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ANNOUNCING
THE HAROLD S. SHERTZ
TRANSPORTATION LAW JOURNAL
ANNUAL AWARD

An award of $250.00, named in honor of Harold S. Shertz, Esq., of Philadelphia, Pennsylvania, Bar, will be given for the student article deemed best in the development of transportation problems. The Award was established by the Film, Air and Package Carriers Conference of the American Trucking Associations with the Motor Carrier Lawyers Association to honor Mr. Shertz' long service to the transportation industry and to the legal profession. The paper receiving the Award will be published in The Transportation Law Journal.

Open to all students of accredited North American law schools, the competition will focus upon any area of transportation law with special emphasis on the role of regulatory bodies, national or international.

Submission of manuscripts must be in conformance with the competition's rules as follows:

1. *Participating Law Schools:* All accredited law schools in Canada and the United States are invited to participate in the Competition.

2. *Eligible Students:* Any law student of a participating school is eligible.

3. *Subject Matter:* Any phase of Transportation Law.

4. *Determination of Awards:* The prize will be awarded to the student who shall, in the judgment of the Editor-in-Chief and the Board of Governors of The Transportation Law Journal, prepare the best article. The prize may be withheld if it is deemed that no worthy article is submitted.

5. *Prizes:* A prize of $250 will be paid. The winning paper will be published in The Transportation Law Journal.

6. *Formal Requirements, Right of Publication, etc.:*
   (a) Manuscript must be typewritten (double-space) on 8½" x 11" paper, 1" margin all around.
   (b) Manuscript must not exceed 50 pages.
   (c) Citations must be in approved law review form.
   (d) Two copies of manuscript must be submitted.
   (e) Cover for manuscript: any standard form stiff cover with label on outside showing title of article, author's name and permanent home address.

The papers will be forwarded to the Editor-in-Chief, *The
7. Any paper may be written in collaboration with others provided there is full disclosure.

8. Closing date: Papers must be received by March 1, 1976. Questions concerning the Competition may be addressed to the Editor-in-Chief, The Transportation Law Journal, Osgoode Hall Law School, York University, Toronto, Canada.
INTRODUCTORY NOTE

This issue of The Transportation Law Journal represents the first published under the recently appointed Board of Governors. David A. Sutherland, who has served as the Chairman of the Board of Governors since the Journal was instituted, graciously cooperated and assisted in its preparation.

Mr. Sutherland and the other members of the recent Board of Governors are to be commended for their past efforts. They were instrumental in the conception and development of the Journal during their six-year tenure. Under their guidance the Journal has established itself as a meaningful medium for advancing and diffusing knowledge and information in the field of Transportation.

The members of the new Board of Governors look forward to their responsibilities and shall endeavor to continue and improve upon the work of the predecessor Board.

The Board of Governors also seeks the assistance of our readers and solicits any suggestions or comments which will further the objectives of the Journal and increase its value to the legal community.

JAMES C. HARDMAN
FINANCIAL DISCLOSURE—A TOOL FOR PUBLIC ANALYSIS

A. Daniel O'Neal, Jr.

and

Sherman D. Schwartzberg

"Once ample and reliable data is publicly available, investors and the general financial community are better able than any governmental agency to assess the inherent investment merits of securities. In addition to assuring an honest market place, public disclosure is an effective governor of the conduct of corporate managements in many of their activities; it is the best bulwark against reckless corporate publicity and irresponsible recommendations and sale of securities. The potential exposure of corporate management, securities salesmen and others to personal financial liabilities and to civil and criminal penalties effectively encourages compliance with the Federal Securities Law."1

This statement is from a recent House Committee Staff Report. The cardinal purpose of Federal securities legislation has always been full and fair disclosure to the public. The Interstate Commerce Commission is in the process of assuring that this purpose is upheld with regard to surface transportation industry security devices. The vehicles for this assurance are the Commission's recent decisions in Ex Parte No. 275, Expanded Definition of Term "Securities"2 and Ex Parte No. 279, Securities Regulation—Public Offerings (Form of Offering Circular Required for Public Sales of Securities Authorized Under Section 20a or 214 of the Interstate Commerce Act)3—neither of which is administratively final. To understand the issues involved in these two proceedings, some background is probably called for.

The first annual report of the Commission issued back in 1887 referred to the manner in which corporate stocks were manipulated for the benefit of managers and to the destruction of the interest of the owners, and it added that this was often a great scandal resulting sometimes in bank-

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1. Commissioner, Interstate Commerce Commission; A.B. Whitman College (Walla Walla, Washington); J.D. Univ. of Washington School of Law; Member, Washington State Bar; Former Transportation Counsel to the U.S. Senate Committee on Commerce.


4. 344 ICC 114.

5. 344 ICC 168.
ruptcy and practical destruction of roads which could have been avoided.\(^4\)

In 1894, the Commission pointed out that one reason for this condition
was undoubtedly over-capitalization. "It is a notorious fact", the Com-
mission said, "that many of the lines then in the hands of receivers were
capitalized out of all reasonable proportion to the actual cost of the
property. Until there is some practical restriction upon the capitalization
of railway properties at fictitious values there must still continue to be
non-dividend paying stock, defaulted interest on bonds, receiverships,
etc."\(^5\)

In 1908, and every year thereafter, to and including 1919, with the sole
exception of the year 1918, the Commission repeated its recommendation
that some adequate method of Federal control over railway capitalization
ought to be adopted.\(^6\)

Finally, on February 28, 1920, the Transportation Act of 1920, section
20a', gave the Commission "control" of capitalization by making it un-
lawful for railway carriers to issue securities or assume obligations on
securities of others except upon application to and investigation and ap-
proval by the Commission.

In 1936, the Congress passed Section 214\(^8\) of the Act which in effect
placed motor carriers under section 20a.

The pertinent part of section 20a is paragraph (2). Under paragraph
(2), common carriers by railroad (and motor carrier) must first obtain
this Commission's authorization before issuing any share of capital stock
or any bond or other evidence of interests in or indebtedness of the carrier
(collectively termed securities) or before assuming any obligation or lia-
ibility as lessor, lessee, guarantor, endorser, surety, or otherwise in respect
of the securities of any other person, natural or artificial, even though
permitted by the authority creating the carrier corporation. The Commis-
ion may then issue an order granting the authority requested only if it
finds that such proposal (a) is for some lawful object within the appli-
cant's corporate purposes and compatible with the public interest which
is necessary or appropriate for or consistent with the proper performance
by the carrier of service to the public as a common carrier and which will
not impair its ability to perform such service and (b) is reasonably nec-
essary and appropriate for such purpose.

That authority is broad. It applies not only to protecting the public and

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the investor, which is also the function of the Securities and Exchange Commission, with respect to most securities, by requiring full disclosure, but it permits the Commission to go beyond that and determine whether a transaction would be financially sound for the carrier and in the public interest. This is consistent with the fact that carriers perform a vitally important public service. They are in many ways considered to be a utility, or are at least considered to be affected with the public interest, requiring adequate regulation.9

The whole question of the scope of the regulation of carrier financing was broadened as new methods of financing evolved. As pointed out in the report of the Commission in the Watt Case,10 the question as to what constitutes an evidence of interest in or indebtedness of a carrier is one which merits detailed analysis in the light of present day practices. Indeed, the Commission’s previous limited view of its own jurisdiction under section 20a probably contributed to a loss of effective control over carrier financing.11 And as the recent report by the ICC states, the narrow construction of section 20a was largely self-imposed. This was widely recognized as was the fact that at least partly as a result of restrictive administrative interpretation of section 20a the Commission simply did not have effective control of carriers’ capital transactions.

The Commission, in recognition of the situation and changing times, instituted the proceeding in Ex Parte No. 275. In instituting the proceeding it referred to “the present day situation where a substantial amount of financing by carriers is represented by instruments other than capital stock, bonds, or notes, the traditional forms of securities.”12 This represents an effort to give maximum effect to the statute’s objectives. The action taken is supported by the Commission’s underlying power essential to the effective discharge of the Commission’s responsibilities—in this case the National Transportation Policy’s admonition to foster sound economic conditions in transportation and among the several carriers13 as well as the accounting and reporting provisions of the Act.14

Specifically, the decision in Ex Parte No. 275 expanded the definition of the term “security” recognized by the Commission. In the past, the Commission had interpreted the term “securities” as extending only to stocks, bonds, notes and other agreements having similar attributes.

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9. See for example 6 CFR § 150.
11. The Penn Central and Other Railroads, A Report to the Senate Committee on Commerce, Committee on Commerce, United States Senate, December, 1972.
“Noteless” borrowing was held beyond the reach of the Interstate Commerce Act. With regard to an evolving economic life style within the surface transportation industry, the commission has re-evaluated its position and determined that “securities” will now be construed to include all agreements which create a present or future interest in, or indebtedness of a carrier or in property owned, leased or otherwise employed by all regulated carriers. Included would be loan agreements, credit agreements, mortgages, chattel mortgages, advances, deeds of trust, equipment trusts, and security agreements whose terms provide for other than full payment at the time of consummation.

What does it mean to the public, the surface transportation industry, and the financial community generally?

Carrier fiscal policy will be given more scrutiny. It will be more difficult—hopefully impossible—for carriers to subordinate operating requirements including plant improvement to the wholly illusory goal of unjustifiably improving the company’s credit standing. It will be more difficult for carriers to use methods of financing which give the appearance of a reduction in long term debt and fixed charges where no such reduction has occurred. It will be more difficult for carriers to construct irresponsible techniques of earnings maximization or earnings inflation. It will be more difficult for carriers to employ an unjustified dividend policy set up solely to inflate the price of the company’s stock and give the carrier a better credit standing. It will also be more difficult for carriers to indiscriminately utilize and expand a program of diversification investments at the expense of meeting their statutory obligations.

The Penn Central collapse unveiled for public scrutiny a whole series of unsavory practices. New ground was broken by a management anxious to put the best possible face on its financial condition. Earnings inflation was employed by the Penn Central and its predecessor, the Pennsylvania Railroad, with great forcefulness. This technique was not concerned with realities of income or cash flow but was an effort to pretend that earnings were larger than they really were by inflating them. Earnings maximization, a practice in many deteriorating companies, was thus pushed to extremes by the management in this case.15

As the practice of earnings inflation continued throughout the sixties, there developed less and less relation between cash flow and reported income. Devices used included requiring subsidiaries to inflate reported earnings and declare large dividends, reporting as much income as possible as ordinary income rather than extraordinary; restricting maintenance and capital expenditure budgets; capitalizing equipment refurbishing (a

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15. See The Penn Central and Other Railroads, Note 11.
practice which the ICC Bureau of Accounts has considered to be improper, requiring that costs should be written off as maintenance expenses in the year of rebuilding; and treating as many ordinary expenses as possible as "extraordinary expenses". These practices did not generate any new cash; they only seemed to. Although the Penn Central was an illiquid company where cash management would seem to be a major area of management concern, the generation of cash according to the Senate Commerce Committee Staff Report "was secondary to the attempt to inflate and thus distort reported net. Accounting theory which stresses conservatism and consistency, was either ignored or adhered to solely when consistent with the principal objective of delusion."\(^{16}\)

It is not possible here to go into all of the practices of the Penn Central that have been pretty widely described in various places including the Staff Report of the Senate Commerce Committee. We know by the self-admitted statements of the Penn Central Management that cash flow had very little relation to the reported net income of the corporation. The result may have been that the Penn Central stayed out of bankruptcy longer than it would have otherwise, but the real question is whether this deferral of bankruptcy was in the public interest or in the interest of the transportation company involved. The company policy served to keep the impending financial collapse from the public generally and even from many financial analysts. Although it is perhaps impossible to prevent such misrepresentation and deception, nevertheless, improved knowledge about the sources and uses of funds by the Penn Central would have highlighted its precarious position several years before the event. It is thus appropriate and advisable that the Interstate Commerce Commission should develop the necessary procedures for spotting problems well before a crisis develops and before hurried, poorly reasoned temporary expedience is forced by events.

In addition to the proceeding in *Ex Parte No. 275* and *Ex Parte No. 279*, the Commission is reviewing the entire railroad accounting system. A precise accounting policy is inseparable from a policy which advocates adequate financial disclosure.

The Commission's interests in obtaining additional or more meaningful information is not for harassment purposes. Adjustments in accounting techniques and disclosure improvements can have a direct impact on the performance of a transportation company. It may affect management's decision on how much effort to apply to various transportation purposes of the carrier. Perhaps the Penn Central for example would have spent more money on rail maintenance if the accounting practices had

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\(^{16}\) See *The Penn Central and Other Railroads*, Note 11.
been somewhat different than as prescribed by the ICC rules. The Penn Central advised the Federal Rail Administration on October 16, 1973, that some 6,900 miles of its track would not meet the minimum safety requirements, i.e., trains could not safely travel 10 miles per hour. It is difficult to comprehend how such incredible deterioration could occur. It is conceivable that adjustments in accounting practices a few years ago would have helped prevent such deterioration.

The purposes of disclosing information accurately are many. First, the public and user knowledge of such information may be assumed to be a helpful corrective element in itself. It would enable the public to take action to protect itself against a sudden loss of rail service or the unacceptable deterioration of service while at the same time providing an objective signal for public opinion influence to be felt by private decision makers. Second, such information would be of vital assistance to government in formulation of policy and identification of specific problems. It is quite possible, for example, that if the federal government had been completely aware of the condition of the railroads in the Northeast during the 1960's it might not be faced with the kind of crisis situation which now confronts the Nation. This increased financial information would be very useful to present and prospective investors and would provide some useful protection for them. 17

The key goal of an accounting system and of disclosure should be understandability. As one well known accountant has put it:

"The confounding and confusion of tongues has evoked strong criticism even from persons who are sophisticated in the accounting idiom.

If financial statements were 'understandable', could Penn Central have disposed of its commercial paper to some of the most astute and prestigious banks, insurance companies, and other professional investors? Could there have been the psychedelic conglomerate craze of the 1960's? . . . " 18

Management, the Commission and the public must be better able to acquire the most accurate and extensive information possible about carriers and the transportation industry.

With regard to a securities application, it should be kept in mind that principal concern of this Commission under section 20a is the effect of a security device upon the soundness of the carriers' credit and financial

17. See The Penn Central and Other Railroads, Note 11.
structure. The Commission thus considers whether the proceeds are to be used for a proper carrier purpose, whether the terms are unreasonable, whether the financing will result in overcapitalization, etc. There are certain things the Commission must have in order to process security applications. The Commission needs to know what the parties want. It is surprising how frequently an application fails to present clearly what it asks for. The Commission needs all relevant financial data including a balance sheet to see if the carrier can afford what it proposes. The Commission has to know what the carrier is going to use the money for in specific terms. The carrier should state what the cost of employing the security device will be.

There has been consistent use of the term “carrier”. However, in a situation where a person who is not a carrier, for example a holding company, which is authorized under section 5(2)\(^19\) of the Act to acquire control of any carrier or two or more carriers, the Commission may provide, pursuant to section 5(3)\(^20\) of the Act, that such person will be considered a carrier and may subject it to the provisions of section 20a and 214. In such cases, the Commission will authorize the use of a security only if it finds that such use is consistent with the proper performance of service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

There are two basic conflicts here. One is that the Commission should do everything it can to prevent the carrier from being exploited, i.e., to prevent the destruction of the carrier’s capability to provide transportation services as required by the public. On the other hand, there has been some thought that holding companies may be beneficial to a carrier in the sense that they have a broader base for attracting money at better rates. Such money could be advanced to the carrier and this would be particularly valuable where the carrier would have difficulty in raising money:

This Commission does not in the abstract want to pass on whether an investment in any non-carrier is good. Yet, if it should appear that an investment would endanger a carrier, the Commission should be able to focus on the non-carrier investment to make a determination consistent with the purposes of the Act. This does not mean that the Commission would insert itself into the everyday decision-making process of the management of regulated carriers; nor does the Commission in any way intend to usurp management prerogatives. But carrier management will

\(^{19}\) 49 U.S.C. § 5 (2).

be made more aware that its prerogatives are not unlimited but subject to review and publicity. Hopefully, this awareness will spark a reaction of more thought, better planning, improved management action, and greater disclosure to safeguard the carrier's financial well being—and benefit the public as users and investors.

Section 20a also confers upon the Commission the authority to require not only the filing of a prospectus, but its dissemination to all prospective purchasers. Indeed, the Commission already requires a prospectus to be submitted for approval if securities are to be issued to general public. However, there have been no guidelines or requirements established for the content of that prospectus. The Commission's ultimate decision in Ex Parte No. 279, whatever its specific requirements, should correct this deficiency.

The provisions of Ex Parte No. 279 require that a new prospectus or offering circular be filed by carriers seeking public financing through the Commission. The form involved is similar to the form of the SEC—namely, the S-1 form—but would require additional information relevant to the transportation industry. This includes such information as carrier investment in non-transportation areas, carrier investment in corporate conglomerates, and the relationship of a carrier as to subsidiaries and/or corporate parent. In particular, the financial data would show a carrier's relative operation in transportation and non-transportation areas.

This complete disclosure form would be required primarily in connection with general stock issues. There would also be a new abbreviated form for use with stock offered solely to a carrier's employees. Several exemptions to using the new form are contemplated. Moreover, the form would not be required in connection with securities issued to knowledgeable individuals or businesses who do not propose to make further offering to the general public. These would include stock dividends and splits since they are issued only to current shareholders.

In concluding, it is evident that the public, the financial community and the surface transportation industry should recognize that the Commission's actions in Ex Parte No. 275 and Ex Parte No. 279 were guided by the hope that such disasters as those that befell the Penn Central and other bankrupt carriers will not occur again. The public and the financial community generally should have greater confidence in future carrier securities, because many devices employed to circumvent Commission surveillance will no longer be available to chip away at financially healthy carriers. The Commission is determined to reassert and broaden its control over carrier financing. The two recent decisions in Ex Parte No. 275 and Ex Parte No. 279, with whatever modifications that may appear
appropriate in those proceedings before they become final, will help the Commission do this—not only to the benefit of the public but to further financial disclosure as a tool for analysis by the public and particularly the financial community most concerned with carrier investment, debt, and security practices.
THE "WRITE" TO ARGUE:

MODIFIED PROCEDURE IN ICC MOTOR CARRIER CASES

BRUCE A. DEERSON*

INTRODUCTION

In recent years, a barrage of criticism has been directed at both the theory and practice of motor carrier regulation. Advocates of deregulation abound.1 But, deregulation is not a panacea for all the problems of motor carrier transportation. Indeed, stronger and more efficient regulation in certain areas may be a more viable solution. And in those areas where reform is needed, such reform may often be accomplished, through procedural means, rather than through a wholesale substantive revision of the existing regulatory framework.

An example of reform through procedure is the adoption and use of modified procedure by the Interstate Commerce Commission in motor carrier operating rights cases. This procedural change has had significant substantive effects—a sort of deregulation without deregulation.

In examining modified procedure, in terms of its legal and constitutional aspects and evaluating its practical impact, this paper will study the historical roots of motor carrier regulation and the issues involved in a motor carrier application.

1. National Transportation Policy: Background Of The Motor Carrier Act.

By 1935, fierce competition in the trucking industry had resulted in chaotic transportation conditions.2 The industry was still relatively young, having emerged shortly before World War I. And, although the boom years of the twenties were kind to it, the years of depression were bad years for the industry. Millions of Americans lost their jobs; many turned to trucking. This great influx of unemployed enlarged the trucking

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1. One writer has suggested that the abundance of criticism is not based on a widespread failure of the system:
   The avowed purpose of the regulatory structure is primarily to prevent problems from ever arising, rather than to effect their post hoc solution. But, paradoxically, the more it succeeds in this objective, the more doubts it raises that there are in fact any problems to be thus forstalled. . . . By contrast, regulatory failures are embarrassingly visible. . . .
industry to enormous proportions. From a total of 85,600 trucks on the road in 1914, the industry had grown to the point where 3,480,939 trucks were in service in 1930. And, the numbers kept increasing.

There were many reasons for this spectacular growth. Small fixed costs compared to variable costs, lack of significant economies of scale, and mobility of resources all resulted in economic conditions conducive to easy entry. Consequently, anyone with the price of a down payment on a single truck could go into the motor carrier business for himself.

In the 1930’s, 85 percent of the truckers owned only one truck. Only one percent of the industry owned two trucks, and the average trucker owned 1.6 trucks. As the Supreme Court later observed, the industry had become so “overcrowded with small economic units . . . [that it] proved unable to satisfy even the most minimal standards of safety or financial responsibility.”

In addition, the chaos in the motor carrier industry was beginning to have an effect on the railroad industry which quickly realized that the cutthroat pricing by motor carriers was endangering its own rate structure. In an attempt to stabilize the situation, Congress passed the Motor Carrier Act of 1935, investing the Interstate Commerce Commission with authority to regulate the motor carrier industry, and declaring that the National Transportation Policy was

to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust dis-

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7. 49 U.S.C. 301 et seq.
8. There are segments of the trucking industry which were exempted from regulation. These exemptions are not pertinent to this paper. They are substantial enough, however, to account for two-thirds of the highway freight hauled in the U. S., according to one scholar. Wilcox, Public Policies Toward Business, 395 (4th ed., 1971). Note also that in relation to most of this paper the difference between contract and common carrier is meaningless. It will therefore not be discussed. Only in the area of application requirements are there any significant differences—proof of additional issues is needed in a contract carrier permit application.
criminations, undue preferences or advantages, or unfair or destructive competitive practices.9

II. I.C.C. Requirements for Motor Carrier Authority.10

The I.C.C. has generally interpreted the transportation policy with a special emphasis on protection of existing carriers "from unintended or unwarranted competition."11 But, despite its concern for maintaining competitive stability, the Commission has correctly realized that stability is not an end in itself, but, rather a means to the end of providing shippers with "a healthy system of motor carriage to which they may resort to get their goods to market."12 For example, in Davidson Transfer and Storage Co. v. United States, the District Court found that the shipper involved had been unable to obtain proper and sufficient service, particularly on less-than-truckload shipments, resulting in spoilage and a loss of business. In affirming the I.C.C.'s grant of authority, the court stated: "We think one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service."13 The substantive proof requirements, to be discussed next, should be viewed in light of the framework of the Commission's philosophy of competition.

A. Issues Of Proof

Statutory guidelines for grants of motor carrier authority are set forth in Section 207(a) of the Motor Carrier Act as follows:

A certificate shall be issued . . . if it is found that applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter . . . and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such applications shall be denied.14

This section indicates that there are two issues in every application: (1)

the applicant's fitness, and (2) public convenience and necessity. These two issues are distinct and do not overlap.15

1. Fitness Of Applicant

Proof of applicant's fitness is usually a "routine matter of form."16 Often the applicant will have appeared before the I.C.C. through prior application proceedings;17 in such cases the Commission has previously approved its fitness, albeit in a different context. When the applicant's financial status is so weak as to put into doubt the successful maintenance of proposed operations, the I.C.C. may refuse to grant a license. However, the Commission is often lenient in this regard.18

If the applicant has had no experience in the conduct of motor carrier operations, the I.C.C. may require some proof as to his ability to perform such service.19 Failure by applicant to prove access to a sufficient amount of equipment (either leased or owned) to perform the proposed service may result in a denial of the application.

Considering the Commission's leniency and flexibility, it is unlikely that most applicants will have trouble meeting the above-mentioned standards of fitness. Some may, however, run afoul of another fitness principle: "In the absence of extenuating circumstances," an applicant who has, in the past, performed unlawful operations will be considered unfit.20 While there are no black-letter rules as to what will be considered extenuating circumstances, a few examples may suffice to illustrate the trend of the cases. When the applicant operated under color of right without intention to deliberately circumvent statutory requirements, the I.C.C. granted the requested authority.21 In addition, when the applicant was unaware of the impropriety of its operations and voluntarily ceased them22 or was operating under the mistaken belief that it had authority,23 the Commission has not found lack of fitness.

16. Id. at 361.
17. In a recent year, the Commission granted in whole or in part 4,371 applications for authority. Of this number, 443 applications involved an initial license to operate. Interstate Commerce Commission, 86th Annual Report to Congress 33 (1972).
18. In R.B. "Dick" Wilson, Inc., 79 M.C.C. 554 (1959), the I.C.C. approved an application where applicant's current financial information showed an operating loss. The grant was based on the company's ability to perform its present service notwithstanding its poor financial status.
2. Public Convenience And Necessity

If proving applicant's fitness is a "routine matter of form," convincing the Commission that an application should be granted on grounds of public convenience and necessity is far from a simple matter. Decisions are often in conflict and the policy statements in one decision may contradict those in another.

Although, an early Commission case warned that "Public Convenience" and "Necessity" are "not synonymous, but must be given a separate and distinct meaning,"24 recent Commission decisions have not considered the two terms separately to any meaningful extent. In Pan American Bus Lines, Operation, the Commission, in a general way, defined the issues to be examined in deciding whether a grant of authority is warranted:

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 applicant with the new operation or service proposed without endangering or impairing the operation of existing carriers contrary to the public interest.25

a. Whether The New Operation Or Service Will Serve A Useful Public Purpose, Responsive To A Public Demand Or Need

Public need and demand is usually demonstrated through shipper support. Two Commission cases define with great particularity the required information to be included in shippers' statements.26 The shipper must identify the commodities to be transported, including generic descriptions, total volume, volume to be tendered to applicant, frequency with which proposed service would be used, and any unique or particular characteristics of any of the involved commodities. Again, while the Commission is not inflexible, failure to delineate these characteristics to

25. Id. at 203. These guidelines still have importance for today. Compare Guandolo, supra note 10 at 59, with Comment, South Dakota Law Review, supra note 15 at 381, where the conclusion reached is a paraphrase of the Pan American opinion.
the extent possible will result in a denial of application. 27

In addition, the applicant should also identify points from and to which service is sought, including, if possible, specific volume to be transported to each of these points. In *Ashton Trucking Co., Extension—Kirtland, New Mexico*, the Commission denied an application for a certificate on the following grounds:

Moreover, while shippers assert a need for a single carrier capable of serving all of the involved origins, the fact still remains that unless and until the records establish specific volumes from and to specific points involved herein, we are unable to determine whether or not to what extent the existing service is or will be inadequate. Accordingly, the application will be denied. 28

The applicant must prove that Public Convenience and Necessity require the service even in the absence of opposition to the application. 29 Furthermore, mere preference, unsupported by a specific showing of need will not be enough to support a grant of authority. 30

b. Whether The Public Purpose Can And Will Be Served As Well By Existing Lines Or Carriers

Although early case law may have indicated that applications for motor carrier authority would be granted only where there was an affirmative showing of the inadequacy of existing service, 31 this requirement

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27. In *Hyder Trucking Lines, Inc., Ext.*, 155 M.C.C. 600 (1972), the Commission stated:

In this proceeding Hormel has failed to present any evidence indicating the volume of traffic it would tender to applicant, and the relative volume of each of its products that now moves or will move in the foreseeable future. . . . Hormel's remaining testimony is not sufficiently detailed to enable us to ascertain its actual transportation requirements so that we rationally may frame a grant of authority responsive to its needs.

*See also Smith Transit, Inc., Ext.*, 74 M.C.C. 337 (1958), and *Chemical Leaman Tank Lines, Inc., Ext.*, 98 M.C.C. 452 (1965).


30. The Commission has denied an application, explaining that:

The evidence shows a mere preference on the part of the shippers for applicants service. A mere preference or desire for applicants service over that offered by existing carriers is insufficient in the absence of evidence showing that carriers now authorized cannot or will not render a reasonable service. *Oscar A. Carter, Ext.*, 74 M.C.C. 385, 388, 389 (1958); accord, *Clyde R. Sowers Ext.*, 61 M.C.C. 65 (1952).


The Commission has frequently held that under §307, there must be an affirma-
has now been eased considerably. Changing case law has rendered adequacy of service only one element to be proved in motor carrier application cases; failure to prove inadequacy of existing service is no longer fatal in and of itself in most applications, especially where an increasing volume of total shipments means that existing carriers will not be adversely affected to any significant extent (i.e., they will lose little, if any, traffic). On the other hand, where applicant is unable to support his application with any other important elements of proof, his failure to prove inadequacy of existing service will result in a denial of the application.


33. See generally 45 *WASH. L. REV.* 817 which traces the development of I.C.C. policy from a "protectionist tack" which appeared to favor "regulated monopoly" to a policy favoring "regulated competition."

In *I.C.C. v. Parker*, 326 U.S. 60, 70 (1945), the Supreme Court upheld an I.C.C. grant of authority holding "the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service;" accord *U.S. v. Dixie Highway Express*, 389 U.S. 409, 411 (1967).

In *Texas Mexican Railway v. United States*, 250 F. Supp. 446, 950 (S.D. Tex. 1966), the court indicated that the Commission should have leeway to make its decision and that a failure to prove inadequacy of existing service does not obligate the board to deny the application.

34. See, e.g., *Guy Heavener, Inc., Ext.*, 83 M.C.C. 216, 220 (1960). In addition, see *FAIR AND GUANDOLO*, supra, note 9 at 218. Note that this reasoning is directly in line with the Commission's interpretation of the National Transportation Policy (see text accompanying fns 10-13).

been touched upon, one or two additional points might be noted here. The Commission has made it a policy that existing carriers should be accorded the right to transport all the traffic they can handle adequately, efficiently, and economically in the territory served by them before additional authority is granted.

It is important to note that the initial burden of proof in relation to whether or not the proposed operation will serve a useful public purpose is on applicant. If applicant meets that burden of proof by whatever means, including inadequacy of service, the burden then shifts to protestants. Protestants then have the burden of proving either that the public need for the service can be adequately filled by existing carriers, or else that the grant of the application will be injurious in terms of revenue to the existing carriers.

IV. Modified Procedure

A. Why Did It Arise?

In 1964, motor carrier applications numbered 5,655. The number of new filings rose to 7,658 by 1965 and in that year made up about 85 percent of the Commission's formal case docket. During the year ending 1966, 8,700 motor carrier applications were disposed of through oral hearings. The informal nature of I.C.C. pleadings made large records and meant that the issues were not sharply drawn when the matter was presented for oral hearing. Protestants would often appear at hearings only to find that they had no real interest in the traffic to be moved, once that traffic had been finally defined by explanations from witnesses. The I.C.C.'s liberal approach to rules of evidence resulted in long records crammed with irrelevant and immaterial portions.

In addition, various abuses increased the burden of I.C.C. officials. In 1964, 5,379 applications were dismissed at the request of applicant; 1,091 of these represented cases which had already been scheduled for hearing. In some of them several days and even weeks had been set aside for those hearings. Those cancellations were often made at the last minute, too

39. The most recent statistics available indicates that these applications still account for more than 80 percent of the Commission workload. I.C.C. Report, supra, note 17 at 33.
late to schedule another hearing, resulting in a complete waste of Commission time. Other applicants attended hearings with the hope that none of the protestants would appear. When they did appear, the applicants would dismiss or amend their applications to eliminate all opposition. Once again, the time scheduled for hearings was lost. Because of all of these abuses, the pending docket of motor carrier applications had been bloated to 6,534 cases by April 1, 1966. The Commission's solution was to adopt a new application form and a modified procedure for motor carrier cases.

B. How Does It Work?

The new application form required written proof in the form of affidavits from shippers, that they were willing to support the application, in order to demonstrate that there was public need for the service proposed. An application fee of $250 (at this writing-$350) was required. This was designed to eliminate the practice of last minute withdrawals of applications. Modified procedure is defined in the Interstate Commerce Commission General Rules of Practice, Rule 5(j). It is described in Rules 45 and 54, inclusive, as well as in Special Rule 247. The Commission has stated that, "[i]n processing the motor carrier case load, the scheduling of unnecessary oral hearings will be avoided to the extent

42. Id.
43. General Policy Statement Concerning Motor Carrier Licensing Procedures (Ex Parte No. 55), 31 F.R. 660. In that policy statement the Commission noted:

Motor carrier application proceedings involve issues of substantial interest not only to the regulated transportation industry, but to every shipper and receiver of goods, regardless of the size of his operation; to manufacturers, wholesalers, distributors, and retailers; and to all members of the general public, both as buyers and consumers, and as travelers over the lines of the nation's common carriers of passengers. To delay a determination that a newly proposed motor transportation is required by the public convenience and necessity or would be consistent with the public interest and the national transportation policy can result in an irretrievable loss of sales and can unjustifiably deprive the public of needed products in transportation services. For the regulated surface transportation industry to continue to thrive, to grow, and to keep pace with the expanding national economy, the mechanics of regulation must be such that administrative decisions are not only fair and impartial, but are rendered with reasonable dispatch and efficiency. The regulatory process in which competing claims are considered and adjudicated must be geared to the type of proceeding involved and must not entail an expenditure of time and money, either for the parties or the Government, which is disproportionate to the scope, importance, and economic significance of the particular proceeding.

44. 49 C.F.R. 1100 247.
45. See text accompanying fns. 41 and 42.
possible. Where the issues presented are well defined or where the matters involved are not of sufficient moment to justify the expense of an oral hearing, parties will be required to submit their evidence in the form of verified statements under the modified procedure." Requests for oral hearing must be contained in the application. All applications are published in the Federal Register.

Timely protests must be filed, because failure to do so will be considered a waiver of both opposition and participation in the proceedings. Protests must set forth the specific grounds upon which they are made, including a copy of any of protestant's authority which is claimed to be in conflict. They must describe in detail the method by which protestant intends to meet and provide the service proposed. If an oral hearing is desired, the protestants must "specify with particularity the facts, matters, and things relied upon." Protests phrased in general terms may be rejected. Requests for oral hearing must be supported by an explanation as to why the evidence cannot be presented in written form. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross-examination.

Under Rule 51 as amended, applicant is required to serve upon the other parties a statement of all the evidence upon which it relies within twenty days of the date of an order requiring modified procedure. Defendant must submit its reply within thirty days thereafter. Applicant then has twenty days in which to serve a rebuttal statement.

The evidence filed by the parties usually consists of "verified statements" submitted by witnesses on their behalf, in addition to a written argument. Under modified procedure, there is no means of cross-examining the opposing witnesses. The only effective means of undermining their statements are (1) utilization of Commission discovery and deposition procedures, or (2) convincing the Commission that a material issue of fact is in question so that the application will be placed in the oral hearing docket. The lack of opportunity to utilize cross-examination "the greatest legal engine for the discovery of the truth"—has had many practical ramifications for motor carrier operating rights proceedings.

47. Rule 247 2 (d)(2).
49. Rule 247 a (d)(4).
50. Rule 53(a).
50.1 In practice, Commission orders often provide for more time to submit these statements.
52. 5 WIGMORE, EVIDENCE, §1362 at 29 (3rd ed. 1540).
C. Practical Effects Of Modified Procedure

While an applicant continues to bear the burden of proof in operating rights proceedings, the use of modified procedure represents nothing less than a "gift from heaven" to applicants.\textsuperscript{53} Applicant has the advantage of having the "last word," because, it can respond to protesters' statements and cite case law through the rebuttal statement. Its response to protests are made easier because: (1) there is more time to respond to protesters' contentions, and (2) the exact scope and extent of protesters' objections will be known. This enables applicant to point out protesters' deficiencies from the standpoint of (a) commodities and territory, (b) equipment, and (c) transportation facilities. Proof of these deficiencies may then be bolstered by supporting arguments with citation to the case law. As a result, applicant can formulate issues in the light most favorable to it. Alternatively, applicant may restrictively amend its application to eliminate opposing interests. In addition, applicant has the opportunity to precisely describe its existing operations and transportation facilities, especially as they relate to the requested authority and the interest of protesters.

It is much easier to obtain shipper support, for the only imposition on shipper is the submission of a verified statement, which is usually prepared by applicant and merely signed by the supporting shipper.\textsuperscript{54} Contrast this with the requirement under oral hearing that the shipper must (1) attend the hearing wherever held, (2) be examined, and (3) be cross-examined. At an oral hearing, an inexperienced shipper, unfamiliar with the I.C.C. requirements for motor carrier authority may become confused or omit material evidence. There is no danger of this in modified procedure. In an oral hearing, applicant has the additional worry that scheduling difficulties may make it impossible for the supporting shipper to appear, even if he wants to do so. This problem too is non-existent when modified procedure is employed.\textsuperscript{55}

\textsuperscript{53} See Panel Discussion: Modified Procedure—a Curse or a Blessing in MOTOR CARRIER LAWYERS ASSOCIATION 1972 CONFERENCE.

\textsuperscript{54} In effect, this means that the verified statement is prepared by applicant's attorney. This has two effects: (1) it reduces the burden of the shipper to merely reading and signing the statement, and (2) it enables the attorney to submit the shippers' evidence in the best possible light, i.e., it is the lawyer (not the witness) who is actually "testifying."

The Commission is not unaware of this situation, and has noted that obvious "fill-in-the-blank" statements will not be given much weight. Empire Feed and Transfer Co., Common Carrier Application, 113 M.C.C. 38 (1971).

\textsuperscript{55} This advantage should not be over-emphasized. Even in oral hearings, if the supporting shipper cannot be present, applicant may use a supporting shipper statement. It is
Finally, the use of modified procedure relieves applicant of the financial burden of having shippers appear at a hearing. Instead, the financial burden, from the standpoint of travel, deposition taking, and hearing expense is shifted to the protestant.

All of these tremendous advantages to applicant are not balanced by corresponding advantages to protestant. It is true that the absence of an expensive oral hearing makes it easier for protestant to continue a protest to an application. This advantage, however, is quite probably illusory. For, although his ability to protest more frequently is increased, his ability to protest effectively is decreased. As will be seen, requests for oral hearing will probably not be granted in the absence of utilization of expensive deposition and discovery procedures. If the protestant deems the denial of an application to be vital, he must first undertake deposition and discovery and then, if he is successful and is granted a hearing by the Commission or the court, he will have to bear the expense of a hearing anyway. If he does not consider the denial of the application vital, he may still, of course, protest. But, in view of the way advantages stack up for applicant, such protests may be meaningless and ineffective in blocking grants of authority.

In light of these practical effects it is not surprising that the vast majority of applicants seek modified procedure, while a correspondingly vast majority of "serious" protestors seek oral hearings. When requests for oral hearings were denied by the Commission, protestors sought to overturn the use of modified procedure on the grounds that it constituted a denial of due process.

C. Legal Aspects Of Modified Procedure

1. Constitutional Attacks

Procedural due process has been defined in terms of "fair play." Various factors will be examined in determining the requirements of due process, including "the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." Modified

arguable, though, that a supporting shipper statement in lieu of oral testimony is less impressive than a supporting shipper statement submitted as per modified procedure.

56. The new application form does require a $350 "application fee." Two things may be noted in relation to this fee: (1) all applicants must pay it, whether the application is to be handled under modified procedure or oral hearing, and (2) compared to the expense required in an oral hearing, this fee may aptly be termed "chicken feed."

56.1. See text accompanying fns. 62-63 infra.


58. *Id.*
procedure seems clearly to meet due process requirements.

Thus, to this date all due process attacks on modified procedure have been rebuffed by the courts. While there are no Supreme Court decisions dealing directly with its use in operating rights applications, the Supreme Court has affirmed federal court judgements that modified procedure fulfills the constitutional due process requirements in cases of modification of carrier authority.\(^{59}\)

Although those cases involve modification of existing authority, logic suggests no significant distinction between modification resulting in "encroachment" upon protestants' property rights and a grant of original authority resulting in a conflict with protestants' property rights. Thus, the Supreme Court affirmances would seem to apply equally well to cases involving original grants of authority.

Indeed, federal courts have continuously upheld the use of modified procedure in granting original authority. Of course, this judicial approval of the substance and form of modified procedure has not overlooked the fact that abuses may occur. When they do occur, courts have not hesitated and should not hesitate to remand the case to the Commission.\(^{60}\)

The leading case approving the use of modified procedure is Allied Van Lines Co. v. United States.\(^{61}\) The protestants in that case demanded the right to cross-examine at an oral hearing every supporting "witness" who submitted verified statements favoring applicant's service. The court noted that, although the protestants had had an opportunity to rebut applicant's evidence, they did not do so. The request for cross-examination failed to specify the facts in dispute and the alleged defects in supporting shipper's statements. No attempt was made to utilize the Commission's discovery procedures,\(^{62}\) the use of which might have eliminated the necessity for oral hearing.\(^{63}\)

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60. See Crouse Carriage Company v. United States, 343 F. Supp. 1133 (N.D. Iowa, 1972). In Crouse, failure of a joint review board to review any of the evidence contained in the "voluminous written submission of either party" was held to be violative of both due process and statutory dictates. 343 F. Supp. at 113.


62. 49 C.F.R. §100.56-.67.

63. 303 F. Supp. at 749. Note that the court's requirement that protestants use discovery procedures before being allowed to protest the lack of a hearing, may often place a great financial strain on protestants. If the shippers are located over a diverse geographical area, the financial burden placed upon protestants by the court may have serious effects on
The court acknowledged that *Movers Conference of America v. United States* established that the holder of a certificate of public convenience and necessity possesses a property right which is entitled to constitutional protection. Nevertheless, it held that plaintiffs had no "absolute right to an oral hearing . . . and they have not cited any cases which specifically hold that an application for a certificate of public convenience and necessity requires an oral hearing."  

Subsequent cases have agreed with *Allied* that procedural due process is not violated by the use of modified procedure. All of these cases emphasize the rule: *Unless material facts are in dispute, there is no right to cross-examination and confrontation.* In *National Trailer Convoy*, the court stated:

> In our view, the effect of the plaintiffs' request for cross-examination is to attack the weight of undisputed facts, not the credibility of the affiants. Clearly, the weight of evidence is arguable but due process does not require that this be done orally. We find no denial of fundamental fairness on the face of the Commission's modified procedure, nor in the present application of it.  

One case that is sometimes misread as holding that modified procedure cannot be used is *Drum Transport, Inc. v. United States*. The confusion stems from language in *Drum* to the effect that "they [the affidavits] are not sufficient, untested by a full hearing and cross-examination to prove inadequacy of service." A close examination of the case reveals just how misleading this language is. *Drum* involved a proposal by applicant for a new service from Mexico to specific points in the United States. The
grant was to be accompanied by the restriction that there was "no authorization to transfer property from one vehicle to another." The service would have therefore been unique; since none of the protestants had authority to operate in Mexico, as did applicant, their service to points in Mexico could only be accomplished through transfer at the border to other carriers. After examining the case under modified procedure, the Commission declined to include the proposed restriction. The reviewing court found that without the prohibition of transfer, applicant's service might be substantially similar to that of protestants. In such case the court felt that there should be some proof of inadequacy of service. In remanding the case, the court indicated that the record was not sufficient to uphold a broad grant absent the "prohibition of transfer" restriction, and it presented the I.C.C. with two alternatives. The Commission could either enter the restriction in applicant's authority in which case the grant would be perfected, or hold a hearing to determine the adequacy of service. The first alternative clearly involves an explicit approval of modified procedure. The second alternative does not represent a decision that modified procedure violates due process, but, rather, a finding that material facts as to the inadequacy of service were in dispute in this case, and therefore modified procedure was improperly employed.

The court decisions are correct. Despite the many practical advantages that accrue to applicant once modified procedure is utilized, the decision as to whether or not to employ it (i.e., are material facts in dispute?) is not inapposite to notions of "fair play." There are appropriate safeguards, which have been judicially approved and, if used properly, seem adequate. The primary safeguard is, of course, the provision that where material facts are in dispute, oral hearings will be held.

Further justification for modified procedure may be found in a recent Supreme Court trend indicating a reliance on a functional analysis in due process decisions. This analysis involves balancing the function of the safeguard in assuring a proper result, against the cost to society of providing the safeguard. Chief Justice Burger has pointed out that an overzealous search for constitutionally-rooted remedies leaves no room

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70. See text accompanying fns. 31-35.

71. It has been generally suggested that the extent of the procedural safeguards necessary is dependent upon what is at stake. See, e.g., Comment, The Growth of Procedural Due Process Into A New Substance, 66 Nw. U.L. Rev. 502, 547-550.

72. In Howard Hall Co. v. United States, 332 F. Supp. 1076, 1080 (D.C. Alabama 1971), the court found that "the proper safeguards for procedural due process exist under the I.C.C. modified procedure, which provides for a specific method of obtaining an oral hearing where material facts are in dispute."

for adjustment if a particular hearing process is too costly. \textsuperscript{74} Besides meeting the "fair play" standard, modified procedure can be justified by these functional standards as well. The cost, both financial and time wise, to impose a requirement of oral hearing upon all motor carrier applications before the I.C.C., whether or not material facts are in dispute, would be prohibitive. \textsuperscript{75}

It is extremely unlikely that protestors (or applicants) will be able to convince a court to overturn modified procedure on due process grounds. However, a protestant may be able to convince courts that the safeguard of an oral hearing should have been applied because material facts were in dispute. To best accomplish this he should (1) attempt, in his own affidavits, to controvert or deny as specifically as possible the factual material contained in opposing affidavits, (2) utilize discovery and deposition-taking procedures, if at all possible, and (3) at appropriate times continue to enter objections to the use of modified procedure so as not to waive any procedural rights.

2. \textit{Statutory Attacks}

Attacks on modified procedure based on Section 5 of the Administrative Procedure Act\textsuperscript{76} will not be sustained by the courts. The Supreme Court interpreted Section 5 in \textit{Wong Yang Sung v. McGrath}.\textsuperscript{77} Justice Jackson, speaking for the court, wrote:

\begin{quote}
We think that the limitation to hearings "required by statute" in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion.
\end{quote}

The court held that in deportation proceedings, due process required


\textsuperscript{75} According to Mr. J. Patterson King, Assistant Deputy Director, Section of Operating Rights, about 80 percent of motor carrier applications are now being decided under modified procedure. This raises some questions as to whether or not the "no material fact in dispute" test is being abused by the I.C.C. The courts should review such decisions wherever necessary. And the reviewing test to be used should be broader than the "substantial evidence" and "rational basis" test often used. \textit{See, e.g., Illinois C.R. Co. v. Norfolk & W.R. Co.}, 385 U.S. 57 (1966). Here the question for review is whether or not material facts are in dispute. There seems to be no reason why administrative expertise should be deferred to by the judiciary in such a basically judicial question.

\textsuperscript{76} 5 U.S.C. §554(a).

\textsuperscript{77} 339 U.S. 33, 50 (1950).
oral hearings. *Wong Yang* has been interpreted by federal courts as standing for the proposition that Section 5 of the Administrative Procedure Act applies only to agency action "which the agency statute provides must be preceded by a hearing." Courts dealing with the question of modified procedure in motor carrier applications have adopted this interpretation, and, since the statute does not require oral hearing, have held that A.P.A. does not compel the I.C.C. to conduct an oral hearing.

The suggestion has been made that when applications for motor carrier authority involve not more than three states, a line of cases indicates that modified procedure may not be employed. These cases apply Section 205 of the Motor Carrier Act which states:

The Commission shall when operations of motor carriers or brokers ducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgement of the Commission is desirable.

*Jones Truck Lines, Inc. v. United States* refused to require joint board referral when there were no material facts in dispute. The court in *Land—Air Delivery, Inc. v. United States* relied on *Jones* to state the converse: mandatory referral to a joint board would be maintained whenever (1) an application was protested and (2) material issues of fact were presented. The final building block was added by the decision in *Garrett Freight Lines, Inc. v. United States*. *Garrett* held that the protests placed the following issues in dispute: (1) Protestants' ability to transport the traffic in question, and (2) Public necessity for the service proposed by applicant. The court ruled that since there were material

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issues of fact in dispute in an application involving less than three states, the I.C.C. was required to refer it to a joint board under Section 305(a).85

The "jury is still out" as to whether or not the Garrett court realized what it was doing. Since the issues found to be in dispute in that case are issues that will be in dispute whenever protests to an application are filed, Garrett seems to require hearing before a joint board in all contested applications involving three states or less. Hearings would also appear to be required for larger area applications, along the same lines of reasoning. That the Garrett court was confused is evidenced by their statement that "we express no opinion on the propriety of . . . [modified] procedure on a reference to a joint board."86 Clearly, if material facts are in dispute, as the court felt there were, an oral hearing should be required. The Court's problem was a confusion of "issue" and "fact." It confused the dispute over issues of adequacy of existing service and public convenience with a dispute over facts presented by witnesses. Thus, while Garrett may appear to protestants to be a lightning bolt of good fortune in a sky full of bad luck, the bolt should not be relied on. It should fizzle out rather quickly, and do little damage to the "legitimacy" of modified procedure.

**CONCLUSION**

It is not the intention of this author to delve deeply into the controversy over deregulation of the motor carrier industry. The issue has been debated by writers with far more expertise and experience.87

Specific criticism of regulation has included price collusion and high

85. The court further ruled that neither the I.C.C. nor the parties involved could cure the jurisdictional defect by consent; Contra Howard Hall Company v. United States, 332 F. Supp. 1076, 1081, (N.D. Alabama 1971) where the court determined that "Hall waived any right that it had to insist upon a joint board hearing by participating in the modified procedure without complying."

86. Garrett, supra, note 7 at 1269, fn. 2.


costs, lack of service to small shippers, internal subsidization resulting in misallocation of resources, and lack of incentive for technological innovation.

Those who favor deregulation face a “dilemma” as to how to proceed, and indeed as to whether deregulation can be satisfactorily accomplished at all. While the more extreme opponents of regulation advocate complete deregulation, the more reasoned analyses admit that “the existence of regulation is perhaps best accepted as an established fact and the focus must therefore be upon identifying means of more effectively and equitably performing the regulatory power within the competitive environment of the market economy.”

Proponents of regulation have pointed to the valid accomplishments of regulation: (1) protection of common carriers from excessive competition, (2) encouragement of adequate investment in modern equipment, (3) improvement of standards of service, (4) avoidance of wasteful competition and investment, (5) maintenance of higher safety standards, (6) assurance of operating stability, (7) promotion of liability and responsible service, (8) promotion of rate stability, and (9) reduction of unfair rate discrimination.

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88. See, e.g., FELLMETH, supra note 87 at 126.
89. See, e.g., PEGRUM, supra, note 87 at 334.
90. Posner, supra, note 87 at 607, 609. Posner’s other criticisms of internal subsidization are (1) that it limits consumer choice and (2) that it is a crude instrument for assessing the needs of many elements of society. These criticisms, while applicable to public utilities, seem to have little relevance to the motor carrier industry.
91. See Ash Report, 72-74; Meyer, supra note 87 at 223. But, note that although the problem of lack of technological innovation is generally found in regulated industries, highway transportation regulation has less effect on innovation than other forms of regulation have. Gellman, Technological Changes in Regulated Industries, in CAPRON, ed., SURFACE FREIGHT TRANSPORTATION 166, 178-181 (1971).
93. See FELLMETH, supra note 87 at 131, 132. Felmeth argues that “no study contradicts” the rosy picture he has painted of unregulated, exempt transport. But see LUNA, supra, note 6 at 194 summarizing the findings of the Doyle Report: “increased highway hazards due to low safety standards, less financial responsibility (particularly in reference to cargo insurance), and less economic stability of participating carriers. In some instances, many rates fluctuate often and in an irregular manner, according to the supply of trucks and the column of shipments to be moved in a given locality. There is discrimination among shippers in regard to rates, and a tendency to cut rates in the face of hard competition, significantly slashing the income of exempt carriers.”
94. Meyer, supra, note 87 at 230.
95. See, e.g., FAIR, supra note 87 at 158 (1972). The I.C.C. has stated:
Entry control encourages investment and provides a practicable and effective tool by which those carriers may be required to live up to their common carrier commitments. I.C.C. REPORT, supra. note 17 at 33.
Modified procedure should provide both proponents as well as opponents of deregulation with some measure of solace. In a practical sense, applicants' burden of proof in motor carrier applications has been greatly reduced. As a direct result, ease of entry into the motor carrier industry has increased. This should serve somewhat to pacify those who demand deregulation in the motor carrier industry.

This accomplishment—easing of entry control—through procedural rather than substantive changes in I.C.C. regulation should also satisfy opponents of deregulation. Increased competition should result in better quality service to shippers; the absence of substantive deregulation means that small shippers and others may continue to depend on the stability of the nation's motor carrier industry.

Maintaining stability in the motor carrier industry has become more important in light severe that could result in a severe disruption of the national economy. Transportation accounts for 15 percent to 20 percent of our gross national product. Chaos and ruinous competition in the transportation industry would inevitably result in chaos in the national economy. Stability in the transportation industry can have an important, steadying effect on the economy in the crisis to come.

96. In 1963, 4,457 applications for operating authority were received. Out of this number, 2,657 were granted, in whole or in part. Interstate Commerce Commission, 77th Annual Report 44 (1963).

In 1972, 5,945 applications were received and 4,371 were granted in whole or in part. Interstate Commerce Commission Report, supra note 17 at 33.

In 1973, 5,240 applications were received and 4,299 were granted in whole or in part. Interstate Commerce Commission, 87th Annual Report 31 (1973).

The percentage of applications granted rose from 50 percent in 1963 to 73 percent in 1972 to 85 percent in 1973.

97. Fellaeth, supra, note 87 at 13.
NOISE POLLUTION AT AIRPORTS—A SERIOUS PROBLEM IN THE SEVENTIES

PETER M. LYNAGH*

The Wright brothers’ flight early in this century did not extend as far as the wingspan of a Boeing 747. Air transportation has grown rapidly since that December day at Kittyhawk. This growth has brought with it a host of benefits to users of air transportation and to the century as a whole. Along with the benefits, however, have come some problems. One of the most serious of the current problems is the environmental damage caused by aircraft noise.

Individuals living near airports are being constantly harassed by the noise of jets landing and taking off. Noise pollution has had the effect of placing a moratorium on airport construction, particularly in congested urban areas where new airports are vitally needed.1 Airport operations, airlines, aircraft and engine manufacturers, the Federal Government, State and Local governments and other organizations have become deeply involved in attempting to find solutions to the noise problem.

One environmental protection method employed has been the use of nighttime curfews. The Federal Aviation Administration (FAA), which operates Washington National Airport, bans the use of jet aircraft from 11 p.m. until 7 a.m. Problems arise when local communities attempt to use their police power to impose such curfews. This problem centers on the conflict between the Federal government as the organization which manages the navigable airspace in country and State and Local governments attempting to protect their citizens from noise pollution.

This paper will first explore the general area of noise pollution caused by the airplane. Next, noise control efforts by the air industry and the Federal government will be reviewed. Efforts by individuals to control noise pollution and to seek damages when harmed by noise will be covered next followed by noise control efforts by local and state governments. The right of State and Local governments to use their police power to place nighttime curfews at airports will be covered in detail. Focus of this use of police power will be on the May 14, 1973 Supreme Court decision in the City of Burbank v. Lockheed Air Terminal.2 In

closing, some suggestions will be made, in light of the Burbank decision, about what can be done to help solve some of the problems of noise pollution created by aircraft.

Noise Pollution

"Noise is any sound, independent of loudness, that may produce an undesired physiological or psychological effect in an individual and that may interfere with the social ends of an individual or group." Excessive noise in terms of high intensity for short periods of time or lower intensity for longer periods can cause destruction of some of the 17,000 irreplaceable hair cells of the inner ear.4

The "Report to the President and Congress on Noise" stated that there was evidence that exposure to noise can permanently damage the inner ear with resultant permanent hearing loss, created a temporary loss of hearing, interfere with speech communication, disrupt sleep, be a source of annoyance and interfere with the ability to perform complicated tasks.6 It has been suggested that noise can cause indigestion, heart disease, stomach ulcers, impaired vision, spinal meningitis and other diseases.6

Noise is generally measured in decibels (db) which range upward in logarithmic progression. What decibels cannot measure is the human response to noise. At a certain level of noise, one individual may go deaf while another will suffer no ill effects. Decibel measurement does not take into account the fact that high frequency noise is generally more annoying than low frequency noise. Perceived noise decibels (PNdb) and effective noise decibels (EPNdb) combine the decibel scale with other factors to better correlate sound with judged loudness or annoyance.

Noise Control—Air Industry

It has been recognized that aircraft noise is one of the main sources of noise pollution. Efforts to reduce aircraft noise pollution have been directed in two areas—quieter airplanes; and operational procedures which

take the noise away from the people.⁸

Quieter Airplanes—Major noise problems came with the jet airplane. Two of the most popular early jets, the Douglas DC-8 and the Boeing 707, were powered by Pratt and Whitney JT3D engines. High velocity exhaust caused a “jet roar.” Turbo fan engines were introduced to control the jet roar. Part of the air compressed by the fan moves through the primary part of the engine while the remainder bypasses the core and flows around. While the “fan jets” reduced the roar they increased the fan noise or “whine.” The JT3D engine is the major noise problem. These engines can be retrofitted to bring noise levels down to acceptable levels, but this would cost around $1,000,000 a plane to accomplish.⁹

Newer engines create less problems. The JT8D engines used on the shorter range airplanes like the Boeing 727 and 737 and the DC-9 have fan ducts which are integral with the engine case and exhaust into the tailpipe along with the primary jet gases, thus allowing for successful retrofit.¹⁰ The JT9D engine used on the wide-body airplanes like the Boeing 747, DC-10 and L-1011 have reduced fan noise by various techniques employed in the design of the engine, and are the quietest engines now in commercial use.

Operational Procedures—Various flying procedures have been employed which are designed to take the noise away from the people. Such procedures include increased holding and maneuver altitudes, flight patterns which avoid congested areas, increased glide slope and increased altitude for glide slope intercept, two-segment approaches, and flap retractions on take-off.¹¹ At Washington National Airport all airplanes landing and taking off must follow the Anacostia or Potomac rivers in order to avoid flying over populated areas.

Noise Control—Federal Government

The Federal Government’s interest in noise pollution goes back to the early 1950’s in the Eisenhower Administration;¹² however, no major legislation was passed until 1968. In 1968 the Federal Aviation Act of 1958 was amended giving the FAA the power to set standards for aircraft

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noise. The following year Part 36 of the Federal Aviation Act was passed which set specific formulas for measurement and evaluation of aircraft noise. Measurement is made at approach, take-off and sideline with 108 (EPNdb) being the maximum noise level allowable. These rules apply only to aircraft certified after December 1, 1967. Older planes, like the Boeing 707 powered with JT3D engines, and with an approach EPNdb of 121, are not affected.

The second major piece of Federal legislation was passed on October 27, 1972, "The Noise Control Act of 1972." This law requires the Administrator of the Environmental Protection Agency (EPA) to make a study of aircraft noise, such a study to come within nine months of the passage of the Act. Upon completion of the report, the EPA is to submit to the FAA proposed regulations for the control and abatement of aircraft noise.

The Noise Control Act of 1972 amends section 611 of the Federal Aviation Act of 1958 (49 U.S.C. 1431) requiring the FAA to set standards of aircraft noise based on regulations prescribed by the EPA. The FAA can modify the proposed regulations of the EPA, and it is the FAA which has the final say in setting noise standards.

It should be pointed out that two stricter noise control measures were not included in the Noise Control Act. One was a provision which would require the EPA to set noise standards. In the minority view of Senator Muskie, "...The Federal Aviation Administration has had this (regulation of noise pollution) since its inception. It has had a specific legislative mandate for the past four years. And its record is wholly inadequate." The second measure not included in the Noise Control Act was a provision for the amendment of FAR 36 so that no aircraft could land at a U.S. airport after January 1, 1976 with noise levels in excess of 108 EPNdb. This would have forced the retrofit of older plans like the 707. In addition, new aircraft manufactured after the date of enactment of the Act would have to have had a noise level, at a minimum, 15 EPNdb's lower than those currently in effect under FAR 36.

14. Ibid., Sec. 7 (a).
16. Ibid., p. 29.
Noise Control—Individual Action

Early law followed the Roman maxim that owners were entitled to the complete use of the airspace above their land. This maxim was followed prior to the airplane and was used for cases like overhanging trees. The question of ownership of property above the ground was still an issue when Congress passed the "Air Commerce Act of 1926." This act attempted to separate that part of the airspace which was for public use and that which was for the owners' use. In defining "navigable airspace" Congress said that this means "... airspace above the minimum safe altitude of flights prescribed by the Secretary of Commerce." The Secretary prescribed that air traffic must fly at altitudes of at least 1,000 feet above congested areas and at least 500 feet elsewhere. The question of ownership of the airspace was put to an end in 1946 when the Supreme Court rules in the United States v. Causby that ownership of the airspace had no place in the modern world.

If the ownership of the airspace is public property, what redress does the individual have against noise pollution? Four basic sources of relief are: A) Injunction; B) Trespass; C) Nuisance; D) Inverse Condemnation.

A) Injunction—Recourse in an injunction action would involve having the courts stop the construction or operation of an airport. There have been some cases where this has occurred, the most notable being the Swetland Case wherein the plaintiff succeeded in stopping the construction and operation of an airport near Cleveland. Injunctions have had limited success in stopping noise and in recent time have been almost nonexistent.

B) Trespass—"The Trespass notion is predicated on a physical invasion of the airspace over one's property." The Supreme Court decision in the Causby Case has made the collection of damages based on trespass very difficult. Thomas Causby was a chicken farmer who was located next to a military base and alleged that the noise scared his chickens to death and that his property had been taken without compensation. As mentioned previously, the court ruled that the airspace was public domain and that, therefore, there had been no trespass.

C) Nuisance—"In contrast to a Trespass, a Nuisance may arise with-

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19. Ibid., p. 574.
out a physical invasion if the activity unreasonably interferes with the use and enjoyment of the property." However, if a public or quasi-public facility like an airport is authorized by legislation, then, the question of "legalized" nuisance arises. This doctrine states that where such a facility is set up by legislation, damage claims are to be denied. Since the doctrine of "legalized nuisance" comes into play in most cases, nuisance has had very limited success in damage cases.

D) Inverse Condemnation—Under this defense, plaintiffs claim that the noise created by the operation of the airport violates their rights under the Fifth or Fourteenth Amendments of the Constitution. Noise takes the individual's property without paying for the loss. In the Causby case, the decision finally rested on the fact Mr. Causby had his property taken away and was entitled to compensation. Inverse condemnation has been the most frequent recourse for the recovery of damages due to noise.

Three questions arise with respect to this Constitutional taking. 1) What constitutes a taking? The Supreme Court said in the Causby case that, "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

2) To whom is the plaintiff to go to collect his damages? Are the airlines the offenders? Are the airport operators the offenders? Or is the Federal government the offender?

This question was answered by the Supreme Court in Griggs v. Allegheny County. The Supreme Court said that the airport had taken the easement and that the plaintiff should look to the airport operator for relief.

3) Is there a taking if the airplane does not actually fly over the property? In Batten v. United States the Court rules that there was no taking if there was no overflight. Federal Courts still adhere to the position that there will be no award of damages unless there is a physical invasion of the airspace. Some states have not adhered to the Batten conclusions, the most notable case being Thornberg v. Portland. Here the Court ruled that the property was less desirable, not because of the plane flying over, but because of the noise. Plaintiffs were entitled to damages where their property was taken because of aircraft noise, and

27. U.S. v. Causby, 328 U.S. 266.
the exact position of the airplane did not matter.

The individual's recourse against noise pollution caused by airplanes landing and taking off seems to be to seek damages against airport operators, based on inverse condemnation, and usually only when there is a direct overflight.

Communities have attempted to protect their citizens by using their police power to force the airport operator to control noise pollution. In the exercises of their police power, the local governments run the risk of conflicting with the Federal government and its powers under the Commerce Clause and Supremacy clause of the Constitution.

Noise Control by Local Government

Local communities, states and municipalities have at various times attempted to exercise their police powers to control airport noise. In taking such action, the question that always arises is whether local communities are acting in an area which has been preempted by Congress. In essence, the conflict is between the local communities and their right to protect citizens from noise and the right of the Federal government to control and regulate commercial aviation. The legal situation can be delineated by looking at three recent cases.

Cedarhurst—In Allegheny Airlines v. Village of Cedarhurst, the village of Cedarhurst passed an ordinance forbidding air travel at less than 1,000 feet above the Village. Cedarhurst is located near John F. Kennedy (JFK) Airport in New York, and Allegheny Airlines plus nine other airlines, the Port of New York Authority, and the Air Line Pilots Association (ALPA) brought suit to declare the ordinance unconstitutional. The Court concluded that Congress did have a right to regulate air commerce and had been doing so since 1926, and that the Cedarhurst ordinance was unconstitutional in that it interfered with interstate commerce.

Hempstead—The issue in American Airlines v. Town of Hempstead was whether the town of Hempstead could pass an ordinance which set the maximum decibel tolerance for aircraft passing over the town going into or out of JFK Airport. Again, the Court ruled that such an ordinance placed an undue burden on interstate commerce and that as such was unconstitutional.

Hollywood-Burbank—In March of 1970, the City of Burbank passed an ordinance which prohibited pilots of pure jet aircraft from taking

31. 132 F. Supp. 871 (E.D. N.Y.); 238 F. 2nd 812.
off from the Hollywood-Burbank Airport between 11 p.m. of one day and 7 a.m. the next day. The ordinance also prohibited the operator of the airport, Lockheed Air Terminal, Inc., from allowing pure jet aircrafts from taking off during those hours.

Lockheed Air Terminal and Pacific Southwest Airlines brought suit to invalidate the city ordinance. The United States District Court in California ruled that "the federal government had so preempted fields of use of airspace and regulation of airspace and regulation of air traffic as to invalidate and preclude enforcement of such an ordinance." The lower court also said that there would be a "very serious loss of efficiency as to the use of air space if a national curfew were imposed," and ruled that the curfew violated the commerce clause of the Constitution.

In the lower court case the Air Transpor: Association of America was an intervening plaintiff and the FAA filed an amicus curiae brief in support of the plaintiff. The State of California filed an amicus curiae brief in support of the defendants.

Appeal was made by the City of Burbank to the United States Court of Appeals, Ninth Circuit. The Court of Appeals did not concern itself with the issue of interference with interstate commerce but centered on the issue of preemption. The lower court's decision was upheld as the Court of Appeals ruled "... that the preasiveness of federal regulation in the field of air commerce, the intensity of the national interest in that regulation, and the nature of air commerce itself compel the conclusion that state and local regulation in that area has been preempted." In October of 1972 the Supreme Court granted certiorari.

The position of the City of Burbank is set forth in the summary statement in their brief before the Supreme Court.

"The quality of our environment has deteriorated to such an extent that the freedom to live in an atmosphere of peace and quiet has been severely restricted. The "domestic tranquility" which the framers of the Constitution sought to promote is no longer with us, not only in the area of noise but also in other areas of citizen need.

The primary reason for this is that Congress has by and large ceased to be responsive to the will of the people. To a large degree needed legislation is under the control of committees of the House and Senate. Individual members of Congress can, by delaying tactics and other means, frustrate the passage of necessary legislation. Special interest

34. Lockheed Air Terminal vs. The City of Burbank, 318 F. Supp. 914.
35. Ibid., p. 927.
36. 457 F. 2nd 667.
37. City of Burbank et. al. v. Lockheed Air Terminal, Inc. et. al., United States Supreme Court, October Term, 1972, No. 71-1637.
groups, such as the airlines, appear to have an unusual ability to block legislation in the area of concern to them.

We, therefore respectfully urge this Court to re-examine the preemption and conflict doctrines as presently enunciated and take upon itself the burden of defining those areas in which States and local governments may properly exercise their police powers, and the Courts may act, notwithstanding a declaration of Federal preemption. It is suggested that a proper rule would be that such State and local governmental enactments, and Court applied restraints, would be valid, provided it is demonstrated that the enactment or restraint in question is reasonable and necessary under the circumstances. Such a rule would find adequate support under the Ninth and Tenth Amendments.\(^\text{38}\)

Lockheed Air Terminal based its contention that the ordinance was unconstitutional on three factors.

1. Preemption—The federal regulatory scheme meets all three tests for preemption laid down in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and subsequent cases. First, viewed in sequence, the 1958 Act, the 1968 Amendment, and the 1972 Noise Control Act constitute a complete and pervasive occupation of the fields of airspace management and the regulation of aircraft operations and aircraft noise. Second, the congressional statutes and regulations pertaining to management of the navigable airspace unquestionably touch a field in which the federal interest is dominant. Finally, it is clear that uncoordinated local regulation would produce a result inconsistent with the objective of federal law, which is to secure efficient as well as safe use of the navigable airspace.

The Burbank curfew ordinance intrudes into this exclusive federal domain. It would deny jet aircraft access to the navigable airspace for fully one-third of each day. As the district court concluded, the local imposition of curfews would cause a "very serious loss of efficiency" with the result that the statutory objectives would be "compromised" (C.L. 16, A. 404). Moreover, curfews would increase the already serious congestion problem and also actually increase, not relieve, the noise problem by pushing more flights into the periods of greatest annoyance.\(^\text{39}\)

2. Conflict—Lockheed claimed that there was a conflict between the Burbank ordinance and an FAA order which established a preferential runway system to curtail noise.\(^\text{40}\)

3. Commerce Clause—Lockheed contended that the ordinance would impose an undue burden on interstate commerce. Specifically, Lockheed


\(^{40}\) "Brief for the United States as Amicus Curiae," Supreme Court of the United States, October term, 1972.
contends that the Burbank curfew would lead to a nationwide rash of nighttime closings and would have a detrimental effect on the national air transportation system.\textsuperscript{41}

It is interesting to note that the Department of Justice filed a "Brief For the United States as Amicus Curiae" on behalf of the City of Burbank.\textsuperscript{42} The Department of Justice contended that: 1) "Congress did not intend to preempt local regulation of aircraft noise by means of night curfew ordinances applicable to airports within the jurisdiction of local governments."\textsuperscript{43} 2) "Burbank's ordinance is not in conflict with the tower chief's preferential runway order."\textsuperscript{44} 3) "The validity of the Burbank ordinance should be assessed on the basis of its specific impact on commerce rather than on the basis of the theoretical impact of nationwide curfews."\textsuperscript{45}

On May 14, 1973, the Supreme Court, in a 5-4 decision, ruled in favor of Lockheed Air Terminal.\textsuperscript{46} The Court based its decision on the issue of preemption and weighed heavily the Federal Aviation Act of 1958\textsuperscript{47} and its amendments and the Noise Control Act of 1972.\textsuperscript{48} The Court said that the FAA has been given broad authority to regulate air transportation and that the United States is to exercise sovereignty in the airspace.\textsuperscript{49}

The Noise Control Act of 1972 provides further evidence of the preemption by the FAA. The FAA is to publish proposed rules on noise control based on regulations proposed by the EPA. The Supreme Court said that the act "... reaffirms and reinforces the conclusion that the FAA, now in conjunction with EPA, has full control over aircraft noise preempts state and local control."\textsuperscript{50} This preemption, the court said, was not written into law but was implied. \textit{Rice v. Santa Fe Elevator Corp.}\textsuperscript{51} said that preemption occurs when the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, or that Congress may touch on an area where the federal system is assumed in control.\textsuperscript{52} The Court felt that federal preemption is implied with respect to curfews to control noise.

In its decision the Court said that "If we were to uphold the Burbank

\begin{footnotesize}
\textsuperscript{41} Ibid., p. 12.
\textsuperscript{42} Ibid., p. 49.
\textsuperscript{43} Ibid., p. 53.
\textsuperscript{44} City of Burbank v. Lockheed Air Terminal, Inc., Supreme Court of the United States, No. 71-1637, May 14, 1973.
\textsuperscript{45} 72 STAT. 737, 49 U.S.C. 1301.
\textsuperscript{46} 86 STAT. 1234.
\textsuperscript{47} Supreme Court, No. 71-1637, op. cit., p. 3.
\textsuperscript{48} Supreme Court, No. 71-1637, op. cit. p. 9.
\textsuperscript{49} 331 U.S. 218.
\textsuperscript{50} Ibid., p. 230.
\end{footnotesize}
ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow.” In order to control the airspace, the FAA must have control over practices which prohibit the use of airports during various hours of the night.

In the dissent, Mr. Justice Rehnquist, writing for the minority, felt that Congress did not intend that the FAA should preempt the powers of local governments in the area of noise control. Justice Rehnquist feels that the “Noise Control Act of 1972” maintains the status quo and at the controlling point is congressional intent in passing the “Federal Aviation Act of 1958.” He felt that this act does not preempt the regulation of aircraft noise, and that “the history of congressional action in this field demonstrates . . . an affirmative Congressional intent to allow local regulation.”

The City of Burbank case would seem to put an end to the issue of the rights of local governments to place curfews on airports. It may not be appropriate to do this at the moment. First, Hollywood-Burbank is a privately owned airport. Based on the Court’s opinion, operators of the airport could enforce curfews if they desired. Since most airports are operated by local or State governments future legal questions will arise with respect to curfews placed by local or state operated airports.

Second, the Supreme Court addressed itself to the issue of preemption. It failed to resolve the issue of conflict between FAA rules and local regulations. Likewise, no decision was forthcoming on the question of whether curfews place an undue burden on interstate commerce.

For the moment, the results of the Cedarhurst, Hempstead and Burbank cases indicate that the job of managing the airspace lies with the FAA and that noise control procedures must arise from the FAA and not through local regulation.

Conclusions

Noise pollution is a major problem which faces the United States in the 1970’s. One of the most prevalent forms of noise pollution is aircraft noise.

For individuals, the most successful route in collecting damages has been through inverse condemnation. This procedure is costly and only partially successful. Individuals should support efforts to provide proper zoning at airports and, where the issue is a new airport they should work

53. Supreme Court No. 71-1637, op. cit., p. 15.
to see that the airport is isolated. New airports should be located where noise will have a minimal impact.

Local communities should work with the operators of airports and the airlines serving the community to reach agreements which control noise, yet allow for the reasonable operation of the airport. Such an agreement might follow the pattern set at Minneapolis-St. Paul where the airlines and the City agreed to nighttime plans which would require airlines to limit their flights and use limited-impact runways.

The Federal Government and particularly the FAA, should work on and support programs which are aimed at noise reduction. In setting standards as required by the "Noise Control Act of 1972" the FAA should set standards as strict as possible as long as they are both technically and economically feasible. The Federal government should promote a program of retrofitting older, noisy airplanes. If it is impossible for the airlines to absorb the cost of retrofitting a 707, then perhaps a Federal program should be initiated with funds to come from a ticket tax at all United States Airports.

Aircraft manufacturers and the airlines in the fight against noise pollution must continue to support programs which are aimed at noise reduction. Airlines should also work closely with communities and airport operators to work out noise reduction plans which are agreeable to all sides.

Airplane noise is never going to disappear completely. This would require the abolition of air transportation altogether. Such an option may have been feasible in the 1930's when the Court ruled in favor of Sweetland. Today, however, an airport is an integral part of any vibrant city. What is necessary is dedication on the part of all those involved and a willingness to cooperate in an endeavor which will maximize the societal benefits.
TRANSPORT REGULATION IN CANADA

IVAN R. FELTHAM

Introduction

Transport regulation encompasses safety, labour relations, working conditions, protection of the environment, and the attainment of other social and economic policy objectives. This paper focuses on regulation designed to implement the national transportation policy, which may be described for convenience of reference as "economic regulation," to distinguish it from other subjects of regulation. In focusing on economic regulation, one should not overlook the fact that other aspects of regulation have economic significance, but that is not the primary purpose of such regulation. Their primary purpose is to achieve certain minimum standards and they are usually directed specifically at the objectives being sought. The achievement of those objectives through the regulation can be measured and predicted with some degree of certainty. In the case of economic regulation, however, the relation between the techniques of economic regulation and the overall goal of providing an efficient and adequate transportation service is complex and unclear. It is the purpose of this paper to examine some of the problems in this connection.

The objective of the national transportation policy is the provision of (at least) adequate transportation to serve the broader national policies of industrial development and alleviation of economic disparities among the regions of the country. This involves investment in the facilities of transportation such as roads, ports and harbours, airports and navigation aids. It also involves provision by government, either directly or by subsidy, of necessary services that private enterprise will not provide based on an expectation of profit.

The government's duty to ensure an adequate transportation service to meet national and regional needs may be described as the promotional function. Compared with other aspects of the regulatory system, this is the broader and more basic element of total transportation policy. Within this framework, economic regulation, as we usually understand that term, is designed to constrain free business decision-making to avoid destructive competition, exploitation of monopolistic power and cutting corners with regard to service and safety.

The National Transportation Act¹ sets out the following goals for the

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¹ Revised Statutes of Canada 1970, c. N-17, as amended.
national transportation system. The system should be economic, efficient and adequate and achieve the best use of all modes at the lowest total cost in the interests of users and the economic well-being of Canada. The statute states also that competition is the technique chosen generally to achieve those goals and that they are most likely to be achieved when the modes are free to compete, when they bear the real cost of public facilities and services provided to them, when they receive fair compensation for public duties imposed on them and when rates are fixed so as to avoid discrimination among users and to offer no undue obstacles to trade in Canada and externally. The techniques are to be employed with due regard to national policy and to legal and constitutional requirements.

The Act imposes upon the Canadian Transport Commission the duty to perform its functions "with the object of coordinating and harmonizing the operations of all carriers engaged in transport by railways, water, aircraft, extra-provincial motor vehicle transport and commodity pipelines. . . ." The powers and duties of the Commission more specifically enumerated in the National Transportation Act and in the other statutes which it administers, particularly the Railway Act, the Aeronautics Act and the Transport Act, are to be carried out within these broadly defined principles. Indeed, the policy is so broadly defined that one might reasonably conclude that it offers very little, if any, guidance in the application of the more specific rules and powers assigned to the regulators. The specific powers, to the extent that they are clear and unambiguous, must be complied with. Indeed, they are the very definition of the general principles.

One might reasonably assume from the grand declaration of policy that the specific regulations for the several modes would exhibit a uniform pattern. However, one is led quickly to question whether there is indeed any national transportation policy as one notes the differences among the modes and their governing statutes in the regulation of rates and entry to, and abandonment of, particular transportation services. These are developed in some detail in this paper. The essential point to be made at this stage is that there is no apparent plan to accomplish the goals of Sections 3 and 21 of the National Transportation Act. It is questionable, therefore, whether the agency upon which is imposed the responsibility for implementing the policy has been given adequate authority to do so.

An active agency could strive toward a comprehensive policy by formu-
lating recommendations for new policy and law\textsuperscript{7} and by developing principles for uniform application subject only to the inflexible constraints of the statutory framework\textsuperscript{9} This has undoubtedly happened to some extent, but it is not apparent from a review of the published work of the Canadian Transportation Commission— the regulatory decisions and the annual reports. We now have five annual reports of the Canadian Transport Commission. They have shown some expansion but they are still slim pickings for anyone wishing to gain from them help in evaluating the operation of the regulatory system.

Two different approaches may be taken to a discussion of the system of regulation. One approach would review the transportation system with a view to identifying major problems, then determine what policies might best achieve a solution to those problems and evaluate the regulatory system and its operation against those policies. The other approach would consider the system of regulation as it presently exists and attempt to evaluate its efficacy in the light of facts relating to the operation of the system and the problems inherent in the system. The danger with the former approach is that it might not adequately take account of the experience reflected in the system as it presently exists. The danger with the alternative approach is that it has a tendency to limit one’s perspective and, particularly in the Canadian context, to embroil the reviewer in past experience, thus distorting what could otherwise be a contemporary and future-oriented review. I propose in this paper to look at the system as it exists and attempt to evaluate its efficacy having due regard to stated and implicit economic and social policy.

This paper generally attempts to relate specific rules to general policy, and to evaluate the processes by which policies are translated into action and applied to particular cases and problems. From this evaluation will arise questions and criticisms of the fundamental policy itself. A policy that does not work is not satisfactory, that is, a policy has to be evaluated in the light of the details of its application. A general statement of policy by itself does not suffice because all such general statements assume some effect or effects. On close examination of the results of the application of the policy, the assumptions on which the policy rests may be shown to be not well founded.

This paper is not intended to be a comprehensive analysis of economic regulation of transportation in Canada. It is a selective analysis of certain problems which reflect my assessment of priorities and the legal content of the problems.

\textsuperscript{7} See Section 22 of the National Transportation Act.
Regulation of carriers or traffic

Transportation is not an end in itself. It is a service; it serves the purposes of moving goods and people from point to point. For this discussion, let us concentrate on the movement of goods. Goods are available in certain places and are needed in others. It is the movement of goods which is the basic economic phenomenon. The means of movement are secondary. If we follow this line of reasoning, we might conclude that economic regulation should concentrate on the movement of goods. In context, that would mean that price, service and conditions of carriage would be subject to uniform regulation for any movement. Such a system should tend to minimize the cost of regulation and insure that similar movements are subject to similar regulations in terms of cost and competitive effects.

The National Transportation Act and the related statutes regulate carriers. Only within that framework does the regulation bear on the movement of goods and people. As matters now stand, movements of goods are not subject to a uniform regulatory system. They are handled by some carriers and other providers of transportation service who are subject to one regulatory regime and by some who are subject to another as far as the essentials of price, service and conditions of carriage are concerned. The regulatory regime which applies to any movement of goods may be an accident of how a particular firm is organized. A multifaceted undertaking may be wholly subject to federal regulation; another inter-provincial carrier may use local cartage services, or interline with intra-provincial carriers subject only to provincial regulation. There are several aspects of the mix. One is the constitutional division of authority between the Parliament of Canada and the provinces, another is the “natural” division of authority and responsibility between those supervising the broader system and those supervising local services. No system will be simple or perfect because of the complexity of our geographical and political organization. A third aspect is the separate modal regulation even within federal jurisdiction. This aspect is amenable to greater coordination and uniformity.

Some aspects of transportation (for example, conditions of carriage) would appear to me to be more conveniently regulated if the focus were on the movement of goods. Every movement would be subject to a uniform set of conditions. Other aspects of regulation, perhaps entry of new highway carriers in any particular transportation market, may be more conveniently regulated as now where the focus is on the carrier rather than the cargo. In this case, the emphasis is on the provision of service in a geographical area; with regard to conditions of carriage, the empha-
sis is on the contractual relations between the shipper and the carrier without regard to the question of competition in the transportation market although the existence of competition may well have an effect on the conditions of carriage the carrier attempts to impose on the shipper.

The subject of regulation, that is, whether the focus is on the movement of goods or on the operation of providers of transportation services, has a large constitutional aspect. But, in addition to that, it still remains a fundamental consideration and should be reviewed, as far as possible, apart from the constitutional division of power in Canada. On such review, it might appear that some aspects of regulation are appropriate for uniform national regulation and also that the constitutional power exists or a system can be agreed upon between the provinces and the federal authorities, and other subjects of regulation might be dealt with differently to reflect the different needs to which they relate.

**Uniformity and coordination of regulation among the modes.**

A fundamental question that arises from a review of the Canadian statutory package is, to what extent should the several modes be subject to a set of uniform principles? As noted before, the specific statutory directives to the Transport Commission are not at all uniform, although all modes and the distinctive services provided by those modes are part of a single system with a single goal, namely, the provision of economic, efficient and adequate transportation service in Canada. Of course, some service capabilities are peculiar to particular modes. One does not conceive of moving Kootenay coal to Roberts Bank by aircraft nor is the bus likely to be regarded as an alternative mode for air passenger service for business travellers from Toronto to Vancouver. But, the bus is clearly competitive for some users of passenger service even over very long distances and many commodities which only a few years ago were not moved by air except in the extreme circumstances where no alternative modes were available (as in the far north) may now move by air because of the peculiar advantage of speed. Fresh fruits and vegetables are perhaps a good illustration of this potential. It is, I suggest, consistent to continue to think of bulk movements by rail and water as special problems at the same time as we consider the integrated use of the rail bed and water facilities for other aspects of freight and passenger service. I believe we are compelled to establish a perspective which is comprehensive of all aspects of the transport system, rather than focusing first on the special conditions and the peculiar problems of each mode and, from that starting point, moving toward a more comprehensive view. Each approach or perspective may achieve the same results, but I believe the broader ap-
proach is more likely to assist us in a contemporary and forward-looking review. Certainly, we would appear to know better what we are doing if we were to develop a comprehensive transportation code within which special rules could be framed as required rather than persisting with the scissors-and-paste job which characterizes our present statutory package.

*The structure of government—the role of an "independent tribunal"
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Parliament habitually delegates to the executive arm of government substantial powers to make laws (usually referred to as regulations) within the framework of a statutory mandate. Such regulation-making authority is never delegated to the courts (except perhaps with regard to some procedural matters). The "independent tribunals" within the structure are in many respects more closely akin to the executive branch than to the judicial, although they are often referred to and thought of as quasi-judicial tribunals. The governing statutes often delegate to such tribunals the power to make regulations as well as the authority and responsibility for determining issues in a quasi-judicial fashion. The Canadian Transport Commission is one of the tribunals to which such power and responsibility is assigned. The subject of separation of powers is, of course, a complex field by itself. The reason for referring to it in this context is to ask the question whether the utilization of a quasi-judicial or independent tribunal for the range of authority and responsibility assigned to the Transport Commission is the most effective and satisfactory method of implementing a dynamic transport policy.

It is often stated that there should be a clear-cut distinction between judicial and executive or administrative functions. The difference between the two is sometimes described as a narrow line. This is a fallacy. There is in fact no line at all. Most functions within the sphere of economic regulation are a mix of judicial and executive functions. Nor is it demonstrated that the mix of functions is bad. Those who conclude otherwise with regard to the operation of independent boards base their view on assumptions about the difference between administrative and adjudicative functions which are not borne out by experience. The fact that some boards may have performed inadequately, or less well than hoped or expected, is not proof that boards staffed by more imaginative, skilled people would not have performed better. Having due regard to the practicalities of staffing all responsible positions, we must distinguish those problems from others inherent in the structure itself.

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9. Similar discussions now rage about the Competitive Practices Tribunal proposed in
Examination of the role of the Canadian Transport Commission involves a double-barrelled question: how much independence does the statutory structure contemplate? And, to what extent if any does and should the Cabinet or the Minister of Transport direct policy? The statutes (Aeronautics Act, National Transportation Act, Railway Act and Transport Act) assign responsibilities and powers to the Commission. These include not only the power of decision in individual cases, but also a relatively broad power to make regulations. But, every decision of the Commission, whether on an individual case or on a general regulation, is subject to review by the Cabinet which may act either on complaint or of its own motion. In effect, the Cabinet is given the statutory authority to reach out and substitute its own view for any action of the C.T.C. That the Cabinet has exercised this power sparingly still leaves the obvious question as to the extent to which the Transport Commission and its predecessors felt obliged to be responsive to declared government policy. Further, an appeal may be taken to the Minister of Transport in certain cases involving a decision of the Commission in connection with an individual license.

These provisions for appeal and review by the Minister and/or the Cabinet undoubtedly reflect the basic conviction that the development of national transport policy, both in general terms and in particular cases, is a matter of the highest importance and should not be totally delegated by the government. This being the case, is it desirable to preserve the impression of independence? Would it be preferable to recognize the Commission for what the statute makes it, namely a branch of the executive arm, albeit one with important and far-reaching responsibilities? In practice, the Commission appears to operate independently with regard to a wide range of its work (as in the railway passenger service decisions), yet express itself to be very concerned to implement stated government policy rather than develop its own opinion, as one might expect having regard to the statutory duty of the Commission, with regard to regional air services.

Another model for decision-making is to give a tribunal independence subject only to judicial review to contain the decisions of the tribunal within its proper sphere of discretion. Such a tribunal might be more

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10. N.T.A., s. 64 (1).
11. Ibid., s. 25.
12. See the Nordair and Transair decisions, March 9, 1970, decision serial no. 2954, and February 24, 1969, decision no. 2689.
inclined to strike out on its own and to formulate long-run policies. Issues before such an independent tribunal might be the subject of representation by both federal and provincial governments. The tribunal would be the arbiter among opposing views. But, is such independence desirable for the wide range of responsibilities of the C.T.C.? Is it practicable or desirable to divide the functions relating to transport between adjudicative and administrative? The model of the regular courts is not instructive. It has long been recognized that one of their greatest limitations is their inability to innovate with regard to matters of general public policy, and the field of economic regulation is perhaps the leading illustration of this.

A distinctly different approach would be to eliminate the appearance of a division of function and to integrate the function of economic regulation directly into the ministry structure. One might ask whether the present division of function is not based on outmoded notions and fears of political buccaneering. What greater chance of impropriety, or what greater chance of not reaching the "right decision", is there under the present structure which requires the C.T.C. to rule on rail abandonment, or air service rationalization, than would be the case if the decisions were made by the same people working directly within the Ministry of Transport? What purpose does the "independent" tribunal play in these matters? Is the present structure just as effective as any other?

An anomaly in the Canadian structure is that while the Ministry of Transport has broad responsibility for planning and developing an adequate transportation system, a number of the direct-promotion functions of the system are assigned to the Canadian Transport Commission, for example, the determination of abandonment of passenger rail services and railway branch lines. The C.T.C., on finding actual loss, has the power to order continuance of the service or permit abandonment. Upon ordering continuance of the service, the operator becomes entitled to a subsidy—100% in the case of branch lines and 80% of the loss in the case of rail passenger service (except commuter service). Yet the Ministry has the fundamental responsibility for the provision of basic facilities—ports and harbours, airports, etc. How does the provision of a railway branch line to serve the communities thought to need that service differ from the provision of an airport or seaport to serve other communities? There seems no logical distinction.

One can conceive of the role of the Transport Commission as being that of orchestration and administration of competition (including potential competition). This assumes that there is a desire on the part of private entrepreneurs to offer additional service, that there is competition and that it is necessary to regulate competitive practices and entry into the
several transportation markets. Provision for the supervision of all non-competitive service, including the basic decision as to whether to provide a subsidy, might be the responsibility of the Ministry. An operation conducted by a private operator, but on subsidy, would be treated the same as other private operations. But, is the distinction viable for the peculiar mix of public and private enterprise in the Canadian transportation system?

Another question with regard to the governing structure is whether an adequate establishment has been provided for the C.T.C. to do the job assigned to it. This again is a large and complex topic, but one is left wondering whether scarce resources are not being dissipated over too many different branches of the federal government's structure relating to transportation. For example, it is not obvious to the outsider what the relative roles of the Transportation Development Agency and the Research Branch of the Canadian Transport Commission are to be. One notes that the National Transportation Act assigns extensive research responsibility to the C.T.C. To what extent has this been superseded by the Ministry reorganization?

Problems of the Canadian Constitution—division of legislative power—cooperative federalism

This is one of the fundamental problems in the development of a rational regulatory structure. As noted before, some of the problems are inherent in the geographical dispersion of Canadian cities and centres of economic activity which need to be joined by the transportation system. There are inherently local-interest matters and inherently national questions. There is also the over-riding consideration of the division of authority between Ottawa and the provinces.

In strictly legal terms, the constitution gives to the federal Parliament adequate scope to regulate the national transportation system including highway carriers. The jurisdiction to regulate highway carriers has, however, never been assumed and regulation by provincial transportation boards continues under the authority delegated to them by the Motor Vehicle Transport Act of 1954. Notwithstanding the constitutional division of authority, there is substantial provincial interest in air, rail and water service and considerable expressed reluctance to give up control of truck and bus service. To what extent and how should this interest and

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concomitant responsibility be reflected in the regulatory system?

The problem of the division of authority requires a bold imaginative approach. It is not peculiar to the transport field, nor is it more acute in that field than it is in others. In all fields of economic regulation, the same problem is inherent—how to integrate provincial and regional interests into an overall national policy. In functional terms, the question is often seen as one of provincial participation in the decision-making process. The problem is alive in connection with broadcasting, particularly community television and cable services, regulation of securities issues and securities dealers, and probably will become a more active issue in connection with energy, foreign investment and competition policy. Indeed, the problem is inherent in the development of basic economic policy. An illustration of current importance is the insistence by the Government of Ontario that there should be established some joint economic machinery to develop and coordinate policy.

The provinces have a special interest in transport regulation which is not satisfied by the present structure. On the one hand, they have exclusive yet uncoordinated control of for-hire motor carriers. On the other hand, they have virtually no control of the rail, air or water service. The British Columbia Railway and the Ontario Northland Railway are notable exceptions. If federal jurisdiction over trucking were asserted, the greater portion of inter-city trucking would fall under federal control. Although the validity of the proposition that the provinces are better able to regulate this service than a board appointed by the federal government is questionable, there is no doubt that the provinces (at least some of them) want a substantial role in the regulatory structure and, in my view, this should be accomplished by some form of cooperative federalism, but subject to the paramount control of federal law, and to the overriding authority of review by the federal cabinet if that type of review power is to be retained. Provincial interest in regional development within a province could be adequately satisfied by the provinces' power to attract carriers by subsidies where appropriate, and even to provide the carrier service. Illustrations exist today to demonstrate the viability or the desirability of such provincial activities. Over a period of a relatively few years, the road networks have been considerably improved and expanded. The British Columbia Railway has been substantially expanded to comple-

15. An Ontario study estimates 75% to 90% of the larger commercial carriers in Ontario, accounting for 95% of the for-hire traffic revenue in the province, although 75% of the tonnage accounting for the 95% figure moves wholly in Ontario. “An Appraisal of the Potential Impact to Ontario from the Implementation of Part III of the National Transportation Act”, prepared by The M.W. Menzies Group Limited for the Department of Transportation and Communications, February, 1972, pp. iii, VII-14.
ment the rail and road service in the province. The Ontario Northland Railway is maintained to provide a service in north-central Ontario.

Probably the best compromise to satisfy all governmental interests is some sort of joint-board arrangement under which some members of the board, nominated by the respective province or region and other members would deal regularly with problems in all parts of the country. The value of provincial nominees would be that their work would be heavily concentrated on questions pertaining to their own region while other members of the board would be involved in questions from several parts of the country and would therefore be more inclined to take a broader national view. The provincial nominees might also have responsibility for administration of the regional offices of the board.

The effectiveness of a cooperative board is related closely to the question of its independence. If the members of the tribunal are not independent of the governments, whether federal or provincial, there is serious risk that the work of a joint board would be a constant cause of friction and might be stymied by continuing differences in the instructions and policies of the respective governments to which the members were responsible. One solution would be to make a tribunal independent of both levels of government, subject only to the statutory framework of its authority and to judicial review with regard to the extent of its jurisdiction. Such a tribunal would have wide power to regulate the transport system. The question would still remain, of course, as to what is the appropriate scope of work for such a regulatory tribunal. Is it merely to be confined to orchestrating and administering competition or is it to extend to the broader questions of guaranteeing essential service as in the case of railway branch lines and railway passenger service?

A number of different arrangements for cooperation between federal and provincial governments might be considered. For systematic coverage of transportation services, some arrangements might involve some delegation of federal jurisdiction to provincially appointed boards (as under the Motor Vehicle Transport Act) and some delegation of provincial jurisdiction to federally appointed boards. A possible difficulty with an agreed arrangement between Ottawa and the provinces is that any person adversely affected by a decision under such a system would be free to attack the constitutional validity of the regulation or the decision. It is not clear that legislation could be framed sufficiently precisely to achieve a functional division of responsibility between provincial and federal agencies which does not follow the constitutional division of

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power. In other words, there may be a point at which cross-delegation to boards either by the provinces or under federal law might be defective. In the field of transportation, having regard to the basis for federal regulation, the risk is minimal and should not, in my view, deter attempts at a cooperative arrangement. If such cooperative arrangements were attempted for foreign-ownership policies, energy and natural resources, broadcasting, securities regulation or other aspects of economic regulation, the problem might be more acute.

An attempt to extend federal jurisdiction to the operations of forwarders and brokers might well involve the necessity of relying on the trade and commerce power rather than the works and undertakings power of Section 92 (10) of the British North America Act. The courts have generally given wide scope to federal jurisdiction under the latter power.  

There has been some indication recently of a judicial willingness to reconsider the extent of the trade and commerce power. It is likely that there will be further development of the jurisprudence relating to the trade and commerce power as the federal government proceeds with its new competition policy and the policy respecting foreign ownership is developed.

Regulation and adequate service—curtailment and abandonment of service

The central question under this heading is, what is the relation between economic regulation and maintenance of an adequate transportation system? The subject matter involves different considerations from those dealt with in the next section of this paper, namely, the regulation of

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19. The relevant recommendation of the Special Joint Committee of the Senate and House of Commons is notable but unhelpful ("The Constitution of Canada", Report of the Special Joint Committee of the Senate and House of Commons, 1972, pp. 84-85). The Committee recommends (Ibid.) that "Parliament should have adequate power to control the instrumentalities of trade and commerce". The Committee's discussion of the scope of the concept of trade and commerce is far from clear, but the Committee appears to lean in favour of federal regulation of the inter-provincial and inter-national movement of goods and of the system that performs that movement. At the same time, the Committee recognizes the importance of provincial control over intra-provincial trade and commerce. The fact that transportation undertakings typically serve both intra-provincial and extra-provincial trade and commerce is not considered. The problem remains—how to accommodate federal and provincial interests in the regulatory structure. This problem is not materially assisted by the recommendations and discussion of the Special Joint Committee.
competition, which I have referred to earlier as the orchestration and administration of competition. The latter presupposes the desire on the part of private entrepreneurs to offer transportation services and the essential questions are, to what extent should entry into markets be limited and competition among transport operators in a market controlled to prevent what would otherwise be adverse effects of unrestrained freedom of business decision-making? With regard to the maintenance of an adequate system, the central questions relate to the provision of basic facilities by government, either directly or by contract, and restraint on private entrepreneurs or managers from deciding to reduce or eliminate a service which is not returning a profit satisfactory to the operator. The decision on the part of the subsidizers to maintain, for example, a rail service when it would not otherwise be competitive with road service, the latter not receiving a subsidy, represents a public policy decision regarding the maintenance of competitive service but does not involve regulation of competition in the sense in which it would apply if both rail and road service were profitable and the operators were free to indulge in price and other types of competition. The relation between the two chapters of discussion is complex, particularly in respect of the obligation which might be imposed upon the operator of a profitable business to continue unprofitable services or marginal services as a quid pro quo for the right to engage in the profitable business. Recognizing the inter-relation of all aspects of transport regulation, one can make a substantial distinction between the focus on maintenance of an adequate system and the focus on regulation of competition.

The legal questions related to abandonment of service include the following: (1) definition of actual loss, including analysis of the costing order as it applies to railway branch line and railway passenger services, and (2) comparison of the considerations to be applied with regard to the various modes to determine whether abandonment of a line or a service should be permitted or denied. The Railway Act directs the Commission to determine, with regard to branch lines, the public interest and stipulated eight considerations to be reviewed in that connection, namely: (a) the actual losses that are incurred in the operation of the branch line; (b) the alternative transportation facilities available or likely to be available to the area served by the branch line; (c) the period of time reasonably required for the purpose of adjusting any facilities, wholly or in part dependent on the services provided in the branch line, with the least disruption to the economy of the area served by the line; (d) the probable effect on other lines or other carriers of the abandonment of the operation

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20. The costing order will be discussed infra in connection with rate competition.
21. Section 254(3).
of the branch line or the abandonment of the operation of any segments of the branch line at different dates; (e) the economic effects of the abandonment of the operation of the branch line on the communities and areas served by the branch line; (f) the feasibility of maintaining the branch line or any segment thereof as an operating line by changes in the method of operation or by interconnection with other lines of the company; (g) the feasibility of maintaining the branch line or any segment thereof as an operating line either jointly with or as part of the system of another railway company by the sale or lease of the line or segments thereof to another railway company or by the exchange of operating or running rights between companies or otherwise, including, where necessary, the construction of connecting lines with the lines of other companies; and (h) the existing or potential resources of the area served by the branch line, seasonal restrictions on other forms of transportation therein and the probable future transportation needs of the area.” With regard to the abandonment of passenger service, the Railway Act\(^2\) directs the Commission to determine the public interest but lists only four matters to be particularly reviewed, namely: “(a) the actual losses that are incurred in the operation of the passenger-train service; (b) the alternative transportation services, including any highway or highway system serving the principal points served by the passenger-train service, that are available or are likely to be available in the area served by the service; (c) the probable effect on other passenger-train service or other passenger carriers of the discontinuance of the service, or of parts thereof; and (d) the probable future passenger transportation needs of the area served by the service.” The specified items are not exhaustive and there is probably therefore little significance in the catalogues except so far as they relate to the special features of branch line and passenger service operations. No criteria are stipulated with regard to the curtailment or abandonment of freight service. The power of specific regulation of railway service would presumably apply.

The Aeronautics Act does not contain any specific provision regarding abandonment of service. Control is exercised by requiring all carriers to obtain approval of their service plans, and by the requirement of the Air Carrier Regulations that no service be suspended or abandoned without approval of the Air Transport Committee.\(^2\) Nor is there anything in the Transport Act dealing with the abandonment of regulated water service. It is directed to the regulation of service which an operator wishes to offer, not specifically to the maintenance of an adequate transportation system.

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22. Section 260 (6).
23. Air Carrier Regulations, SOR/72-145, May 5, 1972, s. 7 (6).
With regard to highway carriage, the public Commercial Vehicles Act of Ontario, for example, contains no provision regarding the abandonment of service, nor is there provision for regulations in that respect. However, the Ontario Highway Transport Board may review a licence and failure to maintain adequate service would be a ground for cancellation or suspension. There is apparently nothing to prevent an operation from going out of the transportation business altogether. The statutory and regulatory provisions regarding busses are parallel. This reflects the practical consideration that a bankrupt cannot be forced to continue and an unwilling operator is not desirable. The laws of other provinces exhibit a variety of provisions. The uniform regulations proposed by the Federal Provincial Advisory Council on Motor Carrier Regulation would require a carrier to have approval of abandonment or substantial curtailment of service. No criteria for determination of the issue are prescribed.

Another question which should be noted is whether total abandonment of service should be treated according to the same principles as curtailment of either freight or passenger service. The latter might be thought of as more a matter of convenience, while the former may be a matter of "life or death" to a community or a business. Considering the availability of alternative modes of transport, and the critical factor of transportation costs (not only price but also quality and frequency of service) to a business, it seems to me that the pertinent principles are largely of general application. Again, one should note that the basic concern is to maintain an adequate transportation system and "adequate" must surely bear some relation to the importance of the service to the user.

Regulation and competition

It will be noted that the maintenance of an adequate transportation system, discussed in the last section of this paper, is fundamental goal of the system. Competition, by contrast, is seen as the most effective instrument by which an economic and efficient system can be achieved. It is expected that it will also contribute to the maintenance of an adequate system at the lowest total cost and consistent with general public policy.

A basic consideration is the relation between the general competition policy as reflected in the proposed Competition Act (or in the existing Combines and Investigation Act) and control of competition in the

26. Draft uniform regulations were distributed to carriers and others for comment during December 1971.
27. Bill C-256, June 29, 1971.
“regulated industries”. Regulation and free competition may be seen as partners. What one partner is doing, the other need not be doing. Is it useful to consider whether “free competition” or “regulation” should be regarded as fundamental?\textsuperscript{29} One view is that the general competition policy should be regarded as the more fundamental building block in our free enterprise society. Direct regulation of the kind applicable to the transportation industry should be imposed only where the general policy of free competition cannot be relied upon to produce the desired results. In fact, a substantial part of our industrial activity is subject to direct economic regulation. Moreover, it can be argued with some persuasiveness that regulated monopolies or cartels may be just as efficient as firms operating under free competition. The general statement of transportation policy\textsuperscript{30} opts for free competition as the fundamental principle—but the specific provisions of the several statutes are not consistent.

\textit{Concentration}

It is said that too much concentration is likely to result in monopolistic prices and profits and arbitrary decisions regarding service. Is this a valid assumption if rates and service are regulated? In many markets, transportation services are not monopolized and competition is at least potential in all markets unless prevented by control on entry into the market. Before considering the application of competition policy with respect to concentration, one should attempt to establish a picture of the transportation industry in Canada with regard to its propensity for concentration and the anti-competitive effects which may be inherent in any such trend. At the one extreme, one may conclude that the industry is already so highly concentrated that it exhibits monopolistic tendencies; at the other extreme, one may conclude that there is plenty of real competition and no serious immediate danger of too much concentration. This analysis may be broked down and applied differently to the different modes. At the same time, we should consider present or potential inter-modal competition and present and potential competition by “private” trucks. An important element in the concentration of transportation services may be the activities of brokers and forwarders. Conglomerate mergers may require special attention. All of the foregoing may involve different conclusions for different transportation markets.

\textsuperscript{29} It is interesting to note in this connection the recent proposal of the Director of the Antitrust Division of the U.S. Department of Justice to replace much of the direct regulation now exercised by the Interstate Commerce Commission by application of the general antitrust laws.

\textsuperscript{30} National Transportation Act, s. 3
The National Transportation Act requires a transportation company subject to the legislative jurisdiction of the Parliament of Canada to notify the Canadian Transport Commission if it "proposes to acquire, directly or indirectly, an interest by purchase, lease, merger, consolidation or otherwise, in the business or undertaking of any other person whose principal business is transportation, whether or not such business or undertaking is subject to the jurisdiction of Parliament".\textsuperscript{31} The Commission is required to give or cause to be given such public or other notice of any proposed acquisition as appears to be reasonable in the circumstances, including notice to the Director of Investigation and Research under the Combines Investigation Act.\textsuperscript{32} If any person affected by a proposed acquisition or any association or other body representing carriers or transportation undertakings affected by such acquisition object to such acquisition on the grounds that "it will unduly restrict competition or otherwise be prejudicial to the public interest",\textsuperscript{33} the Commission is required to make an investigation and it may disallow any such acquisition if in its opinion "such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest".\textsuperscript{34} The disallowance power can operate only if the acquirer is within federal jurisdiction. It cannot be used directly to prevent acquisitions by trucking companies operating only intra-provincially, nor does it apply to Canadian or foreign acquirers who are not in the transportation business. Moreover, it does not appear to cover a holding company that is not itself directly in the transportation business.

It will be noted that the Commission may act under section 27 only if objection to the acquisition is made by certain specified persons or associations. It may not act itself in the absence of such objection; nor does inaction by the Commission or its failure to disallow an acquisition when objection has been received amount to approval of the acquisition. The National Transportation Act does in section 23 give to the Commission wide power to investigate acts of carriers which it thinks may prejudicially affect the public interest, but the purpose of the section seems to be confined to rate-making activity. Further, the specific mention of acquisitions in section 27 might be taken to exclude that subject matter from the operation of section 23.

Whatever the constitutional or other justification for the limited scope of section 27, the fact of the limitation has to be noted in assessing the effectiveness of the Commission's review power under that section. The

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31. National Transportation Act, s. 27 (1) \\
32. \textit{Ibid.}, s. 27 (2) \\
33. \textit{Ibid.}, s. 27 (3) \\
34. \textit{Ibid.}, s. 27 (4) 
\end{flushleft}
limited scope of section 27 is important because the result of the limitation is to bring under review by the Canadian Transport Commission only acquisitions by the named companies and not others. Therefore, a proposed acquisition by a company not now in the transportation business is clearly not covered, nor is it clear that the section covers acquisitions by a holding company, least of all a conglomerate.

The provisions of the National Transportation Act do not specifically derogate from the general effect of the Combines Investigation Act and the duties of the Director of Investigation and Research under that Act. Whether or not objection is received to a proposed acquisition of which notice is given under section 27, it appears that the Director of Investigation and Research is free to consider the acquisition as he would any other acquisition. Indeed, it is his duty to do so. The only objection the Commission may consider is that the proposed acquisition "will unduly restrict competition or otherwise be prejudicial to the public interest". Although the Commission is not required to disallow such acquisition even if in its opinion such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest, it is likely that a decision by the Commission not to disallow an acquisition will in most cases be in accord with the view of the Director of Investigation and Research. However, this may well not be the case where the transportation company is part of a conglomerate merger likely to be restrictive of competition in other aspects of its business.

Regulation of acquired companies.

One of the criteria normally applied to determine whether the public convenience and necessity indicates the desirability of granting operating authority is the fitness of the applicant to operate the undertaking. This may involve equipment, financial stability, and moral character. Another reason for concern by the regulator about the transfer of an operating authority lies in his general concern about the quality of the industry as it may be affected by reduction in competitive strength and tendencies toward monopolization. The regulator may therefore have a two-fold concern in any transfer or merger of an undertaking, of the corporate structure within which, in effect, is synonymous with the undertaking. Without the licence there can be no undertaking insofar as the licensed operation is concerned. The regulator may be concerned about any change in the management or control of an undertaking or operation. Any such change may in effect be a transfer of the licence from one person or group of persons to another. At the time of transfer, or in
anticipation of it, the regulator may wish to exercise control either by prohibiting the transfer or by subjecting the transfer to certain conditions. Control may also be exercised from time to time by review of licences.

A licence is issued in the name of a person and it is therefore relatively easy to control any change in the name of the person to whom the licence is granted. However, the control or management of the licence may also change in fact where the licensee delegates the operation to some other person to be operated in the licensee’s name, or where the control and management of the licensee, being a corporation, is changed by sale or other transfer of the shares in the corporation. The corporate vehicle is an immensely flexible instrument of business organization and the types of changes of control, direct and indirect, which may result from manipulation of the corporate vehicle are complex. This is so even in the case of corporations or groups of corporations held by a relatively small number of people, with no shares traded publicly, and is even more so in the case of corporations with publicly traded shares.

The Aeronautics Act provides that the Commission may make regulations “prohibiting the change of control, transfer, consolidation, merger or lease of commercial air services except subject to such conditions as may by such regulations be prescribed”. The Air Carrier Regulations adopt the provisions of Section 27 of the National Transportation Act for all proposed changes of control, consolidations, mergers, leases or transfers of commercial air services. In effect, the “conditions” prescribed by the regulations are that the C.T.C. not disallow the transfer. Thus the power to prohibit, transfer, etc., “except subject to such conditions. . . .” is boot-strapped by the regulation into a general power to prohibit transfer.

An alternative interpretation of the regulation-making power is that it is not intended to give the C.T.C. general power to prohibit transfers, but only to attach to transfers such conditions as may be deemed desirable to protect the public interest or to ensure that the public convenience and necessity will continue to be served after the transfer. However, it does not appear to me to be sensible to talk about the conditions which may be imposed unless one also talks about the possibility of prohibiting the transfer outright. There is, of course, theoretically a difference between outright prohibition and a prohibition subject to conditions, but if the types of conditions are not limited in any way, I doubt if it makes any practical sense unless the notion of imposing conditions is carried to its logical extent of also permitting complete prohibition. This is the interpretation reflected in the Air Carrier Regulations and their predecessor,

35. Section 14 (1) (1)
36. SOR/72-145, s. 19, 20.
the Commercial Air Services Regulations,\textsuperscript{37} which, as far as I am informed, have not been challenged on this point.

The power to regulate the transfer of control of motor carriers is conferred upon the provincial regulatory agencies by some of the provincial statutes. For example, the Ontario Public Commercial Vehicles Act prohibits the transfer of an operating licence without approval\textsuperscript{38} and

\begin{quote}
The Board may in its discretion require the directors of a corporation that is the holder of an operating licence to present to the Board for approval any issue or transfer of shares of its capital stock, and, where, in the opinion of the Board, a substantial interest is issued or transferred, such issue or transfer shall be deemed to constitute a transfer of all operating licences held by such corporation, and the corporation shall forthwith pay the fees prescribed by the regulations for the transfer of operating licences.\textsuperscript{39}
\end{quote}

It will be noted that the section does not require notification of the Board of a proposed transfer. Although the section is far from clear, it appears to give the Board power to disapprove any transfer of shares. Where the Board considers that a substantial interest is being transferred, fees applicable to the transfer of operating licences are payable. Looking at the section as a whole, one might infer that it was intended primarily to give the Board power to disallow only transfers of a substantial interest\textsuperscript{40} which would be tantamount to the transfer of an operating licence. In any event, it is not broad enough to cover holding companies, nor does it deal with publicly traded shares.\textsuperscript{41} Data are not readily available (if at all) on which to base a systematic analysis of the practice of the Ontario Highway Transport Board with regard to acquisition of motor carriers within its jurisdiction.

\textit{Entry control}

The national transportation policy apparently envisages a single transportation system. Provision of an adequate and efficient transportation system at the least total cost is the goal. One might reasonably assume

\begin{flushleft}
\textsuperscript{37} SOR/65-1440, as amended.
\textsuperscript{38} Revised Statutes of Ontario, 1970, c. 375, s 5(6) and 11
\textsuperscript{39} \textit{Ibid}. s 6
\textsuperscript{40} There is no guidance to the Board in the state or regulations as to what constitutes a "substantial interest."
\end{flushleft}
that to the extent that the several modes compete, or are potential competitors, the criteria upon which to decide whether new service should be permitted should be uniform. Water, truck and rail service may be competitive over a wide range of service. The rail system is in place and generally offers freight service to as many points as the companies would wish to serve under present circumstances. The range of water service is, of course, limited. Truck service, by contrast, might be the subject of expansion by new entrants to the field in practically every area served by rail and by the Great Lakes-St. Lawrence water service.42

Entry control assumes that someone wants to offer the service, that is, that there is either actual or potential competition. As noted before, the following questions are related, namely, abandonment or substantial curtailment of service and the grant of operating authority conditional upon offering service for which authority is not sought. Entry control by itself is a narrow concept. It is only a fraction of the total picture which includes providing service where it is needed, although no-one wants to offer it because there is no profit expectation. Abandonment is also a narrow concept because it pre-supposes that service is being offered which the operator seeks to abandon.

There are two basic questions: (1) why entry control? and (2) if entry control, on what criteria? Why entry control is essentially an economic question. The traditional justification is perhaps too well-known to bear repeating. The questioning of entry control is equally well-known. In the United States, the 1971 legislative proposals of the Department of Transportation have increased the tempo and temperature of debate with regard to trucking.43 If regulation can not be justified, we should not keep it. But, we do not know what would happen if it were eliminated.44 How does one balance the expected gain from deregulation against the risk of disruption of the system? With regard to trucking, one possibility is to try deregulation on a gradual basis. Some transportation markets surely do not need the protection of entry control. There is a sufficient number of firms willing and able to provide the service. How can we evaluate the argument that firms now providing that service need the protection of regulation to support their less profitable service elsewhere? Even if the proposition is accurate, is it desirable to perpetuate that cross-subsidization?

A new approach might short-circuit the regulation/deregulation arguments. For this purpose we must re-examine our fundamental concerns.

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42. I am focusing on the areas where competition is possible, or practicable; there are some areas served only by air, rail or water, as the case may be.
44. The English, Australian and Alberta experiences may indicate that entry control could be relaxed or eliminated without causing serious problems.
They are as follows:

1. Adequate service for transportation of goods and people, that is, a high quality, efficient service to facilitate efficient, competitive commerce.
2. The minimum infrastructure necessary to facilitate such high quality service.
3. Minimization of the adverse effects on space, congestion, air and noise.

A basic purpose of regulation should be directed to maximize utilization of facilities and minimize adverse effects. This may lead us to control the capacity offered by highway trucking services, (for-hire and private), the goal being the fewest trucks consistent with high quality service and not as at present a few for-hire operators free to operate as many trucks as they wish and no limit on private operators. We should discourage all inefficient use of the infrastructure and “private” trucks should pay identical user charges to those charged for-hire trucks. If we are going to continue regulation of entry, let us have a system geared to the fundamental issues, not a half-baked mix of differential user charges and nonspecific controls that grew haphazardly over the years.

One of the major problems in our society is the cost of roads and related facilities, the cost of congestion on those roads and the pollution of air and the high noise level. This surely leads to the conclusion that the basic need is to limit capacity to the amount reasonably necessary to carry traffic efficiently. It is argued that for-hire trucking is preferable to private trucking because for-hire trucking generally has a much higher load factor. If this is so, for-hire trucking probably represents a more efficient use of the investment in road and related facilities.

Entry control is variously based on “public convenience and necessity” and “public interest”. The criteria for the establishment of “public convenience and necessity” or “public interest” are nowhere definitively established. Nor has the accumulated experience of regulatory agencies resulted in the articulation of a well-defined body of principle. Included among the problems are the differences, if any, between public convenience and necessity and public interest. In any case, the question is, what onus is to be placed on the applicant to establish the basis for a ruling favourable to him? Does he have to show that existing service is inadequate? Is an opportunity to be afforded to the presently licensed carriers to add service to meet the needs sought to be satisfied by the applicant? Will a new licence be granted only when existing operators are unwilling or apparently unable to provide the service demanded by shippers or
passengers? In practical terms, the pressure for new entrants comes in the realm of air services and trucking.45

It is notable, too, that some applications to the C.T.C. illustrate a major interface between federal and provincial policy makers. Perhaps a leading illustration of this is the Air Ontario application which was rejected.46 The proposed operation was supported by the Ontario government. The Ontario government also supported the Ontario World air application for a charter service, which was also denied.47 The denial of the application by Burlington Northern to interchange traffic with Kootenay and Elk may also represent a similar interface in substance, although, the case itself was decided on a technicality and the decision of the C.T.C. has been overruled by the Supreme Court on the crucial point of law.48

Another special aspect of entry control and the regulation of competition involves the operations of brokers and forwarders. There is, first of all, in Canada a fundamental question about constitutional jurisdiction to regulate such operations. The issue raises squarely the question of the extent of federal jurisdiction under the trade-and-commerce power. By only a stretch of the imagination can the transportation-works-and-undertakings provision49 be used to support federal jurisdiction over brokers and forwarders who are not themselves providing the means of transportation except by contract with independent carriers. As matters now stand, they do, however, provide competitive service through a combination of local cartage with rail piggy-back. The underlying mode of transportation is subject to regulation, but the relations between the broker-forwarders and their shipper-customers are not directly regulated as are the relations between carriers and their customers. The field is a mix of considerations involving local cartage, inter-city trucking and other transportation services which needs to be harmonized with other aspects of regulation of the transportation system. The promotion of an economic and efficient system requires that every aspect of it be subject to uniform treatment so far as uniformity is relevant to the basic consid-

45. There have been some recent applications for water service on the Mackenzie River system. Statutory criteria for entry control are to be found in the Railway Act (as amended by R.S.C. 1970, 1st supp., c. 10, sections 11 and 11.1), the National Transportation Act, Part II, re commodity pipelines (s. 32) and the Transport Act (s. 5). Some provincial motor carrier statutes, for example, British Columbia, indicate the criteria to be considered. Others do not (for example, Ontario and Quebec). Nor are criteria indicated in Part III of the National Transportation Act regarding Motor carriers and in the Aeronautics Act.
46. Air Transport Committee, May 12, 1972, Decision no. 3360.
47. Air Transport Committee, August 26, 1971, Decision No. 3234.
49. British North America Act, s. 92 (10).
eration. Ontario requires freight forwarders to obtain a licence under the Public Commercial Vehicle Act but principles of economic regulation do not appear to be applied in the granting of the licences. Presumably the licensing power can be used to maintain the quality of service provided by the forwarders.

**Rate Regulation**

Rate regulation involves at least two aspects, namely, prevention of "unfair" or uneconomic competition and the prevention of monopolistic exploitation by rate agreements or exploitation of the captive shipper situation. The rate agreement question involves the operations of the tariff bureaus and of the Canadian Freight Association as well as the practice of the Air Transport Committee in establishing uniform rates. The problem or costing permeates the field as well as having application with regard to determining levels of subsidization where subsidies are related to a calculation of "actual loss". Whatever controls may be established by the laws specifically relating to transportation, agreements among two or more carriers and discriminatory trade practices have their counterpart controls in the Combines Investigation Act and in the proposed Competition Act. The question of the relation between the Combines Investigation Act and the existing rate-making practices is not clear; nor has the relation between the proposed Competition Act and the direct regulation of the transportation system been finally established.

The national transportation policy appears to favour intermodal competition and this presumably is designed to reflect the inherent advantage of each mode. For the purpose of accurate comparison, it is obviously necessary that any minimum standards for rates be calculated on uniform principles. If cost is to be the desideratum for the price of any service, the principles of costing should be uniform as far as that is possible. The following catalogue of the inconsistencies of the statutory framework is subject to the observation that the accumulated experience in regulating rates in Canada may render more precise and uniform definition unnecessary. Perhaps the people who are doing the job do not require, and would not be assisted by, additional statutory direction.

The Aeronautics Act merely provides in general terms that the Commission may make regulations "respecting traffic, tolls and tariffs and providing for (i) the disallowance or suspension of any tariff or toll by the Commission, (ii) the substitution of a tariff or toll satisfactory to the Commission, or (iii) the prescription by the Commission of other tariffs or tolls in lieu of the tariffs or tolls so disallowed".50 Within this framework, the Air Carrier Regulations provide that carriers shall establish

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50. Section 14 (1) (m).
just and reasonable tolls and that the Commission may determine and
prescribe what are just and reasonable individual or joint tolls.51 The
regulations further provide that the Commission may disallow any tariff
or any part thereof that it considers to be unjust, unreasonable, or con-
trary to any provisions of the regulations or any orders or directions
issued by the Commission and require the air carrier to substitute a tariff
or part thereof satisfactory to the Commission, or it may prescribe other
tariffs or parts thereof in lieu of those so disallowed.52 Rates for air
services are thus subject to the just and reasonable test. No statutory
guidelines are offered.

Part III of the National Transportation Act provides that the Commis-
sion may disallow a highway carrier’s rate that is not compensatory and
not in the public interest.53 It follows that a rate may be permissible if it
is in the public interest whether it is compensatory or not. There is no
guidance to the Commission with respect to the criteria to be applied.

The provisions of the Railway Act as amended by the National Trans-
portation Act in 1967 are relatively elaborate.54 The basic provision is that
rail freight rates must be compensatory, that is, they must exceed the
variable cost of the traffic concerned. The Commission is given the re-
sponsibility of prescribing costs for this and other purposes55 and did so
in the cost order of August 5, 1969.56 Agreed charges are authorized by
the Transport Act57 and are not subject to the requirement of the Railway
Act that charges be compensatory.58 Express tariffs are subject to the
provisions of the Act relating to freight rates.59

The Transport Act provides that where an agreed charge has been in
effect for at least three months, carriers and other persons adversely
affected by the charge may complain to the Minister and the Minister
may, if he is satisfied that the facts justify an investigation, refer the
complaint to the Commission for that purpose.60 The Governor-in-council

51. Sections 45, 46.
52. Ibid., s. 47.
53. Section; not yet operative.
54. See Prabh, “Freight Rate Regulation in Canada”, 17 McGill Law Journal 292
(1971).
55. Sections 329, 330.
56. Railway Transport Committee, Order No. R-6313 and Reasons for Order. A subse-
quent appeal was dismissed by the Supreme Court of Canada, the Court stating only that
it was “of the opinion that all the questions in issue in this appeal should be answered in
the negative.” Unreported judgment, October 8, 1970.
57. Part IV
58. Ibid., s. 32, but cf. s. 33 (3)
59. Section 305.
60. Transport Act, s. 33 (1)
has a similar power of reference. The Commission is directed to have regard to the following considerations:

In dealing with a reference under this section, the Commission shall have regard to all considerations that appear to it to be relevant, including the effect that the making of the agreed charges has had or is likely to have on the net revenue of the carriers who are parties to it, and in particular shall determine whether the agreed charge is undesirable in the public interest on the ground that it is unjustly discriminatory against any person complaining against it or places his business at an unfair disadvantage or on any other ground, and, if so directed by the Governor in Council in a reference under subsection (2), whether the agreed charge is undesirable in the public interest on the ground that it places any other form of transportation services at an unfair disadvantage.

and the Commission is given the power to vary or cancel the agreed charge.

The provisions of the Railway Act dealing with railway passenger fares stipulate that such fares must be just and reasonable for non-competitive and commuter services. On complaint, the Commission may fix a rate in the public interest.

The provincial laws applicable to rates for truck service vary widely from the extreme of no regulation whatsoever (for example, Ontario and Alberta) to specific approval (for example, Saskatchewan and British Columbia). Only Quebec attempts to regulate rates for extra-provincial service.

The provisions of the Transport Act respecting regulated water carriers provide for specific approval by the Commission. The Commission may disallow any tariff or any portion thereof that it considers to be unjust or unreasonable or contrary to any provisions of Part II (Transport by Water) and may require the licensee, within a prescribed time, to substitute a tariff satisfactory to the Commission or the commission may prescribe other tolls in lieu of the tolls so disallowed.

Part II of the National Transportation Act contains a provision re-

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61. Ibid., s. 33 (2)
62. Ibid., s. 33(3), cf. s. 32 (10) respecting the rights of a shipper who complains of unjust discrimination.
63. Section 280.
64. Sections 14, 16, 17, 18, 19, 20 and 23.
65. Ibid., s. 23.
transporting tolls and tariffs for commodity pipelines identical to the provision of Part III respecting highway carriers. The National Energy Board Act, by contrast, provides that all tolls shall be just and reasonable. The Board may disallow any tariff or portion thereof that it considers to be contrary to any of the provisions of the Act (including the just and reasonable provision) and may require the company to substitute a satisfactory tariff or itself prescribe a tariff in lieu of the tariff or portion disallowed.  

In summary, therefore, it appears that the old just and reasonable test was left intact by the National Transportation Act for the air and water modes and for some railway passenger service, rail freight got special treatment because of the background to the statute, particularly the MacPherson Royal Commission Report of 1961, and the provisions of the N.T.A. respecting highway carriers and commodity pipelines should probably be regarded as a rather hastily put together addition to the statutes to parallel the provisions governing rail freight rates. It should also be noted that an important number of rates are guaranteed by statute or subsidized (the Crows' Nest Pass rates, the "at and east rates" and the Maritime freight rates.

All rates are subject to the overriding power of the Commission under section 23 of the National Transportation Act to respond to a complaint that a rate fixed by a carrier is not in the public interest. Having complied with the requirements of that section and, in particular, having held a public hearing and determined that the rate in respect to which the appeal is made is prejudicial to the public interest, the Commission may, notwithstanding the fixing of any rate pursuant to Section 278 of the Railway Act (the captive shipper section) "but having regard to Section 276 and 277 of that Act, make an order requiring the carrier to remove the prejudicial feature in the relevant tolls or conditions specified for the carriage of traffic, or such other order as in the circumstances it may consider proper, or it may report thereon to the Governor-in-Council for any action—that is considered appropriate".

There has as yet been no final decision under Section 23, although

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70. Section 23 (4).

71. At the time of writing, March 1973.
there have been important decisions regarding jurisdiction and the establishment of a prima facie case. There are three cases before the Commission and the first hearings on the substance of the issues began on April 24, 1972. That case involves a complaint by certain rapeseed processors about the rates applicable to rapeseed, rapeseed meal and rapeseed oil shipped into, through or from their processing plants in Manitoba, Saskatchewan and Alberta. The other cases are: (1) The *Prince Albert* case in which the complaint is against the rates applicable to wood pulp from Prince Albert to certain Minnesota, Wisconsin and Michigan points; and (2) the *Anglo-Canadian* case, involving an application by a number of companies respecting the transport of newsprint from their mills in the province of Quebec and New Brunswick to the United States.

Section 23 of the National Transportation Act provides that the public interest for the purpose of that section “without limiting the generality thereof” includes the public interest as described in Section 3 (the statement of national transportation policy). In conducting an investigation under the section, the Commission is required to “have regard to all considerations that appear to it to be relevant, including without limiting the generality of the foregoing,

(a) whether the tolls or conditions specified for the carriage of traffic under the rate so established are such as to create

(i) an unfair disadvantage beyond any disadvantage that may be deemed to be inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or

(ii) an undue obstacle to the interchange of commodities between points in Canada or an unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports; or

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72. There was a preliminary decision November 2, 1971 in the rapeseed case with regard to the status of the intervenors and the establishment of a prima facie case by the applicants. Other decisions involve points of evidence (November 16, 1971, in the *Prince Albert* case) and jurisdiction over joint rates with foreign carriers (June 21, 1971 in both the *Prince Albert* and the *Anglo-Canadian* cases.). The decision of May 26, 1972 in the *Anglo-Canadian* case determined that the applicants had established a prima facie case.

73. The application was filed on October 14, 1970.

74. The application was made April 24, 1970.

75. May 17, 1970.

76. An application by the Kootenay Columbia Timber Council for leave to appeal certain acts, omissions and/or rates of Canadian Pacific has been abandoned.
(b) whether control by, or the interests of a carrier in, another form of transportation service, or control of a carrier by, or the interest in the carrier of, a company or person engaged in another form of transportation service may be involved.\textsuperscript{77}

Those provisions are very close to parts of Section 3 and one may question why it was thought necessary to repeat the principles in Section 23, they having already been imported into that section by the definition of public interest. The Commission is given no direction as to whether it should confine its considerations to economic efficiency or whether it should go beyond those considerations to whatever social and national policy issues may be involved in elimination of regional disparity, the social effects or relocation of industry, and so on. Also, it remains to be seen to what extent the experiences and jurisprudence built up under the old “unjust or unreasonable” rate provision of the Railway Act\textsuperscript{78} are relied upon and made relevant to the consideration of the public interest in the Section 23 cases.\textsuperscript{79}

\textsuperscript{77} National Transportation Act, s. 23(4).
\textsuperscript{78} R.S.C. 1952, Chapter 23, section 328.
\textsuperscript{79} See generally Prubhu’s article, \textit{op. cit.}, footnote 54, at page 312.
COMMENT: DEBT FINANCE AND VOLATILITY IN RATES OR RETURN IN AIR TRANSPORT

BY RICHARD D. GRITTA*

Introduction

Air transport has long been noted as a high "risk" industry. One component of this risk, identified as "business" risk by many airlines economists, stems from the intrinsic nature of the industry and the intense competition facing many of the carriers.† It results in unstable revenue and operating profit levels.‡ To investors, a second component, "financial" risk, has been added. Its cause is the carriers' excessive dependence on long-term debt finance. Its result is instability in rates of returns to common stockholders.

The purpose of this paper is to summarize briefly the financing patterns of the ten Domestic Trunklines for the period, 1960-1972, in order to show this over-reliance on debt finance and to quantify its effect on rates of return. In an era of depressed airline stock prices, an analysis of these effects is of interest.

Financing Patterns:

The source and application of funds statement often yields insights into carrier attitudes toward various types of funds. Table I presents the major sources of funds to the Ten for 1960-1972 inclusive. Of particular interest on the exhibit is the heavy proportion of all sources arising from long-term debt finance. More debt equals more financial risk.

At the high end of the scale are TWA (long-term debt accounting for 34.9% of all funds), Continental (33.5%), Braniff (33.3%), National (29.4%), and Eastern (29.3%). Only Delta (10.0%) and Northwest (10.7%) are more conservative. UAL (27.2%), Western (21.8%), and American (19.8%) fall in between the two extremes. When other non-current liabilities (mostly deferred credits, etc.) are included, the figures are even more

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† For an excellent discussion of this topic, see: Frederick, John H., Commercial Air Transportation, 4th ed., (Homewood, Ill.: Richard D. Irwin, Inc., 1961), 331-332.
‡ There are many ways to measure business risk. For these measures and a comparative analysis of the high levels of this risk in air transport versus other utilities and industrial sub-groups, see: Brown, Victor H., "Testimony of Victor Brown", Domestic Passenger Fare Investigation, (Washington, D.C.: Civil Aeronautics Board, August 1970), Docket 21866-8, Exhibits BE-101 through BE-107.
### TABLE I

**Sources of Funds (in Percent) 1969-1972**

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<td>50%</td>
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</tbody>
</table>

**Notes:**
- Figures are rounded to the nearest whole number.
- The table includes sources of funds categorized by percentages for the years 1969 to 1972.
significant. American's proportion is increased from 19.8% to 26.9% (other non-current lia.7.1%), UAL's to 35.4%, Continental's to 40.9%, etc.\textsuperscript{3} Such excessive reliance on long-term debt is not characteristic of other industries displaying similar conditions of cyclical vulnerability, intense competition, etc.\textsuperscript{4} The majority of the Ten thus stand as an example of a violation of a sound "principle of finance". That principle asserts that firms (and/or industries) facing high levels of business risk should not assume high debt burdens (that is, high financial risk).\textsuperscript{5}

How this debt finance has affected widely known investor measures of financial risk, such as the Moody's debt ratio (long-term debt/total capitalization), can be seen from the following data. The carriers are ranked in descending order of financial risk.

\begin{table}
\begin{tabular}{lll}
  & & \\
TWA & 64.4\% & National & 52.1\% \\
Braniff & 61.5\% & Western & 50.3\% \\
EAL & 59.5\% & American & 45.6\% \\
Continental & 58.4\% & Delta & 26.4\% \\
UAL & 55.4\% & Northwest & 24.9\% \\
\end{tabular}
\end{table}


According to one industry expert, a sound ratio in this industry would be in the 30-40\% range.\textsuperscript{6} The CAB, in the recent \textit{Domestic Passenger Fare Investigation}, selected 40-45\% as the optimal debt ratio for the Ten.\textsuperscript{7} In either case, actual ratios exceed the "norm" by significant margins.

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\textsuperscript{3} Even these figures understate the real debt burden to the carriers. Leasing, the equivalent of long-term debt finance in this industry, is not considered in the above analysis as it does not directly appear on the airlines' balance sheets. Leasing, however, is a major source of funds; especially to EAL and TWA, and its inclusion as long-term debt significantly affects measures of financial risk. For a detailed treatment of the effect of leasing on financial risk, see: Gritt, Richard D., and Peter M. Lynagh, "Aircraft Leasing: Panacea or Problem?", \textit{Transportation Law Journal}, V (January 1973), 9-21.

\textsuperscript{4} See, Victor Brown, "Testimony of Victor Brown"; Exhibits BE-101 through BE-132. Brown contrasts air transport's levels of business and financial risks to those of a sample of 35 Electric companies, 7 Gas, 3 Telephone, and 74 Industrial firms. Only air transport evidences high levels of both business and financial risk.


\textsuperscript{6} See the summary of the testimony of David Kosh, in: "The Final Decision—Phase 8, The Rate of Return", \textit{Domestic Passenger Fare Investigation}, Docket 21866-8, 12-14, issued April 9, 1971.

\textsuperscript{7} \textit{Ibid.} See the statements of Whitney Gilliland, the CAB Examiner, on page 1 of the Final Decision.
Rates of Return:

Financial theory suggests that the effects of combining high levels of financial risk with high levels of business risk is a compound or multiplicative one. Unstable revenue and operating profit levels are further magnified by debt finance into more volatile rates of return on stockholders' equity (net profit after taxes/net worth). Table III shows the net results on these returns for the 1960-1972 period.

**TABLE III**

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>Range</th>
<th>Stand. Dev.</th>
<th>CV</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>8.3%</td>
<td>-7.3 to 19.1%</td>
<td>7.3%</td>
<td>0.88</td>
</tr>
<tr>
<td>Eastern</td>
<td>-3.3%</td>
<td>-40.1 to 24.1%</td>
<td>15.3%</td>
<td>4.64</td>
</tr>
<tr>
<td>UAL</td>
<td>6.2%</td>
<td>-7.2 to 16.1%</td>
<td>5.9%</td>
<td>0.95</td>
</tr>
<tr>
<td>TWA</td>
<td>5.7%</td>
<td>-21.3 to 26.4%</td>
<td>13.6%</td>
<td>2.39</td>
</tr>
<tr>
<td>Braniff</td>
<td>8.8%</td>
<td>-3.2 to 21.4%</td>
<td>6.6%</td>
<td>0.76</td>
</tr>
<tr>
<td>Continental</td>
<td>11.4%</td>
<td>3.3 to 27.4%</td>
<td>8.1%</td>
<td>0.71</td>
</tr>
<tr>
<td>Delta</td>
<td>17.8%</td>
<td>7.3 to 29.6%</td>
<td>6.5%</td>
<td>0.37</td>
</tr>
<tr>
<td>National</td>
<td>10.0%</td>
<td>-28.1 to 28.0%</td>
<td>15.4%</td>
<td>1.54</td>
</tr>
<tr>
<td>Northwest</td>
<td>13.9%</td>
<td>3.1 to 27.7%</td>
<td>8.0%</td>
<td>0.58</td>
</tr>
<tr>
<td>Western</td>
<td>10.9%</td>
<td>-15.4 to 24.7%</td>
<td>10.5%</td>
<td>0.96</td>
</tr>
</tbody>
</table>


The mean return is the arithmetic average of the returns for each carrier for the period. CV is the coefficient of variation (the standard deviation/the mean). It allows for direct comparisons of data (that is, by dividing by the mean it adjusts for size differentials in the levels of the returns themselves).

Two factors are clear from this table. First, the reason for the above "principle of finance" is evident. The ranges of rates of returns are wide and the variability marked. Second, those carriers employing the largest amounts of debt are the most unstable. EAI's range is the greatest (-40.1% to 24.1%), its mean the lowest (-3.3%), and its CV the highest (4.64). As Table II shows, the carrier's debt ratio (59.5%) is exceeded only by TWA's (64.4%) and barely by Braniff's (61.5%). TWA's range is -21.3% to 26.4%, around a mean return of only 5.7% (with a standard deviation of 13.6% and the second highest CV of 2.39). Other carriers high in risk, such as Braniff, Continental, National, UAL, and Western have somewhat higher mean returns but still significantly wide

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ranges and high standard deviations. Delta and Northwest, the only two carriers more conservatively financed, have the highest average returns (17.8% and 13.9%, respectively), the narrowest ranges (7.3% to 29.6% for Delta, 3.1% to 27.7% for Northwest), and the lowest relative variances (CVs of 0.37 and 0.58, respectively). The penalty for the excessive dependence on long-term debt in this industry has therefore been quite high.

Conclusions:

This paper has shown the carriers' heavy reliance on debt finance. The volatility introduced into rates of return to common stockholders bears testimony to the penalty extracted. This instability in returns is highly undesirable from the common stockholder's viewpoint and is one reason for the current lack of interest in airline securities. Empirical evidence has demonstrated that common stock price/earnings ratios are correlated to stockholders' perceptions of risk (as measured by the variance in rates of return). Increasing risk is discounted by stockholders in the form of lower price/earnings ratios and therefore in lower stock prices. For the past several years, carriers' stock prices have remained at very low levels, outperformed by virtually all other industry indices and by the general market, and at this writing eight of the ten are selling below book value. Considering the key position occupied by air transport in the national economy, such a situation is significant.

What are the implications of the above for the future? In light of the continuing high demands for new funds to finance the wide-body jet, one can only conclude that the carriers would be well advised to pursue a sounder course in future financing episodes. This means less long-term

9. In fairness to the other carriers, it must be noted here that these two carriers, because of competitive advantages and because of optimal route structures (both functions of historical development and CAB policies toward new route awards), are much lower in business risk than the other of the Ten. Only these two carriers approach the rate of return norm of 13-15% suggested by Weston and Brigham for large industrial firms high in business risk. See, Weston, J. Fred, and Eugene F. Brigham, Managerial Finance, 3rd ed., (New York, N.Y.: Holt Rinehart & Winston, Inc., 1969), 66. Brown's data suggests that the Ten face levels of business risk similar to his sub-samples of large industrial firms. Brown, "Testimony of Victor Brown", Exhibits BE-107 through 110, and 131-132 (a listing of the sub-samples). All the other carriers fall well below the 13-15% norm.
10. Weston and Brigham, Managerial Finance, 412-414.
12. The high degree of financial risk in the industry has also had an impact on the credit ratings of the carriers. Most airline debt is now rated by Moody's as lower grade to speculative (Ba to B). See, Moody's Transportation Manual, 1973 edition. The net result of this poorer credit rating has been to significantly increase the cost of debt funds to the carriers.
debt and more equity finance. Continued additions to debt can serve only to further increase the variability in returns and compound the problems of the industry. While this remedy may be unpleasant in the short-run, (because it will temporarily dilute the stockholder's position), it may well be crucial to many carriers' survival in the long-run.

Reviewed By Frances Frisken.*

Although this book first appeared eight years ago, it continues to deserve the thoughtful attention of anyone concerned with urban transportation planning and policy-making. It constitutes the rigorous application of the techniques and criteria of economic analysis to arguments related to urban transportation improvements, particularly those favoring extensive investment in new and costly rail transit systems. While one can take issue with some of the authors' underlying assumptions and priorities, and can recognize that changing economic conditions will necessitate continuing reassessment and updating of their cost estimates, one must acknowledge the strength and cogency of their arguments, and agree with many of the premises on which they are based.

The authors begin by using available data on urban transportation and urban development trends to examine several prevalent assertions about the present and future role of alternative transportation modes. They conclude that the continuing trend toward urban decentralization, both of households and of businesses, is the result of a complex variety of forces. Of these, increasing automobile use has been only a relatively minor factor. While decentralization seems to occur regardless of the nature of a city's predominant transportation system it has shifted the major transportation needs in most U.S. cities away from the Central Business District to the rapidly expanding metropolitan rings and suburbs. These new needs call for different responses than those offered by the high-capacity, CBD-oriented facilities which tend to dominate the planning and delivery of urban transportation services.

The authors examine some of the prevailing assumptions about the relative costs and service levels of alternative transportation modes and conclude that transit service is not in fact the steadily worsening mess some have described; that in fact route miteage has actually increased even though vehicle miles of service have decreased. They also contend that under the existing U.S. tax structure, commuters who use centrally-located, limited access urban expressways during peak hours are the only highway users who do not appear to be paying the full costs of the facilities they use. Finally, they point out that every examination of peo-

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people’s behaviour has shown strong consumer preference for the private automobile, a preference which has become increasingly evident as rising family incomes have put automobile ownership within reach of a growing proportion of North American families.

On the basis of these findings, together with a consideration of the advantages, limitations and relative costs of several combinations of facilities, the authors evaluate alternative urban transportation systems, primarily in terms of journey-to-work requirements, and relate them to a variety of urban forms. They conclude that urban transportation systems in general should give high priority to the private automobile, not only because of its flexibility and consumer appeal, but also because highway-oriented systems are economically attractive in most cases. They find investment in rail transit to be economically justified only in cities where residential densities are high, where passenger volumes are more or less equal along routes, where downtown distribution increases as a proportion of overall trip length, wherever rail facilities already exist and do not need replacement, or where passenger-trip distances increase to a point where driving is no longer considered a “free” service. They point out that cities which meet these requirements are usually those in which rail transit facilities already exist. In most newer, low-density cities (even those which are relatively large) a highway-oriented system (incorporating express commuter bus service) is the least expensive solution. For medium density cities (those able to yield corridor demand volumes of about 10,000 or more passengers per corridor per hour) the “ideal” system will consist of line-haul bus transit on exclusive rights-of-way, with integrated, continuous bus service for residential collection and downtown distribution.

While assigning to transit facilities a limited but essential role in urban transportation, the authors prefer that government regulatory functions to assist or encourage transit operations be kept to a minimum. The policies they favour are those which they consider most likely to enhance the workings of the marketplace, and include such suggestions as pricing policies (either tolls or higher parking fees) to discourage the use of the automobile for peak hour commuting; the granting of priority access to buses on expressways; improvements in the operation, scheduling and design of transit vehicles to make their use more attractive; and elimination of market controls and government regulations on urban transit and taxi operations. They are sceptical about the desirability or effectiveness of direct subsidies to transit operations, although they maintain that the value of subsidies must be assessed largely on non-economic grounds.

Subsidy operations almost invariably embody an element of income
transfer, and evaluating the desirability of such transfers is normally
considered beyond the province of economic analysis. (p.358)

Their arguments fail to show, however, that market mechanisms alone
will be sufficient to reverse the steady deterioration experienced by many
U.S. urban bus systems, particularly in view of the likelihood that the
highway systems they advocate will encourage even more frequent and
more widespread automobile use.

To what extent does a case argued exclusively on the basis of economic
criteria provide useful guidance for the formation of effective public pol-
icy? In order to answer this question, it is necessary to examine the
direction of urban transportation planning and policy-making since this
work first appeared. One of the most significant developments has been
the discontinuance of virtually all urban expressway construction in
North America, a result of anti-expressway campaigns waged by various
urban interests. While it is possible to dismiss political decisions to halt
expressway construction as irrational capitulation to harrassment by self-
interested pressure groups, such a position fails to do justice to the seri-
ousness of many of the arguments put forth by freeway opponents.
Among these have been the following:

1) The construction of expressways in urban areas invariably entails an
unequal distribution of benefits and losses, sometimes to an extreme
degree. Those who benefit most (suburban commuters to downtown) are
seldom the same people as those most likely to suffer hardship (residents
of the more densely populated inner-city and close-in suburban neigh-
borhoods.) While land requirements for an integrated expressway system
may appear to be relatively small (Meyer, Kain and Wohl put them at
approximately 3% of total urban land use) the costs entailed by disloca-
tion, neighbourhood disruption, noise and dirt are perceived as unaccept-
ablely high by those who must endure them. Generous compensation provi-
sions have only partially alleviated this difficulty, largely because they do
not address the basic issue—the reluctance of families and individuals to
sacrifice to an abstract common good those aspects of life which provide
the more basic forms of satisfaction—home, neighbourhood, community,
a sense of place in relation to the urban complex as a whole.

2) If urban expressway plans do manage to avoid excessive takings of
residential or business properties, they can still entail irreplaceable losses
in the form of scarce inner city parkland or historic buildings. It is true
that arguments of this nature can be found to vary greatly in credibility
from place to place. Nevertheless, a decision to incur such losses is not
just a decision to accept present deprivation for future advantage; it is a
decision to accept future deprivation as well.
3) A highway-oriented approach to urban transportation is one which essentially dictates that there will be two classes of citizens: those who own or have access to automobiles, with all the advantages they bring, and those who do not. Even if one argues, on the basis of rising income and car ownership statistics, that economic prosperity is slowly but steadily reducing the number of autoless families, only the most sanguine of social prophets will predict a level of affluence at which every urban family can afford to own at least one car. And even the total elimination of poverty will not eliminate the transportation problems of those either too old or too young to drive, those with physical handicaps, the family members left autoless by their commuting fellows, and those who prefer not to drive at all.

4) Similar arguments can be made for highway-oriented transportation proposals intended (as those in this book are) to deal almost exclusively with the needs of commuters. Such proposals automatically imply two classes of people: those who are employed (roughly 40% of the population of urban places) and those who are not. While it can be argued, as the authors do, that the automobile is much the preferred form of transportation for social, recreational and shopping activities, it remains true that not everyone expresses that preference, and not everyone who does can exercise it. In an urban setting tailored to automobile use, such persons are condemned to relative isolation from and non-participation in most urban activities.

The issues I have raised are not entirely overlooked in the book under review. They fall within the categories of "political, aesthetic, or other purely subjective arguments" (p. 358) said by the authors to lie outside the boundaries of economic analysis. Thus, their place in the investigation is marginal. Since the book was published, however, these issues have increasingly gained ascendancy over purely economic considerations, often leaving planners and policy-makers bewildered as to how to deal with them. This book will provide them with few answers to their difficulties. In other words, by confining itself exclusively to considerations of efficiency in resource allocation, and denying any responsibility for the consequences which are likely to flow from those considerations, economic analysis severely limits its usefulness to policy-makers attempting to deal with the complexity of modern urban systems.

In retrospect, even economists may derive satisfaction from this book's failure to counteract political sensitivity to urban expressways. Recent concern about energy resource limitations, together with a painful awareness of North American vulnerability to decreases in the flow of petroleum products, have led to significant increases in fuel prices and a reap-
praisal of energy needs and priorities. This reappraisal must take account of the long-term energy implications of urban planning and development trends which encourage, or even depend on, the extravagant use of private automobiles. At the very least, these developments necessitate a recalculation of the relative direct costs of the various urban transportation alternatives. It may turn out that the policies which best satisfied the criteria of economic efficiency in the mid-1960s will appear considerably less efficient by the mid-1970s.

I have taken issue with some of this book's recommendations on the ground that they constitute too narrow and too restrictive an approach to a complex public policy area. Nonetheless, the book remains an important one, if only because of its insistence that new urban transportation developments, if they are to make a meaningful contribution to urban life, must reflect a realistic understanding of prevailing urban trends. At a time when most urban activities are steadily decentralizing, the need for high-capacity, downtown-oriented transportation facilities is just as steadily diminishing. Nevertheless, as urban transportation planners are turning their attention to transit alternatives to beleaguered or abandoned expressways, they are tending to concentrate primarily on high-capacity, core-oriented rail facilities, to the exclusion of other needs. Construction of these facilities depends heavily on funding from higher level governments, funding which constitutes, in effect, a massive subsidy to the dwindling ranks of downtown commuters. In the meantime, antiquated bus systems in many U.S. urban centres stagger at the brink of collapse. Some survive only by virtue of last minute crisis funding from government. That funding is usually only sufficient to keep them in operation, and does nothing to help them restore run-down equipment, let alone attract and train more imaginative management personnel, undertake long range assessment of route and service improvements, or experiment with innovations to attract and keep new users. Their captive clientele—the so-called "transit-dependent population"—reaps few or none of the benefits of the new enthusiasm for transit.

What is needed at this point in time is a study which takes up where these authors left off, acknowledges the prevalence and likely persistence of social and political objections to urban highways, and examines the costs and benefits, both economic and social, of alternative ways of employing the funds now becoming available for investment in urban transit.
STEPS TOWARD IMPROVING FREIGHT CAR UTILIZATION

by Rupert L. Murphy*

It is common knowledge that there has been a steady and continuous decline in the overall ownership of freight cars. As a consequence, there is a need for a renewed effort to improve the utilization of the existing freight car fleets. That endeavor is necessary even though there may be isolated or sporadic periods in which the freight car supply appears to be adequate and there are limited reports of car shortages. In that respect, maximum utilization of the car supply should be viewed as a constant responsibility of the several interested groups, including the carriers, the shippers, and the Commission. The following commentary will review the several actions taken by the Commission to improve freight car utilization, the corresponding responsibilities of the carriers and shippers, and the importance of tariff observation in obtaining that goal.

In light of the difficulties experienced or presently being experienced by grain shippers, among others, with regard to freight car shortages, the importance of maximum efficient freight car utilization is apparent today to every knowledgeable individual whether he be a shipper, carrier, consumer, or regulator. Until recently, there had been no similar car shortage problems affecting shippers of lumber and related commodities. But the problems actually experienced by other shippers should serve as a useful benchmark for all persons. It has been said many times and in many variations that experience is the best teacher. But such personal experience may be a costly, time-consuming method of securing an education. Bearing these concepts in mind, lumber shippers and others have an opportunity to review their shipping needs, shipping practices, and steps which may be necessary to meet the challenging demands of the future. The term "steps" in improving freight car utilization is specifically underlined because it is clear that no one approach—whether it be legislative, judicial, administrative or proprietary—can assure a realistic solution of the chronic freight car shortage problem. This problem has existed for a number of years and, in fact, the first proceeding before the Commission in 1887 related to car shortages in the then Dakota Territory.1

At the outset, it would be useful to outline in broad general terms the perimeter of the chronic freight car shortage problem and methods to solve that problem. This problem can only be successfully solved if it is

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clearly understood that there is a need for an adequate overall freight car supply, maximum efficient utilization of the existing fleet and complete cooperation among the many interested individuals. It must be emphasized that the railroads cannot be expected to maintain a car fleet to meet every possible contingency. But they should have a car fleet which, in conjunction with maximum efficient utilization, would enable them to meet reasonable demands for service. A review of the car ownership of class I railroads pinpoints the major cause for the present dilemma.

In 1957, class I railroads owned a total of 1,810,022 cars of various types, including 680,597 plain boxcars, 51,476 equipped boxcars, 50,156 covered hoppers, and 50,183 flatcars. By 1972, the total ownership which had declined to 1,455,058 cars, included 345,718 plain boxcars, 176,473 equipped boxcars, 139,109 covered hoppers, and 95,358 flatcars. As of January 1, 1974, the total ownership had declined to 1,395,105, including 326,484 plain boxcars, 175,323 equipped boxcars, 150,499 covered hoppers, and 99,002 flatcars. Despite the noticeable increases in equipped boxcars, covered hoppers and flatcars, the sharp decline in the number of plain boxcars, frequently called the "workhorse" of the railroads, is a significant factor in the present car shortage problem. Over the past several years the Commission has repeatedly called attention to the steady decline in the overall car ownership of the railroads, especially in plain boxcars, in an effort to alert the industry to the ever present danger of severe car shortages. For example, in Ex Parte No. 241, the Commission, in concluding that there was an overall inadequate car supply, endorsed a railroad-sponsored car ownership formula designed to allow each railroad to determine the number of cars which it should own to meet the demands of its various shippers. The Commission has attempted to assist the railroads in augmenting their car fleets by also imposing an incentive element in addition to the basic for-hire charge assessed by the car owner for its use. The incentive per diem charges now apply year around and not for a specific period. The extra charges assessed during that period must be earmarked for the purchase, building, or rebuilding of plain boxcars. While this program is of relatively recent origin and has been subject to some criticism, it has contributed to the acquisition of additional plain boxcars. The Commission, in adopting the incentive per diem rules, was cognizant that as it gained experience under the new


program a modification or expansion of the rules and charges might well be required.

In summary, the several approaches taken by the Commission to facilitate an increase in the overall freight car supply, namely, a car ownership formula and incentive per diem charges, are essentially long range steps which should provide a means to alleviate the chronic freight car shortage problem. In addition, the Commission has supported legislation which would assist the railroads in acquiring freight cars in those circumstances where their financial resources are severely strained. In the interim, however, there must be a renewed emphasis on maximum efficient utilization of the existing car supply.

While improvements in freight car utilization are an ongoing requirement, they assume major importance during times of acute car shortages. Drastic techniques may be utilized by the carriers and the Commission to provide an equitable distribution of the available car supply, to prevent unnecessary delays in the movement of cars, and to attach penalties, where necessary, to further maximum efficient utilization of the available car supply. These actions although primarily directed toward the carriers may directly or indirectly affect the shipper.

Before commenting on the several recent actions of the Commission during the present car shortages affecting the grain shipper, it would be appropriate to recall some prior steps which have a direct or important bearing on car service. Car service is defined as "the use, control, supply, movement, distribution, exchange, interexchange, and return of locomotives, cars, and other vehicles used in the transportation of property." The carriers have had elaborate rules governing car service for more than 50 years. However, these rules were honored more often in the breach than in the observance. Two of the many important rules, Car Service Rules 1 and 2, pertain to the movement of foreign cars, that is, those on the lines of the nonowner, back to the railroad owner. These two rules normally permit loading of the empty cars. The latter rules are of particular importance to the railroad car owner during times of car shortages since that carrier must be able to meet reasonable demands for service from shippers located on its lines. After lengthy hearings, the Commission in 1970 in Ex Parte No. 241 ordered the carriers to observe seven of their car service rules, including Car Service Rules 1 and 2, in their normal day-to-day operations. While strict observance of Car Service Rules 1 and 2 might result in operational difficulties for some carriers, it was felt that carriers with an inadequate car ownership should bear the responsibility during periods of shortages. The Commission's decision

5. Section 1(10) of the Interstate Commerce Act.
was recently affirmed by the Supreme Court. The prescribed car service rules are now effective except to the extent that service orders may modify their application. Car Service Rules 1 and 2 have made a distinct contribution to better utilization of the available freight car supply during the present car shortages and a number of carriers although expressing some initial opposition to the prescription are now of a different opinion. Interestingly, some carriers have recently requested the Association of American Railroads (AAR) to issue directives on their behalf requiring the return of the cars empty to the owner when there is no load available.

Additionally, the above-mentioned incentive per diem program although frequently considered solely as a means to augment the boxcar fleet actually assists in better utilization of the existing fleet as envisioned by the amendment of Section 1(14)(a) of the Act.

Turning next to the present car shortage problem affecting principally grain shippers, it would be appropriate to briefly sketch each of the series of steps taken by the Commission to provide relief. For over a year prior to last summer, there had been few reports of substantial car shortage primarily because of two factors: a downturn in the economy which resulted in a decrease in demand for rail equipment and a number of labor disputes which also affected that demand. Late last summer, with the news of the huge sale of grain to the Soviet Union, the change in the status quo was dramatic. Shortages began to be reported immediately and intensified as the days went by. For example, in early August the reported average daily shortages of boxcars and covered hoppers were 910 and 767 cars, respectively. A month later, the respective shortages were 2,672 and 1,765 for the same cars. By early January, the average daily reported shortages for plain boxcars and covered hoppers were 8,543 and 10,122 cars, respectively. The Commission's staff in analyzing the situation quickly grasped the need for extraordinary action to stem the mounting tide of boxcar and covered hopper shortages. Acting under its emergency powers, the Commission issued Service Order No. 1112 on October 3, 1972. This service order, in general, requires the railroads to expedite the handling of all traffic by the placement, removal, and/or forwarding the cars within a 24-hour period, to make light repairs within the same period and to assess a storage charge on cars assigned to a specified shipper. Light repairs will be discussed again in more detail. The Commission's action was not greeted with unanimous approval. There were some officials of the larger railroads who felt that the service order was untimely and would encourage diversion of much needed rail traffic to other modes. But a review of the subsequent car supply problems can

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7. Section 1(15) of the Interstate Commerce Act and other provisions thereof.
only attest to the wisdom of the Commission's action. It was timely! It was within its statutory duties! It was, in the last analysis, in the best interests of the public! The service order was subsequently modified on two occasions. The first amendment allows a railroad experiencing hardships or inequities to apply to the Commission through the AAR for relief. A subsequent amendment prohibits a railroad from removing from the point of unloading cars allegedly empty but containing various debris. That aspect will be discussed in more detail later on.

These initial emergency steps to facilitate maximum efficient utilization of the available car supply were followed by Service Order No. 1117 issued early this year, which permits the substitution of open-top hoppers in lieu of covered hoppers for the movement of grain or soybeans where the carrier and shipper agree. The service order specifies that the minimum weight per shipment of the named commodities shall be the same as that required in the covered hoppers regardless of the number of open cars needed to secure the minimum weight. The extent of the use of the open-top equipment may, of course, depend upon many variables, including the weather and the cooperative efforts of the carriers and shippers.

Early this month, the Commission took two further emergency steps. On the same day, it issued Service Orders Nos. 1120 and 1121. A similar order was issued increasing demurrage charges on domestic traffic. Service Order No. 1124 required two credits to offset one debit and reduced the number of debits that could be accrued in an average agreement account from four to two. It also added an increment of $50 a day on detention beyond the sixth chargeable day. With the alleviation of shortages, particularly boxcars and covered hoppers, Service Orders Nos. 1112 and 1124 were modified to eliminate types of cars not now short, and Service Order No. 1117 was vacated.

In its efforts to further improve car utilization, the Commission issued Service Order No. 1134, placing a drastic penalty on cars loaded with lumber and held at hold points for furtherance beyond five days. This order, however, was contested by a few lumber processors and the District Court in Oregon suspended the order. An appeal has been filed with The Supreme Court of the United States by the Commission.

Service Order 1120 places restrictions on the number of covered hopper cars which may be used in unit-grain train service. Unit-grain trains are defined as trains of 50 or more covered hoppers originating and operating as a unit from a single point of origin to one destination in accordance with the governing tariff provisions. The use of jumbo covered hoppers, defined as having a weight-carrying capacity of 180,000 pounds or more, will be subject to greater control. The primary purpose of this service order is to promote a more equitable distribution of the covered hoppers and to make more cars available to the small shipper.
Service Order 1121 reduces the free time on plain boxcars and covered hoppers held for loading or unloading at ports to 72 hours and establishes the minimum rates to be assessed for the detention of freight in such cars at ocean, Great Lakes, or river ports requiring transfer between rail and water carriers. The reduced free time period will apply also on cars held short of the port because of any condition attributable to the shipper or consignee. The principal purpose of this service order is to expedite the loading and unloading of cars so as to achieve improved car utilization.

These several service orders which supplement each other are a graphic illustration of the Commission's determination to act quickly in the public interest to ameliorate the car shortage problem. If you will analyze each of the orders in detail, you cannot conclude otherwise than that they seek principally to improve car utilization, giving due consideration to the needs of the various shippers. The service orders do impose very severe conditions on the operations of the railroads. The Commission's field staff, although small in number, effectively polices the observance of those orders. Our Section of Railroads also maintains excellent relations with the Car Service Division of the AAR in resolving car service matters, especially those which would increase car utilization. The Commission during this period of car shortages has also established liaison with grain exporters and elevator operators at the major ports. Through these channels, the Commission is able to determine the availability of vessels to move the grain and the existence of substantial car accumulations at the ports. In the event of a substantial congestion at a port, an embargo may be placed against the port or elevator. Several such embargoes have been utilized recently with very beneficial results. In addition to monitoring the transportation of grain, the Commission is also maintaining a close scrutiny on the movement of lumber and the related car supply. An official of the Commission works in close cooperation with the President's Council of Economic Advisers on matters involving the movement of lumber. But the Commission's actions without the cooperation of the carriers and shippers would bear little fruit. What then, one might ask, are the responsibilities of the carriers and shippers with respect to freight car utilization?

The railroads under the Act have the duty to provide and furnish transportation upon reasonable request. During this period of car shortages, the railroad obviously must attempt to secure maximum use of their car fleets in conformity with the law. They have, as noted, in some instances instructed the AAR to issue directives requiring the return of the car empty to the owner when there is no load available. These directives are more onerous than the now mandatory Car Service Rules 1 and

8. Section 1(4) of the Interstate Commerce Act.
2. The carriers have also authorized the AAR to impose penalties for the failure to follow directives issued by that organization. This effort by the industry to police itself is to be encouraged but the Commission will not hesitate to issue its own orders where the circumstances so require.

Earlier there was a reference to the provision in a service order which requires the completion of light repairs within 24 hours. The prompt return of bad-order cars to service can make a significant contribution to maximum utilization of the available car supply. Additionally, there have been reports that the railroads are repairing and upgrading as many cars as possible, with emphasis on those types of cars in greatest demand. While those efforts should be encouraged, it is somewhat disheartening to find through field checks that these reports are not entirely accurate. Some carriers, unfortunately, are too lax in maintaining their car fleet in good condition. It should be recognized, however, that several carriers are not financially able to maintain their fleet to the highest possible standards.

The carriers, of course, are expected to enforce their tariffs, to observe the mandatory car service rules to the extent not modified, and vigorously to comply with the outstanding car service orders, including the admonition against pulling a car allegedly empty but containing debris. Cars not completely unloaded by the consignee must generally remain on demurrage or detention status pending completion of the unloading. A carrier removing such cars loaded with debris can be prosecuted not only under the Elkins Act for violations of Rules 14 and 27 of the Uniform Freight Classification, but can subject itself also to penalties under the Interstate Commerce Act.

The shipper, including the lumber shipper, similarly has very important obligations in facilitating better car utilization, especially during this period of critical car shortages. The lumber industry is a major user of rail transportation services. For example, in 1971 the railroads in the United States originated slightly over 2 million carloads of lumber and wood products, except furniture, weighing over 104 million tons; in the Southern District for the same period, the carriers originated over 819,000 carloads of these commodities, weighing in excess of 48 million tons. In 1972 railroads in the U.S. originated slightly over 2 million car loads of lumber and wood products, except furniture, weighing over 109 million tons; in the Southern District for the same period, the carriers originated over 865,000 carloads of these commodities, weighing in excess of 50 million tons. Shippers, including lumber shippers, are knowledgeable in

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the transportation matters. They demand services commensurate with the charges for such services. For example, in many recent general revenue proceedings, shippers have complained that they were being assessed increases in rates despite a continuing deterioration in rail services. In Ex Parte No. 265,\(^{10}\) the Commission in its report took special note of the service complaints of various shippers. Lumber shippers, including some from the South, cited and gave illustrations of such service deficiencies as inadequate car supply, excessive freight loss and damage, and excessive and erratic transit times. As the result of this evidence, the Commission ordered the railroads to file quarterly reports showing what corrective steps they have taken to eliminate the particular service deficiencies set out in the report of the Commission. Several such quarterly reports have been filed and are being reviewed. Additionally, the Commission has instituted a major investigation into railroad freight service in order to facilitate an appreciable improvement in service.\(^{11}\)

The shipper, however, must do more than to complain. The shipper or receiver can best participate in improving car utilization by ordering cars at the appropriate time in sufficient numbers to meet its needs. The carrier should be advised of the destination so that it can furnish cars of the proper ownership in compliance with Car Service Rules 1 and 2. In fact, one of the car service rules prescribed by the Commission in Ex Parte No. 241, namely, Car Service Rule 15, specifies the type of information, if available, which the carrier should secure from the shipper. It would be to the advantage of each shipper to familiarize himself with this rule. After the empty cars have been made available, they should be loaded promptly and the carrier furnished shipping instructions immediately. Circuitous routings in order to prolong transit time should be avoided. The shipper or receiver should promptly unload the car at destination, remove all debris connected with the inbound load, and advise the carrier that the car is available. As previously mentioned, the consignee is generally under an obligation to completely unload carload freight including all dunnage, debris, and other foreign matter connected with the inbound shipment.\(^{12}\) The consignee cannot expect the carrier to provide a free trash removal service. And it should be emphasized that the Commission will not countenance any attempts to circumvent the consignee's obligations in completely unloading carload shipments.

Undue detention of freight cars by shippers should, as a matter of good

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shipping practices, be avoided, especially during this critical period. Despite the sharp increases in demurrage charges authorized by the Commission in 1971, it must be pointed out that the cars were purchased to earn freight by moving traffic, and not for storage purposes. You can rest assured that the Commission even during this critical period will closely scrutinize unwarranted detention of equipment. For example, about 2 years ago, a large midwestern carrier was assessed penalties of about $30,000 for violation of a service order. The carrier was actually unduly holding cars containing lumber rather than placing them on demurrage.

Finally, it is well established that the shipper, like the carrier, is presumed to know the provisions of the tariffs on file with the Commission. To lighten the load on the shipper, the Commission required the rail carriers in Ex Parte No. 265 to incorporate previously authorized general increases into the existing rate structure. With some prodding from the Commission, the carriers have responded and the tariff updating is on its way to completion.

In the coming month, we will undoubtedly see a continuation of the heavy export movement of grain. The new harvest beginning in a few months will further add to the critically low freight car supply. With an expanding economy, there will be increased carloadings of all commodities, including lumber. The news media, for example, has recently reported on the rising prices of lumber and the substantial exports to Japan. Additionally, there have been recent reports of a proposed sale of several hundred thousand bales of cotton to China. In these circumstances, there is a need for cooperation among many individuals, the shipper, carrier, regulator, and other interested persons. While the need for cooperation has been stressed on many occasions, it deserves a reemphasis in these critical times. Human nature, being as it is, reiteration of well-known concepts is vitally important. Without the complete cooperation of shippers and carriers, the Commission's tasks which are immense would become unmanageable. There is a need for a team effort to meet the present crisis and wholehearted cooperation in that direction is earnestly solicited.

SECTION 222 (b) — THE SELF-HELP PROVISIONS OF PART II OF THE ACT — BENEFITS AND PITFALLS

BY PHILLIP ROBINSON*

&

MERT STARNES**

For many years, persons injured by violations of Part I\(^1\) and Part III\(^2\) of the Interstate Commerce Act have had available statutory remedies through complaints to the Interstate Commerce Commission or through suits brought in their own behalf for the recovery of damages in a district court of the United States.\(^3\) However, until recently no comparable right to bring a private suit for damages, or injunction, against one guilty of operating without appropriate motor carrier authority, or in excess of authority held, existed.\(^4\) Prior to September 6, 1965, only the Commission could seek injunctive relief for violations of operating authority requirements pertaining to motor carriers.\(^5\) In 1965, Congress amended Parts II and IV of the Act to "aid enforcement in the motor carrier field . . . by permitting any persons injured through certain violations of certain operating authority requirements of the act (applicable to freight forwarders as well) to apply directly to the courts for injunctive relief."\(^6\) The 1965 amendment of Part II, so far as here pertinent, is contained in sections 222(b)(2)-(3) of the Act, 49 U.S.C.A. §§ 322(b)(2)-(3), which provide:

"(2) If any person operates in clear and patent violation of any provisions of section 303(c), 306, 309, or 311 of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, require-

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1. 49 U.S.C.A. §§ 1, et seq.
ment, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney’s fees to be fixed by the court, in addition to any costs allowable under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper, to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive, or other process is issued should it later be proven unwarranted by the facts and circumstances.

“(3) In any action brought under paragraph (2) of this subsection, the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such a notice the court shall stay further action pending disposition of the proceeding before the Commission.”

Comparable relief from violation of permit requirements relating to freight forwarders is contained in sections 417(b)(2)-(3) of the Act, 49 U.S.C.A. § 1017(b)(2)-(3). The significance of these provisions to an analysis of section 222(b) will later appear.

As heretofore stated, the general purpose in amending section 222(b) was to aid in law enforcement. More specifically, the House Report delineated the intent and scope of the legislation as follows:?

“These new provisions are intended to afford injured parties a measure of self-protection against operations which are openly and obviously unlawful. In each new paragraph the words ‘clear and patent’ are used and are intended as a standard of jurisdiction rather than as a measure of the required burden of proof. As was stated in the Senate report on S. 2560, 87th Congress (S.Rept. 1588, 87th Cong., dated June 13, 1962), in explanation of an amendment to

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7. Id. at 2931.
section 222(b) of the act which is identical to that proposed in this legislation:

No district court is to entertain any action except where the act complained of is openly and obviously for-hire motor carriage without authority under the sections enumerated above. * * * The language of the section is designed to make it clear that the courts would entertain only those suits which involve obvious attempts to circumvent operating regulation."

The purpose of this paper is to inquire into the extent to which the stated Congressional intent has been effectuated.

I.

JURISDICTION AND BURDEN OF PROOF

Though section 222(b)(2) is express in identifying the operating authority sections which if violated will give rise to a private suit for injunctive relief, it may be appropriate at the outset to emphasize that the self-help provisions do not extend to all violations of the Act. For example, jurisdiction does not exist to enjoin alleged unauthorized intrastate operations even though the defendant carrier holds interstate authority and utilizes the same to solicit business for such unauthorized intrastate operations, nor does jurisdiction exist to enjoin a carrier from operating equipment in allegedly defective condition because safety regulations are promulgated under section 204 of the Act, a section not enumerated in section 222(b)(2), nor can one file a self-help action to enjoin carrier activities which, in effect, constitutes a collateral attack upon an order of the Commission rather than an enforcement of the same. Moreover, neither sections 8, 9 nor 222(b)(2) confers any private right of action against a motor carrier for violation of section 5(4) relating to combinations and consolidations of carriers.

"Clear and Patent"

Two "no tacking" cases need to be considered in determining how the courts, thus far, have construed the "clear and patent" standard of jurisdiction.

In *Chemical Leaman Tank Lines, Inc. v. A. J. Weigand, Inc.*, Weigand had secured a contract carrier permit authorizing the transportation of various specified commodities between described points. In a subsequent "conversion" proceeding under section 212(c), the examiner recommended the issuance of a certificate in lieu of and commensurate with Weigand's permit, subject to the condition "that the separately stated authorities herein granted shall not be joined or tacked, one to another, for the purpose of performing any through transportation." The certificate resulting from the conversion proceeding failed to include the language of the "no-tacking" restriction imposed by the examiner, and Weigand proceeded to conduct operations entailing joinder of its separately-stated authorities. Chemical Leaman filed a motion to modify Weigand's certificate by including therein the "no-tacking" restriction, the "conversion" proceeding was reopened, and the petition for modification was consolidated therewith. After a further hearing the examiner found that the restriction was omitted from the certificate due to inadvertent clerical error but that Weigand had shown good cause why the restriction should not be imposed. On administrative appeal Review Board No. 3 reversed the examiner and found that the certificate should be modified to include the restriction, and Division 1 affirmed the action of the Board. Prior to the effective date of Division 1's order, Weigand filed a petition for modification of the effective date in order to file and prosecute temporary and permanent authority applications to permit the continuation of unrestricted operations. In response thereto, Division 1 stayed the effective date of its order imposing the "no-tacking" restriction pending final disposition of the new application.

Chemical Leaman, *et al.*, then instituted a self-help action contending that well-established law precluded the tacking of paragraphs constituting a single grant of authority, that the stay order was not intended as authorization for continued unlawful tacking and that if the Commission had purported to issue an order relieving Weigand's certificate of the no-tacking restriction such action would have circumvented requirements of sections 206 and 207. Weigand contended that the stay order constituted recognition by the Commission that its tacking operations were lawful.

Despite plaintiffs' argument that the validity of the stay order was not under attack and was irrelevant to a determination of the existence of a clear and patent violation of the Act, the court denied relief, reasoning as follows (359 F.Supp. at 1242-1243):

> "Assuming it were clear that the defendant's certificate includes but
a single grant of authority and that tacking is not permitted, it would not necessarily follow that Weigand's present course of conduct is in clear and patent violation of the Act. Since the Commission's stay order was intended to sanction defendant's tacking on a temporary basis, that tacking could be a clear and patent violation only if the stay order is invalid.

"The Commission obviously thought that it could lawfully sanction defendant's tacking operation until its application for authority could be determined. Assuming it were wrong in this view, as plaintiffs contend, I nevertheless am not prepared to say that the matter is sufficiently clear to place this case within the sole category which Congress intended would be entertained under Section 322, i.e. 'clear and patent violations.'

"Moreover, this is a case where the Commission has taken final, affirmative action for the purpose of sanctioning particular conduct and a party adversely affected by the action seeks to overturn it. While the complaint does not directly ask for relief from a Commission order, the suit, in practical effect, constitutes a collateral attack on a Commission order. . . ."

The foregoing reasoning, in our view, is fallacious because, inter alia, it assumes that the Commission's finding that Weigand's authorities could not be lawfully tacked, a construction in accord with well-established law, was somehow reversed or overcome by the stay order. We cannot distinguish, on principle, the fact situation in Chemical Leaman from a situation where the defendant holds no authority, has been denied a grant of authority by the Commission but the effective date of the order of denial has been stayed, and the defendant continues for-hire operations without a certificate or permit. Both situations appear to us to be amenable to a self-help action by injured competitors. Contrary to the holding in Chemical Leaman, we think self-help relief ought to be available in both situations and that Congress so intended.

The courts have repeatedly emphasized that the requirement of a "clear and patent" violation is intended as a standard of jurisdiction rather than a measure of the required burden of proof. But the nature of this

distinction is very difficult to spell out in a given factual context. Indeed, as stated below, we have concluded that one of the "pitfalls" in the "self-help" field is that ordinary motor carrier lawyers may not be tuned in on the same wave length as federal judges about what kind or degree of certificate violation is "clear and patent" as contrasted to an ordinary run-of-the-mill certificate violation. In any event, the court observed in the Mercury Motor Express case:14

"... If a plaintiff cannot show a 'clear and patent' violation, the proper disposition of his complaint is dismissal for want of jurisdiction; if he can, he is entitled to injunctive relief." (emphasis added)

Under such an analysis, as a practical matter jurisdiction and burden of proof appear to be synonymous. If a complaint alleges conduct on the part of a defendant which would constitute a "clear and patent" violation, the existence, vel non, of jurisdiction can only be determined following the reception and weighing of the evidence.

Baggett Transportation Company v. Hughes Transportation, Inc.,15 like Chemical Leaman, involved a self-help action to enjoin unlawful tacking operations by the defendant. Baggett's certificate contained a restriction that "no single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service." Suit was initially instituted in 1966 by Tri-State Motor Transit Company in the Western District of Missouri, Judge Elmo Hunter presiding. The ICC thereafter instituted an investigation proceeding to consider the lawfulness of Baggett's tacking operations, notified the court of the pendency of such proceeding, and the court proceeding was stayed pending disposition of the administrative proceeding pursuant to section 222(b)(3).16

The ICC concluded that Baggett's challenged operations were unlawful and entered a cease and desist order. Prior to the effective date of such order, Baggett filed an action in Alabama, requesting the designation of a three-judge court, to review and set aside the ICC's order and moved for a temporary restraining order. The Alabama court, being advised of the litigation in Missouri, withheld ruling on Baggett's motion, and the Missouri court proceeded to trial at the conclusion of which the court

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14. Supra note 13, at 1095.
15. Supra note 13.
16. The subject of section 222(b)(3) stays will be considered in more detail in Part II below.
declined to enter a temporary injunction in view of the fact that the ICC order requiring Baggett to cease and desist would become effective at midnight on that day. Later that day Baggett obtained a restraining order from the Alabama court enjoining the enforcement and effectiveness of the ICC's cease and desist order, and Hughes, a wholly-owned subsidiary of Tri-State, brought another self-help action in the Western District of Missouri. Judge Hunter again presiding, to enjoin Baggett from performing the type of operations which were the subject of the prior court and administrative proceedings. The Missouri court in this second self-help action found that Hughes was being injured by certificate violations which were "clear and patent" and entered an order temporarily enjoining Baggett from tacking any two or more segments of its authority.

The primary question on appeal related to the right and propriety of the Missouri court to entertain the action and issue the injunction while the validity of the ICC's order, the effectiveness of which had been restrained, was under review in the Alabama appeal.

After first noting that the granting of a temporary injunction was addressed to the discretion of the trial court, the court of appeals held that the issues involved in the Missouri self-help action and the issues involved in the Alabama three-judge review action were different, were based upon separate provisions of the statute, that the granting of one did not necessarily prohibit the exercise of the other as the remedies were designed to be cumulative and not mutually exclusive, and that granting the substantial benefits available under section 222(b)(2) was the "most equitable solution possible."

Not only is the result reached in Baggett deemed correct, but the court of appeals' appreciation of the intent of section 222(b)(2) is noteworthy (particularly when contrasted with subsequent self-help actions brought in the Western District of Missouri) (393 F.2d at 716):

"... enforcement action may be brought by any plaintiff who is injured by the clear and patent violation of the Act; attorney's fees as well as costs may be collected; an injunction or restraining order enforcing obedience to the law may be granted immediately, and plaintiff must post bond security to protect the interests of the defendant in the event the restraining order or injunction be unwarranted. We think, then, Congress was interested in providing for an immediate relief with proper protection for anyone who might be injured thereby..." (emphasis added)

The "clear and patent" nature of the violation in Baggett could not have been a matter of serious controversy in light of the express restriction in Baggett's certificate. Similarly, the courts have demonstrated lit-
tle, if any, reluctance to find, upon uncontroverted facts, that operations by agricultural cooperatives in excess of the exemptions accorded their operations constitute clear and patent violations of the licensing requirements of Part II. However, an understandable reluctance by the involved courts to act on controverted facts and more complex certificate interpretation issues was encountered in the Tri-State cases cited in footnote 13, which will hereafter be referred to individually by the names of the respective defendants and collectively as the bomb cases.

In 1967, Tri-State and other munitions carriers filed a self-help complaint in the Western District of Missouri seeking to enjoin International Transport, Inc., a "size and weight carrier," from transporting all Classes A and B explosives. Sixteen days following the filing of such complaint the court, Judge Hunter presiding, issued a preliminary injunction relating to a portion of the relief sought, restraining International from transporting Classes A and B explosives which when boxed or palletized did not exceed 150 pounds per box whether palletized or unpalletized. But the Missouri court did not restrain International from transporting 500-pound and 750-pound bombs, and concluded in connection with these bombs that "the factual application of the proper rule is difficult and does not attain that degree of clarity and certainty necessary for this Court to deem their transportation by defendant to be a clear and patent violation of 49 U.S.C. § 303(c) and 306." Judge Hunter further reasoned that the lawfulness of the transportation of such bombs under certificates authorizing the transportation of "commodities which by reason of size or weight require the use of special equipment" "is obviously of the type Congress intended to be decided in the first instance by the Interstate Commerce Commission in the exercise of its expertise."

In September, 1967, the ICC instituted an investigation proceeding to determine if International's transportation of the above-described bombs was within its "size and weight" authority and exercised its stay power of the self-help proceeding under section 222(b)(3). Following hearing, the ICC served a Report and Order on January 14, 1969, in which it held International's transportation of such bombs unauthorized and ordered International to cease such transportation.18

Prior to the effective date of the ICC's order, International filed complaints in Missouri and South Dakota, the latter being subsequently consolidated with the Missouri case, to enjoin and set aside the ICC's order.


18. International Transport, Inc. - Investigation and Revocation of Certificates, 108 M.C.C. 275 (Full Com.).
Leonard Bros. Trucking Co., Inc., an intervenor in the ICC proceeding, filed a complaint in Florida to enjoin and set aside the order of the ICC served January 14, 1969, as well as the order of the ICC dated April 22, 1969, in *Ace Doran Hauling & Rigging Co., Investigation of Operations*, 108 M.C.C. 717 (Full Com.). In the action brought by Leonard Bros., a three-judge court was convened, and such court transferred the appeal, insofar as it embraced the *International* administrative decision, to the involved Missouri court. The International and Leonard Bros. appeals were consolidated, and C & H Transportation Co., Inc., and J. H. Rose Truck Line, Inc., intervened as plaintiffs in each of such suits. The United States, a statutory defendant in each suit, admitted that the ICC’s order under review was invalid.

In March, 1970, following hearing before a three-judge court composed of Judges Gibson, Collinson and Hunter, and before Judge Hunter as a single-judge court, said courts entered an Order of Remand, remanding the case to the ICC for rehearing and reconsideration so that the ICC might consider the bearing, if any, on its decision of a regulation adopted by the Department of Defense respecting the handling of explosives and to take additional evidence on matters relating to the alleged absence or insufficiency of evidence to support the ICC’s findings and conclusions.

The ICC then held a further hearing and issued a further order, served October 29, 1971, affirming its previous order served January 14, 1969, ordering that International cease and desist “from all operations . . . of the character found in said Report to be unlawful,” and reciting that “this order shall be effective on a date which is to be later fixed following judicial review of the action.”

International, C & H, Leonard Bros. and Rose filed amended complaints to set aside the later order, as well as the order it affirmed, and the United States admitted the invalidity of each order. Hearing was again held before the same three-judge and single-judge courts on January 5, 1972, and said courts, in a single opinion authored by Judge Hunter, entered judgment dismissing the complaints and ordering that the ICC’s order of October 26, 1971, become effective January 28, 1972.

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21. 49 C.F.R. § 177.835(b).
22. *International Transport, Inc. - Investigation and Revocation of Certificates*, 118 M.C.C. 536 (Full Com.).
During the pendency of the *International* litigation, Tri-State, *et al.*, had sued C & H (Jan 21, 1969), Leonard Bros. (Jan. 21, 1969) and H. J. Jeffries (Dec. 13, 1968) under the self-help provisions of section 222(b)(2), alleging violations by each in substantially the same terms as theretofore alleged against International and seeking the same injunctive relief, attorney’s fees and costs. Judge Hunter ordered all four cases tried on the merits on February 14, 1972, and the cases, separately tried, were concluded on February 15, 1972. In each case, the District Court found the respective defendants had committed clear and patent violations of the licensing sections of Part II with respect to the transportation of bombs and that each defendant, except C & H, had committed similar violations of said sections with respect to transportation of explosives which individually or boxed weighed 150 pounds or less, granted permanent injunctions against the transportation found in each case to have been unauthorized, and awarded attorney’s fees and costs to plaintiffs.24

Of singular note, in each opinion the district court predicated his finding of “clear and patent” violations concerning the transportation of bombs on the Commission’s decisions and the courts’ affirmance thereof which issued *after* the institution of the self-help case against International at which time the same court had found that the transportation of such bombs did *not* constitute a clear and patent violation of the affected sections of the Act and that the legality of the transportation of such bombs was “obviously of the type Congress intended to be decided in the first instance by the Interstate Commerce Commission in the exercise of its expertise.”

It seemed inconceivable to those of us who were involved as counsel for defendants in these self-help cases involving the bombs that a controversy which existed for over five years including two ICC hearings, two three-judge trials, a remand to the ICC and two appeals to the United States Supreme Court could become no controversy at all and instead a “clear and patent” violation within a few days following the second three-judge trial. The Court of Appeals for the 8th Circuit agreed,25 and reversed the judgment of Judge Hunter insofar as it awarded an injunction and attorney’s fees concerning the bomb-hauling part of the controversy. No appeal was taken from this 8th Circuit decision. Thus, finally it was determined that when the Missouri district court expressly found in 1967 that the transportation of the involved bombs under “size and weight”

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24. *Supra* note 13, first four citations.
authority did not constitute a clear and patent violation of the Act, the complaint with respect to such transportation should have been dismissed as the court was then without jurisdiction to entertain that portion of the action.

"Injured" Parties

A self-help action is available only to one injured by a clear and patent violation. Apparently, past, present or anticipated future injury meet this jurisdictional and proof requirement. Munitions Carriers Conference, Inc. v. American Farm Lines, Inc., 400 F.2d 944, 949 (10th Cir. 1971).

Proof of injury has not thus far presented a hurdle for plaintiffs. In the Southwest Marketing case, the court found irreparable injury under the reasoning of a Texas state court case holding:

"On the issue of whether plaintiffs have discharged the burden, applicable to relief by way of injunction of showing irreparable injury should such relief be denied, it is sufficient to note that injury to their business would be a necessary consequence of unlawful competition by the defendant, and that such injury is of necessity one which could not be ascertained with certainty."

The Missouri district court, in deciding the bomb cases, apparently shared the above-quoted view because the only evidence in each of the four cases upon which its finding of injury to plaintiffs could have been founded was evidence that plaintiffs held either single-line or joint-line authority between the points served by defendants in the transportation of bombs. The plaintiffs in the bomb cases presented no evidence that any traffic had been diverted from them by defendants and wholly failed to show that any shipment transported by defendants could have been or would have been transported by any of the plaintiffs had the same not been tendered to one of the defendants.

The subsequent breach of an injunction granted under section 222(b)(2) provides a prima facie case of injury to the parties who secured the issuance of such injunction. Though, as noted earlier, no right to bring private suits for damages resulting from violation of the operating authority sections of Part II exists, money damages are recoverable for breach of an injunction issued under section 222(b)(2). The appropriate measure of such damages has been found to be the amount of the net revenues

26. Supra note 17, at 818.
realized by the violator as a result of its contemptuous transportation activities. Such a measure of damages has been approved in a civil contempt proceeding for violation of an injunction granted in a patent infringement suit, Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 52 S.Ct. 238 (1932), wherein the court said (52 S.Ct. at 241):

"...There is no question here that the respondent has made profits through the infringing sales in violation of the injunction, and the amount of the profits was ascertained, but the appellate court held that petitioners were limited to the damages caused by such sales and that no damages had been shown. We think that the court erred in imposing this limitation. The fact that a proceeding for civil contempt is for the purpose of compensating the injured party, and not, as in criminal contempt, to redress the public wrong, does not require so narrow a view of what should be embraced in an adequate remedial award.

"While the distinction is clear between damages, in the sense of pecuniary loss, and profits, the latter may none the less be included in the concept of compensatory relief. In a suit in equity against an infringer, profits are recoverable not by way of punishment but to insure full compensation to the party injured..."

II.
The Stay Provision of Section 222(b)(3)

Section 222(b)(3) provides that the ICC may notify the district court in which a self-help action is pending "that it intends to consider the matter in a proceeding before the Commission" and upon such notification "the court shall stay further action pending disposition of the proceeding before the Commission." Such language is clear. Nevertheless, the courts have been less than uniform in their construction of this provision.

In Leonard Bros. Trucking Co., v. United States, the three-judge Florida court held that a stay effected by Commission notification under section 222(b)(3) constituted a judicial referral within the ambit of exclusive jurisdiction and venue statutes, 28 U.S.C.A. §§ 1336(b) and 1398(b). Section 1336(b) provides:

"When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination,
the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral."

Section 1398(b) provides as to venue:

"A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue."

Having so held, the Florida court found that it was without jurisdiction or venue to entertain the action of Leonard Bros. to set aside the ICC’s decision in the International case, and that exclusive jurisdiction for review of that decision reposed in the Western District of Missouri. The court did not hold, as later unsuccessfully contended by Tri-State, et al., in a motion before the Supreme Court of the United States, that exclusive jurisdiction and venue reposed in the single-judge court of Judge Hunter, because the Florida court did recognize that a three-judge court is required in order to enjoin and set aside an order of the ICC, 28 U.S.C.A. § 2325, and that any appeal from the decision of the Missouri court would be direct to the Supreme Court.

Before leaving Leonard Bros., one should also note that the court there concluded that the stay provision of section 222(b)(3) is a matter of judicial discretion rather than being mandatory as its language suggests (301 F.Supp. at 898, n. 6):

"Of course if the Commission could arbitrarily decide whether the judicial proceedings must be stayed there could be some basis for attaching importance to the procedural question [whether the court or the ICC initiates the stay], for it would then be more than procedural. The district court in which the notice is filed, however, presumably will, as it should, make a determination as to whether the issue is one which properly should be first determined by the Commission."

The three-judge court in the second International bomb case also held the belief that exclusive jurisdiction and venue to review the ICC’s decision lay in the Western District of Missouri but avoided deciding whether such jurisdiction and venue were in the three-judge court or in the single-judge court because "[a]ll three judges have concurred in the instant decision, including Judge Hunter, both in his capacity as the one-judge
court which referred the matter to the Interstate Commerce Commission, and as a member of the three-judge court," and "no possible problem is presented."

We believe these conclusions by the Florida and Missouri district courts respecting the exclusive jurisdiction and venue question are untenable and, further, that such conclusions probably resulted from the view that section 222(b)(3) was intended to afford a device to allow "self-help" courts to resort to the doctrine of primary jurisdiction, i.e., to throw the ball back to the ICC whenever the alleged violation is not "clear and patent."

We believe the better-reasoned view on whether section 222(b)(3) confers "referral" powers on the district court and certainly the view which better gives effect to the actual mandatory language of section 222(b)(3), is articulated in Mercury Motor Express, Inc. v. Brinke. Brinke involved a self-help suit brought under section 417(b)(2) of the Act, 49 U.S.C.A. 1017(b)(2). by eight freight forwarders who complained that Brinke was operating as a freight forwarder without an ICC permit in "clear and patent" violation of section 410 of the Act and sought a temporary restraining order, temporary injunction and permanent injunction to halt the alleged violations. In describing Brinke's status, the court through Justice Thornberry said (475 F.2d at 1089):

"Defendant Brinke holds an ICC broker's license, which was issued to him in 1964, but he has no freight forwarder permit. He applied to the ICC for a freight forwarder permit in December of 1963, about a month before he applied for the broker's license, but his application, adrift on an administrative odyssey which has already lasted over nine years, has not yet received final action."

Countering the complaint, Brinke moved to dismiss on the ground that his broker's license at least colorably authorized his activities and, alternatively, moved to stay the court action pending final disposition by the ICC on his application for a freight forwarder permit. The district court reserved ruling on the motion to dismiss, granted the motion to stay, and denied plaintiffs' application for a temporary restraining order and preliminary injunction. In granting the motion to stay, the district court concluded (Id. at 1091, n.8):

"The interpretation of the broker's license held by defendant and a

31. Supra note 23, at 988-990.
32. 475 F.2d 1086 (5th Cir. 1973).
33. As noted at the outset, this section was enacted in the same 1965 amendment as section 222(b)(2) and is identical thereto except that it deals with violations by freight forwarders rather than violations by motor carriers and brokers.
determination of the lawfulness of the activities of defendant conducted pursuant thereto are matters within the particular expertise and primary jurisdiction of the Interstate Commerce Commission."

The Court of Appeals affirmed the denial of plaintiffs' application for preliminary injunction but vacated the district court's stay order and remanded the case for trial on the merits. The cogent bases for vacation of the stay order justify, in our opinion, the length of the following quotation (Id. at 1091-1095):

"The district court stayed further proceedings below pending final action by the ICC on Brinke's freight forwarder permit because it concluded that central issues in the case lay 'within the particular expertise and primary jurisdiction of the Interstate Commerce Commission.' We do not believe, however, that the doctrine of primary jurisdiction may properly be invoked to stay a suit brought under 49 U.S.C.A. § 1017(b)(2).

"The judge-made doctrine of primary jurisdiction comes into play when a court and an administrative agency have concurrent jurisdiction over the same matter, and no statutory provision coordinates the work of the court and of the agency. The doctrine operates, when applicable, to postpone judicial consideration of a case to administrative determination of important questions involved by an agency with special competence in the area. It does not defeat the court's jurisdiction over the case, but coordinates the work of the court and the agency by permitting the agency to rule first and giving the court the benefit of the agency's views....

"Primary jurisdiction reference to an agency is favored when it will promote even-handed treatment and uniformity in a highly regulated area or when 'sporadic action by federal courts would disrupt an agency's delicate regulatory scheme.' United States v. Radio Corporation of America, 1959, 358 U.S. 334, 348, 79 S.Ct. 457, 466, 3 L.Ed.2d 354. The importance of uniformity has been recognized especially in cases involving reasonableness of tariffs of rates. E.g., Arrow Transportation Company v. Southern Railroad Company, 1963, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52; Texas & Pacific Railroad Company v. Abilene Cottonoil Company, 1907, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553. Similarly, primary jurisdiction reference is favored when the agency possesses expertise in a specialized area with which the courts are relatively unfamiliar. In Watts v. Missouri-Kansas-Texas Railroad Company, supra, 383 F.2d at 583, for example, this court in affirming the applicability
of the primary jurisdiction doctrine acknowledged judicial lack of expertise in technical questions of railroad financing.

"With these principles in mind, we turn to the case at hand. We note at the outset that plaintiffs have not sued under a traditional common law of equity theory or under a statute which is arguably foreign or inimical to the regulatory scheme of the Interstate Commerce Act, but under a section of the Act itself—§ 417(b)(2), 49 U.S.C.A. § 1017(b)(2). Further, the statute itself is not silent on the problem of coordinating the work of the district courts and the ICC in this type of action, but makes express provision for coordination. Section 1017(b)(2) provides, "The Commission may appear as of right in any such action," and Section 1017(b)(3) explicitly gives the ICC the power to assert primary jurisdiction in an appropriate case:

"In any action brought under paragraph (2) of this subsection ([§ 1017(b)(2)]), the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such notice the Court shall stay further action pending disposition of the proceeding before the Commission.

"The statute thus gives the ICC power to effect a stay of a § 1017(b)(2) action, but conspicuously omits mention of any corresponding power in the district court when the ICC does not intervene. We think the conferring of power to stay only on the Commission in this thoughtfully designed procedural provision, enacted as an integral part of the regulatory legislation, strongly suggests that Congress intended to supersede and replace the judicial primary jurisdiction doctrine in § 1017(b)(2) suits.

"The high jurisdictional threshold of § 1017(b)(2) reinforces our conclusion that application of the primary jurisdiction doctrine is inappropriate in suits brought under it. The section gives the district court power to enjoin only a 'clear and patent violation of section 1010.' Baggett Transportation Company v. Hughes Transportation Company, 8th Cir. 1968, 393 F.2d 710, 716, cert. denied, 393 U.S. 936, 89 S.Ct. 297, 21 L.Ed.2d 272. . . .

". . .The fact that the district court has the power to enjoin only obvious violations largely removes from § 1017(b)(2) litigation the reasons which underlie the primary jurisdiction doctrine. The courts are unlikely to conflict among themselves or with the ICC in deciding clear cases, and judicial action without prior reference to the
Commission therefore would not jeopardize uniformity in the administration of the regulatory scheme. Further, the value of the agency's specialized knowledge and expertise is at a minimum in cases involving 'clear and patent' violations.

"An analysis of the purpose of the 1965 amendment which became the present § 1017 (b)(2) further confirms the inappropriateness of applying the primary jurisdiction doctrine in this type of litigation. A major purpose was to hasten enforcement procedures in cases of clear violations. See Baggett Transportation Company v. Hughes Transportation Company, supra, at 715. Before 1965 only the ICC could sue to enjoin unlawful operations; the 1965 amendment allowed broader use by the ICC of this enforcement method by modifying requirements for service of process and, in addition, for the first time gave injured private parties the right to 'apply directly to the courts for injunctive relief' without the necessity of prior, potentially time consuming administrative proceedings. Commenting on the 1965 amendment, Congressman Oren Harris, Chairman of the Committee on Interstate and Foreign Commerce, made clear the congressional intent to avoid delay in the procedures created and to provide a relatively speedy remedy:

... We firmly believe this new enforcement tool will be a good one. It should not be subverted by any practice which will avoid or delay prompt settlement of the issues.

111 Cong. Rec. 9679. Judicial application of the primary jurisdiction doctrine would re-route plaintiffs through administrative proceedings the amendment entitles them to avoid and permit a delay of precisely the type that Congress sought to eliminate in cases of clear violations.

"In sum, we conclude that application of the judicial primary jurisdiction doctrine is inappropriate in § 1017(b)(2) litigation because (1) the statute expressly provides a method for coordinating the work of courts and the ICC, (2) judicial action which is limited to enjoining 'openly and obviously unlawful' operations will not jeopardize the uniform administration of the regulatory system or require a high degree of specialized knowledge on the part of the courts, and (3) primary jurisdiction reference of cases brought under § 1017(b)(2) would thwart Congress's intention to provide a relatively speedy enforcement procedure and remedy for injured parties. If a plaintiff cannot show a 'clear and patent' violation, the proper disposition of his complaint is dismissal for want of jurisdiction; if he can, he is entitled to injunctive relief." (emphasis added)
CONCLUSIONS

This discussion was intended to explore the benefits and pitfalls of the self-help provisions of Part II. As we see it, the benefits are self-evident. These provisions afford an additional, direct and expeditious means to enjoin flagrant violations of the licensing requirements of Part II. Secondly, they afford an opportunity for the injured party who prevails and is granted such injunctive relief to recover reasonable attorney’s fees from his former unlawful competitor. A possible third benefit is the award of damages to injured parties if an injunction issued pursuant to section 222(b)(2) is subsequently breached.

Likewise, the pitfalls appear to be threefold. First there is the problem of determining and advising your client whether the certificate violation he is suffering from is the ordinary, complex variety that is resolvable only by ICC expertise or is so “clear and patent” as to warrant an immediate judicial injunction. Secondly, after persuading your client to risk the expense of a self-help suit, you must convince an often reluctant judge that in your particular case he is equally able, or more able, than is the ICC to interpret and apply the facts and law to the certificate violation at hand; otherwise he must send you elsewhere for relief and dismiss you out of court. Finally, in any event, you must try to be sure you make a respectable showing that, even if you lose, you had reason to believe that a violation was “clear and patent,” because if you do not succeed in this your client may end up paying not only his own but the defendant’s attorney fees as well as court costs.

The central question is not whether the self-help provisions constitute good legislation (which they manifestly do) but whether the legislation has achieved the intended result in its application.

In the eight and one-half years since their creation, the rights available under section 222(b)(2) have been rarely exercised. Thus, our basis for assessing the success of the legislation is limited. Our assessment is, however, that the courts are likely to be disposed to grant injunctive relief in flagrant cases, i.e., in instances where the defendant holds no operating rights, operates in violation of express certificate restrictions or operates in excess of well-defined exemptions. On the other hand, when the existence of a violation is dependent upon an interpretation of operating rights and there is some law on both sides of the question, the courts have been and probably will continue to be reluctant to find a “clear and patent” violation. Obviously, most of the case law in this field is yet to be made.
TRANSPORTATION LABOR RELATIONS—
A LOOK AHEAD

BY COLIN BARRETT*

In the parlance of business management theory, labor is one of the many inputs in the process of producing goods and services in an economic environment.

From this management-oriented vantage, labor is thus approximately on a par with such other elements of input as capital, plant and equipment, etc. In the labor-intensive transportation industry it is an especially important input—but it remains, nevertheless, only one of many needed inputs in the performance of transportation services.

Yet, however, accurate this view may be, however conducive to sober business decision-making, its dehumanized character tends to obscure the very important fact that the word “labor” also represents people. While at one level this may seem so obvious as not to require mention, it is nevertheless all too easy for the business manager to forget in his decision-making activities that—unlike any other element of operational input—labor constitutes individual men and women, with all the wants, the frailties and, above all, the emotionality of the human species.

On one plane the exigencies of day-to-day operations require the manager to consider “labor” or “the union” as a depersonalized entity. Yet at the same time he must be constantly aware that he is dealing with human beings, and in one of the most sensitive areas of human relations. It is a dichotomy that may sometimes force management decisions which, if viewed in the cold light of logic, may seem questionable—because the purely rational decision would be abysmally wrong in the context of the human environment in which they will be carried out.

Perhaps the clearest illustrations of the peculiar requirements of labor relations may be gleaned from a recently published book entitled Working, by Studs Terkel—a book which, in the author’s view, should be required reading for all business executives engaged in labor relations activities.¹ The book is a series of tape-recorded interviews with individuals in numerous occupations, and casts an intensely human light on the many levels of labor on which our economic structure is based. Consider, for example, the plight of a man who picks fights with co-workers, purposely makes mistakes which spoil his work, deliberately taunts his supervisors—anything to break the monotony of a job he considers so boring that his most important job-related objective of each day is simply to reach “quittin’ time.”

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Because of this human side of labor—especially in an era when personal dignity, self-fulfillment and fundamentally individual goal-attainment have become so culturally important—perhaps no other area of business management offers so many problems and is so potentially disruptive to an enterprise as is labor. Indeed, the frustrations and difficulties of labor relations appear to play a significant role in the increasing tendency toward automation in the U.S. business community. Not infrequently, even where strictly rational considerations might dictate otherwise, companies will move toward automation because of the psychological desires of business managers to avoid the complexities of dealing with the pressures of labor.

Those pressures are not going to be easing in the foreseeable future; if anything, in fact, they will be even stronger. In our current inflationary economic climate, labor demands will be greater than ever before. Not only do workers want to offset the impact of inflation, but they are increasingly demanding a larger share of profits. The workers know it is their labor that makes it directly possible for business to manufacture goods and provide services, and, in their eyes, managers, owners and investors are little more than parasites living off the fruit of their toiling. While those more familiar with managerial complexities and capital needs may see another side to the picture, for the average worker these are simply words and phrases used to deprive him of what he views as his fair share of the proceeds of the work he does.

Nor are we likely to see any dramatic advances in productivity. Labor has grown far too sophisticated to ignore questions of working conditions, automation, etc., in negotiations. Along with the pressure for higher wages and fringe benefits there will be pressure for longer vacations, shorter work-weeks and more holidays—each decreasing the worker's available time on the job—while at the same time there will be strong resistance to work quotas or other approaches to increasing productivity. As for automation, not only will unions continue to fight layoffs—even by attrition—but the tight money market, which makes it more difficult to find the necessary capital investment, and the national energy problems (since it takes energy to run machinery) mitigate against any strong advances here.

This bodes particularly ill for the railroads, to whom labor problems are so important a part of their current financial difficulties. Work rules and seniority districts designed for the rail operations of 50 years ago or more continue to impede progress in that industry, and union leaders show few signs of relenting. Trustees of the Central of New Jersey did reach some extraordinary agreements with unions to allow improved services—but in this case it was a clear choice of take these actions or
close down the railroad. Unions may be expected to continue to give ground only grudgingly, if at all, on these important issues.

What all this adds up to is a strong potential for more strikes of the type that have impeded U.S. transportation during the last few years, as labor pressures continue and intensify.

Hopefully, if and when these strikes do occur, they may prod Congress to again consider legislation outlawing them. This is especially important for the railroad industry; every time a rail strike takes place, Congress finds itself compelled to intercede with emergency legislation to prevent the kind of economic catastrophe that would strike the country in the event of a prolonged national rail stoppage. To understand the full impact of such a stoppage, consider the problems of Great Britain—a much smaller nation with, therefore, much more potential for shifting needed traffic to other modes—encountered due to the slowdowns of the rail engineers last winter.

Official government projections indicate the magnitude of the damage to this country's economy that could be done by a national railroad strike. Approximately 1.5 million workers would be unemployed by the end of the first week of a strike; for each additional week, another 1.5 million would be added to the unemployment rolls. The Gross National Product would be cut by $12-15 billion each week of the strike. The electric power industry, which depends heavily on coal, would be severely hurt. Within a week, mining industries would feel serious harm. Copper production would stop within a week or 10 days; steel production within two weeks. The list goes on well beyond these.²

Nor are the problems of transportation strikes limited to the rail industry. We had a hint of the impact of a national truck strike last winter, during the walkout of the independent owner-operators—and it must be remembered that owner-operators constitute but a small fraction of the industry's labor force. The 1970 Chicago-area Teamster strike, lasting 12 weeks, cost the midwest an estimated $1.5 billion, forced layoffs of tens of thousands of workers, and drove a number of trucking companies out of business. Maritime strikes since 1962 have cost the nation an estimated $14.6 billion; the 1971 west coast shutdown alone brought unemployment of nearly 200,000. The effect of airlines strikes may be measured by the 1966 machinists' walkout, lasting 43 days and aimed at five major trunk carriers; 150,000 passengers a day were grounded, the struck carriers lost $7 million a day, and indirect losses to other sectors of the economy were

². Testimony by Paul McCracken, Chairman of the Council of Economic Advisors, before the House Committee on Interstate and Foreign Commerce, 1970.
in the hundreds of millions.\footnote{3} With these facts in mind, Representative James Harvey and Senator Bob Packwood sponsored proposed legislation in the 92nd Congress which would have forbidden railroad strikes; instead, binding arbitration procedures were proposed, with Administration support.\footnote{4} By very close votes in both houses, the legislation was defeated. A last-ditch effort of Senator Packwood to attach his bill as an amendment to the minimum-wage bill in the summer of 1972 was sabotaged when the White House abruptly withdrew its backing—apparently feeling that, in an election year, it could not afford to so seriously offend the unions.

There are some indications that the unions are growing more amenable to no-strike provisos, such as the experimental agreement signed by the Steelworkers to eliminate the possibility of a steel industry strike in 1974. But the unions are still adamant that they will not accept legislative compulsion in this area—and, in view of the composition of the present Congress, prospects for no-strike transportation legislation are very dim for the foreseeable future.

At the same time, there are some indications that businesses may have to become a lot more accustomed to the problems of unions and strikes, not only in the transportation industry but in all sectors of the economy. Unions are known to be strongly opposed to so-called "right to work" laws, which forbid compulsory union membership as a condition of employment. Right now, under permissive federal statutes, some states have and some do not have such laws on the books. But the unions are pressing for federal pre-emption in this area. Increased power for the unions to conscript members in this fashion would greatly strengthen them in their contract negotiations, and intensify their ability to cause widespread economic harm through strikes.

There is, however, one small bright spot in the picture. Although no one really made an issue of it at the time, there was some question as to the legality of the independent truckers' united action in stopping work last winter. Recent rulings of the National Labor Relations Board in several cases in which the independents proposed to unionize led to the conclusion that they could not legally do so. Citing such things as the fact that independents own their own vehicles and have considerable operational freedom, the Board held that independents are not employees, who can organize in unions; they are contractors, and therefore not union

\footnote{4} S. 2060 and S. 3232, introduced by Senator Packwood, and H.R. 9989, introduced by Representative Harvey.
material. In sum, it held that the independents are themselves business entrepreneurs—and, to rub it in, the Board also held that non-owner drivers who work for the independents are employees of the independents themselves, not of the carrier companies with whom the independents have contracted.  

This raises an interesting point: If the independent truckers are to be considered, as determined by NLRB, to be private businessmen in their own rights, then are they not subject to all the laws applicable to business—including anti-trust laws? And would the anti-trust laws not prohibit unified action of just the type that took place during the stand-down in January and February of this year? Obviously there are many questions still to be finally decided here, including the court system’s acceptance of the NLRB’s decisions. But those decisions raise at least the possibility that in the future such work stoppages may be found illegal.

But the independent truckers represent a very minor segment of the overall transportation labor picture—and elsewhere in that picture it appears that strong labor unions, with full legal right to strike, will remain the rule. This being the case, the question of how strikes are conducted becomes important.

Under present law, strikers are entitled to several forms of government financial assistance—welfare payments, food stamps, even in two states unemployment compensation. Adding to these payments the money available through non-government sources—including the United Way, which has a strong union affiliation—striking workers can draw up to $300 a month or more while a strike lasts. By thus easing the financial pressure on the strikers, this serves to unbalance the economic scales in the collective bargaining process.

Several recent Congressional efforts to ban food stamps for strikers have failed—but the Department of Agriculture last year promulgated tighter regulations which would at least ban food stamps for those participating in strikes declared illegal in the courts, and which would also take unions and their personnel out of the food-stamp dispensing business.

5. George Transfer & Rigging Co., Inc., 208 NLRB No. 25; Kreitz Motor Express, Inc., 210 NLRB No. 11, and Daily Express, Inc., 211 NLRB No. 19.
6. New York and Rhode Island, both of which—after waiting periods—permit payment of unemployment compensation to strikers.
7. On three occasions over the past two years the House of Representatives voted favorably on such proposals; but they were turned down by the Senate by large margins, and were eliminated in legislative conference. Subsequent efforts failed in both Houses.
This last is especially significant, in that it would reduce the potential for fraudulent dispensation of food stamps; former Illinois Governor Richard B. Ogilvie publicly estimated that some $230,000 in food stamps were passed out illegally during the 1970 Teamsters strike in Chicago, where union personnel graciously "helped" the government administer the program. 9

It must be recognized, however, that prospects are not bright for definitive legislation or administrative action in this area. Again, the make-up of the current Congress, with its broad pro-labor sentiment, is responsible. The chance for strong action to ban governmental financial aid to strikers is near zero through 1976, with longer-term prospects dependent on what happens in politics after that.

Somewhat more encouraging prospects are offered by the so-called Super Tire case, in which two automotive tire companies are challenging New Jersey policies of granting welfare assistance to strikers. The companies—Super Tire Engineering Co. and the Supercap Corp.—were struck by the Teamsters in 1971; the strike lasted six weeks, during which many of the strikers received welfare payments from the state. It is these payments, and the policies permitting them which have been challenged by the companies.

This is not the first time such a lawsuit has been filed. But previous efforts have failed because, by the time the cases came up for hearing, the strikes were over; under these circumstances, it was held, the cases were moot. The same thing happened to Super Tire and Supercap—this time the Supreme Court ruled that, even though this particular strike was long past, the issue had signisignificance for the future and the parties were entitled to a full trial. 10 Now the case is once more back in the court system for a decision on the merits.

The particular significance of this case is that it places the matter in a forum not subject to the political pressures of elections and lobbying. Should the companies win, the effect could be widespread and have a significant impact on collective bargaining disputes for the indefinite future.

The philosophic problem posed by this question of public financial aid to strikers is one worth discussion. The accusation is often made that those favoring an end to this assistance propose to "starve workers into submission," and to "wage war on women and children" by depriving the


strikers' families of the wherewithal to purchase food and shelter. But such propagandistic rhetoric misses the point.

A striker is eligible for public aid only because of his own voluntary action in becoming a striker. He chose to walk off his job, in order to try to gain certain personal benefits from his employer. In a nation where there are still millions of genuinely poor individuals, who would lack food and shelter without government aid, it does not seem appropriate to divert funds to those who have voluntarily elected temporary poverty in order to improve their own economic lot without benefit to anyone else.

A flaw in this argument is that an indeterminate number of strikers are not voluntarily on strike, but are compelled to join their fellow union members. As a practical matter, it is simply not feasible to attempt to segregate these individuals, who may have voted against a strike, from their pro-strike co-workers. But what we have here is not a case in favor of public aid to strikers — it is a very strong case against compulsory unionization. No one should be required to leave his job against both his own and his employer's will. Union propaganda has made "scab" a dirty word in the American lexicon — but in actual fact a scab is no more nor less than a worker who disagrees with those of his co-workers who want to strike, and would rather go on working. Many believe he should have that right, and find the unions' tactic of first compelling him to strike, and then using the plight they have put him in as justification for public aid to all strikers, to be hypocritical and distasteful in the extreme.

Another strike-related statutory question relates to the violence and vandalism that often accompanies labor disputes. In some instances, rather than go on strike, workers will indulge in industrial sabotage efforts to win their point; in others they will strike and aim their violence at those crossing the picket lines; in still others, where strikes succeed in closing a business down, they will use vandalism to bring increased pressure on the recalcitrant employer.

Such violence is, of course, contrary to state criminal laws. But in many areas law-enforcement officials are secretly (or not-so-secretly) sympathetic to the workers, or are reluctant to act strongly for fear of inciting still greater violence; in either case, it is not uncommon for local police to look the other way when labor violence occurs. Under the so-called Hobbs Act, the Congress made labor-related violence a federal crime — but the Supreme Court subsequently held that the Hobbs Act did not apply to violence committed in pursuit of what it called "legitimate union goals." There was introduced in the last Congress a bill to amend the Hobbs Act so as to eliminate this loophole. Unfortunately, it failed to

win enactment; and the present Congress’ attitude is not likely to be especially favorable in view of the opposition that has been expressed by organized labor. Thus far discussion has focused on the conduct of strikes on labor’s side of the fence. There is also, in the air transportation area, legislation which may have an impact on management’s approach to strikes.

Unlike railroads and motor carriers, airlines do not negotiate contracts on an industry-wide basis; rather, each airline deals with the unions separately. In theory, this means each carrier-union negotiation is an entirely separate and distinct entity. In practice, however, reality being what it is, there is a very strong element of carry-over from one negotiation to the next; that is, once an air union has reached one agreement with one carrier, it is very reluctant indeed to settle for anything less in its subsequent talks with other carriers. As a result, the union-carrier negotiations are of considerable interest to all other carriers.

The industry has recognized this mutuality in their much-publicized Mutual Aid Agreement, under which all airlines come to the financial aid of any line so unfortunate as to sustain a strike. In part, this simply reflects the economics of air transportation; when one carrier is struck, its competitors will normally pick up a “windfall” of the traffic that otherwise would have moved via the struck carrier. And in part it is a recognition of the reality that a strike-enforced labor settlement on one line will very quickly become the starting point for union bargaining with other carriers.

The airlines’ mutual-aid agreement is quite distinct from the question of public assistance to strikers, since the payments to the struck airline come from its peers in private industry and not out of the public purse. A better comparison would be with union strike funds; just as the union-member employees of other lines help finance the strikers, so do the airlines themselves help carry the economic burden for their side of the dispute. And, contrary to some very unrealistic propaganda put out by the unions—who are, needless to say, exceedingly hostile to the mutual-aid pact—no airline gains financially by a strike; mutual-aid payments are not even high enough to wholly offset the struck carrier’s losses, let alone improve its financial condition.

Currently legislation is pending before the Congress to specifically outlaw the Mutual Aid Agreement. The proposed legislation would override rulings of the Civil Aeronautics Board that the carriers’ agree-
ment is legal. Although a good deal of space has been devoted to the question of strikes and their ramifications, because of the leading role this type of activity plays in the labor area, no discussion of labor can stop here. Another very important consideration is the increasing intervention by government agencies in the transportation industry's—and, in fact, all of the business community's—relations with its workers.

The Occupational Safety and Health Standards, for example, include specific standards applicable to longshore work and to materials handling and storage, as well as many other regulations affecting, directly or indirectly, the transporation industry. While there is no question of the need for protection of employee safety and health on the job—and there is a good deal of room for improvement in these areas—it is doubtful whether the broad regulatory type of approach is the proper vehicle to handle this problem. What too often happens is that companies with even extremely high safety records must pay the penalty, in terms of increased protection costs, for the records of those with prior safety histories.

Questions of discrimination on the basis of race or sex constitute another area in which there is increasing governmental intervention in the employer-employee relationship. In a nation where schoolchildren are bussed miles across town to achieve racial balance in a community's school system, where girls are encouraged to play sports with boys, even to the point of being eligible for college football, it does not seem likely that this pressure is going to relax any time in the foreseeable future.

The transportation industry appears to have been singled out as a particular target in this area—whether justly or unjustly is a question that will be up to the courts to decide. The Justice Department last year filed the first class-action racial discrimination suit against the motor carrier industry, naming 349 major trucking companies, the industry's bargaining agent—Trucking Employers, Inc.—as well as the International Association of Machinists, the Teamsters Union, and a Teamsters sub-organization as defendants. The suit accused them of systematically discriminating against blacks and persons of Spanish ancestry.

Basically, the carriers and unions were accused of relegating minority workers to lower-paid, less desirable jobs, and of hiring inadequate numbers of minority representatives. Consent decrees signed by a number of the carrier defendants indicate what the Administration wants—hiring

15. Following a four-year investigation of the mutual-aid agreement, the CAB concluded that "the mutual-aid agreement represents a legitimate resort by the carriers to economic self-help, in a manner that is in no way inconsistent with the national labor policy." Statement issued February, 1973.
quotas designed to bring minority representation in each job classification in line with the community's population distribution, plus back pay for minority workers who have allegedly been kept out of better-pay jobs.\textsuperscript{17}

This lawsuit reflects an increasing tendency of the government to intervene in the hiring, promotion and firing process to further social objectives. For example, employers may no longer test applicants as to their qualifications for jobs if the test is found to discriminate, directly or indirectly, against any minority group. In one recent instance, it was held that a company could not enforce its policy of discharging workers whose pay had been subject to excessive garnishment—on the ground that more blacks than whites had their pay garnisheed. Clearly this is a factor that business is going to have to live with for a long time to come.

In this connection, one other matter warrants mention—the question of a prospective employee's past criminal record as a hiring criterion. Thus far, at least, it has not been suggested that employers should be compelled to hire known criminals; but there are moves afoot which would at least make it much more difficult for an employer to exercise his freedom in this area. The federal government is now developing central, computerized data banks of criminal records—but there are strong pressures, at both the administrative and the legislative level, to permit industry no access whatever to these records. Especially in view of the very considerable attention currently being devoted to the subject of cargo security by both government and private industry, it seems unrealistic to bar management from checking a prospective employee's past criminal record before hiring him and giving him access to cargoes that are susceptible to pilferage and theft.

In conclusion, the outlook for labor, from the management viewpoint, appears to be one of increased pressures in the areas of wages, benefits and working conditions, and a growing level of governmental intervention in the personnel management field. Both the law and its administration will continue to impose sharp restrictions on the freedom of business to deal with its labor problems. The effectiveness of business, and especially the labor-intensive transportation industry, in handling these problems is going to depend in great part to how well it adjusts to the new and increased pressures on it—and how well labor, both organizationally and at the individual-worker level, responds to the increased need for respon-

\textsuperscript{17} The partial consent decree was signed by Arkansas-Best Freight System, Inc.; Branch Motor Express Co.; Consolidated Freightways, Inc.; I.M.L. Freight, Inc.; Mason-Dixon Lines, Inc.; Pacific Intermountain Express Co., and Smith's Transfer Corp. The carriers did not admit to violations of the law, but agreed to try to meet hiring goals for the future. Back pay was not involved in the decree.
sibility that has been thrust upon it. In the final analysis, both labor and management are on the same side; neither one can function if they do not cooperate in striving toward their primary objective of getting the job done. If they ever really lose sight of this fact, this nation is in for probably more serious economic trouble than it has ever before experienced—a disturbing, and, it is to be hoped, unrealistic, prospect.
POOLING BY INTERSTATE MOTOR FREIGHT COMMON CARRIERS

John M. Records*

In these days of concern by carriers, regulators, and the public alike with means to reduce the consumption of motor fuel in the United States, it would be well to consider the use of pooling by interstate carriers as one device by which that end may be accomplished; a device by which with official approval, such carriers may eliminate certain operations which are economically unfeasible without jeopardizing their certificates.

DEFINITION OF PROBLEM AREA

The situation involves the regular route certificates of interstate common carriers.¹ A particular route is authorized to two or more such carriers with service at several or all of the intermediate points between the larger cities which are the termini at either end of the route. The available traffic to and from the small intermediate points, if it were spread among the authorized carriers, is not enough for each carrier to justify a frequency of service acceptable to the shipping public without being at the same time too costly for it to handle. There is obviously too much competition on the route and some sort of adjustment should be made. Each carrier tries to accomplish its own adjustment in order to bring its costs into line. It may reduce the frequency of its peddle runs to once or twice a week; it may encourage shippers to seek the services of one of the other carriers; and it may interline shipments for delivery. This problem just is one facet of the "small shipments problem" which has plagued the shipping public, the carriers, and the Commission for a considerable number of years.

INTERLINING AS A SOLUTION

Interlining would seem to be an acceptable solution, particularly if one carrier should receive the intermediate point traffic of enough of the other carriers to make it worthwhile to perform acceptable service. Reduction in the overall number of partially loaded and empty miles over the route logically would have the effect of increasing the caliber of service and at

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¹. This paper deals with pooling as a device to be used by motor freight common carriers. It is available also to railroads, bus companies and barge lines under Section 5(1) of the Interstate Commerce Act, 49 U.S.C. 5(1), hereinafter referred to as the "Act". The Interstate Commerce Commission which administers the Act will be referred to as "Commission" or "I.C.C.".
the same time conserving fuel. But interlining has been found not to be consonant with the duty imposed upon motor carriers by Section 216(b) of the Act to provide reasonably continuous and adequate service to and from their authorized service points. It also violates the provision uniformly contained in certificates issued by the Commission reading as follows: "IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate."

Failure to serve may result in institution of proceedings by the Commission's Bureau of Enforcement under the authority of Sections 204(c) and 212(a) of the Act for the purpose of suspending or revoking the respondent's operating authority if it fails to reinstitute service to the involved points after being ordered to do so.

One of the early cases in which the Commission considered whether the interlining of traffic to small intermediate points on a carrier's route could be considered a reasonably adequate and continuous service is Red Ball Motor Freight, Inc. v. Herrin Transportation Company. This is a case in which the complainant was the carrier to which the defendant habitually interlined its small shipments. Apparently the complainant finally got its fill of this scurvy treatment and turned to the Commission to compel its rival to serve the points itself.

The Commission, Division 5, vindicated the complainant by ordering the defendant to institute, within 60 days after the date of service of the order, reasonably continuous and adequate service to the public for the transportation of traffic tendered to it for movement to or from intermediate points on its authorized route between Houston and Shreveport.

In the course of its report, the Commission said that under circumstances in which three large common carriers, including the defendant, had authority to serve practically all points on the route under consideration; that the traffic moving to these points consisted principally of intrastate shipments; and that most of the points had relatively small population, it could not be expected that any one carrier would have opportunity daily

4. 49 U.S.C. 304(c).
5. 49 U.S.C. 312(a).
6. See f.n. 3
or regularly to transport interstate shipments to all points on the route. The defendant did not have the intrastate rights. Therefore, Division 5 said an occasional interchange with a competitor of a shipment also should not be construed as non-compliance with the condition that reasonably continuous and adequate service be rendered by the holder of a certificate. But to actually render no direct service when it had an opportunity to do so to 14 points on a considered route, could not be considered compliance.\(^7\)

Similarly, in *Pacific Intermountain Express Co. Investigation of Practices*,\(^8\) upon the institution of separate investigations by the Bureau of Inquiry and Compliance of the Commission, PIE, Missouri Consolidated Freightways Corporation, and Riss & Company, Inc. were found to have failed to provide reasonably continuous and adequate service in violation of Section 216(b) of the Act\(^9\) where they had interlined LTL shipments to Garden City and other points in Kansas to which they held direct authority. Division 1 cited the *Red Ball* case\(^10\) with approval. PIE had instituted the service before the hearing at Garden City, and all of the respondents had delivered truckload shipments direct to the involved points and they argued that this activity and the fact that their interline arrangements were satisfactory to the shipping public should lead to the conclusion that they were providing a reasonably continuous and adequate service. The Commission nevertheless approved entry of an order requiring them all to institute and provide such service. It said that if need for their services no longer existed, it would logically follow that their certificates of authority should be revoked.

**POOLING**

Of course, a carrier may voluntarily seek to have the Commission amend its certificate to eliminate routes or points which it no longer wishes to serve. Perhaps understandably, carriers seem reluctant to do this, or indeed to suffer involuntary revocation, perhaps because they feel that they may possibly desire the authority in the future should some new commercial development take place along the route to generate additional and more desirable traffic. The problem then becomes one of preserving the authority intact for possible future use or sale while at the same time assuring that adequate service is maintained to the public. Pooling of service has been found in several instances to be the answer.

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7. 52 M.C.C. at p. 457-458.  
8. See f.n. 3  
10. See f.n. 3.
The leading Commission decision on the subject of pooling of service by motor common carriers of freight in Consolidated Freightways Corporation of Delaware, et al., Pooling. In that case, eight multi-state carriers and one single-state carrier entered into an agreement for pooling of service and filed an application for an order under Section 5(1) of the Act for its approval. The points involved were located on U.S. Highway 77 between Oklahoma City and the Oklahoma-Texas state line (except points in the Oklahoma City Commercial Zone), and at the off-route point of Sulphur, Oklahoma. What had precipitated the agreement was a complaint filed against the multi-state carriers and others by the Oklahoma Corporation Commission alleging failure to render adequate service at authorized points.

The underlying situation was that the multi-state carriers operated linehaul equipment over U.S. Highway 77 between Oklahoma City and Dallas - Fort Worth, a distance of 215 miles, and found it economically unfeasible to stop vehicles to pick up or deliver LTL shipments to the intermediate points. They almost always handled volume shipments to the intermediate points direct. The single-state carrier, Ryan Freight Lines, Inc., was handling most of the LTL traffic at the Oklahoma points on U.S. Highway 77 through interline arrangements at Oklahoma City.

Since the agreement specified that the linehaul carriers would tender all of their traffic, even the volume loads, to Ryan, that carrier anticipated a healthy increase in its business under the agreement.

Furthermore, it argued that if the pooling agreement were not approved and the multistate carriers were required to institute direct service this traffic would diminish and Ryan's economic health would deteriorate.

**CONTRACT REQUIREMENTS**

The form of contract entered into by the parties and approved by the Commission in the Consolidated case was found to be one for the pooling or for the division of service and therefore that it was the type of agreement contemplated by Section 5(1) of the Act.

The Commission discussed the elements which must be incorporated in such an agreement for the pooling of service. The agreement must be among carriers subject to Part II of the Act. The proposed pooling must be in the interest of better service to the public or the economy of

operation. It must not unduly restrain competition. It must be assented to by all of the carriers involved. The agreement must imply that the multi-state carriers will continue to solicit traffic for the pool points and otherwise perform all the duties inherent in their motor carrier operating rights, the only exception being that they will fulfill their obligation through the use of an agent.

The policy of the Commission is clearly stated as follows:16

"Where we have examined the situation in the light of current conditions and a concrete proposal to continue and even improve operations under a pooling-of-service arrangement which would benefit both the carriers involved and the shipping public, we can find that the active and continued interests and participation by carriers in such a pooling arrangement can be considered to have met the duty imposed by section 216(b). Such a finding, we emphasize, does not imply that any carrier may casually abandon its duty to render an active and continuous service under its certificates."

Other features of the particular agreement in the Consolidated case17 are: service would be performed by Ryan on a five-day-per-week basis at the pool points; tender of outbound freight by Ryan to the proper multi-state carrier would be prompt; Ryan's remuneration would be on the basis of the regular schedule of revenue splits from time to time obtaining among Oklahoma carriers for division of joint interstate rates; the multi-state carriers would be responsible for the collection of charges and handling of loss and damage claims; and Ryan would deliver truckload shipments in the multi-state carriers' trailers. The term of the agreement is five years from the effective date, with no need for further approval from the Commission for successive five-year renewals in the absence of changes affecting its substance. Any of the parties may withdraw from the agreement upon 30 days written notice to each of the other parties and to the I.C.C. Entry as a party is open to any interstate motor common carriers authorized to serve any pool point, with notice to the I.C.C. The agreement is expressly made subject to the approval of the I.C.C. by means of a Section 5(1) application.18

15. 49 U.S.C. 301 et seq. The agreement in this case provided for Ryan to perform cartage service at Ardmore and Oklahoma City under certain circumstances and at rates to be established for such service. The Commission said that such terminal area operations would be exempt under Section 202(c)(2), 49 U.S.C. 202(c)(2) and provision for them should not be included in the contract because the Commission has no jurisdiction over such service.

16. 109 M.C.C. at 606.
17. See f.n. 11.
18. 49 U.S.C. 5(1),
EXTENSION APPLICATIONS IN POOLING AREA

At about the same time as the carriers in the Consolidated case\textsuperscript{19} filed their application for approval of the contract they had entered into, Texas-Oklahoma Express, Inc. filed an application under Section 207 of the Act\textsuperscript{20} for extension of its authority to transport general commodities over regular routes between Dallas and Oklahoma City over U.S. Highway 77 serving all intermediate points except certain points in Texas, and serving Sulphur, Oklahoma as an off-route point. The request for authority encompassed the same points in Oklahoma which were the subject of the pooling agreement in the Consolidated case.\textsuperscript{21}

One of the three protestants in the application proceeding\textsuperscript{22} was Ryan Freight Lines, Inc. In its Report, Division 1 referred to the pending complaint proceeding in the Consolidated case\textsuperscript{23} and the related pending pooling application, and the fact that there had been a hearing examiner report in the pooling case conditionally approving it. After thoroughly discussing the circumstances that various carriers had engaged in the practice of interchanging less-than-truckload shipments involving the Oklahoma points along U.S. Highway 77, and in doing so, were attempting to effect certain operating economies, and that this was one of the basic premises underlying the pending pooling agreement, Division 1 said:\textsuperscript{24}a"The practice of common carriers' interchanging freight destined to points which they are authorized to serve directly in single-line operation cannot be condemned where it is accomplished under appropriate legal sanction. Under a given set of circumstances, this kind of interchange service may serve a useful purpose, such as effecting operating economies or efficiencies which are helpful both to the participating carriers and to the shipping public."

The report concludes that in spite of the possibility that the pooling application might be approved by the Commission and represent the only feasible means of assuring expeditious service for the shippers along U.S. Highway 77 in Oklahoma, the TOX application should be nevertheless approved, but should be limited to a term of three years, during which the carrier would be required to file an annual "performance report" with the Commission's Bureau of Economics, supplying information detailed in the order.

\textsuperscript{19} See n.f. 11.
\textsuperscript{20} 49 U.S.C. 307.
\textsuperscript{21} See n.f. 11.
\textsuperscript{22} Texas-Oklahoma Express, Inc., Extension—Oklahoma Points, 110 M.C.C. 769 (1969).
\textsuperscript{23} See n.f. 11.
\textsuperscript{24} 110 M.C.C. at 779.
EFFECT ON FINANCE CASES

In Section 5 acquisition cases,\textsuperscript{24} the parties may find that the Commission will refuse to transfer, because they are considered dormant, segments of certificates involving authority to intermediate points where those points have been served only by interlining traffic. The intermediate point authority of one such segment was eliminated by the Commission in \textit{Murphy Motor Freight Lines, Inc. - Control and Merger - G & P Transportation Co., Inc. and Roadway Cargo, Inc.}\textsuperscript{25} Similarly, such evidence tendered in support of viable operations was refused in \textit{East Texas Motor Freight Lines, Inc. - Purchase - Lee American Freight System, Inc.}\textsuperscript{27} In the latter case, the fact that the protestants also engaged in the practice of interlining to points which they had authority to serve was considered not germane to the basic issue of whether a motor carrier involved in a Section 5 transaction had been conducting, active and viable operations.

In \textit{Clairmont Transfer Co. - Control - Milburn, Inc.}\textsuperscript{28} Division 3 relied upon the \textit{Murphy}\textsuperscript{29} and the \textit{East Texas}\textsuperscript{30} cases in approving the transfer of Milburn's authorities to Clairmont upon the condition that the dormant portions of the Milburn certificate be cancelled. After referring to the pooling agreement in the \textit{Consolidated} case,\textsuperscript{31} Division 3 said:\textsuperscript{32}

"While the Commission has approved such arrangements where it has been in the best interests of the public to do so, and lends its continuing support to these multiple-line substitutions for single-line service if they are being conducted pursuant to appropriate approval, it does not condone, and, in fact, condemns the carrier practice of regularly serving, by means of interline or interchange, authorized points which a carrier may move directly. See \textit{T.I.M.E.-DC, Inc. - Investigation and Revocation of Certs.}, 113 M.C.C. 897, and cases cited therein. Such conduct not only violates section 216(b) of the act, but also is contrary to the very terms of common carriers' certificates of public convenience and necessity."

The chronology of events in connection with \textit{Consolidated} is important

\begin{itemize}
\item 25. 49 U.S.C. 5.
\item 26. 90 M.C.C. 535 (1962).
\item 27. 109 M.C.C. 299 (1969).
\item 28. 116 M.C.C. 1 (1972).
\item 29. See f.n. 26.
\item 30. See f.n. 27.
\item 31. See f.n. 11.
\item 32. 116 M.C.C. at p. 5.
\end{itemize}
to an understanding of various contemporaneous and subsequent cases which refer to it. The complaint which precipitated the filing of the application for approval of the pooling agreement was filed in March, 1967. The application itself was filed in May, 1968. Hearing was in March 1969 at Oklahoma City. The examiner's report was served on November 6, 1969, and the final report of the Commission was not served until March 8, 1971. In 1970, not long after the report of the examiner was out, the Commission instituted two investigations of importance, *T.I.M.E.-DC, Inc. - Investigation and Revocation of Certificates*, which has resulted in a Division I report\(^{33}\) and *Pacific Intermountain Express Co. - Investigation and Revocation of Certificate*.\(^{34}\) The latter case embraces 11 proposed pooling applications involving points in Nebraska and Iowa.

The *T.I.M.E.-DC* report was the subject of a petition for reconsideration filed by the respondent, to which the Bureau of Enforcement replied. Thereafter, three applications for approval of pooling agreements in the involved territory were ordered by Chairman Stafford on April 2, 1972, to be assigned to Division I for handling and determination on a consolidated record with the *T.I.M.E.-DC* case and, by its order dated May 15, 1973, served May 23, 1973, the Commission permitted the intervention of the National Small Shipments Traffic Conference, Inc. and the Drug and Toilet Preparation Traffic Conference, providing that the issues were not to be broadened unduly. The same two conferences through a single representative have written the Commission in the *PIE* case requesting to be considered "participating parties" and have made representations in support of the pooling agreements filed in that case. Thus, both cases are now pending on petitions for reconsideration of the latest orders in each. The pooling agreements which are involved in the *PIE* and *T.I.M.E.-DC* cases were patterned very closely after the agreement approved in the *Consolidated* case.

**REASONABLE AND ADEQUATE SERVICE**

Examiner (now Administrative Law Judge), William A. Royall in his Report and Order served April 2, 1971), in the *T.I.M.E.-DC* case, found that the respondent had failed to provide reasonably continuous and adequate service to the public as a regular route common carrier at 366 involved points in Arkansas, Missouri, Oklahoma, Tennessee and Texas. The respondent had always solicited traffic to and from the points, but would provide service by interlining through

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33. 113 M.C.C. 897 (1971).
its gateways and terminal points or by handling in single-line service if the shipper specifically routed the traffic by respondent. Judge Royall concluded that to compel the institution of direct service, without affording respondent the opportunity to legally conform its operations in order to discharge its certificate obligations, would not be in the public interest or consistent with the Commissions's obligations to shippers and carriers alike. He then cited the *Consolidated* case with approval and ordered T.I.M.E.-DC to enter into a pooling agreement within 60 days and file an application for its approval, failing which an order would be entered requiring the respondent to institute such reasonably continuous and adequate service to the public at the involved points as to maintain compliance with the terms of its certificates. Then if the respondent wilfully failed to comply with the latter order, its certificates would be revoked or suspended, in whole or in part.

Division 1 on appeal agreed with the Examiner that T.I.M.E.-DC had been in violation of Section 216(b) of the Act and had failed to comply with the terms and conditions of its certificates, but disagreed with him with respect to the part of his recommended order that directed the respondent specifically to enter into a pooling agreement. Division 1 stated:

"Moreover, we believe that institution of service as required in the order entered herein is a prerequisite to our determination whether or not a pooling agreement would be in the interests of better service to the public or of economy in operation. [Footnote omitted.] Thus, if respondent, subsequent to reinstitution of service, desires to exercise its managerial discretion and enter into a pooling agreement with any other carrier, it may file such an application seeking this Commission's approval. [Footnote omitted.]"

As mentioned above, subsequent to the Division 1 report T.I.M.E.-DC apparently filed some pooling applications, but whether or not they were preceded by institution of service at the points involved is not apparent at this time.

Approximately a year and a half after the Division 1 report in *T.I.M.E.-DC*, Administrative Law Judge John Dodge's Report and Order was served in *Pacific Intermountain Express Co. - Investigation and Revocation of Certificate*. There PIE was accused of failing to

35. See f.n. 11.
37. 113 M.C.C. at 902.
38. Docket No. MC-C-6767.
render direct service to a considerable number of authorized points in Iowa and Nebraska. Prior to resolution of the investigation case, the carrier filed applications for approval of the 11 pooling agreements which were very closely patterned after the approved agreement in Consolidated.\textsuperscript{39} Judge Dodge, therefore, had for consideration both the investigation and the pooling applications. He dealt with the investigation and revocation case first in his report and concluded that the record clearly showed that the respondent was wilfully failing to render direct service to a substantial majority of the Nebraska and Iowa points named in the investigation order; that what service was performed to the small points was done by interline; and, that PIE intended to continue interlining unless the Commission ordered it to institute direct service or approved the pooling applications as to certain of the points. He concluded that while the wilful failure to provide a reasonably adequate and continuous service was a violation of the terms and conditions of the particular certificate under consideration in Iowa and Nebraska, there was no evidence of a violation of Section 216(b) of the Act.\textsuperscript{40}

The latter determination was based upon the fact that the section specifies a duty to furnish "adequate service only, and in this case, there was no sufficient evidence to make a determination on that point. As a preface to and explanation of his recommended order, Judge Dodge said:\textsuperscript{41}

"Interline of traffic seems adequate to meet public needs from this record and institution of local PIE services might result in uneconomic and wasteful expenditures of labor and money with no concomitant improvement in service to the public at the involved points. For that reason, and because it is believed that the carrier should have some freedom to plot its course of business operations, the order will provide an option, namely that respondent either institute such service at all such points, upon penalty of possible revocation of the entire certificate for failure to comply, or alternatively file an application seeking revocation of all the said certificate except that portion set forth in appendix D hereto. The appendix will retain no local authority in Nebraska or Iowa except to serve existing terminals and most (but not all) nearby points at which service is offered from such terminals. It is reasonable that short-haul carriers be allowed to enjoy all traffic to and from smaller points (not just the unprofitable 'garbage' traffic) and that long-haul carriers be limited

\textsuperscript{39} See f.n. 11.
\textsuperscript{40} 49 U.S.C. 316(b).
\textsuperscript{41} Mimeo Report, p.14.
to the long hauls. On that basis both categories can operate profitably, each offering a specialized service with appropriate types of equipment."

**NEED FOR COMPETITIVE SITUATION**

Turning to the pooling applications, which covered only part of the points which it had been determined that PIE was not serving, Judge Dodge referred to the *Consolidated* case\(^4^2\) and drew comparisons between the circumstances there and those involved in the PIE agreement. It will be remembered that the *Consolidated* agreement involved eight multi-state or long-haul carriers and one single-state or short-haul carrier (Ryan). Each of the 11 agreements entered into by PIE involved only one long-haul carrier (PIE) and one short-haul carrier. The judge referred to the requirement in the *T.I.M.E.-DC* case\(^4^3\) that the respondent reestablish service before there could be any favorable consideration of its pooling applications, and cited with approval *Southern Railway Company, Pooling*\(^4^4\) to the effect that there must be a prior existing competitive relationship between the participating carriers before the Commission can take jurisdiction over the proposed pooling application. Accordingly, he concluded that there was no competition existing between PIE and any other pooling applicant, nor any other short-haul Iowa-Nebraska carriers at pooling points. And, in his opinion, the pooling arrangements were nothing more than an effort to rename the existing interline arrangements. The traffic would be handled on PIE bills, and the short-haul carriers would now get all of the PIE traffic, whereas they formerly shared it with other such short-haul carriers, but the Judge could find no significant difference between regular interlining and this "one-on-one" pooling. Accordingly, he specified an order which would require PIE either to institute and maintain continuous and adequate service to the full extent of its authority in accordance with the particular certificate in question or to file an application seeking partial revocation of that certificate; and denying all of the pooling applications.

In its Decision and Order\(^4^5\) Division 3 approved the Report and Recommended Order of Judge Dodge except that it modified his proposed revised certificate to add certain routes which it concluded should not have been eliminated by the Judge and to use more up-to-date road designations for one of the routes.

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42. See f.n. 11.
44. Docket No. 27027, decided May 1, 1972 (not printed).
Before Judge Dodge's Report and Order was served, there had been Commission action in a finance case following which the vendee entered into a number of one-on-one pooling arrangements which received approval of the Commission upon application under Section 5(1) of the Act. Apparently in challenging the fitness of the vendee, the protesters had adduced evidence which showed that the purchasing carrier was not serving directly various authorized points but was using other carriers in a joint-line service. Division 3 agreed with the examiner's warning to the applicant that such arrangements could not be continued without Commission approval under Section 5(1), and also found that since the unlawful arrangements had been instituted prior to the Commission's decision in Consolidated, it would not be fair to impute unfitness retroactively to a time before that decision.

Division 3 also noted that since the examiner's report, the applicant had filed at least eight applications for approval of pooling arrangements. Those applications were heard under modified procedure and resulted in individual orders by Review Board No. 5, each dated December 5, 1972, and served December 22, 1972.

The above arrangements variously involved points in California and Washington. According to the recitals of underlying facts appearing in each of the orders, the applicants adhered very closely to the language of each of the elements of the pooling agreement in the Consolidated case. The operating verified statement filed in each of the cases, which were not opposed, included an extensive operational study of the previous handling of traffic with each of the pooling carriers, and the entire empha-

47. 49 U.S.C. 5(1).
48. Id.
49. See f.n. 11.
No. MC-F-11422, Smith Transportation Co. - Pooling - O.N.C. Motor Freight System.
51. See f.n. 11.
sis of the evidence was upon the money savings to be accomplished by the parties as compared to direct service.

A one-on-one pooling arrangement was approved in Consolidated Freightways Corporation of Delaware, Inc. - Pooling — Silver Wheels Freight Lines, Inc. 92 This arrangement also concerned a number of points in Oregon and Washington. Subsequently, by supplemental order dated December 17, 1973, served January 9, 1974, pursuant to its petition to the Commission to join in the pooling arrangement except at certain points in Oregon, Garrett Freight Lines, Inc. was admitted to the arrangement as a pooling party. Again, this matter was handled on modified procedure and there were no protesters.

SUMMARY AND CONCLUSIONS

In summary, then, the pooling of service by regular route motor common carriers of freight has been established as a method by which they may serve authorized points by the use of agents without being considered by the Commission in violation of their certificates. The Consolidated case93 provides the rationale and the prototype contract to use. The T.I.M.E.-DC case94 at this stage stands for the proposition that the carrier must reinstitute service at authorized points which it has not served direct before a pooling application will be approved involving those points. The PIE case95 thus far indicates that one-on-one pooling may not be approved. But the success of the other cited pooling applications96 approved on modified procedure without opposition tends to refute those conclusions about reinstitution of service and one-on-one pooling. Perhaps it depends on how the matter gets before the Commission. If upon complaint of failure to serve, reinstitution of service may be required before approval of pooling. If as part of a Section 597 finance case, or upon application and compelling proof of savings and efficiency in the public interest, reinstitution of service may not be required as a prerequisite to approval of pooling.

On the other hand, it seems that the question is really one of policy. Pooling is authorized by the Act. Having established that pooling - particularly of service - is appropriate under certain circumstances and with certain safeguards so that service to the shippers and receivers at small

53. See f.n. 11.
54. See f.n. 43.
55. See f.n. 38.
56. See f.n. 46 and f.n. 52.
57. 49 U.S.C. 5.
points is or will be actually improved, then this device should be sanctioned by the Commission without regard to reinstatement of direct service or to whether or not there are only two parties to the contract.

It is felt that the Commission is more likely than not to approve a specific pooling of service proposal that makes sense on the evidence. The parties need only ask.
COMMENT: SOLVENCY AND FINANCIAL STRESS IN AIR TRANSPORTATION

BY

RICHARD D. GRIFFIN

Introduction

In the wake of the Penn-Central collapse, increasing attention is being directed at the dangers of corporate bankruptcy and in particular at financial stress in regulated industries. With stock prices abnormally depressed and with interest rates at record levels, many firms have found it increasing difficult to meet growing demands for necessary financing. Many are rapidly approaching unsound financial structures in this harsh economic environment. This is particularly true in air transportation, and the situation could pose very real problems in the near future. Given the catastrophic effects of such events as Penn-Central, a better method of gauging financial health and the likelihood of insolvency in air transportation is needed. This paper is addressed to this need.

Research in the prediction of financial success or failure is still largely in the developmental stage. Newer attempts at designing predictive models have usually taken the form of traditional ratio analysis combined with statistical tools. This paper applies one such model to the U.S. Domestic airlines in an effort to appraise their financial strength. The purpose is to assess their solvency and to demonstrate the industry’s very fragile present financial condition. As a corollary, this paper will seek to identify the reasons behind the industry’s poor financial performance. Possible solutions will be explored in the conclusion.

The Altman Model:

Financial analysts have long sought to identify key ratios that measure financial strength. Edward Altman has isolated five such important mea-

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1. Pan Am, TWA, and Northeast have all had to deal with a liquidity crisis. Northeast, on the brink of bankruptcy, was merged into Delta in May 1972.


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sures demonstrated to be consistent predictors in several studies of industrial bankruptcies. These five are:

(1) the working capital to total assets ratio (WC/TA), a liquidity measure,
(2) the retained earnings to total assets ratio (RE/TA), a measure of accumulated past profits relative to assets,
(3) the earnings before interest and taxes to total assets ratio (EBIT/TA), a measure of the firm’s basic earning power,
(4) the market value of equity to book value of debt ratio (MVE/BVD), a measure of financial leverage,
(5) the sales to total assets ratio (S/TA), often called capital turnover, a measure of the firm’s productive use of assets.

Altman has combined these five, via an applied regression technique, into the following predictive model:

\[ Z = .012X_1 + .014X_2 + .033X_3 + .006X_4 + .999X_5 \]

where \( X_i \) are the above financial ratios. The objective function, \( Z \), is an index or score which Altman maintains is of considerable use in both forecasting insolvency several years in advance and in assessing overall financial performance. The critical values of \( Z \) are 1.81 and 2.67. A \( Z \) score of less than 1.81 indicates severe financial stress, a likely bankruptcy candidate, while a value in excess of 2.67 indicates a strong financial condition. Scores between these extremes form the gray area, firms out of immediate danger but not necessarily immune from problems in the future.

Application to Air Transport

Exhibit I is an application of the Altman model to the ten domestic airlines for the years 1966 and 1973. On the exhibit, the first four ratios are expressed as percentage figures (that is, a ratio of 100/100 = 100.0% or 100.0). The last ratio is expressed as a decimal (100.0% = 1.00). The \( Z \) scores for both years are presented in the final column of Exhibit I and below in summary form:

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3. Ibid., Altman, 594, for a complete description of the ratios.
4. Ibid., Altman’s technique utilizes multiple discriminant analysis. As this paper emphasizes the use of the model, the reader interested in the derivation and testing of the model is referred to the original source for more detail. The actual application of the Altman model is quite simple, as demonstrated in Exhibit I.
5. Altman found that the \( Z \) value of 2.99 as the safest indicator of the strongest firms but that a cut off of 2.67 was the best dividing line.
6. The year 1966 was chosen as the base as it represented the height of the airlines’ success despite a short strike noted below.
Z Values

<table>
<thead>
<tr>
<th></th>
<th>1966</th>
<th>1973</th>
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<tbody>
<tr>
<td>American</td>
<td>2.01</td>
<td>1.43</td>
</tr>
<tr>
<td>Eastern</td>
<td>2.16</td>
<td>1.10</td>
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<tr>
<td>TWA</td>
<td>2.30</td>
<td>1.54</td>
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<tr>
<td>United</td>
<td>2.34</td>
<td>1.67</td>
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<tr>
<td>Braniff</td>
<td>2.67</td>
<td>2.23</td>
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<tr>
<td>Continental</td>
<td>3.64</td>
<td>1.08</td>
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<tr>
<td>Delta</td>
<td>5.86</td>
<td>4.19</td>
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<tr>
<td>National</td>
<td>4.64</td>
<td>2.23</td>
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<tr>
<td>Northwest</td>
<td>6.50</td>
<td>2.31</td>
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<tr>
<td>Western</td>
<td>4.10</td>
<td>2.24</td>
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</table>

Two points are clear from the exhibit. First, there has been a sharp deterioration in the Z scores for all the ten carriers. Second, many now fall in Altman’s critical zone.7

In 1966, the industry was at its zenith and the Z scores above reflect this situation.8 Five carriers (CAL, DAL, NAL, NW, and WAL) were well above the 2.67 barrier, and one (BRN) was on it. Only four (AAL, EAL, TWA, and UAL), the “Big Four”, were in the middle range.9 No carrier was below the critical Z of 1.81. The model thus measures the majority of the carriers to be robust financially. The remainder are assessed as reasonably healthy. By 1973, however, the situation had changed dramatically. With Z scores falling significantly, five airlines (AAL, EAL, TWA, UAL, and CAL) are in the danger zone and only one (DAL) is well above 2.67. Four (BRN, NAL, NW, and WAL) are now in the middle area. The results therefore indicate an overall weakening in the industry’s financial condition and the model now suggests that a significant probability of insolvency does exist for several of the carriers.

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7. To insure that the Z values were not the product of random events, the author calculated values for 1965, 1967, and 1972 and found no significant differences between 1966 and the two years surrounding it or between 1972 and 1973. Z scores for 1972 were as follows: AAL (1.92), EAL (1.55), TWA (1.69), UAL (1.60), BRN (2.19), CAL (1.55), DAL (3.77), NAL (2.02), NW (3.45), and WAL (2.28).
8. Some ratios would have been slightly higher in 1966 had it not been for a strike in August which affected EAL, TWA, UAL, NAL, and NW. A mutual aid pact, however, did soften the strike’s impact significantly.
9. These four carriers were under far more competitive pressures in 1966 than the other major carriers. As will be argued below, these pressures have had a lot to do with the financial problems of the airlines.
### Exhibit I

#### Ratios and Z Values for the U.S. Domestic Airlines

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<tr>
<td>American:</td>
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<td>18.63</td>
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<td></td>
<td>1.56</td>
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<td>9.87</td>
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<td>904</td>
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<td>.50</td>
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<td>.879</td>
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<td>TWA:</td>
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<td>166.7</td>
<td>.815</td>
<td>2.30</td>
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<tr>
<td></td>
<td>3.20</td>
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<td>7.31</td>
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<td></td>
<td>2.91</td>
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<td>Northwest:</td>
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<td></td>
<td>1.83</td>
<td>19.51</td>
<td>10.62</td>
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<td>1.099</td>
<td>2.24</td>
<td></td>
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</table>

*Z values are calculated from the Altman model. For example, for American: 1966 data*

\[
Z = 0.012X_1 + 0.014X_2 + 0.033X_3 + 0.006X_4 + 0.999X_5
\]

\[
Z = 0.012(13.73) + 0.014(18.83) + 0.033(8.74) + 0.006(104.3) + 0.999(671)
\]

\[
Z = 2.01
\]

*Source: all ratios are computed using basic data from airline annual reports and from the Value Line Investment Survey.*
Considering the results of the Altman model, is one led to predict the imminent insolvency of the industry? This author does not hypothesize the immediate demise of any of the ten for several reasons. First, it is very doubtful that the CAB would permit an actual bankruptcy. As in the Northeast case, the Board would likely opt for a merger instead. In addition, several of the carriers currently in trouble could recover should the economy and competitive conditions suddenly change for the better. This is true of American, United, and Continental. But the low Z scores, especially for EAL and TWA, (two carriers long plagued by financial woes), do indicate that the entire industry is under severe financial stress that all concerned cannot ignore. Should conditions disintegrate much more, a real possibility in mid-1974, bankruptcy may be the inevitable consequence for the latter two carriers. The travails of two of the largest domestic carriers (ranked third and fourth in asset size) would be of little comfort to an already troubled industry.

Given the deterioration in the Z values noted above, a corollary concern must be the reasons behind the decline. Although most of the five component ratios have declined for almost all the carriers, two of the five seem to hold the keys. They are the earning power ratio ($X_3$) and the leverage ratio ($X_4$). The former ratio is heavily weighted in the model, and there can be no doubt that the lack of profitability in recent years is crucial to the industry's current state. The ratios for CAL and NW are especially interesting: NW's EBIT/TA ratio decreased from 23.36% to 4.72%, and CAL's slid from 20.82% to only 2.01%. Ratios for EAL and AAL turned negative, while those of DAL, NAL, and WAL fell by approximately 50% or more. The prime factor eroding these ratios would appear to be competitive conditions within the industry. The fault largely lies with the CAB. In fostering excessive levels of competition between carriers, the Board has contributed to declining profit margins from two sides. Increased competition has diluted revenues and it has increased

10. American and United especially have only recently experienced severe problems. They are therefore a little better able than others to withstand further pressures.

11. These two ratios are the causal variables in the cause/effect chain. Declines in two other ratios ($X_3$ and $X_4$) are the effects. $X_3$ is also important, but overall turnover improved in the industry between 1966 and 1973, with the notable exceptions of DAL, NW, and NAL. It would be argued, however, that turnover ratios have been, and still are, historically low compared to other similar industries. This is the fault of the CAB's competitive emphasis discussed below.

12. Especially as the lack of profitability affects carrier liquidity ($X_n$, the ratio of WC/TA).

13. The carriers themselves, however, are not totally blameless. They did eagerly increase capacity beyond reasonable bounds in the mid-1960s. Overscheduling on many route segments was still common up to the advent of the energy crisis in late 1973.
costs of operations. The other critical ratio, the leverage ratio (MVE/BVD), has declined sharply for all the carriers. The drop has been particularly pronounced for EAL, TWA, and CAL. Their ratios have fallen from 154.3% to 40.6%, from 166.7% to 38.9%, and from 275.7% to 52.1%, respectively. Causal to these declines are two factors. One is the airlines' heavy reliance on long-term debt finance. The other is the sharp break in airline stock prices over the last several years. The fault here lies with both the CAB and airline management. Insofar as the CAB contributed to sub-par profits via its competitive policies noted above, it thus also contributed to investor apathy toward airline common stocks. For its part, airline management shunned equity (stock) finance at a time when it was essential to the maintenance of sound financial structures. Instead, the carriers opted for the massive amounts of long-term debt that currently burden the industry.

Conclusions

This paper has demonstrated the rather fragile present financial condition of the U.S. Domestic airline industry. It has shown that a significant risk of insolvency does exist for several of the carriers should financial conditions deteriorate further. Regulatory and carrier actions must therefore be initiated before subsequent events give rise to another crisis of the magnitude of Penn-Central.

As the above analysis suggests that declining profitability and excessive debt finance are keys to the solvency problem, any actions taken to alleviate the current situation must act on both these areas of concern. Any significant decrease in debt burdens would take time, however, and thus immediate attention should be directed at short-term solutions geared to boosting profits directly. Few carriers have earned the "fair rate of return" (12.0%) set by the CAB in 1971. Considering the CAB's goal...

14. The degree to which a carrier faces competition is an important determinant of cost levels. See: Gill, Frederick W., and Gilbert L. Bates, Airline Competition, (Boston, Mass.: Harvard University Press, 1949), 519. Excess competition results in duplicative advertising expenditures, "seat wars", etc.
15. This ratio is the most important of the five in the model for several reasons. First, because its absolute magnitude is by far the greatest, its contribution to the total Z value is the most significant, at least in this industry. Second, it is the growing debt burden that creates the real threat of insolvency. Interest charges on debt must be paid. Interest is a legal obligation arising out of a bond contract, and the failure to pay it will surely result in legal action by the bondholders. That legal action is the start of bankruptcy.
16. For data on rates of return, as defined by the CAB, see: Richard D. Gritta, "Risk and the 'Fair Rate of Return' in Air Transport", Transportation Journal, XIII (Summer...
of fostering a "sound financial structure" in the industry, this situation must be corrected. Two possible avenues are open to accomplish this. The CAB might allow fare increases or it could act to reduce competition. As fare increases in the current economic environment might only serve to slow traffic growth, this author sees the latter alternative as the more viable.\(^7\) The CAB should therefore move quickly to reduce competition directly by cuts in new route awards and by permitting constructive mergers.\(^8\) Both actions would restore lost profitability to the carriers.

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17. In fact, it could be argued that reduced competition would result in lower fares and increased traffic generation because of the cost savings that would result. See: Gill and Bates, *Airline Competition*.

18. The latter action would seem preferable as it would be more direct. But constructive mergers should be planned now before conditions worsen, and merger candidates should be selected with a view toward directly decreasing competition. The merger between DAL and Northeast in 1972, served only to intensify competition in the already overcompetitive NY-Florida market, injuring EAL further in the process. A merger between NAL and EAL would do much to restore the lost balance in this market. In addition, merger candidates should be matched properly. Mergers between weak carriers (such as those rumored between TWA and PanAm, and between TWA and EAL) would only serve to prolong the financial problems of the industry and would be self-defeating in the long-run. Stronger carriers should be paired with the weaker if a merger policy is to succeed.
BOOK REVIEW

TRUCKING MERGERS—A REGULATORY VIEWPOINT by

Reviewed by JAMES C. HARDMAN, J.D.*

James C. Johnson, currently Assistant Professor of Marketing and Transportation at the University of Tulsa, has written an interesting and informative book about the regulatory aspects of interstate motor carrier operations.

The title is a misnomer since the author discusses subjects exceeding the limited issue of trucking mergers. A considerable portion of the book is devoted to the history, theory, and scheme of government regulation and the economic reasons which led to it.

The reader will find the above discussion to be an interesting and helpful review which will serve also as a foundation for the better understanding of the specific regulatory issues involving trucking mergers, or more accurately, acquisition proceedings.¹

Based on an analysis of more than 450 reported finance decisions of the Interstate Commerce Commission, the author attempts to acquaint the reader with the issues the administrative agency has considered relevant and material to the proper resolution of the statutory criterion “public interest”.

The cases were selected by the application of formal statistical methods and, on the basis of the cases cited, it appears that a representative sampling was achieved.

Professor Johnson relates the reasons given by the Interstate Commerce Commission in granting or denying acquisitions. Discussed are such issues as fitness, dormancy, and competition.

Professor Johnson is not an attorney and his analysis is more descriptive or narrative in nature than analytical. Transportation attorneys may find the work disappointing in this respect. On the other hand, a trucking executive may find the approach more interesting.

Based on the survey made, Professor Johnson reaches the conclusion that the Interstate Commerce Commission has caused carriers to operate less efficiently than possible by the imposition of gateway and tacking “restrictions”² and by deleting certain portions of authority on the basis of dormancy.

* Attorney-at-Law, Hardman, Burke, Kerwin & Towle, Chicago, Ill.
1. The author uses the term “merger” loosely to include acquisitions of all types including the purchase of operating authority and/or corporate stock.
2. The problem may not really be significant as the author implies since he also states
Before discussing the author's solutions or recommendations, the reviewer should like to transgress briefly to note that this academician apparently makes the same basic error that numerous critics of transportation regulation including the celebrated Ralph Nader have made. The Commission does not force carriers to tack or to utilize gateways. "Tacking" is an incidental privilege of a grant of authority which a carrier may or may not choose to exercise. In reality, carriers have affirmatively exercised the privilege when it was economical and feasible to do so. Where it was not economical and feasible to do so, many carriers have complained about the "procedure" and enlisted many in the academic community to support the position that limitations on tacking and gateway requirements should be eliminated. "Tacking" and also "interlining", as incidental rights, are basically inconsistent with the statutory scheme of regulation since authority generally issues on the basis of proof of need for more limited service and the need for service to points via tacking or interlining is not considered. Furthermore, adequate procedures already exist to eliminate gateways which responsible carriers observe and are satisfied to follow. Opponents of regulations tend to ignore the availability of such procedures.

The solutions which the author suggests to the problems he conceives are two-fold: (1) Imposition of a greater burden of proof on protesting carriers to show the need for restricting or modifying authority, and (2) Imposition of indemnity payments upon the applicants to compensate existing carriers for damages conclusively proven to result from the "merger".

The first recommendation of the author may already have achieved a considerable degree of fruition. Current judicial and administrative cases indicate that protesting carriers may now have an increasing burden of showing compelling reasons for the imposition of the restrictions or cancellation of authority in finance cases. The decision in Garrett Freight Lines, Inc. v. United States, _____ F. Supp. _____ (W.D. 1973), 1973 CCH Fed. Car. Cases ¶82,404, and Branch Motor Exp. Co. - Control - Middle Atl. Transp., 109 M.C.C. 807 (1971) should be contrasted with the author's position.

On the other hand, however, the recent administrative decision in Gateway Elimination, 119 M.C.C. 530 (1974) has clearly placed the burden on applicants seeking to extend irregular route operating authority through purchase of similar authority to prove that tacking is required in order to avoid such a restriction or to allow direct authority encompassing what otherwise could be accomplished by tacking.

at a prior point in the book that it is only occasionally that the Commission will impose a no-tacking restriction on the purchasing carrier or party.
The second recommendation, which involves indemnity payments, is based on the theory that the payments would allow existing carriers to remain solvent and that during the period of such payments said carriers would be able to adjust operations to the new competitive situation caused by the merger.

Unfortunately the author does not develop this theory in detail or establish its feasibility. As a result, the recommendation will not receive serious consideration. On its surface, it does not appear to be a practical solution because of the diverse factors which bear on a motor carrier's financial status and the difficulties which would be present in isolating the effect of a single factor such as a merger.

The failure of the author to develop his indemnity proposal, however, is typical of the lack of other meaningful analysis of the subject matter. The reader should be aware that the author's approach is basically a descriptive one and that the presentation of material is analogous to textual hornbook material.

The non-attorney should also recognize that the book is not and should not be a self-help guide to handling finance cases before the Interstate Commerce Commission and transportation attorneys should recognize that its greatest value is in its summarization of subject matter and copious citations to cases and other legal references. The latter includes numerous texts and law review articles. Unfortunately, however, the author, despite his apparent thoroughness, failed to cite the printed papers of the 1969 Transportation Law Institute, jointly sponsored by the Motor Carrier Lawyers Association and the Denver University School of Law, which the reviewer feels collectively present the most thorough and exhaustive study of the subject involved.

Despite the limited shortcomings mentioned, this book should be a significant part of any transportation library.

A judge appointed from the ranks of those long engaged in the active trial of cases before the particular tribunal brings to his new office an intimate knowledge of procedures, the statutory law and precedents. Nonetheless, the transition from bar to bench often proves difficult. Additional self-disciplines must be acquired, new responsibilities learned.

How much more difficult it is for the judicial appointee drawn from the broader universe of lawyers, lacking that profound experience, to attain the necessary proficiency. An influential minority\(^1\) would spare lawyers that anguish. Under the banner of efficiency and economy, arguing plausibly of the need to put the new judge immediately to work cutting down case backlogs, they would give existing expertise primary place in appointments. Character, judgment, energy, intelligence, the ability to learn and adapt, play an important but subordinate role in that thinking.

But the so-called "expertise" often proves illusory. Many appointees under the present system are not veteran administrative trial lawyers.

The absent expertise can be "self-taught" through energetic study, asking the right questions, wise listening and experience. It can also be cultivated through appropriate texts and seminars.

The latter tools for administrative law judges remain in the developmental stages. The ABA Conference of Administrative Law Judges has been evolving a week-long session, given at the National College of the State Judiciary, University of Nevada, for federal, state and local administrative law judges. Problems in evidence, pre-trial, opinion writing, judicial discretion and judicial review are taken up. Recent developments in administrative law analyzed.

There is a need for useful texts. This makes the book here under review opportune. Prepared for the Administrative Conference of the United States by retired administrative law judge Merritt Ruhlen, this slim text should prove helpful not only to the newly-appointed administrative law judge but to the veteran seeking another viewpoint. Sensible advice is provided in logical sequence on prehearing, discovery, procedural devices to shorten hearings, the handling of intervenors, hearing mechanics, tech-

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* Member Connecticut and District of Columbia Bars; Bars; Adjunct Professor of Law, Georgetown University Law Center; Past Chairman, Administrative Law Section, American Bar Association.

1. This emphasis on expertise has come to play an undue role in the appointment of administrative law judges at certain federal agencies, a practice currently being reassessed by the Civil Service Commission.
niques of presiding, conduct in dealing with counsel and parties, and
decision drafting. Thirty pages of appendices contain an assortment of
suggested notices and orders.

Avoiding the narrow view one might expect to follow from a long
experience in hearing and deciding cases before the Civil Aeronautics
Board, Judge Ruhlen has written a manual of general usage in federal
service.

A few comments indicate the breadth of the text. Long hearings, like
those with many parties, often call for different approaches than those
suitable in simple cases. Judge Ruhlen recognizes this in general. His
suggested coding of exhibits in a manner to identify the submitting party
and the subject matter\(^2\) might work well in some cases but it could prove
quite confusing in a long proceeding. A simple seriatim identification of
exhibits can give counsel a better control over whether he has all of the
exhibits in the case accounted for.

Judge Ruhlen's suggestion that certain issues not be pursued on certain
days makes good sense.\(^3\) Agreements to examine particular witnesses at
a specified time can also be meritorious in long cases where numerous
parties may be interested only in particular issues and witnesses.

It is wise for counsel to rely on refutation of expert witnesses by other
experts rather than through cross-examination, as Judge Ruhlen indi-
cates.\(^4\) But the presiding judge must keep in mind that the intervenor of
limited means may have no alternative — if participation is to be mean-
ingful — than to undertake the treacherous task of building a rebuttal
case through cross-examination of an expert witness.

Judge Ruhlen criticizes "trial by interlude,"\(^8\) the practice of recessing
after the presentation of each phase of evidence for the purpose of pre-
paring cross-examination or rebuttal. His comments are well taken. But the
demand for this criticized procedure may evidence a profound loss of
public confidence in the agency whose attorneys participate in the
proceedings and whose staff is normally looked to as protector of the
public interest. Where this crisis in confidence occurs, the intervenors
may have great difficulties in adjusting to their assumed burden of the
role normally played by agency staff, and need more time than usual to
prepare.

Judge Ruhlen notes the use of oral decisions in cases with few parties,
limited issues and short hearings.\(^6\) This is sound practice, but rarely uti-

\(^2\) Page 19.
\(^3\) Page 23.
\(^4\) Page 34.
\(^5\) Page 20.
\(^6\) Page 62.
lized. When one considers the frequent complaint that the issuance of decisions is delayed solely because of limitations inherent in the use of typing pools, it is surprising that more emphasis is not being given to developing the skill of dictating decisions on the public record, with subsequent correction of the stenographic text as soon as it becomes available.

Judge Ruhlen has made an excellent beginning. Hopefully, experienced administrative law judges will submit to the Chairman of the Administrative Conference their ideas as to how the *Manual* might be improved.

Hearing officers on the state and local levels might look at this *Manual* to see how, with modifications, a revised text might serve their particular needs. Perhaps the Administrative Conference would assist in evolving an edition of the *Manual* in this direction.