Bowman Transportation: The Role of Competition in Motor Carrier Regulation

I. INTRODUCTION

The role that competition and antitrust policies should play in the motor carrier industry has been the subject of much discussion in recent years. A number of economists, legal scholars, and courts have addressed the subject and generally have concluded that regulation of motor carriers should increasingly accommodate antitrust policies by encouraging competition.[1] Contemporary theories are not in agreement regarding the extent to which competition must be balanced against regulation.[2] Nonetheless, a comparison of past and present philosophies reveals that current approaches more strenuously urge allowing competition to shape the market structure. Thus far, these approaches have not caused complete deregulation; they have not even had the effect of greatly decreasing the involvement of the Interstate Commerce Commission in motor carrier regulation. However, the approaches have inspired discussion and could very well cause a reevaluation of the extent to which the ICC should consider competition as it controls market entry. To date, this issue is still the subject of much debate.

Justice Douglas participated in the debate in his majority opinion in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*[3] The policies expressed in the opinion are representative of the popular trend and, taken by themselves, afford a reasonable basis for predicting the resolution that may be reached by the courts. The case provides an even better basis for prediction when it is examined in its historical context and when it is compared with recent decisions affecting the role of competition in other regulated industries.

It is the objective of this note to examine the policies which *Bowman Transportation* expressed regarding the role of competition in the motor carrier industry; to review the history which led to the opinion; to compare its policy with the policies assumed in regard to other regulated industries; and, in conclusion, to formulate a reasonable prediction of the course the courts will take in the future.

1. *See* Corber, *Regulation and Antitrust—Complementary Forces or Implacable Opposites?* 42 ICC PRAC. J. 718 (1975); Davis & Sherwood, *Transportation Regulation: Another Dimension*, 42 ICC PRAC. J. 164 (1975); Handler, *Regulations Versus Competition*, 44 U. OF CIN. L. REV. 191 (1975); and Wilson, *Deregulation: How Far Should It Go?* 51 IND. L.J. 700 (1976).

2. *See, e.g.*, Corber, *supra* note 1; Note, *The Interstate Commerce Commission and The Motor Carrier Industry—Examining the Trend Toward Deregulation*, 1975 UTAH L. REV. 709 (1975).

3. 419 U.S. 281 (1974).

II. BOWMAN TRANSPORTATION, INC. V. ARKANSAS-BEST FREIGHT SYSTEM, INC.

Bowman Transportation reached the Supreme Court[4] on appeal of Bowman Transportation, Inc. to reverse a district court's decision which invalidated an order of the ICC.[5] The invalidated order,[6] a product of six years of extensive litigation,[7] had authorized the issuance of certificates of public convenience and necessity to four motor carriers, one of which was Bowman. Reversal was based on the district court's finding that the ICC's decision was vaguely stated and supported as well as arbitrary and capricious. The Supreme Court considered and rebutted the district court's reasoning,[8] concluding that, except for one issue which required reconsideration by the ICC,[9] the administrative order should be upheld.[10] Justice Douglas did not limit the scope of his opinion to the issues of administrative review addressed by the lower court. Instead, he ventured into the issue of the extent to which the ICC should accommodate antitrust policies and encourage competition within the motor carrier industry.[11]

A discussion relating to the appropriate construction of "public convenience and necessity" provided the opinion's point of departure from determination of scope of administrative review.[12] To begin, any party seeking authorization to operate a trucking service must prove to the ICC that

4. Bowman Transportation's appeal accompanied appeals by Johnson Motor Lines, Inc., Red Ball Motor Freight, Inc., Lorch-West Corp., and the United States.

5. Arkansas-Best Freight System, Inc. v. United States, 364 F. Supp. 1239 (W.D. Ark. 1973).

6. Herrin Transp. Co. Extension - Atlanta, Ga., 114 M.C.C. 571 (1971).

7. The litigation began in 1965 after a large number of applications involving routes in the Southeastern and Southwestern areas of the country were submitted to the ICC. Apparently most of the applications were filed as a defensive tactic. All of these applications were filed within a short period of time, and as a rule, carriers with Southeastern routes applied for Southwestern routes, and carriers with Southwestern routes applied for Southeastern routes. Initially all parties opposed all applicants that sought to duplicate their own routes and at the same time submitted their own applications for additional routes. Eventually the parties assumed different strategies. Some carriers concentrated on pursuing their applications while others concentrated on protesting applications. After the carriers aligned themselves as either applicants or protestants, the remaining applications were then consolidated and considered at a hearing before two hearing examiners. The examiners issued a report after an extensive record had been built. According to the report, public convenience and necessity did not justify the issuance of any of the certificates. In fact, it found that the granting of any of the certificates would result in the deterioration of existing services. A petition for reconsideration was subsequently filed with the ICC in the name of all the applicants. The petition was granted over loud protests. Upon reconsideration, three of the applications were granted. (A fourth was later granted.) Protestants then appealed to the district court. Arkansas-Best Freight System, Inc. v. United States, 364 F. Supp. 1239 (W.D. Ark. 1973).

8. The Supreme Court reversed the decision of the district court on the basis that an agency's decision would be upheld even though the clarity of its reasoning was less than ideal as long as some rational basis for the decision was discernible. 419 U.S. at 286.

9. The ICC was required to reconsider the scope of its grant of authority to Bowman Transportation, Inc. The authority granted exceeded the authority sought in Bowman's original application. 419 U.S. at 299.

10. 419 U.S. at 300.

11. 419 U.S. at 288-98.

12. 419 U.S. at 288.

such service will meet the "convenience and necessity" of the public.[13] Contrary to previous decisions,[14] the opinion noted[15] that to meet the standard, an applicant is not required to show that existing service fails to fulfill some minimal expectation of performance. The effect of such a requirement would be to protect existing carriers from additional competition; however, the ICC has no primary obligation to protect existing carriers.[16] Upon balancing competing interests, the Commission is free to conclude that "public convenience and necessity" requires more weight to be given to benefits which might accrue to consumers than to foreseeable adverse impact upon existing carriers.[17] The opinion concludes that the policy favoring competitive market structure is "entitled" to consideration by a regulatory agency even when Congress has decided that public interest may be best served by governmental regulation of an industry.[18]

The *Bowman Transportation* opinion departs from philosophies expressed in the past regarding the extent to which the ICC should favor a competitive market structure. So that the nature and significance of the difference might be appreciated, it would be useful at this point to review the history of the courts' stances.

III. Historical Background.

In 1935, Congress passed the Motor Carrier Act,[19] and in so doing provided for the regulation of the motor carrier industry by bringing it within the jurisdiction of the Interstate Commerce Commission.[20] According to the Act, motor carriers subject to regulation[21] are authorized to operate only upon the granting of a certificate of public convenience and necessity by the ICC.[22] The Motor Carrier Act was incorporated into the Interstate Commerce Act[23] whose purpose, as formally declared by Congress, is to:

> provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation* and

13. 49 U.S.C. § 306(a)(1) (1970).

14. *See, e.g.*, Drum Transport, Inc. v. United States, 298 F. Supp. 667 (S.D. Ill. 1969); Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (D. Del. 1967); Hudson Transit Lines v. United States, 82 F. Supp. 153 (S.D.N.Y. 1948); Inland Motor Freight v. United States, 60 F. Supp. 520 (E.D. Wash. 1945).

15. 419 U.S. at 288.

16. *Id.* at 298.

17. *Id.*

18. *Id.*

19. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935) (codified at 49 U.S.C. §§ 301-27 (1970)).

20. 49 U.S.C. § 302 (1970).

21. *See* 49 U.S.C. § 303(b) (1970) for categories of motor carriers not subject to regulation.

22. 49 U.S.C. § 306(a)(1) (1970).

23. 49 U.S.C. §§ 1-1240 (1970).

> among the several carriers; *to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . .*[24]

However, the more immediate, and perhaps less altruistic purpose of passing the Motor Carrier Act involved an intent to control competition within the motor carrier industry and to limit competition between railroads and truckers.[25]

By the mid-thirties, trucking concerns had already demonstrated the desire and the ability to effectively compete with railroads.[26] However, railroads were subject to ICC rate regulation and could not spontaneously adjust rates to reflect either lower costs of service, or the need to compete with the quickly developing trucking industry.[27] The ICC recognized that the truckers' freedom from regulation created a competitive advantage over railroads. With the intent of protecting its ward and preserving its own power, the ICC sought to bring motor carriers within its control.[28] At the same time, larger firms within the trucking industry recognized that uncurtailed expansion of trucking promised to create ruinous competition similar to that which had inspired regulation of the railroads fifty years earlier.[29] They, too, supported governmental regulation. Therefore, it was with the support of the ICC and the major truckers that the Motor Carrier Act was passed, and their objectives were to limit competition.

The purpose of the original Interstate Commerce Act,[30] into which the Motor Carrier Act was incorporated, was to inject some of the beneficial effects of competition into the railroad industry, which was characterized as a natural monopoly.[31] Ironically, the Motor Carrier Act was designed to curb competition. The philosophy prevailing at the passage of the Motor Carrier Act was that regulation would curb the adverse effects of limited competition, therefore, free and open competition was not necessary to encourage adequate, economical, and efficient service.[32] Early courts subscribed to this philosophy and readily recognized the authority of regulatory agencies to limit competition within their jurisdiction[33] and regulated industries generally enjoyed immunity from antitrust laws.

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24. 49 U.S.C. preceding §§ 1,301, 901, 1001 (1970) (emphasis added).

25. FEDERAL COORDINATOR OF TRANSPORTATION, REGULATION OF TRANSPORTATION AGENCIES, S. DOC. NO. 152, 73 Cong., 2d Sess. 25 (1934); FEDERAL COORDINATOR OF TRANSPORTATION, 1934 REPORT, H.R. REP. NO. 89, 74th Cong., 1st Sess. (1935) *construed in* Jacobs, *Regulated Motor Carriers and the Antitrust Laws*, 58 CORNELL L. REV. 90, 94 (1973).

26. Jacobs, *supra* note 25.

27. *Id.*

28. *Id.*

29. *Id.*

30. 49 U.S.C. §§ 1-27 (1970).

31. Jacobs, *supra* note 25.

32. Davis & Sherwood, *supra* note 1.

33. United States v. RCA, 358 U.S. 334 (1959); Far East Conference v. United States, 342 U.S. 570 (1952); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932); and Texas & Pac. Ry. v. Abiline Cotton Oil Co., 204 U.S. 426 (1907).

While operating in the atmosphere of deference produced by courts, the ICC, in *Pan-American Bus Lines Operation*,[34] promulgated the following criteria for issuance of a motor carrier operating authority:

> The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers, and whether it can be served by this applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.[35]

From 1936 until the early sixties, the ICC's criteria were interpreted by the courts as having established a requirement of proof either that existing service was inadequate or that the new entrants would advance improvements in service.[36] Notably, such interpretation was qualified by denial that the holder of a certificate could claim blanket protection from increases in competition.[37] Therefore, the courts were willing to validate grants of operating authorities which inspired an increase in competition when such grants were based on a need to improve existing inadequate service.[38] Nevertheless, the Motor Carrier Act was construed to be "basically designed to protect established carriers against the institution of any competing services . . . ."[39] For years, many applications were denied by the ICC on the basis that sound economic conditions in the motor carrier industry would be hindered by the entrance of new carriers into routes already adequately serviced by carriers capable of expanding to meet new demands.[40]

During the early and mid-sixties scattered courts began to express the opinion that inadequate service was not a dispositive factor, but simply one of many to be considered in granting new authorities.[41] Some of the other factors acknowledged to be worthy of consideration in 1964 by *Nashua Motor Express, Inc. v. United States*[42] included potential of developing different kinds of service, the desirability of increased competition and the possibility of encouraging improvements in service. Courts which followed

34. 1 M.C.C. 190 (1936).

35. *Id.* at 203.

36. Curtis, Inc. v. United States, 225 F. Supp. 894 (D. Colo. 1964), *aff'd mem.*, 378 U.S. 128 (1964); Roadway Express, Inc., v. United States, 213 F. Supp. 868 (D. Del. 1963); H.D. Filson, Inc. v. ICC, 182 F. Supp. 675 (D. Colo. 1960); Hudson Transit Lines, Inc. v. United States, 82 F. Supp. 153 (S.D.N.Y. 1948); Inland Motor Freight v. United States, 60 F. Supp. 520 (E.D. Wash. 1945).

37. Hudson Transit Lines, Inc. v. United States, 82 F. Supp. 153 (S.D.N.Y. 1948); A.B. & C. Motor Transp. Co. v. United States, 69 F. Supp. 166 (D. Mass. 1946).

38. Drum Transport, Inc. v. United States, 298 F. Supp. 667 (S.D. Ill. 1969).

39. Roadway Express, Inc. v. United States, 213 F. Supp. 868, 878 (D. Del. 1963).

40. Note, *Public Convenience and Necessity in Federal Motor Carrier Cases—What Are the Criteria?* 16 S. DAK. L. REV. 351 (1971) (noting Adolph L. Hintze Common Carrier Application, 107 M.C.C. 348 (1968); Squaw Transit Co.—Common Carrier Application, 41 M.C.C. 17 (1948); and C. & D. Oil Co.—Contract Carrier Application, 1 M.C.C. 329 (1936).

41. Petroleum Carrier Corp. v. United States, 258 F. Supp. 611 (D. Fla. 1966); Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D.N.H. 1964); and Sloan's Moving Storage Co. v. United States, 208 F. Supp. 561 (D. Mo. 1962).

42. 230 F. Supp. 646 (D.N.H. 1964).

this philosophy continued to require consideration of the adequacy or inadequacy of existing service, but were not willing to preclude issuance of a new certificate solely because existing service was adequate.

These cases received very little attention throughout the early sixties, but by the middle of the decade, they gained enough influence that the courts began to assume divergent positions regarding the need for competition in the motor carrier industry. For purposes of illustration, the following opinions are reviewed. In 1967, *United Van Lines, Inc. v. United States*[43] stated that the ICC may determine the criteria for public convenience and necessity and may weigh evidence as it sees fit even if it gives more weight to the benefits of competition than to the protection of existing carriers. In the same year, the *Lester C. Newton Trucking Co. v. United States*[44] decision included a determination of adequacy of existing service as a basic element of public convenience and necessity. The court of *Younger Brothers v. United States*[45] decided in 1968 that adequacy of existing service was only one of several elements to consider. But, in 1969, *Drum Transport, Inc. v. United States*[46] objected to broad statements made in *Dixie Highway Express, Inc. v. United States*,[47] which negated the ICC obligation to find the services of existing carriers inadequate.

The debate seems to have peaked between 1967 and 1969. Since then the courts have consistently recognized that competition is a legitimate objective of the ICC and that existing carriers providing adequate service do not have a right to be protected against additional competition.[48] However, as of yet, no court has gone so far as to specifically require the ICC to consider antitrust policies which favor competition in entry regulation. In fact, in other areas regulated by the ICC, the agency has been expressly absolved of consideration of antitrust policies.[49]

The Supreme Court has rarely addressed the issue. In *ICC v. J-T Transport Co.*,[50] it did decide that the ICC should not indulge in a presumption that existing carriers would be adversely affected by new entry, and that existing carriers are not entitled to be notified of shippers' greivances so that they may improve service before new entrants are allowed.[51] No Supreme Court decision has ever spoken directly to the issue before *Bowman Transportation*.

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43. 266 F. Supp. 586 (E.D. Mo. 1967).
44. 264 F. Supp. 869 (D. Del. 1967).
45. 289 F. Supp. 545 (S.D. Tex. 1968).
46. 298 F. Supp. 667 (S.D. Ill. 1969).
47. 287 F. Supp. 473 (S.D. Miss. 1968).
48. *See* Slay Transportation Co. v. United States, 353 F. Supp. 555 (E.D. Mo. 1973); Akers Motor Lines, Inc. v. United States, 352 F. Supp. 606 (W.D.N.C. 1973); Feature Film Service, Inc. v. United States, 349 F. Supp. 191 (S.D. Ind. 1972); Denver and Rio Grande Western R.R. v. United States, 312 F. Supp. 329 (D. Colo. 1970), *aff'd*, 400 U.S. 921 (1970); and Hudson Transit Lines, Inc. v. United States, 314 F. Supp. 197 (D.N.J. 1970).
49. Seaboard Airline R.R. v. United States, 382 U.S. 154 (1965).
50. 368 U.S. 81 (1961).
51. *See also* United States v. Dixie Highway Express, Inc., 389 U.S. 409 (1967).

Language found in *Bowman Transportation*, when compared with language of the earlier courts, demonstrates the magnitude of the change that has taken place. As late as 1963, *Roadway Express, Inc. v. United States*[52] supported the ICC's contention that the statutory standards were basically designed to protect existing carriers from competition as long as the established carriers were capable and willing to provide sufficient service. *Bowman Transportation*, on the other hand, made the following statements:

> Our decisions have dispelled any notion that the Commission's primary obligation is the protection of firms holding existing certificates.
>
> . . . A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration.[53]

Such language suggests that the ICC may be required to consider competition as an objective. In fact, subsequent courts have cited *Bowman Transportation* as supporting the contention that the ICC must "adequately consider the public interest in having a competitive market structure."[54] However, not all courts infer such significant mandates. *Hilt Truck Line, Inc. v. United States*[55] cites *Bowman Transportation* merely as authority for the rather old idea that carriers should not be given a blanket protection from the effects of competition. Nevertheless, viewing *Bowman Transportation* in the light of history, it at least demonstrates an increasing preferance that market structure be defined by competition. The limits of such a trend would be hard to predict except that other regulated industries have witnessed similar judicial trends in recent years.

IV. Other Regulated Industries

As already noted,[56] until the last decade the courts have recognized little tension between regulation and antitrust policies.[57] At an early date, 1907, the Supreme Court applied the doctrine of primary jurisdiction in a case involving a conflict between federal regulation by the ICC and state common law.[58] The doctrine, which then stated that a federal statutory scheme was not subject to interference by conflicting state law, was quickly expanded to preclude application of the Sherman[59] and Clayton[60] Acts when the party was pervasively controlled by a federal regulatory agency.[61]

52. 213 F. Supp. 868 (D. Del. 1963).

53. 419 U.S. at 298.

54. Dunkley Refrigerated Transp., Inc. v. United States, 416 F. Supp. 814, 817 (D. Utah 1976). *See also* Corning Glass Works v. FTC, 509 F. 2d 293 (7th Cir. 1975).

55. 532 F. 2d 1199 (8th Cir. 1976).

56. *See* note 33 *supra*.

57. *See generally* Schwarzer, *Regulated Industries and Antitrust Laws*,—An Overview, 41 ICC Prac. J. 543 (1974).

58. Texas & Pac. Ry. v. Abiline Cotton Oil Co., 204 U.S. 426 (1907) reviewed by Handler, *supra* note 1.

59. 15 U.S.C. §§1-7 (1970).

60. 15 U.S.C. §§ 12-27, 44 (1970) and 29 U.S.C. §§ 52, 53 (1970).

61. Handler, *supra* note 1 (citing Pan Am World Airways, Inc. v. United States, 371 U.S. 296 (1963); Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936); United States

Even when the scope of regulation has not precluded application of the Sherman Act and Clayton Act, courts have referred cases to the relevant agency for initial review.[62] The extent to which a regulatory statute exempts an industry from application of the antitrust laws depends upon the provisions within the regulatory statute. Some expressly provide for exemption of activities upon agency approval.[63] Other regulatory statutes provide for such pervasive regulation that the courts have been willing to imply antitrust immunity so that the regulatory objective and antitrust policies do not clash.[64]

In recent years immunity from the antitrust laws has been disintegrating. In a number of regulated industries the courts now require the agencies to take into account antitrust policies or have decided that the agencies have no power to decide antitrust issues. In 1959, the Federal Communications Commission was declared not to have the power to decide antitrust questions.[65] In 1963, the Supreme Court rejected the position taken by bankers that the high degree of governmental regulation immunized banking from the antitrust laws.[66] *Otter Tail Power Co. v. United States*[67] and *Gulf Utilities Co. v. FPC*[68] subjected the public power industry to antitrust policies in 1973 by requiring the Federal Power Commission to consider potential effects on competition in coming to its decisions. Although the Atomic Energy Act required the Nuclear Regulatory Commission to make affirmative findings in its licensing procedure as to whether the activity for which license is sought is inconsistent with the antitrust laws,[69] the Nuclear Regulatory Commission has refused to limit the mandate to licensing procedures, and requires consideration of antitrust policies in every case evaluated by the Commission.[70]

In the last few years, the concept of regulation has been subject to heavy criticism.[71] Many writers suggest that it be radically modified to facilitate the growth of competition. Some feel that without additional legisla-

Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932); and Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922)).

62. Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973). *See generally* Schwarzer, *supra* note 57.

63. *See, e.g.*, Interstate Commerce Act, 49 U.S.C. § 5(11) (1970).

64. *See* note 61 *supra*.

65. United States v. RCA, 358 U.S. 334 (1959).

66. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

67. 410 U.S. 366 (1973).

68. 411 U.S. 747 (1973).

69. 42 U.S.C. § 2135(c) (1970).

70. Toledo Edison Co., The Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-346A, -500A, -501A, -440A, -441A, R.A.I. -77-1, January 6, 1977, 2 NUC. REG. REP. (CCH) ¶ 30,134.01.

71. *See, e.g.*, Davis & Sherwood, *supra* note 1; Handler, *supra* note 1; Hebeson, *Transportation Regulation: A Centennial Evaluation*, 39 ICC PRAC. J. 628 (1972); Schwartz, *The Deregulation of Industry: A Built-in Bias*, 51 IND. L.J. 718 (1976).

tion, progress in that direction will be impeded.[72] However, with little legislative aid[73] the courts to date have managed to inject a policy favoring competition into the objectives of many regulatory agencies.

V. Conclusion

Bowman Transportation is evidence of the fact that the courts have met the difficult task of changing the Motor Carrier Act, whose original purpose was to limit competition within the transportation industry, into legislation which incorporates the policies favoring competitive market structure and that requires the ICC to consider the antitrust laws. This radical change has been accomplished without the express sanction of Congress, and it is not surprising that the transition has been fitful. The inclusion of antitrust objectives in the ICC's regulation of entry into the motor carrier industry would be greatly facilitated by legislation. However, the courts have exercised their power to enforce such policy without directives from Congress, and have demonstrated an inclination to do so in other industries. In the motor carrier industry, unless legislative action is taken fairly soon, Congress may have just two basic options: one, to ratify or refine the changes already made by the courts; or two, to reject them altogether. An examination of history and the present political environment compel the conclusion that rejection will not occur and that the antitrust policies will be increasingly incorporated into regulation. *Bowman Transportation* indicates that such could be accomplished by the courts alone.

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72. Handler, *supra* note 1.
73. *But see* 42 U.S.C. § 2135 (1970).