What's Wrong With the Case Against Collective Ratemaking: Rejoinder to James C. Miller III

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I. Introduction

The current controversy concerning collective ratemaking in trucking and the antitrust immunity which makes it possible has provoked a great deal of discussion on both sides of the issue.[1] The arguments, however, are seldom brought into juxtaposition with each other. Together with my original article in this journal,[2] the present exchange with James C. Miller, an active apostle of the deregulation faith, provides a useful interplay of opposing views with respect to some of the important questions at the center of this controversy.

I say "some" of the questions because while Miller states that his comments are presented to my position in favor of collective ratemaking,[3] they in fact fall far short of doing so. His rebuttal gingerly avoids dealing with several of the major arguments contained in my article, such as the substantial competitive pressures to which general freight rates are subject despite collective ratemaking, the sharp contrast between the close government regulation of motor-carrier collective ratemaking and the little or no regulation of other activities in the economy that are exempted from the antitrust laws, and the role of the collective ratemaking process in facilitating effective regulation which insures that rate levels do not produce excessive carrier profits. I must assume that Miller is unable to fault the facts and reasoning of the arguments he avoids. My response will be directed to the points he has himself selected for comment; these relate to matters involving rate discrimination, rate stability and reasonableness, interline service, regulatory enforcement, independent action, and shipper participation. At the close of my reply, I present a general observation that I believe is worth emphasizing as a result of this colloquy.

II. Rate Discrimination

Miller takes issue with my position that in the absence of collective ratemaking we could expect widespread and gross discrimination in the rates charged to shippers and that large shippers controlling large volumes of traffic at numerous points would inevitably receive favored treatment over smaller, more narrowly based, less powerful shippers.[4]

It appears to me that Miller's rebuttal on the question of discrimination consists largely of avoiding the issue. He injects the irrelevant observation

1. Although Congress has acted on deregulation legislation since this rejoinder was written it is likely that the controversy will continue and quite possible that further legislation will be before Congress in its next session.

2. Friedman, *Collective Ratemaking by Motor Common Carriers: Economic and Public Policy Considerations*, 10 Transp. L.J. 33 (1978) [hereinafter cited as Friedman].

3. Miller, *Collective Ratemaking Reconsidered: A Rebuttal*, 11 Transp. L.J. 291 (1980) [hereinafter cited as Miller].

4. Friedman, *supra* note 2, at 42-43.

that rate discriminations that reflect cost differences can be economically desirable, and goes on to assume the entire problem away by asserting, as if it were indisputable, the premise that under conditions of competition discriminatory prices not reflecting cost differences "simply cannot obtain."[5]

Miller states that the concept of discrimination "often used" for regulatory purposes is not on all fours with the economic concept of discrimination, by which he means rate relationships that are "at variance with appropriate measures of cost."[6] He does not specify what those appropriate measures are, and economists are far from agreed on the matter. His point is that economic discrimination is present when rates to shippers are not proportionate to relevant costs of service and is absent when rate disparities involve correspondingly different costs of service. He argues that when rate uniformity prevails despite cost differences it is not only economically discriminatory but economically unsound because "resources are misallocated;" that the rule of competition that would govern pricing if only collective ratemaking were abolished would insure that resources were properly allocated; and that "if markets are competitive" the only possible discrimination in rates is a discrimination founded on a difference in costs.[7]

The weakness in Miller's emphasis on economic discrimination is that it has little bearing on the matters at hand, and his belief that discrimination not based on costs would be impossible under a system of individual ratemaking is out of touch with business reality. The kind of rate discrimination with which the case for collective ratemaking is concerned is not the rate difference based on cost distinctions but the rate favoritism to privileged shippers which is not at all based on lower costs of serving them. Miller introduces hypothetical situations in which costs of different carriers for a given distance may vary because of differences in route congestion, operating efficiency, or the like, whereas the real issue involves situations of preferential rate treatment that have nothing to do with cost differentials. I argue that without the collective ratemaking system non-cost-based rate disparities would be commonplace, if only because of the economic leverage of giant shippers. I hold that it requires only elementary understanding of the role of economic power in business relationships to appreciate that a large shipper disposing of great amounts of traffic is, for that reason alone, in a position to gain privileged rate treatment not available to smaller competitors.

The problem is not peculiar to trucking. It has its parallel in most other industries, including the entire goods sector of the economy. It is the rea-

5. Miller, *supra* note 3, at 292.

6. *Id.*

7. *Id.* In his explanation of how resource misallocation occurs, Miller states (p. 293) that transportation "costs" are higher than they need be. I believe the intended reference here is to carrier rates rather than to carrier costs.

son for the provision in the antitrust laws that prohibits any price discrimination in the sale of goods of like grade and quality except to reflect cost savings or to meet competition.[8] If the mere absence of collective pricing would be sufficient to foreclose the possibility of price discrimination that victimizes weaker firms, why is it that the law prohibiting price discrimination in the unregulated economy, where collective pricing is forbidden, has such an extensive constituency among small businesses in practically every line of manufacturing and distribution?

Miller's basic answer with respect to the dangers of rate discrimination in trucking is the one-note chant that "it can't happen here," that if carrier rates were made individually rather than collectively "discrimination would be eliminated."[9] The reasoning behind this assertion is that "if one carrier is providing services at a higher rate than another, the shipper discriminated against will simply choose another carrier. . . ." "In theory, there is no reason to expect 'more powerful' shippers to get favored treatment. No carrier would be willing to transport any shipper's freight below cost, and could not do so in the long run and stay in business."[10] These remarkable statements deserve close attention because they constitute the only explanation Miller offers in support of the proposition that in the absence of collective ratemaking discrimination would be impossible.

Taking the latter "reason" first, the argument that below-cost pricing is not sustainable for long has no pertinence. Obviously, discrimination need not involve going to the extreme of granting a below-cost rate to the favored shipper. It seldom does. The typical discrimination involves rates that are above costs but differentially so. It is the disparity in the rates charged large and small shippers that produces the indefensible competitive inequity, and from the victimized shipper's standpoint such a disparity is just as decisive when both rates are above carrier costs as when one is below and one above those costs. By ducking the garden-variety case of discrimination and using an illustrative case far removed from true-to-life situations, Miller's rationale avoids the real issue. Thus, this aspect of his proof that rate discrimination in trucking "simply cannot obtain" carries no weight.

Turning to Miller's first point that any rate discrimination would be vitiated by the disadvantaged shipper's simply shifting its traffic to another carrier, one can only marvel at such a view of the commercial world. Let us take an uncomplicated instance of a carrier that serves two competing shippers and is persuaded by business pressures from the larger customer to grant it a lower rate. Note that we are discussing here not the lawfulness of such discrimination but Miller's argument that it is self-correcting. The

8. Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1970).
9. Miller, *supra* note 3, at 292.
10. *Id.* at 292-93.

power of persuasion possessed by the large shipper arises naturally from the substantial traffic it can offer or withhold at many points along the carrier's system. The ability of the larger shipper to obtain a preferred rate derives from the total business volume it represents to the carrier. On what basis could the small shipper lacking this bargaining strength obtain a correspondingly low rate "simply" by exercising its right to take its limited business elsewhere? The idea that a shipper with limited traffic volume can obtain the low rate enjoyed by its high-volume competition by choosing another carrier "simply" is not convincing.

If Miller's rationalization were valid in trucking, it would be equally valid in the rest of the economy. If price discrimination could not be sustained, there would be no incentive to engage in it. Discrimination could be relied on to cure itself and would require no attention from the law. Lawyers and economists in tune with routine motivations and practices in industrial marketing know that but for legal deterrents, the temptations of buyers to seek discriminatory price concessions, and of sellers to grant them, would be irresistible across a wide swath of American industry.

The manner of Miller's reference to large shippers as "arguably 'more powerful'" and to small shippers as "arguably 'less powerful'"[11] suggests more than a faint shadow of a doubt that shipper size and economic power in dealing with carriers go hand in hand. If he has such doubt, it does not square with the facts of life. The reality of the situation was summed up crisply for a Congressional Committee by an acknowledged expert on the subject during the hearings of the 1940's on the Reed-Bulwinkle Act. The speaker was Joseph B. Eastman, whose practical knowledge and dedication to the public interest during a long career as a member of the Massachusetts Public Utilities Commission, as Chairman of the Interstate Commerce Commission, and as President Roosevelt's Federal Coordinator of Transportation place him high in the esteem of students of transportation:

> If I know anything from experience with certainty, it is that if we rely upon competition as the governing factor in the determination of freight rates by all types or any type of carrier, the benefits will go to shippers in proportion to the size of the 'traffic club' that they wield.[12]

The problem of rate favoritism toward powerful shippers is not limited to unjustified rate disparities between two competing shippers served by the same carrier between common points of origin and destination. The situations in which such favoritism would most severely manifest itself in the absence of collective ratemaking are those where different carriers serve competing shippers from and to the same points and where different carri-

11. *Id.* at 103.
12. Interstate Commerce Act of 1943 (Regulation of Rate Bureaus), *Hearings on S. 942, U.S. Senate Committee on Interstate Commerce*, 78th Cong. 1st Sess. 822-82 (1943).

ers serve competing shippers located at different origins but nevertheless competing for the same destination markets, or located at the same destination but drawing supplies from different origins. In such situations, rate favoritism or discrimination having no foundation in cost justification can decisively affect the outcome of the competitive struggle for business at the shipper level, and even at the carrier level.

Within the framework of these general situations, there are innumerable ways, limited only by the ingenuity and shrewdness of behind-the-scenes negotiations, in which the powerful buyer of transportation can win a significant edge over smaller competitors, while the carrier supplying that edge wins, in turn, a competitive advantage over other carriers. As Dirlam and Kahn summed it up in their study of *Fair Competition* twenty-five years ago: "Price discrimination, like coercively imposed exclusive arrangements plays most often into the hands of the big and wealthy, firm, buyer or seller."[13]

Depending upon the relative importance of the price paid for transportation in total costs of production, disparities in the rates charged by different carriers to competing shippers can have a decisive impact on the outcome of the market rivalry between those shippers. When such rate disparities reflect not differences in costs of service but differences in buying power it is difficult to see how the public interest is served by the resultant undermining of competition. The giant shipper is given an advantage, and the smaller shipper is placed under a handicap, not as a consequence of differences in economic efficiency between them but purely as a result of the superior economic leverage of the big buyer of trucking services. Even under present law it is not easy to reach this type of discrimination. Each carrier individually is innocent of discriminating between its customers, but the effect of the structure of rates of the carriers as a group is to create rate disparities having precisely the same adverse effects on shipper competition as occurs when the discrimination is practiced by an individual carrier.

Under collective ratemaking, such discrimination is avoided because of the basic principle underlying the system of class rates, which account for the great preponderance of general freight traffic. In general, all carriers belonging to a rate bureau charge the same rate, adjusted for distance, to all shippers for moving a particular class of goods under given conditions in the applicable territory, and the rate between one pair of points is, mile for mile, the same as between any other. The resulting parity of rates does not mean that competing shippers will pay identical rates. Where distances from origin to destination differ, or the size of shipment differs, or any of a wide range of other transportation conditions differ, the rates will vary as well and these variations will be closely attuned to corresponding variations

13. J. Dirlam & A. Kahn, Fair Competition, 255 (1954).

in the cost of the service. But for the same conditions, whether of distance or otherwise, the rates charged will be the same for all carriers subscribing to the rates, and to all shippers regardless of their size. The rates are equally available to all, the public gets the benefit of the lower costs of high-volume movements or of other economical transport arrangements, natural economic advantages of shipper location are preserved, and competition among shippers is influenced, as it should be, by relative economic efficiency rather than by relative economic power.

Similarly, commodity rates, which involve departures from class rates and are usually applicable to truckload movements of a specific commodity between specific origins and destinations, are, where established, available to all shippers, large or small, between those points and, in the normal course, to competing points as well. It may be that a large shipper is in a position to benefit from a commodity rate to a greater extent than a small shipper but that benefit is the result of the economics of truckload transport not of discrimination unrelated to the cost of supplying the transport.

III. "Optimal Combination" of Stable and Reasonable Rates

Miller concedes the validity of my statement that the shipping public "regards the need for a reasonable degree of price stability as inseparable from the need for a reasonable price itself."[14] Under collective ratemaking, rate changes occur only after due notice to, and opportunity for deliberation by, all interested parties, and the centralization of tariff publication gives shippers immediate and reliable intelligence as to prevailing rates. One of the prices paid by shippers for unrestricted rate competition by individual carriers would certainly be a high degree of rate instability and corresponding confusion and uncertainty concerning applicable rates. There is a marked difference between cost uncertainties resulting from inability to predict the future, an inability shared by all businesses in all industries, and cost uncertainties generated by confusion and discrimination, which are simply demoralizing if not outright destructive. The importance to the shipping public of a stable system of reasonable and nondiscriminatory rates has been neatly summed up by the Supreme Court: "Shippers have a basis for planning ahead by relying on a coherent rate structure reflecting competitive factors."[15]

Miller informs us that "there is an optimum combination of lower rates and rate stability," and concludes that "on the basis of economic theory, it is quite clear that a competitive market will approximate that optimal combination."[16] He adds that "[t]here is, however, no reason to assume carriers

14. Miller, *supra* note 3, at 293.
15. New York v. United States, 33 U.S. 284, 308 (1947).
16. Miller, *supra* note 3, at 294.

will choose this optimal combination through collective action."[17] It might equally be said that there is no reason to assume that collective action will not produce that result. But both observations are beside the point; the optimality ideal as such is a theoretical one and is unattainable under any system.

It is well to be wary when an advocate proclaims his argument to be irrefutably proven by "theory." In economics, such caution is usually doubly in order, and more so when the certainty of "optimum" results is claimed to be "quite clear." Even if economic theory, in this case the theory of economic welfare, had anything definite to say about price stability in the sense in which it is relevant to this discussion—and it does not—it would be well to examine the reasoning behind it. But Miller does not present any reasoning for us to examine. He wants us to accept on faith the truth that has been revealed to him and his fellow believers. He fervently assures us that economic theory guarantees that "in a competitive market" all will be for the best with respect to both rate stability and rate levels and that we can look forward to the optimal combination of the two. No one need feel logically compelled to flock to the cause of abolition of collective ratemaking on the strength of such assertions. Economic theory itself is not reassuring on the subject of rate stability. As pointed out in a leading textbook on the subject, "even very simple competitive markets may show unstable oscillatory behavior."[18] And the relevance of economic theory to what, as a practical matter, would happen to rate levels in the absence of collective ratemaking is remote. The optimization concepts of welfare theory form the framework of its teaching that maximum economic efficiency is realized under conditions of "pure" or "perfect" competition. These terms are not quite synonymous but the differences are not significant here. It is well understood by thoughtful economists that "pure" and "perfect" in this context refer not to "ideal" or "desirable" or "attainable" conditions but merely to what is logically precise or complete for purposes of theoretical expression, and that the theoretical conditions of pure or perfect competition have no counterpart in the real world. Nevertheless, some economist proponents of deregulation believe that even if the conditions associated with pure or perfect competition are not achievable in the economy as a whole, or even in a particular segment of the economy, economic welfare would be advanced by any move whatever toward an approximation of those conditions in trucking. Thus, they argue to the extent that collective pricing in trucking is inconsistent with the conditions of pure or perfect competition, the elimination of such collective pricing would advance the cause of economic optimality and contribute to general economic welfare.

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17. *Id.*
18. R. Lipsey, An Introduction to Positive Economics 159 (2d. ed. 1969).

The fallacy of this "piecemeal" approach to economic welfare has been thoroughly exposed in an extensive literature. Professor Richard G. Lipsey has summarized "the futility of 'piecemeal welfare economics' " as follows: "It is not true that a situation in which more, but not all, of the optimum conditions are fulfilled is necessarily, or is even likely to be, superior to a situation in which fewer are fulfilled."[19] In his later treatise on "Positive Economics," Lipsey elaborated:

> It is clear even to the casual observer that each of these conditions (of theoretical perfect competition) is wildly at variance with actual facts. Why then is it that this theory has had such a profound effect on so many economists and has led some to a worship of the unconstrained price system? The honest answer is 'I have no idea how it could possibly happen. . . .'
>
> What we cannot do is to assume that economic theory predicts that any increase in the degree of competition in the economy always—or even is likely to—increases the efficiency of resource allocation in the economy.[20]

More recently, two authors of widely-used texts on microeconomic theory, Professor Edwin Mansfield of the University of Pennsylvania and Professor Donald Dewey of Columbia University, have commented on the same question:

> Piecemeal attempts to force fulfillment of the optimality conditions can easily be a mistake. Unfortunately, many practical attempts to apply the principles of welfare economics have been, and are, piecemeal attempts of this sort.[21]
>
> In the real world it never happens that an economic system—or even a particular industry—satisfies the conditions necessary for a welfare optimum. It is also true that these conditions are capable of being more closely approximated in some parts of the system than in others. . . . Should 'as close to perfect competition as possible' be the goal of economic policy? The (possibly) surprising answer is: not necessarily. Because we cannot have all of the results that perfect competition would produce, it does not follow that the second-best solution is to secure as many of these results as we can.[22]

Speaking in the practical terms of applying competition theory to the specific circumstances of individual industries, the Attorney General's National Committee to Study the Antitrust Laws declared without reservation a number of years ago that departures from concepts of pure or perfect competition have no significance for public policy concerning competition, and, paradoxically, can even help to strengthen the competitive system:

> Whatever their views on public policy, economists are in agreement that departures from the model of 'pure' or of 'perfect' competition do not necessarily involve monopoly power or substantial lessening of competition in the sense of being a problem for public policy. We do not regard these models as offering any basis for antitrust policy. Indeed, departures from conditions of pure or

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19. Lipsey and Lancaster, *The General Theory of Second Best*, in REVIEW OF ECONOMIC STUDIES, 12, 17 (1956-57).

20. LIPSEY, *supra* note 18, at 357-77.

21. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS, 437 (1970).

22. DEWEY, MICROECONOMIES: THE ANALYSIS OF PRICES AND MARKETS, 251-52 (1975).

perfect competition are inevitable, pervasive and many of them useful to competition as a dynamic process.[23]

What all of this imports with respect to the issues that concern us here may be put as follows:

1. While the economic theory on which Miller relies to support his contention of optimal results under competition may be valid as an "idealized mathematical abstraction,"[24] it is not a reflection of practical reality. That theory, by its own terms, cannot be valid for trucking, or for any other single industry, unless the necessary conditions of perfect competition were simultaneously present in all other industries. But the conditions of perfect competition are conspicuously lacking in the economy generally because of the prevalence in many industries—notwithstanding the antitrust laws—of a relatively small number of producers, a relatively high degree of concentration, administered prices, economies of scale, patent restrictions, inadequacies of market information, product differentiation and miscellaneous entry barriers, and a host of other "imperfections." Even if conditions of perfect competition could somehow be brought about in trucking, their absence in the rest of the economy would negate any necessary connection between such removal of all restrictions on competition in trucking and achievement of more efficient allocation of economic resources. In fact, unrestrained competition in motor transportation under these circumstances could have just the contrary effect on resource allocative efficiency.

2. If there is no assurance that a total elimination of restrictions on competition in trucking would yield improvements in economic welfare, and even the possibility that the result of such total elimination of such restriction might actually be a decline in economic welfare, it is all the more true that there is no theoretical basis for expecting that a partial removal of such restrictions, such as the abolition of collective ratemaking, would enhance economic welfare.

Miller never quite states that abolition of collective ratemaking in trucking, or even total deregulation of the industry, would produce conditions conforming to concepts of perfect competition. He merely asserts that if markets are perfectly competitive the optimal combination of rate reasonableness and stability will prevail. Nevertheless, he manages—and this appears to be his intent—to leave the strong inference that in the absence of collective ratemaking trucking would be a "competitive market" in which, in line with the tenets of economic theory, we could expect the best possible combination of rate stability and reasonableness.

The theory that Miller invokes for support would require perfect competition both in trucking and in the economy generally. Even without collective

23. *Report of Attorney General's National Committee to Study Antitrust News* 314 (1955).
24. T. Scitovsky, Welfare and Competition, 22 (1971).

ratemaking, trucking markets would be far from perfectly competitive, and other markets in the economy are not perfectly competitive either. It is plain that, contrary to his contention, the economic theory on which he relies provides no support at all for his beliefs as to what would happen to rate levels and rate stability in the absence of collective ratemaking.

The fact that no *a priori* case for unrestricted price competition in general-freight trucking can be made on economic theoretical grounds does not dispose of the question of whether collective carrier action or individual carrier action in ratemaking better serves the economic well-being of the public. As a matter of common observation and experience, we know that in specific situations the prod of competition can be beneficial and that insulation from competition can be harmful, that in the famous words of Justice Learned Hand, commenting on the meretriciousness of outright monopoly, "immunity from competition is a narcotic, and rivalry a stimulant, to industrial progress."[25] We know also that, in the broad perspective of how the public is on balance affected, not every form of competing represents healthy competition and not every restriction of competition is anticompetitive, that the antitrust laws themselves regard certain forms of competitive behavior, such as price discrimination, exclusive dealing arrangements, tying restrictions, and corporate mergers as potentially anticompetitive in their consequences. The real case for or against collective ratemaking turns ultimately on how it affects the public interest. That can only be determined by sober, open-minded, and reasoned analysis of the various factors realistically involved in such a reckoning. It cannot be determined by simplistic recourse to theoretical notions of optimality.

As Miller notes, his rebuttal here is based on his testimony in an ICC proceeding addressed to the question of continued approval of collective ratemaking.[26] In that proceeding, in which he and I engaged in a fuller exchange which included the issue of the relevance of perfect competition theory to that question, Miller, acknowledging the validity of my arguments, which were along similar lines to those I have made here, retreated to the position that is it not economic theory, but economic evidence and judgment, that should be determinative as to the economic consequences of collective ratemaking or its repeal. "[T]here is a need to weigh the inefficiencies caused by unbridled competition vs. the inefficiencies caused by even the best institutional arrangements for restraining competition. This must be a decision based on an assessment of the evidence, not a matter to be based on theory."[27] I agree with that statement. The case for or against collective ratemaking is not to be found in economic theory but in

25. United States v. Aluminum Co., 148 F.2d 416, 427 (2d. Cir. 1945).

26. Miller, *supra* note 3, at 292.

27. Rebuttal statement of James C. Miller III, Interstate Commerce Commission, *Ex Parte* No. 297 (Sub-No. 4), Section 5a Application No. 61, at 15 (1978).

solid reasoning based on real-life facts. Apparently, in reaching for an argument in the present exchange, Miller has failed to heed his own counsel.

IV. Interline Service

Miller's attempts to overcome my arguments concerning disruption of joint-line service in the absence of collective ratemaking and the antitrust immunity that supports it comprise these points: 1) carriers would have just as much incentive to provide interline service under individual ratemaking as under collective ratemaking; 2) antitrust immunity is not required where an individual carrier agrees with another to perform a joint-line service; 3) collective classification is not essential to interline service.

A. *Incentive for Interlining*

Miller's point is no more than this: "The incentive to provide such service would exist since rates would be charged to cover costs."[28] It should be self-evident that under all but extraordinary circumstances interline services will not survive unless the interline rates are competitive with single-line rates for given movements. As pointed out in my article, interline service is in general more costly to perform than service involving a single carrier. If single-line service on the route is available, the interline rate cannot, for competitive reasons, exceed the single-line rate; as the interline service is more costly than the service of single-line competitors it will ordinarily be driven out by normal economic pressures. If there is no single-line service available on the route, the interline service will remain; but whereas, under collective ratemaking, the interline rate is held down to a level equivalent to that of a single-line service on the route, in the absence of collective ratemaking the rate for interline service, whether in the form of a through rate or a combination of local rates, will inevitably rise in line with its higher cost. As Miller emphasizes, "rates would be charged to cover costs."[29] It follows that if collective ratemaking is ruled out, the prospect is for less, and higher-priced, interline service.

There is no escaping this conclusion. It follows directly from the fact that the present equalization of rates for higher-cost joint-line service with rates for lower-cost single-line service constitutes a form of internal subsidization of joint-line service. In the absence of that internal subsidization, interline services would inevitably be crowded out in some markets and forced to higher rate levels in others. It is possible to argue the economic pros and cons of such subsidization but it defies economic logic to expect that elimination of the system which makes the subsidization of joint-line

28. Miller, *supra* note 3, at 294.
29. *Id.*

service possible will have no effect on the business incentive to provide it or upon the amount and price of the interline service that remains.

Also dampening a carrier's incentives for interlining in the absence of collective ratemaking would be the sheer magnitude of negotiating the many complicated terms of interlining with scores or hundreds of other carriers. The difficulties involved are indicated by the fact that a large carrier today may interline with as many as a thousand and more other carriers.[30] At present, as stated in my article and not challenged by Miller, the terms of interlining by carrier members of rate bureaus are highly standardized, and the arrangements are to a large extent automatic, typically covering all of the points at which the interlining carriers have freight terminals.[31] The mechanism by which these arrangements are facilitated would no longer be available if collective ratemaking were abolished. Each carrier would have to negotiate interchange terms, including rate divisions, individually with every other carrier with which it interlined traffic. Under these circumstances, it is only sensible to expect that the disappearance of the collective system would create not only the cost deterrents noted above but a whole complex of administrative deterrents that do not now arise.

B. Antitrust Immunity

Miller's point that antitrust immunity is not needed for the establishment of a joint rate between two end-to-end carriers not in competition with each other evades the significant issue. Joint-line services and rates do not involve connections merely between non-competing carriers but also, and most commonly, between carriers that are in direct and indirect competition with each other because of either the single-line services one or the other may offer between the pair of points in question or the joint line services each may offer on that route in combination with each other or with third carriers, or both.

The point is specious on other grounds as well. The important issue with respect to joint-line service is not whether an individual carrier may enter into a joint rate and service arrangement with an individual non-competing connecting line, raising limited if any questions of antitrust. The question is how to maintain the present network of service connections among all carriers so that service is assured from every point in the country to every other, even though no individual carrier has or can have nationwide access on a single-line basis. The antitrust immunity makes such a total network possible because it permits the collective ratemaking process by which rates for all competing joint-line services between any two points can

30. Friedman, *supra* note 2, at 44.
31. *Id.*

be equalized with each other. Without antitrust immunity, such equalization agreement would, of course, be forbidden.

As a practical matter, it is not enough to provide for collective action on joint-line rates. Because of the competitive relationship between joint-line and single-line service such equalization could not be effective if it applied only to one type of service or the other. Since the rate for a particular movement, whether by single-line or joint-line haul, must be the same in order to be competitively viable, the collectively established rate must apply to both.

C. Collective Classification

Miller says that collective classification is not indispensable to freight interlining. If this is a rebuttal point, its relevance escapes me. My article made no reference to classification, whether in connection with interline service or with any other argument.

As the question of classification has been raised, however, it is worth pointing out that the need for collective classification is related to the entire ratemaking function and to traffic generally, not to one type of service or another. As I have stated elsewhere:

> A uniform freight classification . . . can be achieved only by collective action of the carriers. . . . [N]either collective classification nor collective ratemaking can stand alone. . . . If carriers were barred from establishing rates collectively, the uniform classification would become so riddled with exceptions taken by individual carriers in their individual rate actions that it would as a practical matter become a dead letter.[32]

Freight classification is vital to ratemaking and inseparably bound up with it. The Interstate Commerce Act requires justness and reasonableness of both rates and classifications. Maintaining just and reasonable rates requires a framework of just and reasonable classification reflecting appropriate differences in commodity characteristics as the basis for assessing freight charges. Equitable relationships in the rates charged for hauling the enormous variety of goods requiring truck transport would be impossible to maintain if the freight classification on which the rates were based varied from carrier to carrier. Shipper confusion would be intolerable, and no regulatory agency could cope with the vast multitude of irrational rate variations that would result. A uniform freight classification is essential and the present system of collective ratemaking provides for collective action on classification as a necessary adjunct.

32. Testimony of Jesse J. Friedman, Interstate Commerce Commission. *Ex Parte* No. 297 (Sub-No. 4), Section 5a Application No. 61, at 3-4 (1978).

V. Regulatory Enforcement

Miller disputes my argument that if rates were established individually rather than collectively effective regulation would be literally unenforceable. My argument, however, goes beyond his characterization of it that "if carriers set rates and classifications individually, the temptations for rate inequities would be more than the Commission could control."[33] My position is that, in addition to being unable to control inequities of rate relationships, the Commission would be helpless to maintain effective control of maximum rate levels if, instead of having, as at present, to regulate the reasonableness of profits for carriers on a group basis, it were confronted with the task of "reviewing mountains of detailed historical and *pro forma* information on the revenues, expenses, profitability, and traffic of thousands of individual motor carriers."[34] Miller does not attempt to rebut that dimension of my position.

On the more limited grounds on which he registers objection, his points are: 1) that in the absence of collective ratemaking "a great deal of uniformity" could be expected; 2) that individual ratemaking would result in less discrimination than would collective ratemaking, because the former is "competitive" while the latter is "monopolistic;" 3) that the right of independent action under collective ratemaking makes for some departures from collective rates and classifications; 4) that the Commission could reduce its regulatory burden under individual ratemaking by deciding not "to scrutinize rate reductions in great detail and to entertain protests from competing carriers;"[35] 5) that rate regulation under collective ratemaking has not been effective, as evidenced by excessive rates of return and high prices commanded by operating certificates.

A. *Rate Uniformity*

Miller is being a little double-tongued when he argues that we need not worry that individual ratemaking will lead to rate inequalities because there will actually be considerable rate uniformity. The critics of collective ratemaking would have it both ways: they at the same time attack the high degree of rate uniformity achieved under collective ratemaking as economically unsound and assure us that under individual ratemaking "a great deal" of uniformity will prevail. In anticipation of this duality, my article asked on this score "what purpose would be served by following a circuitous and disruptive course to rate uniformity already prevailing under collective ratemaking."[36]

33. Miller, *supra* note 3, at 295.
34. Friedman, *supra* note 2, at 41.
35. Miller, *supra* note 3, at 296.
36. Friedman, *supra* note 2, at 42.

Aside from the value of the collective ratemaking system as a means of avoiding unjustified rate discrimination, the value of the type of rate uniformity it achieves is particularly significant with respect to equalization of rates for all routings, single-line and joint-line alike, for given movements. I have already discussed the need for such equalization in preserving a coordinated national network of general-freight trucking service and the indispensable role of collective pricing in achieving that result. The problem of achieving rate uniformity for alternative routings, and the importance of collective ratemaking in meeting that problem, are evident from the number of actual and potential carrier combinations available to serve various routes. In my article, I cited some examples for selected routes in New England and Middle Atlantic territories.[37] In Eastern Central territory, to mention but one other, there are twenty-eight rate-bureau members competing for traffic with single-line service between Chicago and Trenton and another 165 two-carrier joint-line services involving fifty-one interchange points. Between Cleveland and Boston, there are thirty-one carriers offering single-line service, and another 117 two-carrier joint-line services involving twenty interchange points. Between Columbus and Philadelphia, twenty-six carriers offer single-line service and there are another 113 two-carrier joint-line services involving eighteen interchange points. Between Dallas and Albany, there are thirteen carriers offering single-line service plus another 289 two-carrier joint-line services involving forty-two interchange points. Between Kansas City and New York, there are twenty-one single-line services and another 357 two-carrier joint-line services involving twenty-three interchange points.[38] Other such examples are numerous.

B. COMPETITIVE VS. MONOPOLISTIC PRICING

Miller makes only a glancing comment on this subject. It deserves a passing reply. His point is merely that "monopolistic firms have a much greater ability to price-discriminate than competitive firms."[39] As I have demonstrated, elimination of collective ratemaking will not produce the conditions of "perfect competition" on which Miller relies for his proof that discrimination would be impossible, and the opportunities and pressures for discrimination in favor of large shippers would be irresistible.

It is pointless to equate collective ratemaking with "monopolistic" pricing and its absence with "competitive" rates. Collective ratemaking, by its nature, involves a restriction on price competition but, as my article points

37. Friedman, *supra* note 2, at 39-40.

38. Rebuttal Statement of Jesse J. Friedman, Interstate Commerce Commission, *Ex Parte* No. 297 (Sub-No. 4), Eastern Central Motor Carriers Association (1978). Each of the joint-line services indicated involve the participation of two carriers only. Many additional joint-line services involving three or more carriers are also available.

39. Miller, *supra* note 3, at 296.

out, there remain many strong competitive forces—independent actions, private carriers, contract carriers, non-member carriers, other transport modes—to hold rates in check, and all rate actions are subject to close regulatory review.[40] This hardly conforms to the classic model of the "monopolistic" firm. It is equally loose to attribute to a system in which rates were individually rather than collectively made all of the virtues with which economic theory invests its idealized model of perfect competition. No amount of such looseness of terminology can obscure the plain prospect that elimination of collective ratemaking would not eliminate or reduce the potential for serious and competitively-damaging discrimination but would greatly increase it.

C. Independent Action

Here Miller quibbles that since members of a rate bureau have a right to act independently, as well as collectively, in establishing their rates, a certain amount of non-uniformity of rates can occur under collective ratemaking. It is difficult to see what this has to do with the effectiveness of regulation or enforcement. Independent action is a healthy safety valve in the collective ratemaking process. It guarantees that no carrier belonging to a rate bureau may be bound, against its will, by the rate action taken by other carriers, and assures every carrier an opportunity to put into effect any rate reduction it is determined to make available to its shippers. The right of such independent action, both when invoked and when lurking in the background, exerts a continual check on the collective pricing process. To the extent that the exercise of that right produced variations from prevailing rates, such variations would be a sign of the strength and desirable flexibility of the collective ratemaking system and its responsiveness to competitive realities and special situations. In fact, an independent rate reduction announced by one carrier is ordinarily, and for normal competitive reasons, promptly subscribed to by other carriers and its effect is reflected in bureau tariffs charged by all members.

D. Commission Policies

Miller's answer to my argument that Commission regulation would be crushed by the administrative and enforcement burdens generated by a system of individual ratemaking is to say that it need not be so if only the Commission would regulate wisely. There is no doubt room for much improvement in regulatory procedures, but that is not what Miller has in mind in recommending how the Commission can "reduce its burden quite substantially."[41] What he proposes is that the Commission stop reviewing pro-

40. Friedman, *supra* note 2 at 37-40.
41. Miller, *supra* note 3, at 296.

posed rate reductions and cease consideration of carrier protests.

These are times of serious inflation, and price reductions anywhere in the economy are highly welcome. But this is not to say that all price reductions are good for the economy. There is predatory and discriminatory business conduct in inflation as well as in recession and in stable times. If pricing conduct of a kind that violates the Interstate Commerce Act—and that is outlawed under the antitrust laws—is engaged in by truckers, should the Commission abstain from interference?

Miller's recipe for regulation is tantamount to saying that regulation would not be burdensome if only the Commission did not regulate. His proposal is actually a confirmation of my argument that the repeal of collective ratemaking would offer boundless opportunities for rate favoritism and would clog intolerably the regulatory barriers that were intended to, and should, prevent flagrant, pervasive discrimination in the rate structure. His "solution" is for the Commission to abdicate its authority.

At the same time that he urges less rate regulation, Miller argues that the Commission does not at present regulate enough "to assure that rates established under collective action are not excessive or discriminatory."[42] He cites the low proportion of rates suspended or rejected as evidence of this failure. The percentage of rates suspended or rejected cannot of itself tell us anything significant about the effectiveness of Commission regulation of maximum rate levels. In any event, proposals for general rate increases account for most of the revenue attributable to increased freight charges, but they involve only a handful of proceedings for all of the major bureaus combined. Such across-the-board increases are frequently suspended, at least in part, by the Commission, but by Miller's method of counting rate proposals the significance of such suspension with respect to total freight charges is minimized.

E. Carrier Profits

Miller declares that "there is considerable evidence that rates of return in the trucking industry exceed competitive levels." The only attempt he makes at citing evidence, however, is to state that "operating certificates command high prices."[43] Miller does not say what he means by "competitive levels" of profitability. Rates of return in trucking are directly regulated by the Commission for the carriers of each bureau on a bureauwide basis. If Miller believes that the standard applied by the commission in such regulations is inadequate, he ought to indicate just what standard he would regard as more valid.

The reference to prices paid in the past for operating certificates is by

42. *Id.*
43. *Id.* at 297.

this time rather threadbare from overuse by deregulation enthusiasts as "proof" that rates established under collective ratemaking must be above a "competitive" level. In waving once more this tatter of "evidence" of monopoly profits Miller chooses to ignore the more workaday and straightforward explanation of the value attached to operating rights by purchasing carriers, namely the increased economies and efficiencies of operation that usually accompany an expansion of the size and scope of the purchaser's system. That such operating-cost advantages do accompany the enlarged operations of carriers is conceded by the Council on Wage and Price Stability when it states that the purchase of operating authority "is in almost all cases likely to increase the efficiency of trucking."[44] This view is confirmed in a recent extensive study of the subject by the Commission, which concludes that "the anticipated market opportunities and potential economies of operation have a substantial influence on certificate values."[45]

VI. Independent Action and Bureau Coercion

Miller clouds the issue also by a hit-and-run allegation of coercion of carriers under collective ratemaking. He questions how effective the safeguard of independent action really is, "given the coercive nature of the bureaus."[46] In my article I noted that the barnacled charge that the more powerful members of a rate bureau coerce the less powerful deserves no weight in the absence of some specific evidence of its validity. There is certainly no reason to give any credence to an unsubstantiated assumption of behavior that would be clearly illegal.

I do not suggest that such behavior cannot occur. I do say that merely assuming or speculating that it can or does occur is not evidence and is entitled to no consideration in a serious debate. After all, we may equally assume or speculate that violations of the antitrust laws can and do occur without detection, but that is no argument for repeal of the antitrust laws. Certainly the fact that in the thirty years or more since collective ratemaking by general-freight motor carriers was authorized not a single documented case of coercion has come to light suggests that such coercion, if it exists, must be exceedingly rare rather than a way of life, and can safely be dismissed as a factor of any consequence.

In a similar vein, Miller, in trying to account for a decline in individual-carrier protests that does not fit his preconceptions, says "this suggests that rate bureau members objecting to an independent action may have

44. Council on Wage and Price Stability, The Value of Motor Carrier Operating Authorities, at 27 (1977).
45. Interstate Commerce Commission, *The Value of Motor Carrier Operating Rights*, at 99 (1979).
46. Miller, *supra* note 3, at 297.

been able to get another rate bureau to protest the action."[47] Miller presents no evidence, no citation of facts, just a speculative "may."

Miller points out, correctly and as I had previously observed, that most independent actions are for decreases rather than increases.[48] Most specific rate actions by rate bureaus are similarly for decreases. He notes also that independent actions are frequently suspended and later disapproved by the Commission, and deduces that to regard independent action as a restraint on collective ratemaking is "farfetched."[49]

Miller's statement that "between one-third and one-half of motor carrier independent actions are suspended following protest"[50] is factually wrong. He indicates that the data on which he relies come from the ICC but are not "yet generally available."[51] He gives us only his own calculations from such unpublished data, so it is difficult to show just where the error lies, but, as can be readily demonstrated, his figures are unmistakably and grossly erroneous. The Annual Reports of the ten major general-freight rate bureaus to the Commission show a total of 29,714 independent rate actions for the calendar year 1978.[52] The Annual Reports of the Commission itself show that in the fiscal year 1978 the ICC considered for suspension a grand total of 1,168 motor carrier rate actions, of which actual suspensions totaled 431; in fiscal year 1979, the total number of motor carrier rate actions considered for suspension was 806, of which actual suspensions in whole or in part totaled 341.[53] Note that these suspensions are the total number of all motor carrier rate actions suspended, not independent actions alone, and that the total includes passenger carriers as well as truck lines. Clearly, the proportion of truck independent actions suspended must be a far cry from the one-third to one-half claimed by Miller. The fact is that independent actions today are rarely suspended.

In any event what do Commission suspension of independent actions actually tell us, other than that the rate proposals were presumptively unlawful? And if presumptively unlawful, should they have been approved? The significance of the right of independent action cannot be judged by a numbers game. As noted in my article, "there is no way of judging the effectiveness of collective ratemaking or of the right of independent action from the numbers of such actions alone."[54] For one thing, the technical defini-

47. *Id.*
48. *Id.* at 298.
49. *Id.*
50. *Id.*
51. *Id.* at 299, n.26.
52. Annual Reports of the following rate bureaus for 1978: Central & Southern, Central States, Eastern Central, Middle Atlantic, Middle Western, New England, Niagara Frontier, Pacific Inland, Rocky Mountain, Southern.
53. Annual Reports of the Interstate Commission for 1978, at 106; 1979, at 118.
54. Friedman, *supra* note 2, at 38.

tion of the term will affect the numbers. But more basically, independent action operates both as an actual and as a potential force to assure that the opportunity to price in common does not override the power to price independently. Obviously, if independent action became the commonplace form of ratemaking, collective action would wither away. But independent action does not have to be invoked indiscriminately—nor does it have to be approved by the Commission every time it is invoked—to have a healthy competitive influence on the ratemaking process.

VII. Shipper Participation

Miller disparages the importance of "the access of shippers to rate bureau proceedings" and sees it as a serious flaw of collective ratemaking that "while the various interest groups may present their cases, the decisions are made by the carriers. . . ."[55]

Judging from the strong support expressed by major shipper groups for the continuation of the collective ratemaking system and the value invariably placed in such expressions upon shipper participation in rate bureau proceedings, the users of trucking service do not agree with Miller. Nor are shippers so impractical as to believe that they should be entitled to vote on the rates they pay for trucking, any more than they would wish their own customers to control the prices charged by the shippers. Earlier in his rebuttal, Miller stated that shipper participation in rate bureau actions tends to be primarily from large rather than small shippers and thus "it must be the large shippers who get the favored treatment."[56] His facts and his reasoning are both in error.

VIII. Conclusion

The rhetoric of free-market zealotry has not enlightened the controversy over collective ratemaking in trucking; neither for that matter has the unthinking defense of *status quo*. That collective rate action involves a limitation on price competition does not *per se* make it either good or bad public policy, although some industry advocates on one side and some industry critics on the other would polarize the issue on that simple basis. The question turns ultimately on how the public interest, in all its aspects, is affected by continuing or ending the collective ratemaking system. Although there are legitimate arguments to be made and heard on both sides of that question, it is important to distinguish the worthy arguments from the pat slogans, labels, and phrases that may get more attention than they deserve because of their disarming appeal to simplicity. I believe that the weight of the significant evidence and the conclusions that flow logically

55. Miller, *supra* note 3, at 298.
56. *Id.* at 293.

from it favor the view that the public interest will be better served by continuing and improving the present system than by abolishing or drastically modifying it.