Antitrust Considerations in Motor Carrier Ratemaking—Rate Bureau Operations and Alternatives

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TABLE OF CONTENTS

I. INTRODUCTION 66
II. TRANSPORTATION AND THE ANTITRUST LAWS 67
III. RATE BUREAUS AND MOTOR CARRIER COMPETITION 71
A. *INTERMODAL COMPETITION* 71
B. *SPECIALIZED CARRIER COMPETITION* 74
C. *PRIVATE CARRIER COMPETITION* 75
D. *INDEPENDENT ACTION* 76
E. *ECONOMIES OF SCALE* 77
IV. RATE BUREAU IN THE ABSENCE OF IMMUNITY 77
A. *TARIFF PUBLICATION* 81
B. *COLLECTING AND DISSEMINATING TRADE INFORMATION* 81
C. *JOINT-LINE RATES* 84
D. *SHIPPER LIABILITY* 86
V. ALTERNATIVE FUNCTIONS FOR RATE BUREAUS 87
VI. CONCLUSION 88

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I. INTRODUCTION

In 1975, the Interstate Commerce Commission explicitly raised the issue concerning the continued need for motor carrier rate bureaus and the justification for granting antitrust immunity to the ratemaking activities of motor carriers by its Order instituting *Ex Parte No. 297*, *Rate Bureau Investigation.*[1] In *Ex Parte No. 297 (Sub-Nos. 3 and 4)*, the Commission has continued to examine these issues by questioning whether the restrictions contained in the 4-R Act[2] for railroad rate bureaus should be applied to motor carriers and by requiring each motor carrier bureau to resubmit its application and rejustify its existence.[3]

By 1979, the focus of activity in this area had shifted to Congress. In early 1979, Senator Kennedy introduced a bill which would eliminate the antitrust immunity granted to motor carriers by the Reed-Bulwinkle Act.[4] Later, he co-sponsored the Administration's motor carrier reform legislation which, likewise, proposed to withdraw the immunity.[5] More recently, Senator Howard Cannon, Chairman of the Senate Commerce Committee, admonished the Commission to refrain from accomplishing administrative change in rate bureau regulation, since Congress intended to deal with the subject comprehensively in 1980.[6] It is, therefore, obvious that motor carrier ratemaking will receive intensive scrutiny from Congress in the coming months.

If Congress should adopt Senator Kennedy's reasoning that antitrust immunity should be withdrawn, what will be the future of rate bureaus? Senator Kennedy has argued that if the immunity is eliminated, rate bureaus could continue to perform their beneficial activities in the collection of industry data and publication of rates having joint-line application. Therefore, an initial issue to be squarely faced is whether the admittedly beneficial activities of the rate bureaus could, and would, be carried on in the absence of immunity.

To obtain a better understanding of this issue, this article will trace the

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1. Ex Parte No. 297, Rate Bureau Investigation, 349 I.C.C. 811 (1975).
2. Railroad Revitalization Act and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976), which is presently scattered throughout the various provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11916 (1979).
3. Ex Parte No. 297 (Sub-No. 3), Modified Terms and Conditions for Approval of Collective Ratemaking Agreements Under Section 5a of the Interstate Commerce Act, 43 Fed. Reg. 1809 (1977); Ex Parte No. 297 (Sub-No. 4), Reopening of Section 5a Application Proceedings to Take Additional Evidence, 43 Fed. Reg. 1666 (1977).
4. S. 710, 96th Cong., 1st Sess., 125 CONG. REC. S 3056 (1979).
5. S. 1400, 96th Cong., 1st Sess., 125 CONG. REC. S 8417 (1979).
6. Address by Senator Cannon (D. Nev.) October 22, 1979, at a Federal-State workshop on motor carrier regulation. The Senator requested the ICC to "go slow" in changing motor carrier policy, so as to allow Congress to deal with the subject in 1980. Daily Traffic World, Oct. 23, 1979, at 1, col. 1.

history of antitrust immunity for rate bureaus. It will then examine Senator Kennedy's assertion that rate bureaus can continue to perform with immunity, and it will examine possible alternative functions for rate bureaus.

II. Transportation and the Antitrust Laws

The conflict between the enforcement of the antitrust laws and the need for attainment of a just and reasonable rate structure is not new.[7] The absence of an effective right of independent action under a rate bureau organization was found to be in violation of the antitrust laws as early as 1897.[8] There was sporadic litigation concerning the status of rate bureaus during the next fifty years, until the issue was purportedly resolved with the promulgation of the Reed-Bulwinkle Act in 1947. That Act was adopted with the unanimous support of shippers and carriers who testified before Congress, but against the opposition of the Department of Justice and over the veto of President Truman.

Even the Reed-Bulwinkle Act did not fully resolve the controversy, however, for thirty years later the Department of Justice [DOJ] discovered what it perceived to be a gap in the immunity granted under Section 5a.[9] As a result, it commenced a criminal grand jury investigation which ultimately led to a suit seeking an injunction against carriers and rate bureaus in the Southern states for collective action in making intrastate rates. An injunction recently has been entered by the U.S. District Court for the Northern District of Georgia. That case, which is likely to become a landmark, is now on its way to the Court of Appeals and perhaps ultimately to the U.S. Supreme Court.[10]

Three years prior to the adoption of the Reed-Bulwinkle Act, an attorney for the Illinois Central System, spoke of the continuing interest of DOJ in the transportation industry:

> Some of these old problems disguised in new forms . . . are: whether the Interstate Commerce Commission should function as an independent tribunal or as a subordinate of the Department of Justice; and whether the rates of all agencies of transportation should be regulated by the Commission, pursuant to

7. For an excellent overview of the continuing tension between economic regulation and the antitrust laws, *see* Schwarzer, *Regulated Industries and the Antitrust Laws - An Overview*, 41 ICC Prac. J. 543 (1974).

8. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

9. 49 U.S.C. § 10706 (1979). Prior to the recodification of the Interstate Commerce Act in 1978 (which was not a substantive recodification), this provision was set forth in section 5a of the Act. Although the citation has been changed, this author has employed the traditional statutory reference throughout this article.

10. In Re Grand Jury Subpoena Duces Tecum Issued to S. Motor Carriers Rate Conference, 405 F. Supp. 1192 (N.D. Ga. 1975); United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29 (N.D. Ga. 1977); United States v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471 (N.D. Ga. 1979) (hereinafter collectively referred to as Southern Motor Carriers Rate Conference).

the policies and standards laid down in the Interstate Commerce Act or by the Department of Justice through its concept of how the Sherman Antitrust Act should be enforced.[11]

In fact, it would appear that the real issue is not so much one of National Transportation Policy versus antitrust policy as it is a conflict of power and jurisdiction between the Interstate Commerce Commission and the executive branches of government, including the Department of Transportation [DOT] and DOJ. It is not as though antitrust principles are not considered in the making of transportation policy, for the Interstate Commerce Commission considers the antitrust laws among other goals in execution of its regulatory duties.[12]

These broad policy issues find sharp focus in the pending applications of the major railroad rate bureaus and in the pending motor carrier applications which have been filed in conformity with the Commission's Notice and Order in *Ex Parte No. 297 (Sub-No. 4)*.[13] A preliminary and fundamental issue in all of those applications is the extent to which the Commission must balance the antitrust laws against National Transportation Policy in approving rate bureau agreements. In general, the carriers, both rail and motor, rely upon the language of the statute in contending that the Commission is required to approve an agreement among carriers if it is found to be in furtherance of the National Tranportation Policy.[14] The statute directs that "the Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of Section 10101 of this title. . . ."[15] The carriers contend that this

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11. Smith, *The Interstate Commerce Commission: An Independent Tribunal or a Subordinate of the Department of Justice*, 12 ICC PRAC. J. 73 (1944); The Sherman Antitrust Act may be found in 15 U.S.C. § 1, et seq.

12. McLean Trucking Co. v. United States, 321 U.S. 67 (1944); United States v. Navajo Freight Lines, 339 F. Supp. 554 (1971); Navajo Freight Lines, Inc. - Investigation of Control - Garrett Freightlines, Inc., 122 M.C.C. 345 (1976).

13. Ex Parte No. 297 (Sub-No. 4), Reopening of Section 5a Application Proceedings to Take Additional Evidence, 43 Fed. Reg. 1666 (1977).

14. 49 U.S.C. § 10706 (1979).

15. 49 U.S.C. § 10101 (1979), Transportation policy, which provides as follows:

(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—
   (1) to recognize and preserve the inherent advantage of each mode transportation;
   (2) to promote safe, adequate, economical, and efficient transportation;
   (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
   (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
   (5) to cooperate with each State and the officials of each State on transportation matters; and

language makes the National Transportation Policy the sole guide to exercise of the Commission's discretion under the Act.

On the other hand, DOJ and the Federal Trade Commission, citing a paragraph in the legislative history, contend that the intention of Congress was to require the Commission to engage in a balancing of transportation policy against antitrust policy. They further contend that in this balancing, the antitrust laws express the nation's fundamental economic policy and must be given primary weight.[16]

In passing, it should be noted that the extent to which the antitrust laws represent a fundamental national policy to be applied to the field of common carriage is open to question. In speaking of the Sherman Act and its application to regulated industries, the U.S. Supreme Court has observed, "Surely it cannot be said in these situations that competition is of itself a national policy."[17] In the transportation context, one court recently observed:

> That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good.
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> The very fact that Congress has seen fit to enter into . . . comprehensive regulation . . . contradicts the notion that national policy unqualifiedly favors competition. . . . It is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest.[18]

A related issue is whether it is more in the interest of shippers, carriers and the public generally to regulate rates prospectively through the suspension power of the I.C.C. before the rates become effective, or to regulate retrospectively through operation of the antitrust laws. Many have suggested that regulating retrospectively after the damage is done is akin to locking the barn door after the horse has been stolen. In addition, wide-

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(6) to encourage fair wages and working conditions in the transportation industry.

16. This interpretation of the Reed-Bulwinkle Act prevailed in the Commission's Initial Decision in the section 5b applications of the principal railroad rate bureaus in an Order served July 21, 1978. Section 5b Application No.2, Western Railroads - Agreement, (July 21, 1978). In that Decision, the Commission found that the railroads had not met their burden of proving that the goals to be achieved in the interest of the National Transportation Policy would outweigh presumed harm to the public interest through the anti-competitive nature of collective ratemaking. The decisions of the Commission on these basic antitrust issues in the section 5b rail agreements are currently pending appeal before the agency. Immediate appeal was taken to the Seventh Circuit from the Commission's ruling that it could not grant immunity for intrastate ratemaking. The ruling has now been reversed and remanded to the Commission. Atchinson, Topeka & Santa Fe Ry. Co. v. United States, 597 F.2d 593 (7th Cir. 1979).

17. Federal Communications Commission v. Radio Corp. of America, 346 U.S. 86, 92 (1952).

18. Trans-American Van Service, Inc. v. United States, 421 F. Supp. 308, 323 (N.D. Tex. 1976).

spread dissatisfaction has been expressed with the expense and delay which appears to be inherent in antitrust litigation. The current (and erroneous) view which seems to be prevailing in Washington is that the average cost of prosecuting an application for motor carrier operating authority is $50,000. In actuality, this sum is an outrageous overestimation of the average cost of entry application proceedings. However, $50,000 is barely sufficient for "openers" in even the simplest antitrust cases.

An additional complicating factor is introduced into the equation by the concept of treble damages permitted as the measure of private recovery under the antitrust laws.[19] The basic policy and concept of the Interstate Commerce Act is the avoidance of preference, prejudice and discrimination.[20] However, if one shipper is able to receive treble damages in an action challenging rates under the antitrust laws, the goal of equality and avoidance of preference and prejudice is undermined.

The legal concept of common carriage with service and rates equally available to all on a nondiscriminatory basis is an ancient and well tested concept. Furthermore, in drafting the U.S. Constitution in 1789, the framers readily agreed that a national government must have the power to foster, encourage and regulate domestic and foreign commerce in order to assure the free flow of essential goods and services.[21]

For the better part of the next hundred years, the commerce clause[22] was invoked from time to time primarily for the purpose of precluding state regulation.[23] During the latter part of the Nineteenth Century, however, it was realized that the excesses of free market competition in for-hire transportation required the establishment of a system of affirmative regulation. Competition had degenerated into commercial warfare. Discrimination was the order of the day in transportation, and the Standard Oil monopoly had been built through the exploitation of transportation advantages.[24] Dissatisfaction with the laissez-faire environment in which the carrier industry operated ultimately led to the passage of the Act To Regulate Commerce and the establishment of the Interstate Commerce Commission in 1887.[25] Subsequently, in 1890, the first of the antitrust laws, the Sherman Act, was passed for the purpose of controlling and limiting monopolistic abuses occurring in industry generally. Thus, the Interstate Commerce Act established the primacy of the Interstate Commerce Commission in the regulation

19. 15 U.S.C. § 15 (1975).
20. 49 U.S.C. § 10101(4) (1979).
21. The Federalist Papers, Essays Nos. 7, 14, 22, 24, 42 and 45.
22. U.S. Const., Art. 1 § 8.
23. Munn v. Illinois, 94 U.S. 113 (1876); Chicago, Burlington and Quincy R.R. Co. v. Cutts, 94 U.S. 155 (1876); Washington, and Georgetown R.R. Co. v. District of Columbia, 108 U.S. 522 (1882).
24. THORELLI, THE FEDERAL ANTITRUST POLICY, 89-96 (1955).
25. SCHWARTZ, THE POWERS OF GOVERNMENT, 178, et seq. (1963).

of interstate commerce even prior to adoption of the Sherman Act. The most recent and fundamental expression of Congressional intent in the field of transportation is the National Transportation Policy adopted in 1941.[26] That policy serves as the primary guide for both the Commission and the courts in the field of transportation.[27]

III. Rate Bureaus and Motor Carrier Competition

Setting aside the issues of legal and economic theory, we should examine how the rate bureau system and Interstate Commerce Commission regulation of rates has worked in practice. The facts indicate that rate regulation as implemented through the rate bureau system has produced a healthy competitive climate in transportation.

A. *Intermodal Competition*

First, it is necessary to recognize that there is active competition between these carriers and competing modes. This competition is in itself supportive of the National Transportation Policy of "developing, coordinating and preserving a national transportation system by water, highway and rail."[28] The Policy clearly recognizes that no single mode of transportation is adequate by itself to constitute a national system. The needs of the national defense could not be adequately met, for example, if the capacity of the railroads as prime movers of large quantities of freight did not exist.

The Department of Commerce's Census of Transportation serves as a rough guide to the extent of existing competition between railroads and motor carriers,[29] as does the following chart:

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26. 49 U.S.C. § 10101, *supra* note 15.

27. The history of the National Transportation Policy suggest that the policies of the antitrust laws determine 'the public interest' in railroad regulation only in a qualified way. McLean Trucking Co. v. United States, 321 U.S. 67, 83 (1944).

28. 49 U.S.C. § 10101(a), *supra* note 15.

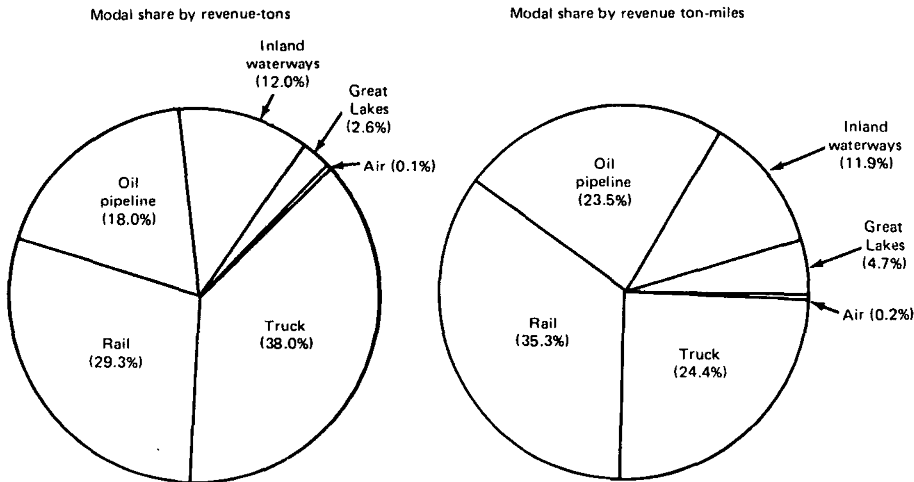
29. *See* chart page 72.

MODAL MARKET SHARES, 1972

Commodity	Tons of Shipment (% by mode)							
	% of total	Rail	Motor carrier	Private truck	Air	Water	Other	Unknown
Food and kindred products	27.0	37.4	25.0	33.9	—	3.5	—	0.4
Tobacco products	0.1	44.4	53.9	1.1	—	0.1	0.4	0.4
Textile mill products	1.0	8.5	63.5	27.3	0.2	—	0.6	0.2
Apparel and other finished textiles	0.4	10.0	68.5	15.2	1.9	—	4.5	0.2
Lumber and wood products	5.6	44.8	16.1	37.6	—	1.3	—	0.4
Furniture and fixtures	0.7	25.1	33.8	40.6	—	0.1	0.5	0.2
Pulp, paper, and allied products	5.9	52.1	27.7	17.9	—	2.2	0.1	0.2
Chemicals and allied products	11.6	42.0	33.5	11.3	—	12.7	0.6	0.2
Petroleum and coal products	23.2	11.5	16.1	8.3	—	63.8	0.2	0.4
Rubber and miscellaneous plastic products	1.2	23.4	60.4	15.1	0.7	0.1	0.4	0.3
Leather and leather products	0.1	2.4	61.1	31.8	0.3	—	3.9	0.7
Stone, clay, glass, and concrete products	11.3	21.3	48.2	23.1	—	6.7	0.1	0.9
Primary metal products	10.7	42.1	43.6	9.9	—	4.1	0.4	0.2
Fabricated metal products	2.7	25.1	49.3	24.0	0.2	1.0	0.5	0.3
Machinery, except electrical	1.5	20.6	61.6	15.5	0.7	0.2	1.3	0.4
Electrical machinery, equip. and supplies	1.0	30.3	53.1	13.8	1.4	0.2	1.3	0.3
Transportation equip.	4.1	54.2	37.3	8.0	0.2	0.2	0.3	0.2
Instruments, photo, and medical goods	0.1	22.6	60.0	12.5	2.3	0.2	2.4	0.3
Mines, manufacture	0.3	20.3	51.8	19.2	0.9	4.2	3.0	1.0
All other misc.	1.7	67.9	12.7	17.3	—	1.9	0.2	0.3
U.S. total	100.0	31.7	31.2	18.3	0.1	18.4	0.3	0.4

Commodity	Ton-miles of shipment (% by mode)							
	% of total	Rail	Motor carrier	Private truck	Air	Water	Other	Unknown
Food and kindred products	14.8	55.9	26.5	13.6	—	3.7	—	0.4
Tobacco products	0.1	64.1	34.5	0.3	—	0.7	0.5	0.2
Textile mill products	1.1	16.2	61.4	21.4	0.2	—	0.7	0.3
Apparel and other finished textiles	0.5	14.4	66.2	9.3	4.9	0.1	5.2	0.2
Lumber and wood products	7.1	76.6	7.7	11.0	—	4.7	—	0.3
Furniture and fixtures	0.8	41.1	32.9	25.2	0.1	0.3	0.5	0.1
Pulp, paper, and allied products	6.3	73.9	19.0	5.5	—	1.4	0.1	0.3
Chemicals and allied products	11.9	51.5	23.1	4.9	0.1	20.1	0.3	0.3
Petroleum and coal products	29.6	9.0	3.5	1.7	—	85.9	—	0.2
Rubber and miscellaneous plastic products	1.4	33.5	55.5	9.4	1.0	0.3	0.3	0.2
Leather and leather products	0.1	2.7	75.7	14.8	0.9	0.2	5.1	1.0
Stone, clay, glass, and concrete products	5.3	45.5	36.4	11.2	—	6.4	0.1	0.6
Primary metal products	8.1	54.1	34.0	6.2	—	5.5	0.2	0.2
Fabricated metal products	2.6	37.2	49.0	10.7	0.5	2.0	0.5	0.4
Machinery, except electrical	2.1	29.2	60.0	7.7	1.4	0.4	1.4	0.4
Electrical machinery, equip. and supplies	1.4	37.6	49.5	8.2	2.6	0.6	1.4	0.4
Transportation equip.	5.3	75.8	18.6	4.8	0.3	0.3	0.3	0.3
Instruments, photo, and medical goods	0.2	36.8	50.5	6.2	4.1	0.3	2.2	0.3
Mines, manufacture	0.5	35.2	46.6	11.8	2.2	1.2	2.6	0.7
All other misc.	0.8	76.5	10.7	8.7	—	3.5	0.2	0.6
U.S. total	100.0	42.1	20.9	6.9	0.2	29.7	0.3	0.3

DEPT. OF TRANSPORTATION, A PROSPECTUS FOR CHANGE IN THE FREIGHT RAILROAD INDUSTRY 17 (1978).



Source: Department of Transportation, A Prospectus for Change in the Freight Railroad Industry 15 (1978).

Another indicator of the healthy state of intermodal competition faced by the motor carriers is the extent of rate activity generated by such competition. In 1975, the transcontinental motor carriers[30] alone considered more than 500 dockets for the express purpose of meeting the competition of the freight forwarders, who utilize rail rates for linehaul service. Generally speaking, those dockets represented reductions in the prevailing level of rates, and the great majority of those proposals were approved by the rate committee.[31] In other instances, even if not approved by the rate committee, the carrier proponent subsequently took independent action to publish the rate. In addition to these dockets for the purpose of meeting the competition of freight forwarders, other dockets were proposed to confront the direct competition of the railroads. Much of this activity was initiated as a result of reviews of the tariffs issued by those competing modes. Likewise, railroads and the freight forwarders subscribe to and closely monitor motor carrier bureau tariff publications.

The rail competitive rates are primarily in the truckload category, since the railroads have effectively embargoed LTL (less than truckload) or LCL (less than carload) traffic. On the other hand, the freight forwarder competition runs the entire gamut of shipments, from minimum charges to truck-

30. The transcontinental tariffs govern freight moving across a boundary line which commences in the south at the New Mexico-Arizona border and terminates in the north at the Montana-North Dakota border.

31. The carriers comprising the Transcontinental Rate Committee as established pursuant to the Rocky Mountain carriers' section 5a agreement.

load. In addition, there is competition on many of the longer hauls from the air freight companies. This competition is particularly acute for some of the higher valued freight in LTL shipment sizes.

A study issued by the Department of Transportation examined in detail the transportation corridor extending between California and Oregon and cited the extensive competition for traffic in that corridor among railroads, regular route common carriers, contract truckers and owner-operators, many of them totally non-regulated.[32] The study observed that many of the rates, particularly in the southbound direction, had been driven so low as a result of this competition that they appeared to be noncompensatory, although contributing something to meeting fixed expenses.

B. Specialized Carrier Competition

Next, it is appropriate to assess the state of intramodal competition. The Commission's 1976 Annual Report indicated that there were 16,472 motor common carriers of property. However, many of those carriers are offering only a limited service, specializing in the truckload transportation of a few specific commodities. While the competetive impact of any specialized carrier may be small, in the aggregate such specialized carriers are a potent competitive force. Many of the commodities which they handle fall within the scope of the general commodities traffic handled by regular route carriers. Many specialized or limited-service carriers publish individual carrier tariffs. In an effort to remain abreast of the price competition in this area, rate bureaus review and analyze individual carrier tariff publications. For instance, Rocky Mountain Bureau [RMB][33] alone monitors almost 2,400 individual carrier tariff publications.

In addition to the competitive activity reflected in individually filed tariffs, there are competitive factors in other bureau publications. While the rate territories of the major rate bureaus are not duplicative, nevertheless, there is an extensive amount of rate competition with other motor carrier bureau publications. Some of these are bureaus organized for specialized carriers. Others are smaller bureaus publishing rates for general commodities.[34]

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32. Department of Transportation, An Improved Truck/Rail Operation: Evaluation of a Selected Corridor (1975).

33. Tariffs published by Rocky Mountain Bureau provides rates on traffic moving in interstate commerce between eleven western states as well as Transcontinental territory. For a discussion of the territorial scope of motor carrier rate bureaus *see* D. Cross, Motor Carrier Rate Territories and Bureaus, Transportation Law Institute, in Tariff Rates and Practices - Part I, 193 (1972).

34. For example, RMB carriers must take into account in whole or in part competitive rates filed under the tariffs of the following motor carrier rate bureaus: Western Motor Tariff Bureau; Intermountain Tariff Bureau; Motor Carriers Traffic Association; National Association of Specialized Carriers; Machinery Haulers Association; Willamette Tariff Bureau (Section 5a Application pending); and Heavy and Specialized Carriers Tariff Bureau.

The sheer volume of competitive rate activity in the motor carrier field is reflected in the Commission's statistics from its 1977 Annual Report, indicating that the Commission received 221,874 motor carrier tariff filings in that fiscal year.[35] By no stretch of the imagination can such extensive tariff activity be ascribed to a stagnant or non-competitive common carrier system. In addition to the activity by other regulated common carriers, the RMB motor carriers also face active competition for the transportation of freight in truckload quantities from the agricultural cooperatives. There are a large number of such cooperatives, both genuine and sham, which are active in the transportation of general commodities throughout the United States.

Another competitive factor which requires mention at this point is United Parcel Service and other small parcel carriers. Regulated carriers participate extensively in the movement of small shipments. Many of these shipments, particularly if considered as individual parcels as required by the UPS tariff, would fall within the scope of UPS's tariff and operating authority.

C. *Private Carriage Competition*

Another intra-modal competitive factor is private carriage.[36] Regulated carriers definitely recognize that private carriage is a competitive factor. Many of the rate actions proposed and initiated by regulated carriers are designed either to prevent diversion to private carriage or to regain traffic previously diverted.

Recent studies commissioned by the Regular Common Carrier Conference of American Trucking Associations, Inc., have concluded that private carriage is perhaps the single most potent competitive force faced by the regular route motor common carriers.[37] The Department of Commerce's "Census of Transportation," disclosed that private carriage grew at a rapid rate between 1967 and 1972.[38] Other studies of private carriage have disclosed that shippers make the decision to enter upon a program of private carriage for a variety of considerations related to both rates and service.[39] However, it is obvious that so long as the shipper retains the alternative of using private carriage, the motor common carrier rate structure must be highly cost oriented and service must be efficient and dependable. These studies also have shown that private carriage is used for the transportation of both truckload and LTL traffic, although the firms using

35. Interstate Commerce Commission, Annual Report, 113 (1977).

36. Borghesani, *Motor Carrier Regulatory Reform and Its Impact on Private Carriers*, 10 Transp. L. J. 385 (1978).

37. Unpublished contract research through Ohio State University.

38. U.S. Dep't of Commerce, 1972 Census of Transportation (1974).

39. *Supra* note 36, at 394.

private carriage tend to retain the services of common carriers for the higher cost, smaller shipments.

Another frequently unrecognized fact is that the competitive thrust of private carriage has an impact upon all rates, not merely upon the rates for those shippers who have sufficient volume of traffic to maintain their private fleets. Under regulation by the Interstate Commerce Commission, rates must be published and available to all, free of undue or unreasonable discrimination.[40] Both the small shipper and the large shipper are equally entitled to enjoy the published common carrier rates. Hence, the small shipper benefits from the competitive impact of private carriage on rates.

D. *Independent Action*

Even within a bureau's structure, there is active price competition evidenced by the exercise of the right of independent action. For example, between 1972 and 1977, the RMB carriers exercised independent action over 2,600 occasions. Many of those independent actions affected hundreds or thousands of separate tariff rates. In summary, both shippers and carriers recognize that the net effect of all of the foregoing factors is an extremely competitive environment within the area to which tariffs apply.

One of the accepted methods of measuring the strength of a competive situation is by an organizational analysis of the industry under study. Organizational diversity of the marketplace has been an accepted guideline by which DOJ has determined whether antitrust intervention is appropriate.[41] Analysis of the motor carrier industry reveals that it is highly diverse in terms of both revenue levels, types of operation, and organizational structure. Its structural diversity includes regular route general freight carriers and irregular route specialized carriers of various types. It ranges from "Mom and Pop" proprietorships to large, publicly held carriers.[42]

As a part of this competitive environment, the right of independent action has served as a healthy counterbalance to collective action within the rate bureau system. The importance of the right of independent action was emphasized very early in the legal history of rate bureaus in the *Trans-Missouri* case.[43] A recent study of rate bureaus concluded that the right of independent action has been vigorously invoked at all levels.[44]

Abolition of the collective ratemaking system is likely to result in an

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40. 49 U.S.C. § 10101, *supra* note 15.

41. Posner, *A Program for the Antitrust Division*, 38 U. Chi. L. Rev. 500 (1971).

42. Popper, *Collective Ratemaking: A Case Analysis of the Eastern Central Region and on Hypothesis for Analyzing Competitive Structure*, 10 Transp. L. J. 365 (1978).

43. United States v. Trans-Missouri Freight Association, *supra* note 8.

44. G. Davis and C. Sherwood, Rate Bureaus and Antitrust Conflicts in Transportation, 75 (1975). This is confirmed by the experience of RMB. *See* note 8 *supra*, and accompanying text.

increase in concentration in the industry, leading to a less healthy, oligopolistic marketplace. At the very least, this is likely to be the situation for the transportation of LTL traffic by the regular route general commodities carriers. Conversely, it is conceivable that truckload traffic could deteriorate into a highly chaotic and fragmented situation through the operations of numerous independent owner-operators.

E. ECONOMIES OF SCALE

A primary question which must be addressed by those who contend that competition would serve as an adequate regulator of LTL transportation is whether there are economies of scale in the general freight business. DOJ and FTC have contended, on the basis of extremely limited economic studies, that there are no economies of scale.[45] DOJ's and FTC's contention relies upon a recent study by Spady and Friedlaender.[46] However, even in that study, the authors confess that the wisdom of economists concerning economies of scale seems to be at variance with events in the real world of transportation, where carriers have engaged in mergers and acquisitions in order to achieve what they perceive to be economies of scale.

Other recent contributions to economic theory show that even classic scale economies are an inappropriate test for "natural monopoly" for multi-product firms or for firms operating in multi-markets. It seems apparent that motor carriers operating in numerous traffic lanes would be a prime example of such firms. Economies may derive *among* the lines even if none exist within particular lines.[47]

Aside from the potential for increased concentration in the industry leading to a long term reduction of competition, there are potentials for predatory pricing and discrimination as against carriers, shippers or communities. A primary aim of the Interstate Commerce Act traditionally has been to curb and eliminate that potential.[48]

IV. RATE BUREAUS IN THE ABSENCE OF IMMUNITY

In all of the pending rate bureau cases, the Department of Justice and

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45. The literature on this subject was recently reviewed and criticized by Professor David Schrock, Professor of Transportation at the University of Arizona, in Schrock, *Economies of Scale and Motor Carrier Operation; Review, Evaluation and Perspective*, 45 ICC PRAC. J. 721 (1978).

46. Spady and Friedlaender, *Hedonic Costs and Economies of Scale in the Regulated Trucking Industry*, 9 BELL J. OF ECON. 159 (1978).

47. *See* Panser and Willig, *Economies of Scale and Economies of Scope in Multi Output Production*, Q. J. OF ECON. (1976); and Baumol *On the Proper Cost Tests for Natural Monopoly in a* Multiproduct *Industry*, AM. ECON. REV., (1977).

48. Interstate Commerce Commission v. Baltimore and Ohio R.R. Co., 145 U.S. 263 (1892); Texas & Pac. R.R. Co. v. United States, 289 U.S. 627 (1932); New York v. United States, 331 U.S. 284, 299 (1946).

the Federal Trade Commission have contended that the rate bureaus could continue to conduct their important functions in the absence of Section 5a immunity.[49] However, it would be foolhardy to do so. The injunction obtained by DOJ against collective ratemaking for intrastate rates in the South permits the rate bureaus to continue functioning only as a publisher of individually determined rates for each carrier.[50] This does not permit the maintenance of a comprehensive network of through routes and joint rates. Under these circumstances there is essentially no benefit to be derived from publication of individual carrier rates through a single publisher. Moreover, there are substantial risks of further antitrust prosecution.

The attitude of the Commission toward the issue of antitrust immunity appears to be in a state of flux. In 1973, the Commission instituted on its own motion an investigation into the activities of ratemaking organizations, *Ex Parte No. 297*. Two years later, after receiving voluminous comments from shippers, carriers and government agencies, the Commission issued its Initial Decision finding, *inter alia*, that rate bureaus assist in the making of appropriate rates and that immunity from antitrust laws should be continued.[51] The Commission stated:

> We are convinced from the evidence of record that the Commission's administration of Section 5a has contributed significantly to the creation of an effective and dependable national transportation system. The changes mandated herein and the investigative approach utilized are a more effective method of insuring such a system than the denial of antitrust immunity. Such denial would be a giant step backwards in effective regulation of stable rate structures and reduce this nation's transportation system to a state of uncertainty with respect to reasonable and lawful levels of rates. We conclude that immunity from antitrust laws should be continued.[52]

Only three years later, in its Notice in *Ex Parte No. 297 (Sub-No. 4)*, reopening all existing Section 5a agreements, the Commission appeared to question its 1975 conclusion.[53] In so doing, it expressly imposed a burden of proof upon the rate bureaus to rejustify continued antitrust immunity.

Senator Kennedy introduced his bill at a press conference held on January 22, 1979. This bill would amend the Clayton Act to provide that antitrust laws apply to collective ratemaking agreements where one of the parties is a motor carrier or freight forwarder. The bill makes no change in the provisions of the 4R Act as they relate to railroad rate bureaus.[54] The background summary of the legislation, which was released at the press

49. In the synopsis to his bill to repeal the immunity for rate bureaus, Senator Kennedy also contends that the bureaus could continue to perform their beneficial functions without immunity.

50. Southern Motor Carriers Rate Conference, *supra* note 10.

51. Ex Parte No. 297, Rate Bureau Investigation, 349 I.C.C. 811 (1975).

52. *Id.* at 848.

53. Ex Parte No. 297 (Sub. No. 4), Reopening of Section 5a Application Proceedings to Take Additional Evidence, 43 Fed. Reg. 1666 (1977).

54. S. 710, 96th Cong., 1st Sess., 125 CONG. REC. S 3056 (1979).

conference that date, asserted that the legislation would not eliminate rate bureaus and that rate bureaus could continue to perform, without antitrust immunity, their beneficial activities in the collection of industry data and publication of rates having joint-line application. Similar assertions have been made by the Department of Justice and Federal Trade Commission in the pending *Ex Parte No. 297 (Sub-No. 4)* applications. Therefore, the issue to be faced is whether the admittedly beneficial activities of the rate bureaus could, and would be carried on in the absence of antitrust immunity. It is the position of this commentator that they would not be maintained.

As authority for the proposition that rate bureaus could continue to perform all of their beneficial activities without antitrust immunity, Senator Kennedy's background summary cited a memorandum prepared by Professor Thomas D. Morgan of the University of Illinois.[55] In the opinion of this author, that paper is a superficial treatment which brings into question the author's grasp of transportation generally or of the motor carrier transportation system in particular. However, some of the conclusions expressed by Professor Morgan underscore the position that the absence of antitrust immunity would almost certainly result in the demise of any comprehensive system of joint routes and through rates. Even Professor Morgan's paper does not support Senator Kennedy's bald assertion that rate bureaus could continue to function in the absence of antritrust immunity. On the subject of joint rates, the Professor's bottom line conclusion is, "any reasonable counsel to a trucking firm would have to take account of this cases [*sic*] and suggest caution before embarking on a plan of establishing joint rates and through routes without antitrust immunity."

At another point in his paper, Professor Morgan recognizes that agency publications of joint rates may be regarded as pro-competitive in the sense that they are an aid to trade. He suggests that this publication activity might be permissible under *Chicago Board of Trade v. United States*.[56] However, eight years later in *United States v. Trenton Potteries Company*, the Supreme Court appeared to have restricted the *Chicago Board of Trade* decision to issues involving the regulations of boards of trade or commodity exchanges.[57]

The ultimate weakness of the Morgan memo is its failure to address the practical consequences of subjecting the rate bureau participants to the antitrust laws. It basically argues that many of the admittedly beneficial activities ultimately might be held to be subject to the rule of reason under the

55. The memorandum is an unpublished study commissioned by the ABA Antitrust Section's Test Force on the National Commission for the Review of Antitrust Laws and Procedures, Oct. 23, 1978.

56. 246 U.S. 231 (1918).

57. 273 U.S. 392 (1926).

antitrust laws, rather than being held illegal per se. This argument overlooks the impact of this jeopardy from the standpoint of the businessman potentially subject to the threat of felony prosecutions, treble damages and hundreds of thousands, if not millions, of dollars in legal fees. This "chilling effect" might ultimately lead to abandonment of such activity, rather than a confrontation of these potentially lethal risks.

The Morgan paper is also useful for the insight that the supporters of the Kennedy bill foresee a wave of mergers to result from repeal of the antitrust immunity for rate bureaus. This may seem to be a strange stance for people who purport to be pro-competitive. For instance, Professor Morgan asserts:

> Similarly, traffic pooling is required largely because regulation has created and preserved some truck lines of less than optimal size. It seems, then, that faced with a loss of the antitrust exemption and a risk in contracting with competitors without it, trucking firms could go in either of two other directions.[58]

The first direction suggested is that firms would attempt to grow internally by extending their existing operations. The paper admits that this is likely to lead to bitter warfare and adds:

> In the long run, the industry would be more efficient as only the fit survived, but at a minimum, the transition would prove painful and the firms themselves would be likely to seek a solution which tended to avoid the all out warfare.[59]

That solution envisioned by Professor Morgan was his second alternative—a wave of merger activity. He notes that there could be many mergers of small trucking firms before industry concentration reached a level raising antitrust concerns. He adds, offhandedly that, "On the other hand, it may seem unfortunate to have trucking firms effectively forced into a 'merge or die' situation."[60]

If Senator Kennedy and the Department of Justice really believe that the beneficial results of collective ratemaking could be carried on in the absence of antitrust immunity, the DOJ would not have sought and obtained the highly restrictive injunction against Southern Motor Carriers Rate Conference in a case where the DOJ felt that it had discovered a gap in the antitrust immunity with respect to the intrastate ratemaking activity. Likewise, DOJ would not have been engaged in numerous prosecutions of rate bureaus in the 1940's prior to the enactment of Reed-Bulwinkle. The simple fact is that Reed-Bulwinkle was necessary in order to bring that litigation to an end.

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58. *See* note 55 *supra*, at 11-12.
59. *Id.* at 12.
60. *See* note 55 *supra*, at 13.

A. TARIFF PUBLICATION

In *Florida Specialized Carriers Interstate Rate Conference, Inc.—Agreement,*[61] the I.C.C. came to the conclusion that it is not necessary for carriers to be party to a section 5a Agreement in order to publish rates jointly with other carriers in an agency tariff. It attempted to draw a distinction between collective ratemaking and the economies of tariff publication. While it is indeed possible under the Commission's tariff circular for a proprietary agent lacking section 5a immunity to publish an agency tariff, any substantial activity along those lines is very likely to place all parties in jeopardy under the antitrust laws.

It is clear that the employment of a common agent for the publication of rates and prices by competing companies raises substantial risks of antitrust litigation, for pricing is regarded as the "central nervous system of the economy."[62] Any parallelism of pricing activities by competitors employing a common agent would create a real hazard of antitrust litigation for a price fixing conspiracy, in view of the implied or apparent ability to obtain advance information of a competitor's pricing intentions.

The use of any common or joint agent by competitors may be prevented by the antitrust laws.[63] It has been observed that "the use of a common agent may inevitably lead to a fixing of prices."[64] Antitrust prosecutions have been built upon far less.

Industry associations may not be employed as a vehicle for any activity which may be viewed as price fixing.[65] Association activities related only to the reporting of past or closed transactions have been approved.[66] Certainly, however, the publication of a tariff containing rates to be charged in the future is a far different matter which would require antitrust immunity.

B. COLLECTING AND DISSEMINATING TRADE INFORMATION

Those proposing the elimination of the antitrust immunity also argue that the bureaus' Continuous Traffic Studies[67] and other research activities

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61. 355 I.C.C. 623 (1977).

62. United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

63. United States v. New York Times Co., 1974 Trade Cas. ¶74,930.

64. United States v. Maryland Coop. Milk Producers, 145 F. Supp. 151 (D.D.C. 1956).

65. American Column and Lumber Co. v. United States, 257 U.S. 377 (1921); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); and Sugar Inst. v. United States, 297 U.S. 553 (1936).

66. Maple Flooring Mfr. Ass'n v. United States, 268 U.S. 588 (1925), Cement Mfr. Protective Ass'n v. United States, 268 U.S. 588 (1925).

67. The major motor carrier rate bureaus maintain a continuous random sampling of the characteristics of the tariffic moving subject to their tariffs. By this method they are able to develop information concerning the volume of traffic and the cost-revenue relationships under the various tariffs. The Commission requires the submission of this type evidence in all general rate increase proceedings.

could be continued without antitrust immunity. However, closer study reveals that this argument also is erroneous.

The leading case upon the antitrust aspects of collecting and disseminating trade information is *Maple Flooring Manufacturers Association v. United States*.[68] In that case, it was held that the activities of the Maple Flooring Manufacturers Association in collecting and disseminating trade statistics concerning the average costs of various grades of flooring, as well as freight rates from the producing regions, did not constitute a violation of the Sherman Act. However, in announcing its decision, the Supreme Court noted that all such cases must be determined upon the particular facts disclosed by the record in each case. The court refused to apply a *per se* rule that collection and dissemination of such data violated the Sherman Act. In that case, there was no allegation by the government of any purpose on the part of the defendants to monopolize commerce in hardwood flooring. Neither was it alleged that there was any agreement tending to fix prices, restrain production or limit competition. Had such allegations been made, a different question would have been presented.

Therefore, this decision stands for the proposition that collection and dissemination of trade statistics and cost data might subject the participating motor common carriers to risk of antitrust prosecution or antitrust civil litigation if the prosecution or the plaintiff chooses to allege a bad motive or evil intent in such activity.[69] In *Automatic Canteen Co. v. Federal Trade Commission*, a Robinson-Patman Act case, the Supreme Court refused to place the burden of discovering a seller's cost upon the buyer, because the exchange of such cost data "would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies," namely, section 1 of the Sherman Act.[70] In *U.S. v. United Gypsum Co.*, the Supreme Court held that mere price verification for the purpose of taking advantage of the "meeting competition" defense under the Robinson-Patman Act would be subject to close scrutiny under the Sherman Act.[71]

In view of the fact that pleadings in antitrust cases are liberally construed, particularly as against a motion to dismiss or motion for summary judgment, it is entirely too easy for an eager plaintiff or prosecutor to make a colorable allegation of bad motive or evil intent sufficient to create an issue of fact requiring a jury trial.

The decision in *Trist v. First Federal Savings & Loan Association of Chester* exemplifies the treatment accorded by the courts today in antitrust

68. 268 U.S. 563 (1925).

69. *Compare* Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956); *with* Steeves v. Rodman, 10 F.2d 212 (D.R.I. 1926).

70. 346 U.S. 61 (1953), *see* 15 U.S.C. § 1 (1975).

71. 438 U.S. 422 (1978).

litigation.[72] The case involved a civil antitrust action charging a price-fixing agreement in violation of section 1 of the Sherman Act.[73] This was a suit against the savings and loan associations in the Philadephia area who made home mortgage loans to plaintiffs. The plaintiffs, homeowners, alleged that the defendants, collectively agreed to add an additional "interest charge" at the settlement of the loan. The plaintiffs' conspiracy claim relied upon four allegations: (1) the additional "interest charge" was a peculiar practice, (2) it was improbable that defendants independently adopted such a practice, (3) the defendants had opportunities to conspire through common membership of trade associations, and (4) defendants had an economic motive for agreeing.[74] Defendants moved for a summary judgment on the grounds that the charge was an acceptable interest charge used in standard accounting procedure. This technique of collecting an additional interest charge, the defendants argued, was a conventional one. The Court found that the four factual allegations alone were sufficient to overcome a motion for summary judgment.

In denying the summary judgment, the Court made several key remarks that warrant noting. The Court observed that in an antitrust suit each fact in an alleged conspiracy must be viewed in totality of circumstances, not in isolation. Circumstantial evidence supporting a reasonable inference of conspiracy is sufficient and no formal agreement need be proven.[75]

In regard to the membership of the banks in trade associations as an element of proof the Court held that:

> Membership in a trade association coupled with regular exchange of business information is not violative of antitrust laws but is admissible evidence because circumstantially probative, to whatever small extent, of an alleged agreement in restraint of trade.[76]

Thus, mere membership in a trade association is one step on the road to proof of an antitrust conspiracy. With such circumstantial evidence accepted as proof, even the most tenuous claims are apt to survive a motion for summary judgment. In this environment, it would be highly risky for motor carriers to participate in any kind of common agency rate publication without antitrust immunity. Hence, the potential for antitrust litigation would have a significant "chilling effect" upon rate bureau participation.

Joint research activities touching upon the subject of cost accounting also have encountered prosecution under the Federal Trade Commission Act.[77] Although the Federal Trade Commission Act does not presently ap-

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72. 466 F. Supp. 578 (E.D. Pa. 1979).
73. 15 U.S.C. § 1 (1975).
74. Trist v. First Federal Savings & Loan Ass'n of Chester, *supra* note 72, at 581.
75. *Id.*
76. *Id.* at 587.
77. American Iron and Steel Inst., 48 F.T.C. 123 (1951); Uniform Mfr. Exch., Inc., 35 F.T.C.

ply to motor carriers or freight forwarders,[78] there is no reason to suppose that this exemption would be continued if meaningful I.C.C. control of rates and practices were substantially removed.

At the present time, defense of antitrust claims which are totally lacking in substantive merit may nevertheless require the expenditure of hundreds of thousands of dollars. The risk is simply too great in today's climate, and without antitrust immunity the Continuous Traffic Study and other joint research activities would be discontinued. Indeed, in the absence of any need for the collection and filing of data in accordance with the mandates of *Ex Parte No. MC-82* related to general rate increases, the considerable expense involved in the collection of the continuing traffic studies could not be justified.[79]

C. JOINT-LINE RATES

It also has been suggested that the carriers could continue to meet at rate bureaus and to set joint-line rates without antitrust immunity, so long as they did not discuss single-line rates. This suggestion is totally unrealistic to anyone who is familiar with the inter-related nature of joint and single-line rates within our national transportation system. In its report in *Ex Parte No. 297*, the Commission concluded that consideration of single-line rates could not reasonably be divorced from joint-line rates.[80]

In the past, the Commission has held it to be unjust and unreasonable to create any differences between joint-line hauls and single-line hauls which are not justified by attendant differences in costs.[81] Consider then the possibilities when carriers meet and discuss their joint-line rates, while presumably avoiding discussion of single-line rates. In the ordinary antitrust case, proof of an agreement or conspiracy to fix prices in an industry does not depand upon written evidence of an agreement or the existence of a formal vote tally. Price fixing is established by circumstantial evidence which, when pieced together, leads reasonable men to a conclusion that an agreement existed. The proviso in the 4R Act that parallel pricing is not enough for a conviction under section 5b[82] is meaningless, since parallel

472 (1942); Western Confectioners Ass'n, Inc., 34 F.T.C. 1431 (1942); Mercerizers Ass'n of America, 15 F.T.C. 1 (1931); and Typothetae of America, 6 F.T.C. 345 (1923).

78. 15 U.S.C. § 41 (1975), *see also* 15 U.S.C. § 21(a) (1975).

79. Ex Parte No. MC-82, New Procedures in Motor Carrier Revenue Proceedings, 357 I.C.C. 497 (1978).

80. Ex Parte No. 297, Rate Bureau Investigation, *supra* note 51.

81. Somers v. New York Ontario & Western Ry. Co., 78 I.C.C. 243, 246 (1923); Trans-American Freightlines, Classes in Central Territory, 43 M.C.C. 189, 195-196 (1944); Restrictions and Increses in Middlewest, 44 M.C.C. 111, 114-115 (1944); and Ford Motor Co. v. Standard Transp. Co., Inc., 62 M.C.C. 311, 314 (1953), *rehearing*, 308 I.C.C. 304 (1959). *See also* Rates on Petroleum and Products in Mont., 176 I.C.C. 707, 729-730 (1931).

82. 49 U.S.C. § 10706(a)(3)(C) (1979).

pricing by itself never has been sufficient for a conviction under the antitrust laws. But parallel pricing, coupled with prior discussion on either process or costs of each competitor, may suffice.

A recent decision of the U.S. Supreme Court illustrates the problem which would confront carriers absent antitrust immunity (*i.e.*, without an I.C.C. approved collective ratemaking agreement). *United States v. Container Corporation of America*[83] involved a civil antitrust action charging a price-fixing agreement in violation of section 1 of the Sherman Act.[84] Competitors in the container industry were exchanging price information, not as to future prices to be charged, but as to prices which were then in effect. There was no formal contract, but an implicit agreement to exchange such existing price information was deemed sufficient to establish the existence of a "combination" within the meaning of the Sherman Act. The Supreme Court noted the infrequency and irregularity of price exchanges and that such price information was often fragmentary. Nevertheless, the fragmentary information was sufficient to invoke the antitrust laws because of the existence of manuals with which competitors could compute the prices charged by each other and to specific customers.[85]

The Court held that the result of this reciprocal exchange was to stabilize prices at a downward level and thus benefit consumers. Knowledge of the competitor's price, the Court noted, usually meant matching that price. But the existence of a stabilized price level was sufficient in and of itself to bring the practice within the ban of the Sherman Act.[86]

The Court ruled that these circumstances constituted a per se violation of section 1 of the Sherman Act. Given such precedent, it would be extraordinarily short-sighted for a motor carrier to participate in a common tariff, wherein competitors' prices for the same or similar services were readily available, regardless of how the actual rates were established. In *Container Corporation*, there was no agreement or collusive action insofar as the setting of the individual prices was concerned. The mere exchange of the price information was sufficient to violate the law. Plainly, participation in a common tariff is at least an exchange of price information.[87]

Further, assume that Carriers A, B and C, as participants in a joint-line motor carrier routing, were to discuss their joint-line costs and rates. If they eventually set a joint-line rate, and if that joint-line rate is subsequently followed by a single-line tariff publication containing the same or similar rate by either A, B or C, then that carrier exposes itself to the real possibility of an antitrust action. Parallel pricing, coupled with prior discussion, would

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83. 393 U.S. 333 (1969).
84. 15 U.S.C. § 1 (1975).
85. *Supra* note 83, at 335-336.
86. *Supra* note 83, at 336-337.
87. United States v. Container Corp. of America, *supra* note 83.

have placed the carrier in jeopardy under the criminal provisions and the civil treble damage penalties of the antitrust laws. And, the carrier would be thus jeopardized because it had done its best to comply with the mandate of the Interstate Commerce Act requiring just and reasonable rates.

D. Shipper Liability

It must be remembered that under the Reed-Bulwinkle Act, the antitrust immunity is extended to "parties and other persons with respect to making and carrying out the agreement."[88] This means that the immunity extends to shippers participating in the ratemaking process through the bureaus, as well as the carriers. In the absence of antitrust immunity, shippers negotiating for rates with carriers could find themselves the target of antitrust action if competitors felt that they had been adversely affected by the resulting rates. A shipper who considered itself disadvantaged could allege a conspiracy in violation of the Sherman Act between the shippers and carriers who were parties to the negotiation.

An example of the jeopardy in which shippers might find themselves in a deregulated rate environment without readily available published rate bureau rates is furnished by *U. S. v. FMC Corporation*.[89] In that case, the court held that the defendant and other shippers violated the Sherman Act by exchanging information concerning unpublished intrastate freight rates in New Jersey, which does not regulate motor carriers.

The U. S. charged in the complaint that the defendant, FMC Corporation, and several other members of the chlor-alkali industry engaged in a conspiracy with the purpose of eliminating price competition in the sale of chlorine, caustic soda and soda ash. The conspiracy was alleged to have been implemented through meetings, telephone calls, and written correspondence.[90]

The evidence disclosed that it was the practice of shippers in the industry to equalize freight rates (*i.e.*, meet or absorb the difference in freight rates from plants located closer to the shipper), so as to be competitive on a delivered price basis. When one of its competitors built a new plant at Linden, New Jersey, FMC believed that it was necessary to find out what the freight rates were from the Linden location. Since motor carrier rates in New Jersey were not regulated, the only reliable source of such information was the competitor shipping from Linden. The court concluded specifically that the exchange of this information concerning unpublished freight rates among the competing shippers was in violation of the Sherman Act.[91]

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88. 49 U.S.C. § 10706 (1979).
89. 306 F. Supp. 1106 (E.D. Pa. 1969).
90. *Id.* at 1134.
91. *Id.* at 1153.

Furthermore, basing point pricing systems have been held to constitute discriminatory pricing in violation of the Clayton Act.[92] Carrier-shipper negotiations on freight rate levels covering broad marketing territorties could well result in antitrust liability under the same doctrine, in the absence of section 5a immunity.[93]

It also might be contended that shippers and carriers who had been negotiating rates on certain traffic had related consideration of those rates to certain other traffic also tendered by the shipper to the involved carriers. Any such considerations conceivably could give rise to an inference of a tying arrangement which would constitute a per se violation of the antitrust laws.[94]

V. Alternative Functions for Rate Bureaus

If rate bureaus cannot continue to provide their present services without antitrust immunity, what is the future of rate bureaus? Are there possible alternatives? Paul Gardiner has recently published an article addressing these questions.[95] In his article he agrees with the consensus in the industry that it would be impractical for rate bureaus to continue to provide the present services if antitrust immunity is removed. However, he disagrees with the view that rate bureaus could not serve any useful purpose. He believes that the bureaus could offer alternative services to the industry by providing information on exchange of rates and routes to carriers and shippers across the nation through the use of an electronic computer network. To provide such a service, he proposes that the motor carrier industry build an electronic data exchange network, similar to the network utilized in the airline industry.

The airline industry employs a combination of in-house computer and telecommunication computer systems operated by Aeronautical Radio, Inc. [ARINC]. This blend of computer systems amounts to an electronic data exchange network allowing airline-to-airline computer interface, with access by travel agents, hotels, motels, car rental companies, etc.

Gardiner's idea is interesting, but unfortunately does not take into account the realities of the motor carrier industry. While his proposal also poses antitrust problems, it is an unworkable alternative for two reasons: (1) motor carrier tariffs are not sufficiently standardized for complete computerized rate retrieval, and (2) motor carrier rate bureaus are not organized or equipped to provide that kind of high technology data communication.

92. Federal Trade Comm'n v. A. E. Staley Mfg. Co., 324 U.S. 746 (1944); Aetna Portland Cement Co. v. F.T.C., 157 F.2d 553 (7th Cir. 1946).

93. *See* Sugar Inst. v. United States, 297 U.S. 553, 589-92 (1936).

94. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

95. Gardiner, *Rate Bureau Functions Without Antitrust Immunity: A Suggested Strategy for Motor Freight Carriers*, 45 ICC Prac. J. 651 (1979).

Motor carrier tariffs presently lack sufficient standardization to allow fully computerized rate retrieval, although the rate bureaus, carriers, and tariff users have been seeking solutions to the problems. Definitions of groupings for commodity rates, rate basis groupings of communities, minimum weights and rules vary from tariff to tariff within the bureau territories as well as among the bureaus. If collective ratemaking were eliminated, all progress toward standardization which has been made over the past years would be lost in the morass of individual carrier tariffs. The goal of computerized rate retrieval would become completely unattainable.

Furthermore, the motor carrier rate bureaus are not equipped and do not have the experience necessary to provide a nationwide data communications system of the type exemplified by ARINC. If the motor carriers were to attempt development of such a system, it probably would be more feasible and less expensive to contract with an organization such as ARINC with an existing capability in the field.

The risks of antitrust liability inherent in any workable alternatives to present motor carrier operations would lead to disbandment of rate bureaus in the absence of antitrust immunity. It is clear that with the disbandment of the rate bureaus and the proliferation of thousands of individual tariffs, the ability of the Interstate Commerce Commission effectively to monitor and regulate motor carrier rates would come to an end. The Commission simply would be overwhelmed by the sheer volume of tariff material filed with it. In the absence of the rate bureau system to help achieve nondiscriminatory rate structures under the regulation of the I.C.C., pressures would inevitably build for revision of the Robinson-Patman Act to apply to services, as well as to commodities. Liability under that Act would extend to shippers if it were shown that they knew they were receiving services (transportation) on terms not proportionally available to their competitors.[96]

VI. Conclusion

In conclusion, affirmative control of rates exercised under the Interstate Commerce Act to make the concept of common carriage a reality must be given primacy over antitrust concepts in the field of transportation. The ability of the carriers to engage in collective ratemaking through rate bureau agreements approved by the I.C.C. encourages and makes possible the development, coordination and preservation of a national transportation system, which is the ultimate goal of the National Transportation Policy.[97]

96. Mid-South Distributors v. F.T.C., 287 F.2d 512 (5th Cir. 1961).

97. Within the Rocky Mountain Bureau territory, for example, approximately 1,170 common carriers participate in the tariffs issued by virtue of Section 5a Agreement No. 60 and approximately one-third of the traffic moves under the through routes and joint rates made possible by the Agreement.

The essential goal of a national transportation system, as envisioned by the National Transportation Policy, cannot be accomplished by some method short of collective action under antitrust immunity. The potential liability of the carriers, absent such immunity, would render it necessary for the carriers to resort to publication of individual tariffs having local application only. This would result in destruction of a coordinated system of transportation and lead to higher combination rates upon joint-line traffic.

The existing rate bureau system has not had undue anti-competitive effects. In fact, under the existing system, motor carriers operate in an extremely competitive environment, both in terms of intermodal and intramodal competition. The national transportation network enhances competition in the overall economy by making it possible for manufacturers and dealers (regardless of location) to market their products on a competitive basis over the widest possible territory.. Consequently, the overall benefits to the public interest, from the standpoint of the National Transportation Policy, completely outweigh any alleged harm to the public interest from the standpoint of national antitrust policy, and should not be jeopardized by experimentation in economic theory of dubious benefit.