended in 1933 to require that the Commission also consider the need for rail transportation "at the lowest cost."[43] Since the enactment of the National Transportation Policy in 1940, it has been the task of the ICC to reconcile these inconsistent directions. In the Transportation Act of

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38. 49 U.S.C. § 10903 (1980).

39. 49 U.S.C. §§ 10908, 10909 (1980).

40. Thoms, *supra* note 12, at 103.

41. *See* D. & R.G.W.R. Co.-Discontinuance of Passenger Trains, 360 I.C.C. 216 (1979), to date the last case handled under Section 10908 (former 13a).

42. Louisville and Nashville R.R. v. Maxwell, 237 U.S. 95, 97 (1915).

43. Department of Transportation, A Prospectus for Change in the Freight Railroad Industry 118 (1978).

1958, Congress addressed the problem of "umbrella ratemaking",[44] requiring that "the rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode . . . giving due consideration to the objectives of the national transportation policy."[45]

ICC rate regulation for the railroads was very similar to the way states regulated utilities. Rates were limited in the fact that a short haul could not cost more than a long haul on the same track. Volume discounts for large shippers were discouraged. If a rate moved the traffic, there was a rebuttable presumption that it was just and reasonable. Costs were not ipso facto an element in ratemaking; rather, rates were based upon value of service.[46]

Rail rate regulation adversely affected the railroads in competing with exempt motor carriers. It was not uncommon for exempt rates to vary from 300% of the rail rate during peak demand to 50-60% during slack periods. The exempt truckers could change their rates seasonally; railroads could not.[47] Rail rate regulation was also used to implement a policy of port and product equalization.[48] Raising rates on competitive traffic to make up for the losses of this subsidized freight would merely have resulted in less traffic. The only real choice was to raise the rates for captive shippers.

The Transportation Act of 1920 first gave the ICC authority to raise intrastate rates that were so low as to constitute a burden upon interstate commerce. The Transportation Act of 1958 directed the ICC not to consider the totality of intrastate operations; the ICC could look at one particular rate to find if it burdened interstate commerce.[49] If the rate is not burdensome on interstate commerce, state public service commissions have jurisdiction over rates within that state. Since 1958, state jurisdiction over intrastate rates and operations has steadily been whittled away.

4. OVERSIGHT OF SERVICES BY THE ICC

In addition to entry, exit and rates, the ICC has power to determine a minimal level of acceptable service to the public.[50] Generally, this means

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44. "Umbrella ratemaking" was a device to protect the market share of each mode. Under the ICC umbrella, a certain symmetry prevailed with trucks being the highest rate, rail next highest, and water carriage the lowest. The scheme could not totally succeed because of the existence of private and exempt carriage. Nonetheless, fears were strong that railroads, with their large market power, might cut rates to put truckers out of business.

45. DEPARTMENT OF TRANSPORTATION, *supra* note 43, at 119.

46. *Id.*

47. Statement of Hays T. Watkins, Chairman of Chessie System, at Hearings on H.R. 4570 before the Subcomm. of Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (1979).

48. Investigation of Railroad Freight Rate Structure—Grain and Grain Products, 345 I.C.C. 2975, 3022 (1979).

49. DEPARTMENT OF TRANSPORTATION, *supra* note 43, at 124.

50. 49 U.S.C. § 11121(ff) (1980).

assuring access to cars on a nondiscriminatory basis. There has been a severe shortage of boxcars (or an inefficient use of them) until recently, and many critics blame the ICC for lax enforcement or inadequate per diem charges.[51] The victim of this shortage is usually the small grain or lumber shippers.[52]

Oversight functions also include sanitation standards for cars hauling grain and other foodstuffs and protection of the safety of livestock shipped by rail and truck. Safety regulation of railroad equipment has been transferred to the Department of Transportation.[53]

Thirty years ago, Robert R. Young said "A hog can cross the country without changing trains, but *you* can't."[54] Although maintaining sanitary standards and minimum conditions for livestock, the Commission denied it had authority to demand minimum comfort standards for rail passengers.[55] Later given such authority in the Amtrak law,[56] its oversight functions were unfortunately removed in another amendment to the Rail Passenger Service Act.[57]

C. *Results of ICC Regulation*

By 1970, the effect of utility-type regulation upon the railroads had been amply documented. The industry everywhere was in decline, with higher fixed costs leading to a rate of return much lower than the cost of capital.[58] Some railroads had disappeared, others were seeking salvation through merger with parallel lines: by 1970, the Burlington Northern, Seaboard Coast Line and Penn Central systems were realities.

There had been some savings in labor cost through dieselization and consolidation of trains, but increased labor costs were still passed on to the public in general rate increases.

The New Haven Railroad had gone bankrupt in the 1960s. In 1969 the bankruptcy problem was settled by fobbing off the hapless New Haven on the Pennsylvania and New York Central, as a condition of their merger.[59]

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51. R. Fellmeth, The Interstate Commerce Omission 274-84 (1970).

52. Many individuals invested in private box cars to take advantage of higher per diem rates, and also to obtain a tax shelter for investment. Now, with traffic having slowed down and railroads having a substantial inventory of their own, these investors are stuck. *See* Traffic World, Jan. 5, 1981, at 48.

53. 49 U.S.C. § 1665 (1976).

54. J. Borkin, Robert R. Young: The Populist of Wall Street (1969).

55. I.C.C. F.D. No. 34733, Adequacies—Passenger Service—Southern Pacific Co. Between California and Louisiana, 335 I.C.C. 415 (1969).

56. 49 U.S.C. § 641 (1970) (repealed by P.L. 96-73, 93 Stat. 541 (1979)).

57. Thoms, *Is Oversight Overlooked?*, Passenger Train Journal, June 1980, at 18.

58. The rate of return on net worth for American railroads for the calendar year 1979 was 5.5%. *See* F. Wilner, Competitive Equity at 6-7 (1981).

59. Saunders, *supra* note 10, at 182-85; 198-200.

On June 21, 1970, the Penn Central (as the three merged partners were then called) filed for reorganization under Section 77 of the Bankruptcy Act—the largest business debacle to date. During the decade to come, most of the Eastern railroads would soon follow Penn Central into bankruptcy.

Passenger service was on the verge of disappearing by 1970. The industry seemed to be fulfilling the predictions made fifteen years earlier by Howard Hosmer, an ICC hearing examiner.[60] The bankrupt Penn Central filed for discontinuance of all its long-distance passenger trains, an act which was the proximate cause of the legislation which led to Amtrak.[61]

Railroads were still prevented from diversifying into other forms of transportation. Despite the bad luck which had fallen the nation's rails, critics were still talking of the ICC's capture by the industry it was supposed to regulate.[62] If this was regulation, the public was seeing few of its benefits. George Hilton published a scholarly article in the popular publication, *Trains*, subtitled, "The ICC Must Go."[63]

IV. THE RAIL PASSENGER SERVICE ACT OF 1970

A. *THE PASSENGER PROBLEM*

With the exception of the heavily-travelled Boston-Washington corridor, service levels on American passenger trains are the worst in the world. Largely, this decline has been the result of government emphasis on highways and private automobiles for movement of people between cities. Other modes of transit have filled the gap previously met by passenger trains; airlines have developed an internal system much more rapidly in the United States than elsewhere and the intercity bus system developed on a relatively untrammelled private basis.

Passenger trains are labor-intensive, due to the necessity for on-train services, fare collection, and because of agreements between the railroads and the operating brotherhoods. The railroads, which devote most of their interest to freight traffic, found it more profitable to discontinue the trains rather than to renegotiate the labor agreements. Now, as a result, diesel engines on passenger trains still carry a fireman, though that functionary has been eliminated on freight trains.[64] The pricing of rail travel is somewhat between bus and air fares, but on a fully-allocated basis, the rail fare

60. Hilton, *The Hosmer Report: A Decennial Analysis*, 36 I.C.C. PRAC. J. 1470 (1968).

61. Penn Central Transp. Co., Discontinuance of 34 Trains, 338 I.C.C. 380 (1970); *see also* Thoms, *Regulation of Passenger Train Discontinuances*, 11 J. PUB. LAW 103, 130-31 (1973).

62. FELLMETH, *supra* note 51, at 1-22.

63. Hilton, What Went Wrong and What to do About It, TRAINS, Jan. 1967 at 37.

64. *See* Thoms, *Three Men on a Horse*, PASSENGER TRAIN J., Nov. 1980, at 12.

would have to be higher than air. If that were done however, virtually no one would ride the trains.

For this and other reasons (obsolescence of equipment and need for replacement, freight train interference, wish to be free of bad public relations, etc.) the major railroads moved to discontinue passenger service on a piecemeal basis during the 1950s and 1960s. Sometimes this was done through downgrading service on trains so as to reduce patronage. The train would show a greater loss and impress regulators with the urgent need for relief.[65]

The ICC had supplanted the state regulatory agencies in permitting exit from the passenger train business in 1958. Less influenced by hometown considerations, the ICC was more lenient about allowing exit than the states had ever been. During this time, most of the major passenger routes were down to one train a day and even these were being posted for discontinuance. The Commission attempted a sort of moratorium while Congress was deliberating what type of bill to pass.

Assuming the political necessity of passenger trains, and seeing that traditional regulation could not preserve the last trains on many routes, Congress wrestled with the need for government subvention. Proposals took two forms: subsidies or nationalization. Subsidies proved to be politically unpopular, since the beneficiaries would be the same railroads which had done their best to discourage the few remaining passengers, and nationalization sounded much too left-leaning for the Nixon administration.[66] The result was that Congress rejected both alternatives in favor of an ostensibly private National Railroad Passenger Corporation, first known as Railpax, but which soon emerged as Amtrak.[67]

B. The Amtrak Approach

On paper, the National Railroad Passenger Corporation is a for-profit private entity and not a part of the United States Government.[68] Its owners are private railroads which bought into the corporation as a consequence of discontinuing passenger trains of their own: Burlington Northern, Grand Trunk Western, Milwaukee and Penn Central. The latter two railroads are in bankruptcy proceedings. Even though Amtrak is considered private (and

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65. *See* Thoms, *Regulation of Passenger Train Discontinuances*, 11 J. Pub. L. 103, 119-24; *see also* Fellmeth, *supra* note 51, at 300-304.

66. Harbeson, *The Rail Passenger Service Act of 1970*, 38 I.C.C. Practitioners' Journal 330 (1971).

67. Amtrak, standing for "American track" was thought up by image-makers Lippincott & Margulies in 1971 for what had tentatively been known as "Railpax" since the passage of the Rail Passenger Service Act of 1970. In 1979, amendments to the Rail Passenger Service Act made the definition official. 45 U.S.C. § 502(1) (1979).

68. 45 U.S.C. § 541 (1976).

obligated to pay property tax to the local communities through which it runs) over fifty percent of its budget comes from government largesse.

How, then, was Amtrak, as a private concern, supposed to succeed where other private lines had failed? The theory was that a streamlined system could reduce deficits by consolidating traffic on the stronger lines and consolidating terminals and other duplicating facilities. By ordering equipment on a nation-wide scale and operating on a country-wide basis, economies of scale could be attained in marketing, purchases, and operations.

But, it also seems possible that the Amtrak scheme was never expected to be a money-maker. The first effort of the Congress at government support of rail operations, it merely seemed to be an effort to get the passenger monkey off the railroads' backs. In this way, Amtrak was a pro-railroad rather than a pro-passenger law. Its first president, Roger Lewis, and his initial cautious moves seemed to betray the fact that Amtrak was meant to be a passenger euthanasia scheme.[69] Every secretary of transportation since Volpe has come up with some variant of the slow withering-away of passenger service as his department's philosophy for Amtrak. However, Congress comes to the rescue of Amtrak again and again.[70]

Amtrak, outside the Northeast Corridor (which it owns), functions through the mechanism of contracts with operating railroads. The railroads supply the tracks and crews to operate the trains and are reimbursed their costs plus a small profit. With any cost-plus arrangement there is room for a great deal of manipulation of apportionment of costs between passenger and freight service. There is room for excess padding of costs to Amtrak, which are thus folded into the cost base for Amtrak. The result is an Amtrak deficit; this of course, is picked up by the general taxpayer.

C. *Amtrak and Regulation*

Since Amtrak is thought of as a proprietary program, it is a bit unusual to think of the Rail Passenger Service Act as a deregulation law. But inasmuch as it took passenger trains out from under ICC regulation, it can be seen as the first of the transportation deregulatory bills of the 1970s.

Upon passage, the Rail Passenger Service Act established a moratorium on abandonments, along with a delegation to the Secretary of Transportation to draw up a system for long-haul passenger trains.[71] From

69. Southern Pacific president B.F. Biaggini predicted at the time that Amtrak's mission should be to "preside over the orderly dissolution of railroad passenger service," while Burlington Northern's president Lou Menk (also a director of Amtrak) urged the corporation to allow the long-distance train to follow the stagecoach into oblivion. On the long-term hostility of rail presidents to rail passengers *see generally* P. Lyon, To Hell in a Day Coach (1968).

70. Act of Oct. 30, 1971, P.L. 91-518; Act of Oct. 28, 1974, P.L. 93-496; Act of May 26, 1975, P.L. 94-25; Act of Oct. 19, 1976, P.L. 94-555; Act of September 29, 1979, P.L. 96-73.

71. 45 U.S.C. § 521 (1976).

October 1970 to May 1971, no passenger train could be discontinued.

Upon a railroad's contracting with Amtrak to provide service, the carrier was relieved of the responsibility for operating its own passenger trains.[72] But if a railroad did not contract with Amtrak at its inception, it could not discontinue service until 1975.[73] Most carriers were quick to take advantage of this provision, although some hung on for quite a while.[74] Even Amtrak was subject to the ICC if it wanted to eliminate trains in the "basic system", but that provision was later removed by amendment of the Amtrak law. Presently, the ICC has no role in Amtrak and the passenger corporation is limited only by its own internal criteria (and whims of Congress) in discontinuing service.[75] As far as exit from the market is concerned, Amtrak is a deregulator's dream. The route structure of the system is deregulated, and Amtrak can (theoretically) spend its resources as it sees fit.

Actually, Congress has not been content to let Amtrak pick and choose routes. Several times it has intervened to protect or institute certain politically-sensitive routes. Congressmen are reluctant to let a service which benefits their district disappear. The only substantial cuts to date have been those which were implemented by Congressional directive in 1979 and 1981. The Secretary of Transportation was mandated to draw up a revised system, which is the slimmed-down Amtrak network which is operated today.[76] Even then, Congress set some standards to insure "regional balance" into the criteria for discontinuance.

The ICC has never had any jurisdiction over Amtrak's fares, and the passenger corporation has tried all sorts of promotional schemes, excursion fares, and even one year giving children rides in exchange for Kellogg's box tops![77] This presents a problem because Amtrak is heavily subsidized and competes for traffic with carriers receiving no direct subsidy. As a result in 1978, Congress enacted a section giving some rudimentary control to the ICC if it discovers that Amtrak's rate-cutting is destructive or predatory as to its effect on a motor carrier.[78] The ICC has not yet seen fit to exercise these powers. Amtrak, however, is directed to recover more of its costs from passenger fares. The options open to the company are bleak: raise fares, cut service, or attempt to renegotiate contracts with labor or the railroads. Fares have risen considerably, but so have operating costs.

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72. 45 U.S.C. § 561 (1976).

73. 45 U.S.C. § 564(a) (1976).

74. The Rock Island lasted until 1978, the Southern until 1979, and the Rio Grande is still operating independent passenger service today. These railroads, when they did discontinue service, were subject to ICC jurisdiction.

75. 45 U.S.C. § 564(b)(c) (1980).

76. 45 U.S.C. § 564(c)(1-3) (1980).

77. *Interview with Paul Reistrap, former president, Amtrak*, TRAINS Feb. 1981.

78. 45 U.S.C. § 546(a) (1980).

The ICC had oversight functions over Amtrak at the beginning. Section 801 of the original Act gave the ICC the power to require certain standards (sleeping cars on overnight runs, diners at mealtime, stations open for service before the train arrives, etc.) which the Commission had denied it possessed in the *Sunset Limited Adequacies* case.[79] These functions were not desired by either the ICC or Amtrak, and as part of general deregulation fervor, they were removed with the Amtrak Improvement Act of 1978.[80] The ICC's sole responsibility now is an annual report to Congress on the state of passenger train service in the United States.

Amtrak's achievements include replacing and upgrading the passenger train equipment in the United States, improving and coordinating service, and reversing the secular decline in railroad passengers. Although there is less service today, what remains is of higher quality than was operated in the 1960s under private management. Its inability to control costs, however, may be its undoing, and the Reagan administration is not favorable to its continuation, on a subsidized basis.

D. Amtrak as a Harbinger of Deregulation

Rail passenger service—in 1970 handling less than five percent of intercity traffic—was considered a small, discrete area where one could see if deregulation would work. It was a pilot for the railroad industry, inasmuch as one segment of the industry operated without ICC supervision.

Amtrak is not the best example of deregulation because there is only one provider of service, the service is heavily subsidized, and politics have played a big part in operations of the system. As a matter of fact, Amtrak supervision in ten years has gone from the Interstate Commerce Commission to the Department of Transportation to Congress.

The Amtrak experience emphasizes one factor in deregulation: If Congress does not like the results, it can always recapture the power and attempt to regulate transportation itself. Since Amtrak is such a large recipient of Federal funds, it seems natural that Congressmen would want to direct what service is offered their constituents.

Amtrak represents an attempt to aid a regulated industry by unloading an unwanted and unremunerative service on the general public. The same has occurred with commuter rail transportation, the whole concept of Conrail has been to isolate the money-losing Eastern lines from the nationwide rail system. The same has occurred with programs to unload branch lines on the states.

This may be delaying the inevitable. In 1981, budget proposals fa-

79. Act of Nov. 30, 1980, P.L. 91-518, title VIII, § 801, 84 Stat. 1339 (1980); Act of Nov. 3, 1973, P.L. 93-146, Section 14, 87 Stat. 554 (1973).

80. Act Sept. 29, 1979, P.L. 96-73, title I, § 111(b), 93 Stat. 541 (1979).

vored a slash in Amtrak subsidies, phasing-out of Conrail assistance and an end to branch-line assistance altogether.[81] Congress managed to save those programs last year, yet many rail projects may be dropped completely. The traditional coalition of constituencies which have supported rail programs in the past may be unable to save these projects.

The experience of deregulation for Amtrak revealed that ICC regulation of an industry was in certain cases inappropriate or irrelevant. A similar formula of deregulation was applied in Conrail, and during the 1970s the conventional wisdom was that subsidy and merger solutions had failed to save the railroads. Maybe freedom from regulation would allow them to put their house in order the best that they could.

V. The Regional Rail Reorganization Act of 1973

A. *The Northeast Railroad Problem*

The so-called Northeastern Problem area actually runs as far west as Chicago, in what used to be called Official Territory (north of the Potomac and Ohio; east of the Mississippi). With the bankruptcy of the Milwaukee and Rock Island, one could technically say that the Northeastern Problem area includes Seattle and Tucumcari, New Mexico. But the carriers between Chicago and the eastern seaboard, at one time the major trunk lines of the country, were the most distressed financially:

1. Jersey Central succumbed in 1967 to the paralysis of labor-intensive terminal operations in high-tax territory, without the benefit of a long rail haul.
2. Boston & Maine defaulted an interest installment of its five percent first mortgage bonds, and in March 1970, was dragged forcibly to court by four nervous creditors.
3. Penn Central fell in June 1970.
4. Lehigh Valley, dependent on Penn Central for advances that were no longer forthcoming, fell in July 1970.
5. Reading fell in November 1971, thanks largely to environmental concerns over high-sulphur coal that slashed coal tonnage 66 percent between 1967 and 1972, with the most severe decline beginning in the spring of 1971.
6. Erie-Lackwanna fell in June 1972 after all its troubles, done in at last by Hurricane Agnes, which tore out 135 miles of the mainline between Elmira and Salamanca, New York, including 11 bridges. The N & W, which controlled it through the Dereco holding company, did nothing.[82]

In addition, the Ann Arbor Railroad, the Lehigh & Hudson River, the Pennsylvania-Reading Seashore Lines and even the tiny New Hope & Ivyland clamored at the federal courts for protection from their creditors under section 77.

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81. Traffic World, March 30, 1981, at 16, 33.
82. R. Saunders, The Railroad Mergers and the Coming of Conrail 295 (1978).

The causes of decline of the eastern railroads have been widely commented upon. They include: a shrinking industrial base in eastern territory as the nation moves from a heavy-industry to a service economy, the heavy terminal costs of serving the major old cities of the country, passenger deficits brought on by heavy commuter travel and intercity operations, the decline of anthracite coal as a fuel, and the improved superhighways built in the region as part of the Interstate system.

Proposals for the easing of this problem called for varied remedies: breaking up Penn Central into its original components, selling parts of the system to Amtrak, nationalization of the entire mess, turning over the profitable parts of the system to private railroads, and constructing a "firewall" line between Albany and Harrisburg. East of this, the government would operate a terminal company, west of the firewall, profitable railroads would be able to operate on a private basis.

A threatened strike over work rules on Penn Central would have disrupted lines of distribution for both the automobile and steel industries. As a result of this crisis (possibly brought upon by Penn Central itself, which moved to unilaterally change the agreed-upon rules) the Shoup-Adams bill moved to the floor of the House. The bill was drafted far from the action, in the front office of the Union Pacific Railroad in Omaha. The UP, mindful of the fact that twenty-five percent of its traffic was sent to or received from the Northeast, looked upon this as an opportunity to protect its connections, and at the same time possibly containing the Northeastern virus to its present location.[83]

The United States Railway Association, established by the Act, is not an "association" at all. Rather, it is one of those off-budget federally chartered non-profit corporations, like Fannie Mae. It is a buffer agency which stands between the railroads and the government, and its main role was to supervise the planning of a slimmed-down system for the Northeast.[84] It fulfills the same function that the Secretary of Transportation did in the early days of planning Amtrak. Similarities between the Amtrak concept and Conrail are rife throughout this legislation. USRA also is the overseer of Conrail and sends periodic reports to Congress on the adequacy of Conrail's efforts. It can authorize loans to Conrail, interim assistance to localities wishing to acquire lines and to Amtrak (for the Northeast Corridor), and other financially-stressed railroads.[85]

Conrail itself, more properly termed the Consolidated Rail Corporation, is an ostensibly for-profit corporation, headquartered in Philadelphia.[86] It is owned by the creditors of the old bankrupt railroads and a majority of its

83. *Id.* at 307-08.
84. 45 U.S.C. § 711 (1976).
85. 45 U.S.C. § 721 (1976).
86. 45 U.S.C. § 741 (1976).

directors are appointed by the President with the advice and consent of the Senate. The bill provided for labor protection for life for former employees of the old corporations who had five years or more seniority, but the corporation could move labor around wherever it desired.[87] As Professor Saunders comments on the deliberations:

> As major bills go, Congress did not put a lot of work into this one. Union Pacific supplied the bill. First National City Bank supplied the financial data. The United Transportation Union supplied the labor contracts. Committee work was minimal. So was floor debate. Support from the South and West was whipped into line with a tart reminder that x thousands of freight cars a day rolled into the Northeast with products from other regions. A largely disinterested House passed the bill in November 1973 . . . The administration put on a blustery show of defiance. . . but Nixon signed it early in January. Such was the Regional Rail Reorganization Act of 1973.[88]

B. *The Emergence of Conrail*

Most of the 3-R Act, as the legislation setting up Conrail is known, is concerned with preserving the Penn Central and other Eastern bankrupt lines for freight service. Provision was also made for grants and loans for Amtrak to acquire certain lines, especially in the Boston-Washington corridor.[89]

The preliminary report of the Secretary of Transportation, required under the Act, called for such drastic pruning of freight traffic that it was attacked in Congress as wasteful of energy. The USRA plan was less draconian in its approach, especially since views of consumers were heard through the newly-mandated advocacy role of the Rail Services Planning office of the ICC.[90] During the time of planning by USRA there was a moratorium on railroad abandonments within what was to be Conrail.[91] Meanwhile, the bankrupt railroads kept running with loan guarantees from USRA.

Many similarities exist between the Amtrak and Conrail schemes. Both owe their origin to the ideas of the late Dr. Paul Cherington of M.I.T. It was Cherington's idea that, although direct subsidies to railroad corporations were unpalatable, railroad deficits could be reduced by the process of "unloading" unwanted services, such as passenger trains, commuter lines and Northeastern freight service upon the government, as well as the cost of labor protection agreements.[92]

Both Amtrak and Conrail laws involve government-sponsored "private,

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87. 45 U.S.C. §§ 771-779 (1976).
88. Saunders, *supra* note 10, at 309.
89. 45 U.S.C. § 791(d) (1976).
90. 49 U.S.C. §§ 10361-10364 (1980).
91. 45 U.S.C. § 744 (1976).
92. Allbright, *A Hell of a Way to Run a Government*, N.Y. Times Magazine, Nov. 3, 1974, at 14.

for profit'' corporations, whose stockholders are the ''unloading'' railroads.[93] Both laws mandated moratoria on discontinuance of service,[94] followed by massive cutbacks by the new corporations.[95] Both aim at savings and eventual productivity through rationalization of routes and centralized operation,[96] and both contain ''put up or shut up'' sections by which localities which otherwise would be stranded can subsidize the cost of continued operation of routes within their areas.[97]

USRA considered several options: a big Conrail system with neutral terminal companies at New York and Philadelphia, a breakup of Penn Central, and a fixed-plant scheme under which the government would acquire track and fix it up, and then lease it to a privately financed Conrail.[98] It opted at last for a single Conrail, hoping that the Chessie System and Southern Railways would acquire some of the unwanted properties to provide a semblance of competition. On April Fool's Day, 1976, the first Conrail trains began operation on the merged system. At age six, Conrail is just starting to show signs of emerging profitability. But Conrail's 1976 optimism and smugness seem to have been at least premature.[99]

The proposed extensions of either the Norfolk & Western or Chessie to balance Conrail in the east never came to fruition. Instead, the small Delaware & Hudson Railroad was given trackage rights over Conrail to Buffalo, Baltimore, Newark, Philadelphia and Potomac Yard, Virginia, in an attempt to provide competition for the Conrail monolith.[100] The additional lines proved to be more than the D&H could swallow, and now the Albany-based road is heavily subsidized itself through loan guarantees from the USRA. The D&H was not included in the recently approved Norfolk & Western—Southern Railway merger[101] (interestingly enough, the Norfolk road actually controls the D&H, but is more than willing to wash its hands of any responsibility for railroading east of Buffalo.)

All the lines of the bankrupts which entered Conrail are now either operated by Conrail itself, abandoned (with no need for ICC approval) or run by ''designated operators''. The latter are short-line railroads which operate over lines not picked up by Conrail. Usually they operate over trackage acquired by states and receive state subsidies for operations.

Conrail itself is a designated operator on many marginal lines, and operated commuter service in the New York, Philadelphia and Washington

93. 45 U.S.C. §§ 541, 741 (1976).
94. 45 U.S.C. §§ 642, 744 (1976).
95. 45 U.S.C. §§ 564, 744(b) (1976).
96. 45 U.S.C. §§ 545(e), 742 (1976).
97. 45 U.S.C. §§ 563, 744(c) (1976).
98. TRAINS, Feb. 1975 at 9.
99. R. SAUNDERS, THE RAILROAD MERGERS AND THE COMING OF CONRAIL 321-23 (1978).
100. *Id.* at 319.
101. *See* U.S. RAILWAY ASS'N, SEVENTH ANNUAL REPORT (1980).

areas as well. As a matter of fact, through its commuter operations, until 1982 Conrail actually operated more passenger trains than Amtrak. Lines between Boston and Washington, Springfield and New Haven, and Philadelphia and Harrisburg were transferred to Amtrak ownership. Amtrak charges Conrail and commuter authorities for trackage rights within the Northeast Corridor.

The United States Railway Association still functions as Conrail's banker and planner. The Department of Transportation, citing duplication of efforts, has tried to eliminate USRA and concentrate Conrail's planning in DOT, but so far to no avail. USRA's 1981 report called for further cutbacks in Conrail's service and more deregulation if the blue giant was ever to get out from the public trough.

Conrail has successfully rehabilitated hundreds of miles of trackage and has placed the former New York Central and Pennsylvania mainlines in pre-bankruptcy condition. It has negotiated an attrition settlement with rail labor which should eventually reduce crew costs. Reliability of service has improved and the system is still a vital adjunct to the auto industry in Detroit and the steel industry around Pittsburgh.

On the other hand, it has reduced service in many areas, increased charges so as to virtually embargo traffic, and is considering closing once-vital main lines like the Erie-Lackawanna and Lehigh Valley. It has consumed virtually all of its authorization and it is problematic how long the entire nation is willing to be taxed to bail out a regional railroad.[102]

The Reagan administration drastically cut back Conrail's authorization and plans to terminate its subsidy in the near future. However, Conrail seems to have turned the corner toward profitability. The USRA, in its April 1, 1981 report, for the first time zeroed in on "obsolete work rules that are costing the railroad more than $300,000,000 per year," and called for a renegotiation package similar to that demanded of Chrysler Corp. employees as a condition of state aid.[103]

In 1981, Congress amended the Conrail law to provide for a special USRA Board to determine whether or not Conrail is likely to be profitable. If so, it cannot be sold piecemeal until mid-1984. The railroad must first be offered to its employees if they develop a "financially responsible" plan. If it is determined not to be profitable, it may be parceled out and sold at any time.[104] Four years ago, Professor Saunders viewed the DOT's insistence on profitability as misplaced:

> Applying just a single test, whether a line could earn a profit all by itself, raised the deepest questions about the new panacea. If the concept were carried to its logical conclusion, there would be no excess capacity on the northeastern

102. P. DEMPSEY & W. THOMS, COURSEBOOK ON TRANSPORTATION LAW, at VI-38 (1981).
103. TRAFFIC WORLD, Mar. 23, 1981, at 20.
104. Phillips, Congress on Conrail, TRAINS, Nov. 1981 at 23.

railroads. But excess capacity was essential. It allowed for business expansion and national emergencies (of which Hurricane Agnes should have been a visible reminder). A lack of it was cited as one of the great economic bottlenecks of the Soviet Union. It also permitted "down time" so maintenance crews could do their work; lack of provision for this had made a bottleneck of PC's River Division.

Was profit and loss all that mattered? Once abandoned, a right-of-way was likely to be gone forever. At least, some thought, a "rail-bank" ought to be created to insure preservation of the right-of-way, even if the lines were abandoned. . . .[105]

C. *Conrail and Deregulation*

Like the Rail Passenger Service Act, the 3-R Act was a harbinger of the deregulation to come. Many of the features of the Act involved bypassing of the ICC; first the moratorium on discontinuances, then the planning process, and finally the discontinuance of lines which were to be abandoned (or in the euphemism of USRA, "available for subsidy").

Once a line was slated for abandonment, its continuance depended upon the state's willingness to put its money where its mouth was. Lines were subsidized by states to continue commuter service to major cities or to preserve a branch lines to rural areas. No regulatory agency was called upon to determine public needs. Oversight functions for Conrail and the other eastern roads recipient of loan guarantees are handled not by the ICC, but by USRA.

Outside of these unique factors stemming from the startup of Conrail, the big blue railroad is treated like an ordinary carrier by the ICC. It still must submit to ICC jurisdiction concerning rates and further abandonment, now that the planning process is over.

Conrail has insisted that it is *sui generis*, and that it will never break loose from Federal funding without complete freedom to set its own rates. What this would mean is freedom to pick and choose the traffic it will carry as well, since one Conrail estimate is limited to some two dozen commodities. Conrail is now shifting the commuter traffic burden (even though subsidized by local authorities) over to Amtrak or to the states,[106] or to the newly-established Amtrak Commuter Corporation.[107]

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105. SAUNDERS, *supra* note 10, at 311.

106. After one year of operation under contract with Conrail, the Massachusetts Bay Transit Authority declined to continue operations. Instead, MBTA contracted with the Boston & Maine Railroad to replace Conrail for Boston commutation service, which has operated since 1977. *See* PASSENGER TRAIN J., March 1981, at 7. *See also, Conrail's Desire to Unload Commuter Service*, TRAFFIC WORLD, March 30, 1981, at 16-18.

107. Phillips, *supra*, n.104. *See also* Business Week, April 5, 1982 at 75.

VI. THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

The 3-R Act was meant to benefit the Northeast. Now there would be a 4-R Act for the rest of the country. The "Revitalization" part was to help railroads in the states outside the Conrail area; the "Reform" was an attempt to bring a measure of deregulation to the troubled industry. Bankruptcies were looming; the Rock Island had gone under and the Milwaukee was soon to follow.

There were early cries for deregulation from academicians. But now, pressure came mostly from the industry. Railroad experts were citing the sorry state of the industry and since subsidy and mergers had not proved to be panaceas, sentiment began to grow for letting the railroads compete in pricing. The real enemy was not the common-carrier truck or barge; it was the unregulated competing carriage which was driving the railroads to the wall.

The 4-R Act was not a piecemeal solution to a particular problem as were Amtrak and Conrail. Rather, it was the first comprehensive attempt in years to reexamine the need for economic regulation of the railroad industry. Although it did not change the fundamental nature of regulation, it did make some changes in the regulatory system: minimum and maximum rate regulation, establishment of demand sensitive (seasonal) rates, separate rates for distinct rail services, operations of rate bureaus, merger, abandonment procedures and accounting and costing methods.[108]

The 4-R Act provided money for the states to apply to rail planning, and a branch-line acquisition assistance program which the current Administration is seeking to eliminate. It provided for loans for rehabilitating rail lines outside the Conrail areas. These loans were secured by the issuance of "preference shares" which the government obtained in the railroad. The biggest beneficiary of this 4-R program was the Milwaukee Road, which managed to rehabilitate its Chicago-St. Paul main line, used by Amtrak and by a new fleet of "Sprint" piggyback trains used in a government demonstration program to see if they could be highway competitive. Although the Milwaukee is now bankrupt, the main line "Sprint" trains are doing well.[109] The Rock Island was not so fortunate; it could not qualify for any 4R loans and was operating through 1979 by a process of deferred maintenance. Then-secretary of transportation Neil Goldschmidt commented that the Rock Island's trustee "took a railroad that was on its knees and drove it to its ankles."[110]

The major contribution to deregulation by the 4-R Act was in rate regu-

108. DEPARTMENT OF TRANSPORTATION, A PROSPECTUS FOR CHANGE IN THE FREIGHT RAILROAD INDUSTRY at 114 (1978).

109. Dolzall, *The Train They Call Sprint*, TRAINS, April — 1981 at 26.

110. Thoms, Those Directed-Service Orders, TRAINS, Sept. 1981 at 48.

lation. The 4-R Act modified significantly the standards which the ICC used in determining the reasonableness of rates so as to assure greater flexibility in ratemaking by rail management. Section 202 of the Act establishes new standards and procedures for determining when rail rates are just and reasonable on traffic for which effective competition exists. A proposed rate that contributes to the "going concern value" of the carrier cannot be found unjustly or unreasonably low. The ICC was also directed to promulgate standards for establishment of seasonal, regional or peak-period rates. A seven percent no-suspend zone was created for an experimental two year period (now elapsed) and time limits were tightened for the ICC to suspend rates. The burden of proof in suspension cases was reallocated to protestants.[111]

The 4R Act also introduced into ratemaking the concept of market dominance. Market dominance exists when there is a lack of competition from other carriers or modes for that particular shipment. The ICC must first find that market dominance exists before it has jurisdiction to conclude that the proposed rates are unreasonably high. The 4R Act did not limit the Commission's jurisdiction over minimum rates, but it gave railroads the freedom to raise rates when traffic was competitive.[112]

Other provisions of the 4R Act required the ICC to establish procedures assuring the railroads adequate revenue levels, modified the provisions governing collective ratemaking, set new procedures and standards (expedited) for abandonment and merger proceedings, and authorized the ICC to exempt from regulation those persons and transportation services that are found not to be necessary to effectuate the national transportation policy.[113] With regard to abandonments, the legislation made it easier to abandon trackage, yet required railroads to state their intention to consider a line for abandonment far in advance so that states could plan to take over the lines and lease them to designated operators.

The Conference Report on the 4R Act states that the changes in rate regulation "are intended to inaugurate a new era of competitive pricing." Very little of this came to pass. The railroads said that the 4-R Act did not go far enough. Despite the policy in favor of innovative ratemaking, railroads still relied on the general rate increase to boost revenues. There was very little competitive ratemaking, and the ICC was reluctant to find market dominance in situations where any traffic went by truck. The 4-R Act was just a way station en route to deregulation of rail traffic.

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111. DEPARTMENT OF TRANSPORTATION, *supra* note 108, at 115.

112. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, § 202(i) (1976).

113. DEPARTMENT OF TRANSPORTATION, *supra* note 108, at 115.

VII. THE BANKRUPTCY ACT OF 1978

In November 1978, President Carter signed the "Act to Establish a Uniform Law on the Subject of Bankruptcies"[114] and eighty years of jurisprudence on the old law became obsolete. But the Act did not take effect until October 1, 1979, and railroads then in reorganization continued under the old law—unless the trustees had failed to file a plan of reorganization before the enactment of the new bankruptcy code. Milwaukee Road and Rock Island began and continue their reorganizations under Section 77, but with new requirements for labor, leased lines, and the public interest because various extensions carried these proceedings into Chapter 11 of the new bankruptcy law.

Subchapter IV of Chapter 11 deals with the reorganization of railroads. One of the first changes is that the Department of Transportation, rather than the ICC, selects a panel of five people, from which the court chooses only one to be a trustee. An essential difference between railroad reorganization and other corporate bankruptcies is that the court and trustee must take into account the public interest as well as that of the railroad, its creditors, and stockholders.[115]

Except for abandonment cases a railroad in reorganization is still subject to the ICC and other Federal and state regulators. The ICC now only has advisory authority over the abandonment of railroad lines. The trustee, if he decides to abandon a portion or all of the railroad, must file an application for abandonment, but the court will tell the ICC when the deadline is to report, and the Commission's report is merely a recommendation to the reorganization court.[116]

A trustee in bankruptcy takes possession of all property of the railroad, and protects it from the creditors at the same time that he is supposed to be operating it for the public. If he chooses to file a petition for abandonment, all the court must find is that abandonment is 1) in the best interest of the estate, 2) is essential to the reorganization plan, and 3) is consistent with the public interest. However, actual abandonment may not take place until the time for filing appeals has been exhaused.[117] This is because of the drastic nature of abandonment. Congress believed that the courts should go easy on approving abandonments which involve the actual removal of track.

Except for the public interest and abandonment provisions, railroad bankruptcies are treated very much as any corporate reorganization. The

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114. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, title I, 92 Stat. 2549, § 101, 11 U.S.C. 101 (1978).

115. 11 U.S.C. § 1165 (Supp. III 1979).

116. 11 U.S.C. § 1170 (Supp. III 1979).

117. 11 U.S.C. § 1170(d) (Supp. III 1979).

trustee must come up with a reorganization plan, which might involve some abandonments. Otherwise, he must recommend that the line be liquidated.

Old Section 77 did not authorize liquidation of a railroad under reorganization proceedings. The court would dismiss the petition for reorganization and a state court receivership would generally follow. Now, if the line cannot be successfully reorganized, the railroad must be liquidated within five years, and its assets sold or otherwise disposed of, with the proceeds going to the secured creditors. The court may confirm a reorganization plan: if the creditors will get something of value equivalent to what they would get if the line were sold for scrap, if it is probably that income from the reorganized railroad will cover fixed charges, and if the plan is compatible with the public interest.[118]

The reduced involvement by the ICC and the streamlined court proceedings in the new Bankruptcy Code are but yet another sign of Congress's current enchantment with partial deregulation of rail transportation.

VIII. SELF-DEREGULATION BY THE ICC

If it is true that the Supreme Court follows the election returns, it is equally true that regulatory agencies see the cold breath of the sunset laws facing them unless they mend their ways. A definite philosophy change ranged at the ICC during the 1970s. With the Ford and Carter administrations enthusiasts for deregulation, and with air deregulation approaching, the ICC began to change its attitude. The Commission has applied in motor carrier cases a less protectionist policy, and this began to occur with railroads as well.

There was also an increased willingness to let competition flourish at the ICC. Of course, with motor carriers each day brought new applicants trying to get into the business. Even the airline industry, cartelized since 1938, was trying to open up to new entrants. But there was no Freddie Laker or Ed Daly beating at the door to get into the railroad business. Regulatory freedom for railroads meant freedom to merge, freedom to abandon trackage, and freedom to change (usually raise) rates.

Mergers were allowed more easily after the passage of the 4R Act. At this writing, the ICC has approved the merger of the Frisco into the Burlington Northern, and the Chessie System (B&O, C&O, WM, etc.) with the Family Lines (L&N, SCL AWP, GA, etc.) into the new CSX corporation. Approval of a Southern-N&W merger and a Missouri Pacific-Union Pacific combine (called MOP-UP by the irreverent) is expected.[119]

These merger approvals were in swift contrast to past ICC behavior.

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118. 11 U.S.C. § 1173 (Supp. III 1979).

119. *See* Thoms, *The Urge to Merge*, PASSENGER TRAIN JOURNAL, August 1980, at 18. The I.C.C. approved the Norfolk-Southern merger in Spring 1982.

The Rock Island merger had languished for ten years before the ICC, until everyone lost interest and the Rock itself was liquidated. The ICC kept the Rock Island trackage going by means of directed service orders, having the Kansas City Terminal operate the railway until it was finally parcelled up among connecting railroads.[120]

In the merger arrangements, there were labor protection conditions, but they were not as rigorous as in the Conrail or Amtrak cases, nor as strict as in previous merger cases. Employees from the merged railroads were to be protected, not those of affected railroads.

On its own, the ICC has deregulated some commodities. In 1980, fruits and vegetables (except potatoes) were deregulated by a rulemaking proceeding. The Commission believed that would allow the railroads to compete with the truckers of these agriculturally exempt commodities. In 1981, the ICC moved to deregulate piggyback traffic, allowing the railroads to solicity business and compete with truckers on their own terms.[121]

In these situations, the ICC was cognizant of the energy shortage, and that trains are more energy-efficient than trucks for long-haul traffic. The ICC has been aware of the financial plight of the railroads and has moved toward competitiveness and moved away from umbrella ratemaking. The ICC also hears the voices of those who call for the agency's abolition and wants to eliminate, as in trucking, the ludicrous forms of regulation that make the Commission trivial or silly. And the ICC has always been cognizant of the sniping from across the Mall:

> . . . . Rivalry between the two government loci of transportation power was coming to a head. When DOT was created in 1966, it absorbed some 31 agencies, including the Coast Guard and the Panama Canal Company, but not the ICC. It was a burgeoning bureaucracy with an insatiable appetite for money and space . . .[122]

IX. The Staggers Rail Act of 1980

The Staggers Rail Act was the logical progression of the anti-regulatory climate of the Carter Administration. Having deregulated air freight, airlines, and trucks, the Administration wanted to conclude the session with a final coup: deregulation of the rails. The influence of Alfred Kahn, then Carter's inflation czar, and Ted Kennedy, then Carter's bitter rival for the presidency, were apparent in the drive for deregulation.

Congressional climate was not as favorable as that of the administra-

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120. Thoms, *supra* note 110. The operative provision allowing the KCT takeover of the Rock Island was 49 U.S.C. § 11125 (1980).

121. The ICC promulgated the deregulation rules on February 19, 1981. They became effective on March 23, 1981. Ex Parte No. 230, Sub-No. 5, Improvement of TOC/COFC Regulation (1981).

122. Saunders, *supra* note 82, at 306.

tion. Agricultural interests had always distrusted the railroads and saw few benefits emerging from any deregulation for grain traffic. The railroads were finding a renaissance of coal traffic, thanks to energy policies which favored replacement of oil-fired power plants with coal-burning ones. But the rates on coal were increasingly disproportionate to any other traffic and contrary to the interests of our energy policy. The city of San Antonio managed to get a low rate for coal shipments written into the Staggers law.[123] Congress's main concern was balancing the interests of captive shippers against those of the railroads.

The main concern for Congress in passing the Staggers Act was the financial condition of the railroads. This Congress was faced with the spectre of more bankruptcies. We had seen railroad bankruptcies before, but it always seemed a healthy part of the financial process. The railroads kept operating, and they were now free of debt. The old creditors were the new stockholders. But now operating income was not enough to fund fixed costs.[124] The Milwaukee and the Rock Island—major transcontinental lines, were disappearing from the official guide and salvage men were actually tearing up the track.

At one time every nation had faced this problem, and had opted for nationalization—or the Canadian solution, whereby the government took all the losers and the Canadian Pacific wound up with the moneymaking lines. But this time Congress faced an electorate worried about government spending. The idea of paying for another Conrail, much less buying up independent, solvent lines was too vexing. Congress would give the railroads anything they wanted to avoid nationalization.

What emerged, of course, was compromise. Reregulation rather than deregulation was the order of the day.[125] It was hardly a consumer bill—it was addressed to the real problem of flagging rail revenues. There were no immediate short-term payoffs to the public as were promised under the Airline and Motor Carrier Acts.[126]

The Staggers Act was signed into law in September 1980; and President Carter described the legislation as "the capstone of my efforts to get rid of needless and burdensome federal regulations which benefit nobody and harm all of us." Congress, having found that modernization of economic regulation of the rail industry by placing a greater reliance on the market place is essential, now created a new declaration of regulation policy which stressed competition to the maximum extent possible.[127] In other

123. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1961 § 702(a) (1980).
124. Shaw, *Rail Reorganization: The Panacea that Passed*, TRAINS, February 1973, at 28.
125. Wilner, Is Deregulation Really Reregulation?, TRAINS, Jan. 1980 at 22-25.
126. *See* Thoms, *A Bronx Cheer for Deregulation*, PASSENGER TRAIN J., December 1980, at 18.
127. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101 94 Stat. 1895 (1980).

words, Congress directs the Commission to rely on competition wherever possible and to continue regulation where competition is not possible.

A. *Entry Regulation*

The Staggers Act has a relaxed entry standard, by which the public convenience and necessity need only permit (not require) construction or acquisition and operation of a rail line.[128]

This section will facilitate the operation of short line railroads carved from defunct lines like the Rock Island. It also facilitates the building of spur lines across town to serve an industrial area served presently by another road. The prior law made it difficult to obtain extension certificates for serving another railroad's territory.

Another section prohibits a railroad from preventing another line from crossing its tracks, and grants procedures for the ICC to arbitrate a dispute which would arise from a crossing of one line by another.[129]

B. *Abandonments*

The new act speeds up the abandonment or discontinuance process; if the carrier meets the burden of proof that public convenience and necessity permit the abandonment, the effective date of abandonment may be no longer than 330 days from the date the application is filed.[130] Interested parties may make offers of financial assistance to avoid abandonment by paying a subsidy or purchasing the line. If the ICC finds the buyer to be a financially responsible person and the assistance is equal to the acquisition cost of the line or the loss, the ICC will stay the application until purchase and then dismiss the abandonment.[131]

C. *Rate Regulation*

The Staggers Act makes its main changes in rate regulation. Competition will be fostered by increased rate flexibility. Rail carriers, within certain bounds, may establish whatever rates they choose. Note that the tariff principle is not abandoned; there may still be only one legal rate for a shipment. A rate which is noncompensatory is presumed unreasonable while rates which contribute to the going concern value of the carrier are conclusively presumed reasonable. Rates may be challenged as being too low, and then the burden is on the protestant to show that the proposed rate would not contribute to the going concern value of the carrier.[132]

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128. *Id.* § 221(a), 49 U.S.C. § 10901(d)(e) (1980).
129. *Id.*
130. *Id.* § 402, 49 U.S.C. § 10904 (1980).
131. *Id.* § 402(a), 49 U.S.C. § 10905 (1980).
132. *Id.* § 201. 49 U.S.C. § 10701(a) (1980).

There is no maximum rate regulation unless the carrier has market dominance over that particular class of freight. Absent market dominance, competition should keep rates in line. Where market dominance exists, rates must be reasonable. An increasing scale of revenue/variable cost percentage running from 1980 to 1984 at rates from 160% to 175% will be in effect. If the revenue/variable cost percentage is less than this figure, market dominance conclusively does not exist. A finding that the rate exceeds this percentage does not raise a presumption of market dominance.[133]

Once market dominance exists, then the reasonableness of rates comes into question. To this effect, the Act creates "zones of reasonableness" within which rates can be adjusted without the necessity of going to the ICC. The Commission cannot suspend rates within this zone, or investigate on its own rate increases not exceeding 190% of costs.[134] A rate set above this no-suspend zone may be investigated by the Commission on its own or after complaint.

Under the Staggers Act, investigations must be completed within five months unless the ICC reports to Congress reasons for the delay. The burden is on protestants to show: they are likely prevail on the merits; that without suspension, the new rate will cause substantial injury to the protestant; and the procedures for post-determination reimbursement do not protect the protestant.[135] If the ICC holds the rate unreasonable, the carrier must return the rate increase with interest.

Shortly before passage of the Staggers Act, the ICC approved rail contract rates on its own, despite a past history which implied that railroads could not act as contract carriers.[136] The ICC in 1979 decided that its policy would change: in order to obtain and hold long-term traffic commitments, the ICC would allow railroads to contract with shippers for guaranteed rates over long terms.[137] This is codified in the new Staggers Act, which states that railroads may now enter into contracts with purchasers of transportation, subject to ICC approval. Within thirty days of filing the contract, it will become effective unless the ICC commences an investigation or a complaint is filed by an individual shipper (who alleges he will be harmed because the contract impairs the carrier's ability to perform its common carrier responsibilities) or a port (on the grounds that the contract discriminates against the port).[138] The major change in the Staggers Act is that

133. *Id.* § 202. 49 U.S.C. § 10709(d) (1980).
134. *Id.* § 201. 49 U.S.C. § 10701(a) (1980).
135. *Id.* § 207. 49 U.S.C. § 10707 (1980).
136. Guaranteed Rates, Sault Ste. Marie to Chicago, 315 I.C.C. 311, 323 (1960).
137. Change of Policy, Railroad Contract Rates: General Policy Statement, 361 I.C.C. 205 (1979).
138. Staggers Rail Act § 208. 49 U.S.C. § 10713 (1980).

railroads, like trucks and barges, can become contract carriers as well as common carriers. Once a contract goes into effect, the contract is exempt from ICC regulation. During peak periods, the contractual shippers can get first call on the railroad's services before it serves the common carriers. Thus, big shippers are rewarded by the new law, as they will be able to take advantage of their contracting power.

Not only are antidiscrimination provisions of the common carrier obligations going by the boards, but common carrier liability may also be contracted away, as it is in air freight and trucking. Rail carriers may now establish rates which limit their liability for loss and damage in transit.[139] This accords with a general trend in the industry to shift the insurance burden to the shipper. Interestingly enough, railroads are not required to maintain rates which do not limit their liability.

Carriers who do not earn adequate revenues under existing joint rates may surcharge their rates, adding it to the through charge. Any carrier not earning 110% of its variable costs may apply a surcharge if it has gone along with all the general rate increases for the preceding year. Other carriers may cancel the application of the surcharge by showing that it is unreasonable.[140] Conrail has used this provision to surcharge a great deal of freight arriving from Western railroads; it had always claimed that it got a bad deal on the rate divisions.

The seasonal or off-peak demand-responsive rates sanctioned by the 4R Act have been repealed by the new law. The role of rate bureaus, as with motor carriers, has been severely restricted. Carriers may not discuss agreements affecting single-line rates except for general rate increases. A railroad can only discuss a joint rate which it practicably participates in. Transcripts of all meetings must go to the ICC. After 1984, the rate bureaus may not discuss general rate increases on single-line rates.[141]

The Commission's jurisdiction to order emergency car service has been restricted to only grave emergency situations which have a substantial effect on service in the United States or a substantial region thereof.[142]

X. Evaluation and Prospects

We have been through a decade of deregulation. Yet in only one industry, aviation, has the logical result of economic deregulation—sunset provisions—been reached. With the railroads, there has been a move toward letting the carriers have their own way in the hope that they will thus

139. *Id.* § 211. 49 U.S.C. § 10730(c) (1980).
140. *Id.* § 217. 49 U.S.C. § 10705a (1980).
141. *Id.* § 219. 49 U.S.C. § 10706 (1980).
142. *Id.* § 226. 49 U.S.C. § 11123 (1980).

be able to compete with the other modes, and that nationalization or massive abandonments will be avoided.

Since the Staggers Act was enacted, it should now be easier for rail carriers to enter a market, but it is doubtful that, except for short lines and some branches to tap coal, that new routes will be constructed. Access to capital is not that easy. It will be easier, however, to get out of the business. Although the standards for abandonment have not been changed, the time frame has. Branch line subsidies to forstall abandonment may be harder to come by since the Federal government is moving toward a policy of disinvestment in rail lines.

The creation of contract rates will allow the rail industry to offer better service to contract shippers. Certain favored shippers may be able to get guaranteed rates and guaranteed service. It may allow a means to compete in agriculture, since contract rates on a long-term basis might compete favorably with exempt carriers. This would allow the carrier to arrange service to be spread out beyond peak demand periods. Common carrier shippers, however, may find service to be even worse than it is now. Long-term contracts may well be a better deal for shippers than hoping to get a good rate out of the ICC.[143] Lawyers are advising shippers to concentrate their legal talent on contract law rather than administrative law in maximizing their interest in low rates. But railroads today seem loath to enter into contracts, when they feel that rates can only increase in the future.

Rate flexibility means ability to compete on traffic that has been lost. It will take more than rates, however, to win traffic back to the rails. Shippers are willing to pay more for guaranteed service, or at least for some reasonable idea where their shipment is and how long it should take to get to its destination. But the Staggers Act has allowed railroads to get out from under noncompensatory rates because of the necessity of equalizing ports or products. It does, moreover, allow the railroads to pick and choose traffic and price themselves out of some undesirable business. It may be that a system is more efficient when it concentrates on a few commodities, but the whole idea of a railroad is to have a transportation system that serves all types of traffic.

With attention paid to rail revenues and rates of return, some fundamental questions are yet unanswered. With deregulation, what is the role of oversight by a regulatory agency? The rails are not yet so deregulated that antitrust is the answer, yet the ICC has been moving away from standards of service. Is it not valuable to have an expert body that is a forum for shippers' and communities' complaints rather than have after-the-fact litigation? Even assuming that freedom of entry, exit, and ratesetting are all

143. Remarks of ICC Chairman Marcus Alexis, reported in TRAFFIC WORLD, Mar. 23, 1981, at 33.

good things, there still is room for supervision of a business charged with a public interest to see that the public has some control or oversight of practices when the railroads are the only ones using their rights of way. When a railroad is abandoned, it is gone. No one is coming to build another one. We should make sure the ones we have are used to their best possibilities.

And here we have a basic problem. The railroads in the United States are privately owned. They may or may not make money for their owners. The public cannot travel on them. They cannot ship LCL, milk, livestock or other commodities that have been declared unprofitable or too much trouble. Now, we could say that whatever the free market produces is the best and highest use. But that is defining the problem away.

The railroads will find it harder and harder to compete with other modes of transport which are directly or indirectly subsidized by the government. Highway, airway and waterway cutbacks are nowhere near as severe as the Amtrak/Conrail/Mass Transit/Branchline subsidies proposed to be cut by the current administration. We can see more cutbacks in service by the private railroads, more mergers and more diverting of funds from the railroad to other subsidiaries. Railroad property will continue to be taxed by localities.

It may be that supply-side economics will work, that a free and unfettered railroad system will be able to compete with the now deregulated air and truck services. But if not, what then? What happens to the properties now included in Conrail? The government has assisted the massive railroad but has no equity in it. It all belongs to the creditors. Amtrak belongs to four railroads (one owned by the Canadian government) who were disenchanted with the passenger business at the creation of the system. Even the mighty Union Pacific does not earn the return on capital necessary to compete effectively with other carriers which have right-of-way provided.

Obviously this administration or any other within the next decade is not going to want to spend billions of dollars to acquire a railroad system. Railroads should do better financially if gasoline prices cut into long-distance trucking and the rails remain adaptable to electrification or even a return to steam power. Our railroads are considerably more profitable than the nationalized systems in Europe but their rail lines provide services that our own lines do not.

One plan that was voiced about a decade ago and hasn't been heard for a while would be to have the government acquire certain rights of way and upgrade them to Interstate Highway standards. Then, operating railroads could, for user fees, use this railed highway. Competition would be preserved; free-enterprise efficiency could go into operations, and the railroads would be free of the maintenance and tax burden on the lines. And the government would receive user charges from each of the operators. In some refinements of the scheme, a completely deregulated environment would allow use not only by traditional railroad companies, but truckers, shippers, small-package firms like United Parcel, freight forwarders, anyone who could invest in trains and be able to use the rail system.

But for the time being railroads are doing relatively well financially. And the railroads probably couldn't do worse under the Staggers Act and partial deregulation than they did when every rate and schedule was subject to ICC scrutiny.