Inedible Tallow, The Maximum Charges Rule, And Other Fables: Motor Carrier Regulation By The ICC*

JOE SIMS**

INTRODUCTION

There seems to be constant confusion about the interest and role of the Department of Justice in motor carrier regulation. We do have both an interest *and* a role, although I could probably get unanimous agreement only on the first of those. I will try in this article to explain why we are interested and what we see as our appropriate role.

You will undoubtedly be relieved to find no discussion of the *Yak Fat* case. But I have a more recent substitute—a story about beer and wine. Some years ago, the Interstate Commerce Commission decided that wine was a "grocery product" and therefore could be transported by those trucking firms that hold Commission licenses to carry grocery products or "prepared food products." Wine, according to the ICC, was "little more than fermented fruit juice, a potable liquid . . . classified as a grocery."[1]

Recently, a trucking firm tried to get the Commission to extend this

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** Deputy Assistant Attorney General, Antitrust Division, Department of Justice; B.S. 1967, J.D. 1970, Arizona State University.

1. Hilt Truck Lines, Inc.—Investigation of Operations and Revocations of Certificates, 117 M.C.C. 9, 13 (1972).

rationale from wine to beer.[2] This firm, which already held a license to carry grocery products and prepared food products, also wanted to carry beer. It argued that beer has greater nutritional value than wine, that it is frequently consumed as part of a meal by many people, and that it is used as a cooking ingredient. In any event, it argued, beer is clearly no less a foodstuff than wine.

But the ICC was not about to allow itself to get trapped in a seamless web of simple logic. The Commission held that beer, unlike wine, is not a foodstuff because what various commodities really are does not depend on the "academic or literal definitions found in dictionaries."[3] The Commission pointed out that those trucking firms that already hauled beer might be injured if other trucking firms that currently haul foodstuffs were also allowed to haul beer. On the other hand, the Commission said, those companies who would like to haul beer, but cannot, would not be injured by a refusal to permit expansion of their operations. Therefore, since one side might have been hurt by declaring beer to be food, and the other side would not have suffered by refusing to declare beer to be food, beer was found not to be food.[4]

If you had trouble following that reasoning process, consider a case reported recently in the *Washington Star*.[5] Trucker A filed an application for a license. Trucker B opposed it and asked for his own license covering the same route. The ICC granted trucker A's request. Trucker B then petitioned for reconsideration. The ICC, until it could make a final ruling, postponed the issuance of the license to Trucker A. Meanwhile, Trucker B won his license. The ICC ultimately ruled that because there was already a trucker on the route—Trucker B—and there was not enough business to support a competitor, the original ruling that awarded the license to Trucker A had to be reversed.[6]

Stories like this circulate about every government agency, but there seem to be a lot of them about the ICC. In addition, this type of "reasoning," if you'll pardon the expression, encourages a lot of otherwise capable ICC practitioners to write very silly things. For example, the Department of Justice was involved in a proceeding before the Commission in which a carrier was attempting to obtain new operating authority to transport inedible tallow. In a reply brief, one of the protestants argued:

> The evidence shows the principal shipper's "tallow" is in fact not tallow at all but in all cases a mixture of pork fat. As demonstrated by any dictionary, tallow

2. Ajax Transfer Co.—Petition for Declaratory Order—Interpretation—Beer as a Foodstuff, 128 M.C.C. 235 (1977).
3. *Id.* at 237.
4. *Id.* at 239.
5. The Washington Star, May 13, 1977, at A-10.
6. Longview Motor Transp. Inc., Ext.—Gilmore Corners, Wash., 126 M.C.C. 596 (1977).

> is derived from cattle; pork fat from pigs; and this Commission has consistently over the years held that a "petroleum" product cannot be transported on "petroleum" authority; a "molasses product" on "molasses" authority; "vegetable oil" on "vegetable oil product" authority or "chemical" authority. . . .[7]

This poor fellow was obviously not familiar with the beer and wine cases, and did not realize that the dictionary carries no weight in ICC analyses.

Recently, the DOJ has attempted to have the Commission further protect the right of independent action. We received a lot of interesting comments in that proceeding, but the most amusing one was contained in the reply statement of the New England Motor Rate Bureau.[8] Among other comments on our position and analysis, the New England Motor Rate Bureau took the position that we did not know how to read a tariff sheet, and it went on to point out inaccuracies in our description and analysis of various rate bureau documents. As clear evidence of our ignorance, the brief pointed out:

> Ms. Hurdle [a government economist] then states that under item 860, a fifteen hundred pound shipment from Massachusetts to Staten Island, New York was rated at 376¢ per cwt., when in fact, by virtue of supplement 38 to tariff 204-R, the proper rate was 410¢ per cwt. She then states that under item 950 of tariff 204-S, the rate would move to 510¢ per cwt., but completely overlooked the application of the maximum charges rule whereby the 1500 lb. shipment would be billed as 2,000 lbs. at a rate of 336¢ per cwt. resulting in an effective rate of 448¢ per cwt.[9]

We hereby plead guilty to not understanding those kinds of documents, and anyone who does, or claims that he does, ought to be immediately placed under a doctor's supervision.

These examples give you half the reason why the Department of Justice is interested in regulation of the motor carrier industry. Any regulatory scheme that produces this kind of analysis must inherently result in economic waste. But there is more than mere humor, as exemplified in another contribution by an ICC practitioner in the independent action rule-making proceeding: "Additionally, we have found the collective rate-making process a healthy, upward influence on prices which allows many small carriers to get rate adjustments they need to stay in business."[10] The reason for our interest here is much less humorous because it involves the approximately $4 billion that comprises investment value in operating rights of Class 1 common carriers,[11] and the 13% per year capital gain on the value of that

7. Wynne Transp. [Serv.,] Inc. Ext.—Inedible Tallow, No. MC-114725 (Sub-No. 75) (Aug. 2, 1977).

8. Reply Statement of the New England Motor Rate Bureau, Inc., Notification of Rate Proposals Following Prior Independent Action, Ex Parte No. 297 (Sub-No. 2) (Oct. 21, 1977).

9. *Id.*

10. Reply Statement of Neuendorf Transp. Co. at 4, Notification of Rate Proposals Following Prior Independent Action, Ex Parte No. 297 (Sub-No. 2) (Oct. 20, 1977).

11. COUNCIL ON WAGE AND PRICE STABILITY, THE VALUE OF MOTOR CARRIER OPERATING AUTHORI-

"ticket."[12] The American Trucking Association correctly describes operating rights as a trucker's "single most important asset." This $4 billion is the added cost to shippers, and ultimately to consumers, that results from the current regulatory system which protects the inefficient, preserves historical patterns of operating rights, and requires a participant in the industry to be not only a businessman, but also a gladiator in the literal sense of that word. He must fight his way through the halls of the Interstate Commerce Commission in order to get the opportunity to make and implement a business decision—adding the cost of that effort to his prices.

The rate bureau system of price fixing is another reason for DOJ concern. This method of determining prices allows carriers to agree collectively on the rates they will file with the ICC, or, to put it bluntly, allows truckers to fix the prices they want to set as opposed to having the prices set for them by the marketplace. Those prices might not always be too high but they are almost certainly not the prices the market would set. Government agencies are not qualified to set prices, and the least qualified institution to set prices in the trucking industry in this country is the ICC. There is no reason to assume that the ICC is ever able to set a price which, even at a particular moment in time, not to mention the next day or week or month, reflects a true market price.

It is the rigidity of regulation and its attendant waste, perhaps most simply illustrated by the gateway problem and its close companion, the empty backhaul problem, which costs consumers well over a hundred million gallons of fuel per year according to a recent study commissioned by the Federal Energy Administration.[13] Finally, the inequity of a system that perpetuates economic and social discrimination is disturbing. Its high barriers to new entry and the enormous costs of entry do not permit potential truckers who were previously denied access to the marketplace, because of racial or economic discrimination, an opportunity to rectify that denial. Instead, discrimination on the basis of race is replaced by discrimination on the basis of time because those lucky enough to get entry "tickets" are then perpetually protected from new competition.

These problem areas are the other half of the reason why the Department of Justice is interested in ICC regulation. We have tried over the years to be relatively clear about our interests and the underlying rationale. We think ICC regulation is wasteful, is in large part unnecessary, and is probably unjustifiable on any rational basis. To the extent it can be justified only

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TIES 7 (CWPS-247) (June 9, 1977); AMERICAN TRUCKING ASSOCIATIONS, INC., ACCOUNTING FOR MOTOR CARRIER OPERATING RIGHTS (1972) (Brief and Petition before the Financial Accounting Standards Bd. of the Financial Accounting Foundation).

12. COUNCIL ON WAGE AND PRICE STABILITY, *supra* note 11, at 13.

13. CHARLES RIVER ASSOCIATES, POTENTIAL FUEL CONSERVATION MEASURES BY MOTOR CARRIERS IN THE INTERCITY FREIGHT MARKET E-12 to E-17 (1977).

as protecting the interests of the "ins" against the "outs," or as perpetuating hidden cross-subsidies, either geographic or product, which the public might not vote to continue if they knew such subsidies existed, or as giving the industry a convenient tool by which it can "rationalize" its internal competitive structure—there is no excuse for continuing this regulatory system.

Department of Justice Role

Given our interest, and our perspective, what do we see as our appropriate role? To answer that, it is necessary to give you a basic understanding of what the Antitrust Division is and what it does.

The Antitrust Division is primarily a law enforcement agency. Its central mission is to punish hard-core restraints of trade, and try to ensure that a reasonable range of competitive choice exists within markets. But we have a second and equally important mission: to serve as an advocate for competitive policies before regulatory agencies, Congress, and within the Executive Branch. This effort does not include arguing for more competition regardless of its consequences, but it does include encouraging the precise definition of public goals and where possible, pragmatically showing how a more competitive policy can be implemented to enhance consumer choice and/or economic efficiency.

This competition advocacy role occurs on a day-to-day basis, and is sometimes closely related to our antitrust casework, because the courts increasingly look to agency jurisdiction and expertise. At other times, it can involve much broader issues, and perhaps broader relief, in the context of an industry wide rule-making proceeding before a regulatory agency. The benefits of a free enterprise society are widely extolled in the abstract, but frequently shuffled aside in specific situations. It is inevitably the case that those seeking exceptions from the ordinary free enterprise rules, or those seeking to undertake particular anti-competitive activities, are capable and willing to make the case for their proposed course of conduct. Unfortunately, there are rarely advocates of competition policy available with the incentives to make counter-arguments. The Antitrust Division had traditionally tried, within the limits of its resources, to undertake this general role of competition advocate.

Perhaps the most obvious advocacy activity is our participation before the federal economic regulatory agencies. For many years, objective observers, including the Council of Economic Advisers[14] and both the Neal and Stigler Task Forces,[15] strongly suggested the need for increased con-

14. *See, e.g.*, Annual Report of the Council of Economic Advisers 106-7 (1970).

15. Presidential Task Force, Report on Antitrust Policy (Neal Report) (1968); Presidental Task Force, Report on Productivity and Competition (Stigler Report) (1969), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,108.

sideration of competitive factors in matters before the regulatory agencies.

The agencies usually receive extensive arguments from industry to the effect that increased competition would be inconsistent with statutory policy and, in some cases, the agency staff is so extended that it cannot critically evaluate a self-serving statement by the regulated parties. Under those circumstances there is often the need for an independent party, experienced in the analysis of economic problems, to bring to the agency's attention the manner and the extent to which competitive and regulatory policies can be simultaneously pursued in advancement of the public interest.

We have participated in regulatory proceedings requiring an accommodation of the purposes of the antitrust laws and those of regulatory statutes for many years. In fact, the 1969 Stigler Report urged even greater activity by the Antitrust Division, and formalization of its role as "the effective agent of the Administration in behalf of a policy of competition. . . ."[16] Others, such as Senator Kennedy who has reintroduced legislation,[17] originally sponsored in 1977, have also urged a more formal advisory structure which would create a statutory right for the Department to intervene before federal regulatory agencies.

Of course, our advocacy efforts are not limited to agencies. The legislative arena, interagency meetings and conferences are all forums that we use when they seem appropriate. Obviously, some people are a bit uncomfortable with these efforts. They believe that the Antitrust Division should simply enforce the antitrust laws without interfering with agency or legislative matters. The reality is that such lines cannot be drawn so easily.

For example, in 1968, the Division urged the Securities and Exchange Commission to eliminate fixed commission rates on sales of stock on the New York Stock Exchange.[18] We believed that fixed rates, which dated back to the 1700's, were neither essential to the effective functioning of the regulatory scheme, nor immunized by that scheme from the operation of the antitrust laws. While the SEC considered what action should be taken, a significant amount of private litigation was initiated that challenged fixed commission rates as violations of the antitrust laws. The Antitrust Division intervened as a party in one of those cases.[19] At the same time, fixed commission rates and other competitive issues in the securities industries were receiving a considerable amount of attention in Congress. The Antitrust Division testified on a number of occasions before congressional committees on these issues.

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16. *Id.*

17. S. 2625, 95th Cong., 1st Sess. (1977).

18. Comments of Department of Justice, Inquiry into Proposals to Modify the Commission Rate Structure of NYSE (April 1, 1968), 115 CONG. REC. 15,932 (1968).

19. Motion of the United States of America to Intervene, Thill Securities Corp. v. New York Stock Exch., No. 63-C-264 (E.D. Wis. Apr. 28, 1972).

Ultimately, fixed commission rates were indeed eliminated, with a resulting savings to the stock buying public of over $680 million thus far, as estimated by the SEC.[20] But seven years and a combination of legislative, regulatory agency, and law enforcement initiatives were required to accomplish this single objective. Not only would it have been undesirable to our law enforcement interest in this area to avoid participation in forums other than the courts in which the subject was being debated, it simply would have been impossible.

This aspect of the Division's activities is in many ways illustrative of its special character and responsibilities. It is not just a cop on the beat, nor is it merely a voice in the night, with no authority. The Division is more than just an advocate, and not merely a litigant. It is in many respects a unique institution, and the continuation of these activities brings with them a special responsibility to be open and consistent. Competitive advocacy may occasionally conflict with a particular piece of litigation, but in the long run they are truly complementary.

Placed in this context, our role before the ICC is relatively clear. The ICC is broadly charged with regulating the entry of new firms, their rates and rate-making, and mergers and acquisitions in the motor carrier industry. The ICC has a broad public interest responsibility, and it also has the authority in certain circumstances to immunize transactions from the scope of the antitrust laws. It is quite clear from the underlying statute, case law, and agency decisions that competitive factors are a relevant consideration in almost everything the ICC does. Thus, the Department not only has a particular responsibility to counsel the ICC on competitive impact but it can offer an expertise, in economic analysis generally and competitive analysis in particular, that is highly relevant to the ICC decision-making process.

DOJ Goals at the Interstate Commerce Commission

Our principal goals at the ICC have been the elimination of unnecessary restraints on new entry into motor carrier markets and the removal of unnecessary restrictions of competitive motor carrier rate-making. These goals are intertwined. Without the possibility of new entry, rate flexibility simply invites the extraction of monopoly profits by existing carriers and could even lead to predatory pricing. The power to set rates in a market protected from the restraining potential of new entry is obviously subject to abuse. Without rate freedom, eased entry would lead merely to excessive service competition with a continuation of the present inflated rate level, which reflects the average cost of both efficient and inefficient carriers.

20. Securities & Exchange Comm'n, Fifth Report to Congress on the Effect of the Absence of Fixed Rates of Commissions (1977).

We have tried to promote these twin goals in a variety of proceedings at the ICC. For example, our efforts to persuade the Commission to ease entry into motor carrier markets can be described as falling into six categories: (1) relaxation of the "public convenience and necessity standard" for certification of new carriers;[21] (2) prospective licensing of carriers through generalized public convenience and necessity findings;[22] (3) removal of inefficiency-producing restrictions on existing carriers' operations;[23] (4) exemption of traffic from regulation;[24] (5) avoidance of market concentration resulting from mergers;[25] and (6) revision of procedural requirements to facilitate new entry applications.[26]

With respect to competitive rate-making, our efforts have fallen generally into two areas: flexibility to set rates without regulatory review, and restrictions of rate bureau activity. We believe the ICC has authority to permit some rate-making flexibility, and that motor carriers should be given the freedom to decrease rates as they see fit so long as the rates cover out-of-pocket costs. Upward rate flexibility, unfortunately, is another matter. Its feasibility would require the elimination of antitrust immunity for rate bureaus and substantial easing of entry. In this second area involving rate bureau activity, the Division has been active in urging the ICC to exercise its

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21. *See, e.g.*, Exception of U.S. Dep't of Justice to Initial Decision, Arrow Trucking Co., Ext.—Pipe and Tube, MC-5623 (Sub-No. 27) (filed Oct. 27, 1977); Comment of U.S. Dep't of Justice in Support of Petition to Reopen Proceeding, State Moving & Storage, Inc., Ext.—Household Goods, No. MC-18302 (Sub-No. 2) (filed Aug. 31, 1977); Exception of U.S. Dep't of Justice to Initial Decision, Roll-on, Inc., Contract Carrier Application No. MC-14207 (filed Aug. 8, 1977); Exception of U.S. Dep't of Justice to Initial Decision, C.I. Witten Transfer Co., Ext.—Weapons, No. MC-47412 (Sub-No. 113) (filed June 27, 1977); Reply of U.S. Dep't of Justice to Petition for Review, Highland Tours, Inc., Com. Car. Applic., 128 M.C.C. 595 (1977) (Reply filed April 14, 1977); Brief of U.S. Dep't of Justice, Scott Truck Line, Inc., Ext.—Colo. Meats, No. MC-113658 (Sub-No. 11) (filed Nov. 18, 1977); Ex Parte No. 110, Comment of U.S. Dep't of Justice, Special Application Procedures for Service at New Plantsites (filed Dec. 5, 1977).

22. *See, e.g.*, Ex Parte No. MC-107, Comment U.S. Dep't of Justice, Motor Carrier Licensing of Economically Disadvantaged Persons (filed Aug. 2, 1977); Ex Parte No. 85, Petition of U.S. Dep't of Justice for Reconsideration, Transp. of "Waste" Products for Reuse and Recycling, No. P-1-77, Smith and Attkisson Trucking Co. (filed May 19, 1977).

23. *See, e.g.*, Ex Parte No. MC-109, Comment of U.S. Dep't of Justice, Special Application Procedures, Substitution of Single-Line Service for Existing Joint-Line Operations (filed Dec. 14, 1977); Ex Parte No. 55 (Sub-No. 27), Dual Operations of Motor Carriers; Ex Parte No. 106, Comment of U.S. Dep't of Justice, Investigation to Consider Modif. of Administrative Ruling No. 84 (filed Dec. 12, 1977).

24. *See, e.g.*, Comment of U.S. Dep't of Justice, Motor Transp. of Property and Passengers Incidental to Transp. by Aircraft, No. MC-C-3437 and MC-C-4000 (filed Sept. 23, 1977); Ex Parte No. MC-37 (Sub-No. 29), Comment of U.S. Dep't of Justice (filed May 24, 1977); Terminal Areas for Express Shipments by Bus, 128 M.C.C. 204 (1977).

25. *See, e.g.*, Roadway-Western Gillette Merger, No. MC-F 13067.

26. *See, e.g.*, Ex Parte No. 55 (Sub-No. 26), Comment of U.S. Dep't of Justice, Protest Standard in Motor Carrier Licensing Proceedings, (filed May 30, 1978); Revision of Application Procedures for Permanent Motor Carrier, Broker, Water Carrier, and Freight Forwarder Authority (filed Oct. 3, 1977).

authority to restrain anticompetitive rate bureau activities,[27] and we have questioned the Commission's jurisdiction to approve certain classes of rate bureau agreements.[28]

While the Division has some specific interests and goals, our participation before the ICC is largely designed merely to make our views known in a consistent manner with respect to a variety of significant activities that come before the Commission for approval. We have tried, especially in recent years, to maintain a program of regular participation before the Commission. The goals of this program may be stated very simply: (1) to encourage the ICC to undertake a more detailed and reasoned analysis of the anticompetitive agreements and activities that come before it for approval; (2) to bring to the Commission's attention the relevant competitive considerations; and (3) to encourage less anticompetitive solutions and a more competitive market in the motor carrier industry. We think we have been relatively successful, at least in recent years, in meeting these objectives.

Still, the ICC is an old agency, and set in its ways. On any absolute measure, there has been very little recent change despite the efforts made by every administration since President Truman's. In 1948, President Truman vetoed the Reed-Bulwinkle Act, which gave motor carrier rate bureaus immunity from antitrust prosecution. Congress overrode his veto.[29] A Presidential Advisory Committee on Transport Policy under President Eisenhower issued a report concluding that less regulation was needed. President Kennedy described federal transportation regulation as a patchwork of inconsistent and often obsolete legislation and regulation. In 1971, the Transportation Regulatory Modernization Act was proposed, with pricing and entry reforms for both railroads and motor carriers.[30] Hearings were held at that time, but nothing concrete resulted. In 1975, the Ford Administration proposed its comprehensive Motor Carrier Reform Act,[31] which would have resulted in substantial deregulation. The bill received some brief attention in the Senate, but no action was taken. Currently there are several pieces of legislation pending before Congress,[32] and the Carter Administration is examining in some detail the possibilities for legislative change in the motor carrier regulatory system. The outcome of that examination remains

27. *See, e.g.*, Ex Parte No. 297 (Sub-No. 2), Petition of Dep't of Justice for Rulemaking, Proposed Rule to Preclude Automatic Cancellation of Independent Rate by Bureaus (filed May 11, 1977); Reply Statement of U.S. Dep't of Justice, Movers and Warehouseman's Ass'n of America, Section 5a Application No. 4, Amendment No. 4, (filed Dec. 5, 1977).

28. *See, e.g.*, Statement of U.S. Dep't of Justice in Opposition, Alaska Rail-Water Ass'n Agreement, Section 5b, Application No. 1 (filed June 8, 1977) (on file with ICC).

29. 49 U.S.C. § 5b(9) (1976).

30. H.R. 11826, 92d Cong., 2d Sess. (1971).

31. H.R. 10909, 94th Cong., 2d Sess. 577 (1976).

32. H.R. 7768, 95th Cong., 1st Sess. (1977); H.R. 8973, 95th Cong., 1st Sess. (1977); S.2269, 95th Cong., 1st Sess. (1977).

unknown, although the reader probably will be able to speculate as to what the Justice Department's position has been and will continue to be.

The key point is there have been few concrete results from all these efforts. Today, of course, the Justice Department is not the only reform advocate in town. The ICC itself has indicated an interest in reform.[33] I think it is clear that ICC Chairman, Daniel O'Neal, probably is both one of the most capable and almost surely the most reform-minded chairman in memory. I think it is clear that he plans to try to fix some of the more obvious problems. But I think it is equally clear that neither the Chairman nor the Commission can make the kind of permanent changes that are necessary in the system of motor carrier regulation. The ICC Chairmen have limited tenure, as do ICC Commissioners. What may be considered reform today may be considered chaotic and destabilizing tomorrow. The only true reform in a system of government regulation is to remove discretion from the regulators.

The Possible Effects of DOJ Involvement

The DOJ can have an impact. Perhaps the best example in recent months is the *Highland Tours* case.[34] The petitioner, Scotty Milloy, was a bus operator from Jacksonville, Florida, with a very small business. When he retired as a mechanical engineer a few years ago, he began operating bus tours around Florida which became quite popular. Before long, he received requests to travel interstate so he sought interstate charter bus authority. Greyhound and Trailways Bus Lines protested, as they automatically seem to do for almost every application for competing authority. As a result, Mr. Milloy had to appear a year later at a hearing before an ICC Judge as a supplicant, asking to be allowed into a business of providing interstate charter bus trips. He presented travel agents, school teachers, the Morocco Temple Pilgrimage Committee and the Sons of Scotland Bagpipe Band, among others, as witnesses to testify to their desire for his services on an interstate basis. Greyhound and Trailways, on the other hand, pointed out that Mr. Milloy would be competing with them if he were granted a certificate, and that would divert traffic from them.

Greyhound and Trailways won the case. Five months later, the ICC Judge held that these companies "are entitled to all traffic they can handle economically and efficiently within the scope of their operating authority before a new, competitive service is authorized."[35] Mr. Milloy then appealed and the Department of Justice intervened in the case at the recon-

33. *See, e.g.*, Interstate Commerce Commission, Improving Motor Carrier Entry Regulations: Report and Recommendation of a Staff Task Force (1977).

34. Highland Tours, Inc., Com. Car. Applic., 128 M.C.C. 595 (1977).

35. Highland Tours, Inc., Com. Car. Applic., No. MC-140444 (Sub-No. 1) 10 (Sept. 30, 1976).

sideration stage. We made every effort to convince the ICC that this was an absolutely silly result, and we attempted to draw public attention to this case as an example of government regulation at its worst. We were reasonably successful since Mr. Milloy and his problem began appearing in newspaper editorials and on television shows. Eighteen months later, the ICC reconsidered, and decided that, in the words of one reporter, "Scotty Milloy and his one-bus bus line aren't likely to bring Greyhound and Trailways to their knees." In the process, and this is the important part from the DOJ perspective, the Commission made some new law when it said:

> It is well established that even when the services of existing carriers are not shown to be inadequate, the Commission is not precluded from granting authority based on consideration of other factors, such as the desirability of competition. . . . A carrier first in business has no absolute immunity against further competition. Even though the resulting competition may cause a carrier already providing service to lose revenues, the issuance of new authority may best serve the public convenience and necessity, as we find to be the case here.[36]

We view results like these as justification for our participation before the ICC, and we hope to see more opinions with language like that. More importantly, the Department of Justice hopes to see a large number of substantive changes in ICC regulation. While we are not sanguine in the long run about changes effected through Commission decision-making, we are perfectly prepared to accept pro-competitive changes in the short run. The Commission should be supported and encouraged in its efforts to do what it can, within the framework of its statute and within the real world environment of its constituency, to make the system of regulation less onerous, less restrictive and less silly than it has proven to be in years past.

For our part, we will try to continue to support the Commission in its efforts to rationalize the regulatory system. For example, one possible filing we are currently considering would request the Commission to provide for the compilation and organization of information identifying all firms holding common carrier authority between all origin and destination points. We believe such tabulation is essential if the Commission is to meet its statutory responsibilities. In merger and licensing cases, it is necessary that the ICC be able easily to determine the number of carriers and type of service authorized in any market so that it may evaluate the effects of the proposed action on the level of competition. In addition, such a compilation obviously would aid the Commission in enforcing the common carrier obligations of certificated firms. After all, this common carrier obligation is frequently pointed to by advocates for the existing regulatory system as the *quid pro quo* for protective regulation. It seems obvious that the ICC cannot effectively enforce common carrier obligations unless it knows who has them.

36. *Id.* at 603.

Finally, the identification of firms holding authority for particular products in particular markets would be tremendously helpful to shippers seeking the best service available at the lowest cost. There will be other initiatives, and whether they are successful and to what extent depends on how they are received by the Commission. But the DOJ will continue to try before the Commission, within the Administration, and, where appropriate, before Congress, to apply our expertise in competitive analysis to the serious regulatory issues in the trucking industry.

Conclusion

Let me caution the reader that he should not think the DOJ had singled out the ICC for our attention or our criticism. Every regulatory agency hears from us, and we usually say things that they don't want to hear. The ICC has plenty of company. In fact, after a long and arduous search, I finally found an even sillier regulatory episode than *Yak Fat*. Recently, the District of Columbia Alcoholic Beverage Control Board ruled that restaurants which feature topless and bottomless go-go dancers must allow minors to view the entertainment. Despite the fact that minors were not permitted to purchase or consume alcoholic beverages, the Board said that the City's human rights law prohibited discrimination by any holder of a restaurant license on the basis of age, with respect to admission. The Board stated that "[we are] not aware of any policy permitting holders of [restaurant licenses] to refuse admittance of minors to a restaurant or to separate them within a restaurant simply because they are minors . . . ." The reader will agree that this holding makes even less sense than the *Yak Fat*, or the beer and wine cases, or the maximum charges rule, where 1500 lbs. is billed as 2000 lbs. The main difference is that the ICC is regulating a $50 billion industry. How long can the nation afford it?

As MGM's Sam Goldwyn once observed, 90% of the art of living consists of getting along with people one cannot stand. If that's true, for an antitrust lawyer at least nine-tenths of the remainder must be learning to cope with a free market that is chock-full of regulatory potholes and fences. We in the Antitrust Division will continue trying to cope.