

Surface Transportation and the Antitrust Laws: Let's Give Competition a Chance*

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I first should thank this association of ICC practitioners for including the subject of the antitrust laws in the program for your annual meeting. We, of course, believe that the antitrust laws do play an important role in the surface transportation industries, and are happy to see that your association apparently shares this view, at least to some extent.

The Antitrust Division's basic responsibility is, of course, to protect free market competition by vigorous enforcement of the antitrust laws. The Supreme Court has repeatedly stressed that the antitrust laws represent our nation's fundamental economic policy, a charter of economic liberty.¹ That policy has as its premise that private persons, not the government, own the means of production, and that decisions as to what and how much to produce, what prices to set, and where and how much to sell are decisions made in a marketplace free from artificial constraints, either governmentally or privately imposed. The government's only role under such a scheme is that of umpire assuring that there is no foul-play by the participants, and enforcing the rules of fair competition.

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1. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

However, one must in candor observe that over the years there has been a steady erosion of that basic national policy: today a substantial portion of our economy is subject to some form of federal regulation which restricts persons in their ability to enter business, and to price goods and services freely. Such federal regulation, affecting about twenty percent of our gross national product, concerns not only surface transportation, but also energy, communications, insurance, finance, agriculture, securities, air transportation, and ocean shipping.

There are some who think that the existence of regulation *ipso facto* eliminates antitrust as a practical concern for regulated firms in the surface transportation industries. This view, however, is a dangerous distortion of reality.

Let us examine first the impact of antitrust principles at the level of the regulatory agency. Although some conduct which is anticompetitive is specifically allowed under regulatory schemes, virtually all agencies must give some weight to antitrust principles in determining whether a particular proposed action is in the public interest. In some limited form, a procompetitive policy has been judicially mandated for a number of independent regulatory agencies, including the Federal Maritime Commission,² the Civil Aeronautics Board,³ the Securities and Exchange Commission,⁴ the Federal Communications Commission,⁵ federal banking authorities,⁶ and the Interstate Commerce Commission.⁷ The *Northern Natural Gas* decision by the Court of Appeals for the District of Columbia clearly sets forth the role of competition in regulatory agency decisions.⁸ The court held that the Federal Power Commission was "obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings and weigh these conclusions along with other important public interest considerations."

The Antitrust Division has been a leader in recognizing the importance of injecting competition into the regulated industries; we actively participate in numerous agency proceedings to urge decisions favorable to competition. For example, the Division is presently involved in six proceedings before the ICC involving the motor carrier or rail industry. Our efforts before the ICC, and other regulatory agencies, are directed toward

2. Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 244 (1968).

3. United States v. Civil Aeronautics Bd., 511 F.2d 1315 (D.C. Cir. 1975).

4. S. REP. NO. 75, 94th Cong., 1st Sess. 12-14 (1975).

5. Washington Util. and Transp. Comm'n v. Federal Communications Comm'n, 513 F.2d 1142 (9th Cir. 1975).

6. United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 185 (1968).

7. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 293 (1974); Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925 (D. Del. 1973).

8. Northern Natural Gas Co. v. Federal Power Comm'n, 399 F.2d 953, 961 (D.C. Cir. 1968).

developing a record that adequately demonstrates the likely competitive impact of agency action, alternatives available to the agency, and the relative competitive impact of the alternatives. Thus, in participating before the ICC, we seek to persuade the Commission to implement rules and issue orders that are as procompetitive as possible under the Interstate Commerce Act standards of "public interest" and "public convenience and necessity."

There are some signs that agencies like the ICC are becoming more sensitive to antitrust concerns, and within the broad discretion granted to them, are adopting procompetitive policies. For instance, the ICC's order in the Rate Bureau Investigation, *Ex Parte* No. 297, a rulemaking proceeding in which the Division participated,⁹ prohibits a rate bureau from protesting independent action proposals by bureau members. In a subsequent report and order on reconsideration, the Commission bluntly observed that such protests "inhibit competition."¹⁰ The Commission took judicial notice in its order of reconsideration that in the six-month period since its initial order in the Rate Bureau Investigation there had been a "substantial increase in the publication of independent action proposals and a decrease in the number of protests filed."¹¹ We applaud the Commission for taking this step to encourage independent competitive activity within the trucking industry, and are heartened to see its procompetitive effects within such a short period of time.

Although the Division's role in agency proceedings is important, it will also take court action under the antitrust laws where firms engage in anticompetitive conduct by avoiding or abusing the regulatory scheme established by Congress. Conduct which is otherwise violative of the antitrust laws and which is not in conformity with regulatory procedures may be subject to antitrust attack.

The Division is not trying to take "pot shots" at companies or individuals who may, in a technical sense, have unwarily strayed outside the antitrust exemption granted them by regulatory legislation. Our primary concern is with those who would intentionally avoid or act in reckless disregard of regulatory processes in furtherance of anticompetitive objectives. By challenging such conduct, we not only protect competition but also the integrity of regulatory processes which Congress created in part to prevent abuses of market power by regulated firms.

In this regard, we believe that regulatory schemes should confer antitrust immunity only by explicit legislative mandates. The Supreme

9. Rate Bureau Investigation, *Ex Parte* No. 297, 349 I.C.C. 811 (June 3, 1975).

10. Rate Bureau Investigation, *Ex Parte* No. 297, Report and Order of the Commission on Reconsideration, 351 I.C.C. 437, 460 (January 23, 1976).

11. *Id.*

Court has consistently held that it will not find that the Congress intended a partial or total repeal of the antitrust laws with respect to a particular industry or practice unless congressional intent to do so is absolutely clear.¹² The fact that an industry is subject to what some may term "pervasive" regulation by a regulatory agency, such as the ICC, does not mean that the participants in that industry are totally immune from antitrust prosecution. As the Supreme Court has held, it will not "lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to the industry."¹³

Judicial decisions clearly establish that pervasive regulation does not completely immunize participants in the surface transportation industries from prosecution under the antitrust laws. For example, the Supreme Court decision in the *Trucking Unlimited* case¹⁴ makes clear that a pattern of baseless and repetitive protests made before an agency in furtherance of a conspiracy to exclude competitors from a market are fully subject to challenge under the antitrust laws.

In 1973, a federal grand jury sitting in the District of Columbia returned an indictment charging Morgan Drive Away and two other mobile home carriers, and individual officers, with an unlawful conspiracy to restrain and monopolize interstate trade and commerce in for-hire transportation of mobile homes. As alleged by the indictment, the terms of the conspiracy were to exclude competitors from the industry, to deprive conference members of their independent action rights, and to coerce other persons to join the defendants' rate bureau, among other things. The indictment also alleged that the defendants had carried out their conspiracy by depriving other persons applying for mobile home authority of meaningful access and fair hearings before federal and state agencies and courts.

In this case, agency action and procedures were allegedly used by the defendants as a mere sham to cover up and further the unapproved, and, I might add, unapprovable anticompetitive behavior. This type of assault on competition through the purposeful avoidance or abuse of a regulatory scheme cannot be tolerated.

After the indictment withstood a broad-based motion to dismiss on the ground of pervasive regulation, defendants entered pleas of no contest to each of the three counts of the indictment. Fines totalling \$170,000 were imposed by the court.

In light of the Division's commitment to maintain a vigilant watch on

12. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973).

13. *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966).

14. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

the conduct of regulated firms, I should point out that violation of the antitrust laws is now a felony, and the conviction for violation of the antitrust laws may result in corporate fines of up to one million dollars and jail sentences of up to three years.¹⁵

While discussing regulated industries and antitrust enforcement, it seems appropriate to mention the status and purpose of the Administration's regulatory reform effort in the regulated industries. I am sure that you are already aware of the enactment of the Railroad Revitalization and Regulatory Reform Act in February of this year.¹⁶ The Department of Justice is participating in the ICC rulemaking proceedings to construe the provisions of the new Act.

The Act should have a substantial procompetitive impact upon the rail industry. First, as most of you undoubtedly know, it prohibits agreements on single line rates except as to those of general applicability. Further, the Commission's power to suspend a proposed rate change has been narrowed. The Act establishes a zone of reasonableness—seven percent the first year and seven percent the second year—within which the Commission may not suspend a proposed non-discriminatory rate change pending determination of its lawfulness. Rate changes that fall outside this zone are subject to suspension only if the protestant can carry a burden roughly comparable to that of the party in district court moving for a restraining order: that he will suffer substantial harm if the rate is not suspended immediately, and there is a reasonable likelihood of his ultimate success on the merits. Finally, the Act introduces new standards governing the ICC's rate-making authority: the ICC can exercise maximum ratemaking power only in situations of railroad market dominance; and the ICC cannot reject a rate as too low if it contributes to going concern value. Any rate which covers variable costs would carry a presumption of lawfulness under this standard.

With respect to regulatory reform in the motor carrier industry, the Administration has proposed the Motor Carrier Reform Act, which is at present pending before both Houses of Congress.¹⁷ This proposal seeks to increase individual ratemaking flexibility for members of the motor carrier industry, and ease entry barriers. Ratemaking flexibility would be achieved by an approach similar to that taken in the Rail Act: there would be a zone of reasonableness within which rate increases and decreases could be implemented by carriers without being subject to suspension by the ICC. Suspension of other rates, pending a determination of their

15. Antitrust Procedures and Penalties Act of December 21, 1974, Pub. L. No. 93-528, 88 Stat. 1708 (1974), *amending* 15 U.S.C. §§ 1, 2 (1890).

16. Pub. L. No. 94-210 (Feb. 6, 1976).

17. H.R. 10909 and S. 2929, 94th Cong., 1st Sess. (1975).

lawfulness, could be ordered only upon proof of three elements: that the complainant would suffer immediate and irreparable harm, there was a likelihood of success on the merits, and suspension would advance the public interest. Agreements among carriers on single-line movements would be prohibited immediately, and agreements on general rates would be illegal three years after the enactment of the bill. Rate bureaus would be allowed to continue, however, to carry on those activities which are not anti-competitive.

The liberalized entry provisions of the Motor Carrier Reform Act would have two effects. First, it would inject a competitive philosophy in setting rates by forcing carriers in a market to be aware of the possibility that, should the rates in that market get high in relation to costs, other firms would enter. That threat is faced by the vast majority of firms in the United States and is essential if price competition is to be maintained. Second, it would permit carriers to rationalize their services by removing inefficient backhaul and route restrictions.

The bill would achieve liberalized entry by broadening the focus of the present entry tests and providing a new alternative test for entry. First, the ICC would be required to favorably consider any proposed service which would produce lower carrier costs, greater efficiency, better service, satisfaction of shipper preferences for different combinations of rates and services, and generally improved competition. Second, the Commission would be required to issue a certificate if the applicant demonstrated that he was "fit, willing and able," the revenue from the proposed service would cover the "actual costs" of the service, and the rate would not be discriminatory. The adequacy of existing service or the effect on existing carriers could not be considered.

Some of the more naive among us expected that when the Administration introduced its transportation reform bills, the business community would be uniformly enthusiastic. After all, much industrial rhetoric and emotion has been expended in denouncing the evils of control of our nation's economy by Washington bureaucrats. However, in the case of transportation generally, and trucking specifically, the support for the Administration's efforts to remove economic controls has been muted. Indeed, the head of the American Trucking Association accused us of "trying to tear apart the finest transportation system in the world." We found this rhetoric somewhat startling, for none of the authors of the Administration's program had any such idea.

Recently, however, I came across a document which gives me at least some greater explanation of why the truckers are so enthusiastic to preserve what seems to be economically wasteful regulation. This document, *Accounting for Motor Carrier Operating Rights*, was a petition and

brief to the Financial Accounting Standards Board, and was filed on behalf of the American Trucking Association. It concerned accounting standards for motor carrier operating rights. It expressed deep concern at the action of the accounting community in attempting to treat motor carrier operating rights as depreciating assets. This approach was all wrong, the petition protested. Rather, "operating rights are the single most important asset to the motor carrier," and, far from *depreciating* in value, they seem to *appreciate* over time. Since 1961, the Accounting Board was told "very few carriers amortized the cost of operating rights because there had been almost no instances of loss of value." Indeed, "[o]perating rights have increased at an annual compound rate of approximately 16%"

Now, I thought, we are really on to something. Of course, the certificates of operating rights only exist because of economic regulation by the ICC. Otherwise, all citizens would have operating rights. The ICC grant of public convenience and necessity amounts to a true golden egg—an extraordinary investment opportunity. Indeed, one wonders whether those who invest in gold stocks rather than ICC certificates aren't somewhat foolish. But why should these certificates be such a magnificent investment?

First of all, as the truckers explain, a carrier simply cannot engage in interstate over the road transportation without one of these magic pieces of paper. The country is obviously growing, and the demand for more and better surface service is increasing. If a carrier does not have the necessary operating certificates to provide through service to the ultimate destination of a customer's shipment, it must interline the shipment with another carrier which does serve the ultimate destination. Since shippers are demanding faster and better service, motor carriers are faced with the necessity to obtain additional operating rights or risk the loss of significant amounts of business to other carriers who can provide through service. This need for operating rights certificates by a growing number of carriers of course explains why they are so valuable.

The net result, according to the Trucking Association, is that "[s]maller carriers with limited operating authorities are finding it increasingly difficult to compete effectively in today's transportation marketplace."

Virtually the only way for the smaller carriers to get out of this bind, and to "obtain additional operating authorities is to buy them from other motor carriers, either by direct acquisition of a particular authority or by acquisition of an entire carrier and all of its assets, including its operating authorities."

You may ask how these operating rights came to be granted to those who now own them. The truckers are quite straightforward about it. They explain in their brief that the vast majority of operating rights existing today

were created by a grandfather clause in the original Motor Carrier Act of 1935. In that Act, they point out that the Congress made "a special provision to acknowledge and protect the interests of motor carriers [engaged] in bona fide operations prior to the passage of the Act by not requiring them to prove a public need to continue such operation."

You can see how all of this works. The ICC and its certificates of public convenience and necessity benefit the business descendants of those truckers in business prior to 1935. This is, of course, a very powerful group. Indeed, the truckers estimate motor carrier revenues for 1973 as in excess of \$21 billion and accounting for approximately fifty-five percent of the total of federally regulated freight revenues.

The seller's market for scarce operating rights obviously creates enormous profits for those who own them. If an incumbent carrier does not want to sell his operating rights, he receives the valued privilege of being protected from new competition on his route. Operating rights, according to the truckers, also have many values beyond that of sale. Apparently they are often used as collateral for bank loans, and, indeed, in certain circumstances, seem to be almost a financial insurance policy. This explains the following passage of the American Trucking Association's petition:

Experience has indicated that not only carriers with viable profitable operations but also carriers with poor operating results and even carriers in or near bankruptcy are able to demand and obtain prices for their operating rights far in excess of the cost of such authorities carried on their books.

We are grateful to the Truckers Association for providing such a lucid, if perhaps inadvertent, explanation of why regulated industries have not welcomed the Administration's transportation reform proposals with open arms.

However, the Administration remains hopeful that the Rail Act, as implemented by the Commission, and the Motor Carrier Reform Act, to the extent that it is enacted into law, will restore a vitality and vigor to the surface transportation industries that has been lacking for too long. We would hope to see the return of a healthy level of competition to both of these industries. I can give you my complete assurance that it is not the goal of either the Antitrust Division or the Administration, as some critics would suggest, "to tear apart the finest transportation system in the world." We believe that competition has greatly benefited the vast majority of the American economy. All we are saying to the regulated transportation industry is give competition a chance.