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The Transportation Law Program

PAUL STEPHEN DEMPSEY*

I. INTRODUCTION

With this issue, the Transportation Law Journal begins its second decade of publication. As a result, this seems to be a particularly appropriate point at which to reflect succinctly upon the accomplishments of the past decade, and to speculate on the potential of the next.

The regulatory and legislative developments in transport regulation during the past few years have been extraordinary. One need only glance through the Business and Finance section of any major metropolitan newspaper or news magazine to appreciate the magnitude of the regulatory reform movement in transportation. For example, there has been widespread media coverage of: (a) the half fare coupons of United Airlines and Emery Air Freight; (b) the proposal by Amtrak to eliminate a significant portion of its 26,000 rail passenger network; (c) the long struggle of Conrail to get its balance sheet into the black; (d) proposals to move Alaskan crude oil by pipeline from Pacific ports to Gulf Coast refineries; (e) proposals to transport coal slurry by pipeline from western mines to eastern power facilities; (f) attempts to eliminate the antitrust immunity accorded to the price fixing rate conferences of maritime, surface, and international air carriers; (g) the Rock

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Island Line bankruptcy and strike, and the threat the latter poses to midwestern agriculture; (h) the environmental issues of airport noise and automobile emissions; and (i) the question of whether DC-10s are safe enough to fly. Each of these events represents a legal or economic transportation problem in the marketplace which has recently been confronted by the federal government — some successfully, some unsuccessfully.

This is an exceptionally challenging era for transportation, for the events of the past two or three years have reached to the very core of the industry and its relationship with government. Considering the legislative proposals which are now before Congress,\(^1\) and the philosophical tilt of the regulatory agencies,\(^2\) the next two or three years may well produce an era of even more profound development. There are many who argue that, at least from a substantive standpoint, transportation is the most dynamic area in all of administrative law. It is precisely this powerful surge in regulatory and legislative interest and activity that gave birth to and insured the success of this academic program.

The Transportation Law Program was inaugurated in 1968 as a continuing legal education program for attorneys in transportation law. It was expanded significantly in 1976 as a result of a generous series of annual grants by the Motor Carrier Lawyers Association (MCLA), a bar association comprised of attorneys who practice before the ICC. As a result of this endowment, the law school was able to establish a chair in transportation law.\(^3\) The Program has been expanding rapidly to match the vigorous de-

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1. Among the significant bills now being considered by the 96th Congress are S. 1496 and H.R. 4549 (the "Motor Carrier Regulatory Improvement Act of 1979"), S. 1497, S. 1400, and H.R. 4596 (the "Trucking Competition and Safety Act of 1979"), see 125 Cong. Rec. S 8416 (June 25, 1979), as well as important proposals to reform rail regulation, including H.R. 4570, and S. 796 (the "Railroad Deregulation Act of 1979"), see 125 Cong. Rec. S 3498 (March 27, 1979), and S. 1946 (the "Railroad Transportation Policy Act of 1979"), to eliminate the antitrust immunity presently accorded to rate bureaus by virtue of the Reed-Bulwinkle Act, 49 U.S.C. § 10705 (1979), in S. 710, and to substantially amend existing regulatory provisions affecting international aviation, S. 1300 (the "International Air Transportation Competition Act of 1979").

2. It is generally acknowledged that most of the appointees of Presidents Ford and Carter to the Interstate Commerce Commission, the Federal Maritime Commission, the Civil Aeronautics Board, and the Department of Transportation have been firmly committed to the principle that regulation should either be reformed radically or, indeed, wholly eliminated. Concurrently, many of the distinguished public servants who devoted their careers to the development and perfection of the traditional regulatory structure have either retired or have not been reappointed. For example, Commissioner Rupert Murphy served on the Interstate Commerce Commission from 1955 to 1978; G. Joseph Minetti served on the Civil Aeronautics Board from 1956 to 1978.

3. The author is the present incumbent in that position. Prior directors of this program have included Professor Andrew F. Popper (1976-1978) and visiting Professor Gale Norton (1978-1979). Both have made significant literary contributions in the field of transportation law. See e.g., A. POPPER, SHIPPER ANTITRUST LIABILITY IN A RATE-DEREGULATED MARKET; FUNDAMENTAL INQUIRIES AND ANALYSIS (1979); Popper, Collective Ratemaking: A Case Analysis of the Eastern Central Region and a Hypothesis for Analysing Competitive Structure, 10 Transp. L.J. 365 (1978); Popper & Beabout, Finance Transactions-Jurisdiction in TRANSPORTATION LAW INSTITUTE, MOTOR CARRIER FI-
Development of law and economic regulation in this field, and now consists of five major components:

1. The Academic Program
2. Transportation Law Journal
3. The Transportation Law Society
4. The Transportation Law Institute
5. The Transportation Scholarship Fund

II. THE ACADEMIC PROGRAM

The University of Denver now offers a comprehensive and advanced academic program in transportation law, including introductory courses, seminars, independent study, and clinical internships. In the aggregate, this educational structure provides a comprehensive review of the legal, regulatory, and economic problems confronting transportation. The courses include, but are not limited to, a review of the economic regulation of each mode of transportation (i.e., rail, motor, pipeline, maritime, and air carriers) by the relevant regulatory agencies (i.e., the ICC, CAB, FMC, DOT, and to some extent the Departments of State and Energy, and the Antitrust Division of the Department of Justice). These courses also provide a review of the regulation of international transportation by the United States and foreign governments pursuant to a wide range of bilateral and multilateral agreements. Of course, within this broad framework, students are exposed to issues in urban mass transit, highway development, contracts of


Professor Murray Blumenthal is currently engaged in the preparation of workshops for judges on traffic law under a project funded by the National Highway Transportation Safety Administration of the U.S. Department of Transportation.
carriage, insurance and liability for loss and damage in transit, and the
plethora of environmental, energy, antitrust and labor law issues which reg-
ularly arise in transporation.

In addition to the introductory courses, which review the economic reg-
ulation of rail, motor, water, air, and pipeline transportation, and the liability,
environmental, and energy problems associated therewith, the Program
also offers advanced courses and seminars in the fields of Aviation Law,
Admiralty, and International and Intermodal Transportation. The law
school also offers a wide range of related courses, including Administrative
Law, Administrative Practice, Antitrust Law, Law and Economics, and Pub-
lic Utility Law.

III. TRANSPORTATION LAW JOURNAL

Because the legislative and regulatory events of the past two or three
years have been so significant, and have been promulgated with such
haste, much of the legal literature in the field of transportation has been
rendered virtually obsolete. As a result of the current controversy surround-
ing the issue of regulatory reform in transportation, and the increased atten-
tion given this lively issue by the President, the Congress, the regulatory

4. Admiralty is taught by Professor William A. Altonin (A.B., Columbia University; J.D., St.
John's University; LL.M., New York University); Aviation Law is taught by Professor J. Scott Hamil-
ton (B.A., Hendrix College; J.D., University of Denver; LL.M., Southern Methodist University);
Intermodal & International Transportation, as well as the introductory courses, are taught by the
author.

5. Administrative Law is taught by Dean John H. Reese (B.B.A., LL.B., Southern Methodist
University; LL.M., S.J.D., George Washington University), Professor John A. Carver, Jr. (A.B., Brig-
ham Young University; LL.B., Georgetown University; LL.D., College of Guam), and the author.
Administrative Practice is taught by Professor Alan Merson (A.B., Harvard College; J.D., Harvard
Law School). Antitrust Law is taught by Professor Altonin (see supra, note 4) and Professor John
Soma (B.A., Augustana College; J.D., M.A., PhD., University of Illinois). Professor Soma also
 teaches Law & Economics. Public Utility Law is taught by Professor Carver.

Students interested in entering the Transportation Law Program are encouraged to write or
phone the Admissions Officer, College of Law, University of Denver, 200 West 14th Avenue, Den-
ver, Colorado, 80204, ((303) 753-3656), for additional information, copies of the Bulletin, and
admission forms.

6. For example, the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705,
promulgated in October of 1978, is probably the most significant piece of legislation in the past 40
years of regulation, for it effectively reversed the traditional course of entry and pricing controls
for domestic passenger transportation, and promises to abolish the Civil Aeronautics Board by 1985.
Similarly, the Air Cargo Deregulation Act of 1977, Pub. L. No. 95-163, 92 Stat. 1278, created
virtually unlimited pricing and entry freedom for air carriers engaged in the domestic transpor-

Likewise, in rail transportation, fundamental changes in the traditional regulatory structure have
been made by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210,
90 Stat. 147, and the Rail Passenger Service Act, Pub. L. No. 95-421, the former attempting to
improve the poor financial health of the rail freight industry (e.g., Conrail), and the latter establishing
Amtrak as a corporation to provide national rail passenger service.
agencies themselves, and the media, the Transportation Law Journal has become an increasingly important forum for continuing debate, an important means of disseminating information, and an invaluable research tool for attorneys and practitioners attempting to comprehend the rapidly evolving regulatory structure.

From the subscribers' perspective, a legal periodical serves two primary functions: (1) as source of information; and (2) as a forum for the contemporary debate over pertinent legal, economic, and political issues. Many of the Journal's articles have surveyed the recent revolutionary developments in transportation. In addition, several distinguished attorneys, economists, and public officials have employed the Journal as a means of debating the strengths and weaknesses of the regulatory reform movements before a national audience of subscribers who will be directly affected by the outcome. It is safe to assume that a number of Congressmen, Judges, and Commissioners of regulatory agencies are also looking to these articles for advice on how to proceed on the important regulatory issues now before them. Considering the magnitude of the legislative and regulatory proposals now before the Congress and the pertinent federal agencies, the events of the next decade will accentuate the importance of these two functions.

From the publisher's perspective, a legal periodical performs two separate functions: (1) to provide law students with an opportunity to enhance their essential literary skills; and (2) to improve the national notoriety and prestige of the educational facility or bar organization with which it is affiliated.


ated. The law students of the University of Denver who serve as editors and staff of the Journal have an opportunity to review and edit a wide range of scholarly literary products submitted by distinguished attorneys, economists, and public officials, and thereby to explore an exceptionally energetic and fascinating area of the law. Moreover, the students also have abundant opportunities to publish their own literary contributions as Notes, Comments, or Recent Decisions, in a highly respected legal journal. Because the legal profession is, predominantly, a literary profession, the development of literary skills is essential to the successful practice of law.

The Transportation Law Journal reaches a vast national and international audience, with subscribers located throughout the United States, Canada, Europe, Japan, and Australia. Moreover, the editors of the Journal are planning to publish a symposium on the subject of intermodal and international transportation during the forthcoming academic year, for this is a field which has heretofore not been adequately explored in legal periodicals.

The Journal is the only legal periodical which offers a comprehensive review of all aspects and modes of transportation. For that reason, and because this is such a rapidly developing area of the law, its audience is growing rapidly, and increasingly relying on the Journal as an essential research tool.

Rapid and continual change, foreshadowing important trends in the American economy, characterizes the development of transportation law. The difficulty of keeping abreast of recent legislative, judicial, and administrative action in this expanding field has become increasingly frustrating.

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9. Individuals interested in subscribing to the Journal are encouraged to contact:
   Business Manager
   Transportation Law Journal
   College of Law
   University of Denver
   200 West 14th Avenue
   Denver, CO 80204
   (303) 753-2000

With this in mind, the editors and staff of the *Journal* strive to provide its national and international readership with the highest caliber of professional writing in areas of current interest.

The *Journal* was inaugurated in the Fall of 1968 under the direction of Professor David J. Baum of Osgood Hall University Law School of York University (Toronto, Canada), who published the *Journal* in conjunction with the MCLA Board of Governors. Since 1976, it has been published by the students of the University of Denver College of Law.

In an effort to encourage interest among law students in transportation law, the Film, Air, and Package Carriers Conference of the American Trucking Association, in conjunction with the Motor Carrier Lawyers Association, has, for the past several years, sponsored the Harold S. Shertz Essay Award. All students of any U.S. or Canadian law school are eligible to participate.\(^\text{11}\) Winning authors are awarded a prize of several hundred dol-

\(^{11}\) Submission of manuscripts must be in conformance with the competition's rules as follows:

1. **Eligibility:**
   The contest is open to any law student of a school in the United States or Canada. An essay may be written in collaboration with another student provided there is full disclosure.

2. **Subject Matter:**
   A contestant may write on any area of transportation law.

3. **Determination of Award:**
   Essays will be judged on timeliness of the subject, practicality, originality, quality of research, and clarity of style. The Board of Governors of *Transportation Law Journal* shall act as judges. In the discretion of the judges, no prize may be awarded. The decision of the judges shall be final.

4. **Prizes:**
   A prize of $500.00 will be paid and the winning essay will be published in the *Transportation Law Journal*.

5. **Right of Publication:**
   Each contestant is required to assign to the *Transportation Law Journal* all right, title, and interest in the essay submitted, and shall certify that the essay is an original work and has not had prior publication. Papers written as part of a contestant's law studies are eligible provided first publication rights are assigned to the *Transportation Law Journal*.

6. **Formal Requirements:**
   Essays must be submitted in English and be typewritten (double space) on 8 1/2" x 11" paper with 1" margins. Footnotes shall be typed separately and all citations must conform to the Harvard Law Review citation booklet (12th Edition). The essay shall be limited to forty pages including text and footnotes.

7. **Submission Requirements:**
   Three copies of the essay should be enclosed in a plain envelope and sealed. Contestant's name should not appear on either the envelope or the essay. The envelope containing the essay should be placed in another envelope with a letter giving the name and address of the contestant, stating that the article is submitted for the contestant, and that the author has read and agrees to be bound by the Rules of the contest. The certification set forth in Rule 5 above, and a brief biographical sketch of the contestant must be enclosed with this letter.

8. **Date of Submission:**
   The essay must be received at the University of Denver College of Law, 200 West 14th Avenue, Denver, Colorado 80204 on or before October 15, 1980.
lars, and their essays are published in the *Transportation Law Journal*.12

IV. The Transportation Law Society

The most recent addition to the Program is the Transportation Law Society, a student organization which provides a regular series of debates, speeches, and lectures on current issues in transportation. It was established in order to satisfy student interest in the exploration of current legal and economic issues in transportation, and to expand contact between students and outstanding authorities in the field of transportation. A number of distinguished individuals have spoken on topics as diverse as the "Airline Deregulation Act of 1978", "Rock Island Bankruptcy", "Amtrak in the 1980s", "The Future of U.S. Urban Mass Transit", and "Proposals for Legislative Reform of Surface Transport Regulation."13 The Society intends to continue to invite national figures in transportation to discuss contemporary legal, regulatory, and economic issues in this lively field.

V. The Transportation Law Institute

After more than a decade of growth and development, the annual Transportation Law Institute has established itself as among the premier programs in the University of Denver's continuing education schedule. The Institute, begun in 1968, is a joint effort of the College of Law and the Motor Carrier Lawyers Association.

The concept of a continuing legal education program in transportation originated with members of the Motor Carrier Lawyers Association. They envisioned an intensive educational experience that would offer training to attorneys and practitioners in the burgeoning area of motor carrier regulation. Implementation of such a program required the expertise of an entity experienced in continuing legal education. The University of Denver College of Law was approached as a potential co-sponsor. From this initial meeting has come a union that has produced many excellent educational programs.

Each summer, hundreds of attorneys and practitioners, as well as governmental and industrial executives, gather at a selected Colorado locale


13. Prior speakers have included Samuel Freeman (Vice President & General Counsel of the Rio Grande Railway), David Brichton (Vice President & General Counsel of Frontier Airlines), William Thoms (Professor of Law, the University of North Dakota), Howard Beck (Executive Director of Denver's urban mass transit administration, RTD), and Michael Erenberg (Deputy Director of the Office of Proceedings, Interstate Commerce Commission). Among the future speakers scheduled to appear before the Transportation Law Society is Senator Howard Cannon (D.-Nev.), Chairman of the Senate Committee on Commerce, Science and Transportation, and Gary Edles (Director of the Office of Proceedings of the Interstate Commerce Commission).
for several days of intensive professional training and review of broad issues in transportation law. Past programs have focused on such diverse topics as:

- Motor Carrier Operating Rights Applications
- Finance, Transfer, and Securities Cases
- Tariff Rates and Practices
- Practice and Procedure Before the Interstate Commerce Commission
- Carrier Claims and Handling—Law Relating to Loss, Damages, and Delay in Transit
- Federal Legislation Affecting Motor Carriers
- Rate Regulation and Reform

The Institutes have also included updates on current legal and economic developments in such areas as legislative proposals for regulatory reform, computerized legal research, and antitrust developments in transportation law.

A literary endeavor of the Institute that has proven to be of equal if not greater value is the publication of the proceedings of the Institute.\textsuperscript{14} In addition to the presentation of speeches at the Institute, faculty members also prepare law review type articles for publication. These articles are then compiled by the University of Denver and published in bound volumes.\textsuperscript{15} Many sources believe that these books are the definitive authority on transportation law. The continued growth in registrations for the Institute and the demand for the published proceedings demonstrate that the annual Transportation Law Institute has established itself as among the prime continuing legal education programs in transportation law.

VI. THE TRANSPORTATION SCHOLARSHIP FUND

Recently, the Marion F. Jones Scholarship was established at the University of Denver for a student who seeks to specialize in transportation

\textsuperscript{14} See e.g. Transportation Law Institute, Rate Regulation & Reform (1979); Transportation Law Institute, Motor Carrier Finance Transactions (Part II, Practice & Procedure) (1978); Transportation Law Institute, Motor Carrier Finance Transactions (Part I, Substantive Law) (1977); Transportation Law Institute, Operating Rights - Practice & Procedure (1976); Transportation Law Institute, Operating Rights - Substantive Law (1975); Transportation Law Institute, Federal Legislation Affecting Motor Carriers (1974).

\textsuperscript{15} Readers interested in purchasing any of the prior volumes of the Institute listed in the immediately preceding footnote, or in securing information concerning the location, date, and subject of future Institutes, may contact:

Transportation Law Institute
Program of Advanced Professional Development
College of Law
University of Denver
200 West 14th Avenue
Denver, CO 80204
(303) 753-3351
law. The Program hopes to expand the scholarship and research opportunities available to students through a fund raising effort to be launched later during this academic year.

VII. CONCLUSION

Because this is such a rapidly developing field, it offers a marvelous opportunity for law students who would like to have a significant influence on the law early in their careers, for the regulators are grasping for innovative young attorneys to justify the application of regulatory philosophies which are radically different from those which have traditionally been applied. The unique educational opportunities available at the University of Denver in transportation law also enable students to gain exposure to administrative law and economic regulation, a field which now plays a significant role in virtually all of this nation’s commercial activity. Attorneys and practitioners in this exciting area of the law seeking new associates, as well as transportation corporations seeking house counsel, recognizing the need for legal specialists to confront prudently the myriad of revolutionary regulatory demands imposed and opportunities offered by the Washington bureaucratic labyrinth, are recruiting our graduates.

16. Among the requirements of this scholarship are:
(1) Any law student to be benefited shall have demonstrated financial need to the satisfaction of the Financial Assistance Committee; and (2) preference shall be given to junior and senior law students who have demonstrated past interest in Transportation Law, including such activities as participation on the Transportation Law Journal, past academic work, employment, writing, and current academic performance demonstrated by high scholastic achievement in Transportation Law courses.

17. Readers interested in contributing to the Transportation Scholarship Fund or the Transportation Research Fund are encouraged to contact either the author or:
Director of College Resources
College of Law
University of Denver
200 West 14th Avenue
Denver, CO 80204
(303) 753-3615

18. The Placement Office of the University of Denver College of Law has compiled resumes and credentials on the students who are participating in the Transportation Law Program. As these students approach the end of their law school careers, we hope to have a specialized placement service for them. This service will only be of use if you, the potential employer, notify us of your needs in advance. We have several students who are interested in the practice of law in the transportation area as a fulltime profession. Additionally, we have a number of students who would be interested in working in the capacity of a law clerk or research assistant during our summer session. We also have the capacity to create internships in various private and public offices, and would be interested in knowing if you would like to have a transportation law clerk or intern working with you. Compensation and academic credit are arranged on an individual basis. Additional information concerning recruitment of the students in the Transportation Law Program may be obtained from:
Director of Placement
College of Law
University of Denver
200 West 14th Avenue
Denver, CO 80204
(303) 753-2317
We stand on the threshold of a new and exciting decade, a decade which will witness the inauguration of a regulatory structure in transportation significantly different from anything that has preceded it. It promises to be a volatile and active period for all who take an interest in the fundamental relationship between government and business. It is our hope that these legislative and regulatory activities will be debated, discussed, analyzed, and criticized with some vigor in these pages during this, the second decade of the Transportation Law Journal, and that as a result, our national transportation policy will evolve in a prudent and responsible manner.
Motor Carrier Operating Rights Proceedings—
How Do I Lose Thee?

JAMES W. FREEMAN*
ROBERT W. GERSON**

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** A.B. in Law, Emory University, 1959; J.D., Emory University, 1960. The author is a member of the Bar of the State of Georgia, and a Partner in Troutman, Sanders, Lockerman & Ashmore, Atlanta, Georgia.
I. INTRODUCTION

As even the most casual observer of the Interstate Commerce Commission [ICC] is aware, recent trends (both judicial and administrative) have dramatically modified the standards pursuant to which the Commission examines applications for motor carrier operating authority. The long-standing Pan-American1 and Novak2 considerations have been replaced by enhanced reliance on increasing competition whenever and wherever possible. To many, however, this emphasis on competitive considerations is merely backdoor deregulation by administrative fiat, without the benefit of legislative approval.

There was a time when the Interstate Commerce Commission granted and denied operating rights applications, but recently it seems that the Commission has resolved to grant all but a token number of applications

1. Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936) is a seminal case establishing three common law criteria for determining "public convenience and necessity":

   1) 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 operations of existing carriers contrary to the public interest.

Pan-American is often coupled with All-American Bus Lines, Inc., Com. Car. Applic., 18 M.C.C. 755, 776-77 (1939) which establishes the Commission's responsibility to evaluate whether the advantages of the proposed service to the shipping public outweigh the actual or potential disadvantages to existing carriers. These two cases, along with John Novak Contr. Car. Applic., 103 M.C.C. 555 (1967), are among the most commonly cited ICC decisions.

2. John Novak Contr. Car. Applic., 103 M.C.C. 555, 558 (1967) requires that shippers and consignees supporting an application must, at a minimum, meet the following standards if applicant is to make a prima facie showing of need:

   Those supporting the application should state with specificity the transportation service which they believe to be required.

   The shippers and consignees supporting applications for authority to transport property should identify clearly the commodities they ship or receive, the points to or from which their traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving their traffic, and any deficiencies in existing service.

   Those supporting an application for authority to transport passengers should indicate the frequency with which they would use the proposed service and should identify any transportation services now available and the inadequacies believed to exist in such service.

The Novak criteria have also been accepted in the common carrier context. E.g., F&W Express, Inc. (Memphis, Tenn.), 129 M.C.C. 48, 63 (1977) and Jerry Lipps, Inc., Ext.—Pipe, 110 M.C.C. 113, 118 (1969).
unless it is absolutely prohibited from doing so by some condition precedent to its consideration on the merits of public convenience and necessity. Enunciated standards for proof of public convenience and necessity appear to have changed dramatically, but close observation reveals that only the probable outcome of the proceedings has really changed. Whether the Commission gives lip service to the "traditional" adequacy of existing service doctrine, or applies the "modern" standard of increasing and improving competition, it can, and always has been able to, rationalize a grant or denial of any application consistent with the statutory requirement of public convenience and necessity. The idea that Pan-American and Novak have been bent, massaged, warped, abandoned, violated, or ignored is certainly of interest from an academic perspective when observing the tortuous trail followed by the ICC to justify wholesale, seemingly indiscriminate grants, but verbose and inconsistent rationalizations and mental gymnastics are not instructive if the end result is always a grant.

While the ICC's recent preoccupation with competitive considerations has increased both the number of motor carrier operating rights applications and the percentage of grants of authority, it probably would be premature to state that the ICC has abdicated all control over the granting of operating rights by embracing an open door philosophy. The "candy store" may be open, but in order to receive a grant of authority, a motor carrier must still do more than request the authority and point to the resulting increase in competition.

<table>
<thead>
<tr>
<th>Motor Carrier Operating Authority Cases Disposed of by ICC</th>
<th>Fiscal Year</th>
<th>Fiscal Year</th>
<th>Fiscal Year</th>
<th>Fiscal Year</th>
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<tr>
<td>Fiscal Year 1975</td>
<td>5,818(^1)</td>
<td>6,800(^2)</td>
<td>7,815(^2)</td>
<td>9,828(^2)</td>
<td>12,944(^4)</td>
</tr>
</tbody>
</table>

Percent Granted in Whole or in Part on Merits Only 86%\(^3\) 80%\(^3\) 86%\(^3\) 96%\(^4\) 98%\(^4\)

1. INTERSTATE COMMERCE COMMISSION, ANNUAL REPORT, 103 (1977).
2. INTERSTATE COMMERCE COMMISSION, ANNUAL REPORT, 96 (1978).

This data was obtained from several sources and may not be strictly consistent on a statistical basis, but it does serve to represent the clear trend at the ICC of granting increasing percentages of an increasing number of applications. The percentage of total applications granted would be substantially lower if dismissed and withdrawn applications also were considered.
The genesis of this article was the not always idle curiosity that spawned the question: Is there any way to persuade the Commission to deny an operating rights application on the merits? If so, where lies the true line of distinction between grant and denial? Notwithstanding the barrage of rationalizations unleashed upon participants in operating rights cases, where does the public interest lie? Does the Commission really seek to discover (regardless of "old" or "new" stated standards) whether a grant will improve service, have no effect, or dilute and diminish service available to the public, or is the Commission merely going through the motions to grant virtually every application possible in a rush to de facto deregulation of entry?

That relaxed standards have evolved during the last several years is apparent, but no one seems to have examined the circumstances under which an operating rights application can and will be denied by the Commission. There are still substantial requirements that must be met by any carrier before new authority will be granted. Clear avenues of attack remain open to protesters, although applicant's burden certainly has been diminished at the expense of protesters' in proceedings of this type. While applicant can rely to a much greater extent on the concept of increased competition, protesters, if they are to prevail, must begin to develop more thoughtful and sophisticated evidentiary presentations.

This article will not attempt to review the historic allocations of the burdens of proof and persuasion between applicants and protesters, and will only sketch the recent judicial and administrative developments that have led to the ICC's present position on the importance of competition in operating rights proceedings. This article will emphasize arguments that continue to be available to protesters and which, in many circumstances, could lead to a denial of the application. Principally, this will be accomplished by analyzing that remaining trickle of operating rights proceedings that have resulted in a denial based on the merits, along with the numerous cases granting operating authority which comment on the failures of protesters to establish the requisite harm to the public interest necessary for the denial of an application.

4. See generally Transportation Law Institute, Operating Rights Applications (1969), and Transportation Law Institute, Operating Rights - Substantive Law (1976).

5. As an additional disclaimer, the authors have chosen not to focus on the problems of specialized and truckload general commodities carriers as hypothetical protesters, but will assume that applicant and protesters are less-than-truckload general commodities motor common carriers; however, the practical effect of this decision is minimal and is made merely for convenience in handling the subject matter. In most, if not all, circumstances, the protest considerations discussed within would be appropriate regardless of the type of application. But see Ex Parte No. MC-135, Master Certificates and Permits (Notice of intent to open rulemaking), 44 Fed. Reg. 57,139 (1979), in which the ICC will consider easing licensing requirements in certain specialized areas of for-hire transportation.
II. THE ROAD TO COMPETITION

Although the Commission has ostensibly followed the tripartite weighing process of Pan-American and the minimum support standards of Novak in deciding operating rights cases, considerations of protecting existing carriers and, perhaps, at least a little carelessness on the part of the ICC gradually deteriorated the Pan-American criteria. By the early 1970’s, the sole test seemingly was adequacy of existing service. Once an existing carrier showed it was “fit, willing and able” to move freight for which applicant had obtained shipper support, and once the existing carriers demonstrated that some diversion of their present traffic could result and revenue would be lost, the application would, in all probability, be denied. The presumption weighed heavily that existing carriers were entitled to all the freight they could handle adequately. Once adequacy of existing service and potential diversion of traffic were established, there was literally no course of action or evidence that applicant could present to the Commission to convince it that the proposed authority should be granted. If, for instance, a shipper suggested that it needed more efficient or expeditious service, the Commission would determine whether the shipper truly needed the service or whether it would merely be a convenience. In hotly contested proceedings, it was unusual for shippers’ testimony to be accepted totally, as the Commission, in its quest to protect existing carriers from destructive competition, often substituted its judgment for that of the supporting shippers with respect to the adequacy of existing motor carrier service. At times the cards seemed to be stacked against applicants; protection of existing carriers was the overriding implicit policy of the Commission.

This is not to say the benefits of competition were never considered. In a number of cases, the Commission weighed competition along with the ability of existing carriers to move, in an adequate manner, the freight in question and found increased competition to be in the best interests of the


8. Id.
public. A decision rendered in 1964 by a federal district court, Nashua Motor Express, Inc. v. United States, often cited by applicants and occasionally adopted in principle by the Commission, held that competition, as well as several other considerations, including adequacy of existing service, could be considered in determining the public convenience and necessity. In Nashua, inadequacy of existing service was found to be satisfactory grounds for granting an application, but the absence of inadequate service, standing alone, was not sufficient to bar granting an application. Thus, solicitous consideration of the benefits of competition in the late 1970's cannot be seen solely as a complete reversal of previous policy.

All in all, though, the Commission for many years seemed to shunt aside the stated balancing test of Pan-American in a manner which was slanted strongly in favor of protecting existing carriers from new or increased competition. While paying lip service to the Pan-American standards, the true standard seemed to be that "existing carriers should normally be allowed the right to carry all traffic which they can adequately, efficiently, and economically handle in territories served by them in order to foster sound economic conditions in the motor carrier industry." No weighing or balancing was taking place. Existing carriers which could transport the subject freight in an efficient and satisfactory manner were almost always able to succeed in their protests. In effect, this attitude amounted to an overwhelming presumption that the benefits of increased competition to the public did not outweigh the harm of revenue and traffic diversion to existing carriers.

A number of Commission proceedings and court decisions considered the benefits of increased competition to the public and held the purpose of the Interstate Commerce Act to be advancing the public interest rather than protecting monopolies of existing carriers. Nevertheless, the present emphasis on increasing competition probably was triggered by the Supreme

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Court in *Bowman Transportation v. Arkansas-Best Freight System*. This decision, however, merely upheld the right of the Commission to weigh the benefits of competition, along with any other reasonable factors, in reaching its judgment as to what best served the public interest. While many recent cases mandating consideration of the benefits of competition seemingly rely on *Arkansas-Best Freight* as a trend-setting decision, the Court merely acknowledged that the ICC had already weighed the benefits of competition in the underlying proceeding, and simply affirmed the appropriateness of the Commission’s finding.

In *Arkansas-Best Freight*, the Supreme Court accepted the argument that benefits to consumers would result from applicant’s proposal, and then examined the potential adverse effect on protestants. The Court discerned no serious adverse effects and determined that it was reasonable to grant the authority because consumer benefits outweighed the detriment suffered by existing carriers. The Court’s holding was that the Commission “could conclude that the benefits of competitive service to consumers might outweigh the discomforts existing certificated carriers could feel as a result of new entry.” Later, the Court reiterated: “The Commission, of course, is entitled to conclude that preservation of a competitive structure in a given situation is overridden by other interests.”

Although there is substantial language in *Arkansas-Best Freight* and other decisions that the primary obligation of the ICC is not to protect existing certificate holders and that existing carriers do not have a property right in their traffic, *Arkansas-Best Freight* did nothing more than allow the Commission to continue its deliberations in the traditional manner. No great upsurge in grants of authority based on advancing the public interest through increased competition resulted directly or immediately from this decision.

In a pivotal 1977 case, *P.C. White Truck Line, Inc. v. I.C.C.* the District of Columbia Circuit held that the Commission, under *Pan-American*, must consider the benefits of competition before denying an application.

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15. Id. at 293-94, 298.
16. Id. at 292, 297.
17. Id. at 298.
18. Id. at 292.
19. Id. at 292, 293.
20. Id. at 298 [emphasis added].
21. Id. at 298-99, citing U.S. v. Drum, 368 U.S. 370 (1962) [emphasis added].
23. See generally note 3 supra.
25. Id. at 1329.
The Court believed the Commission had examined only the adequacy of existing service and had failed to weigh competing interests as required by Pan-American. The Court also pointed out that Arkansas-Best Freight "recognized the relevance of increased competition in assessing the public interest." In its initial deliberations, the ICC found that the "grant of the instant application would result in the wasteful duplication of existing services and creation of excessive capacity without a concomitant benefit to shippers or receivers," but the Court concluded that nothing in the Commission's report was "specifically referable to competition," and remanded the proceeding to the Commission for analysis of the benefits of competition. In its haste to require that competition be considered, the Court overlooked or ignored the Arkansas-Best Freight conclusion that the Commission "could consider" the benefits of competition when balancing appropriate factors pursuant to Pan-American, and exaggerated the Supreme Court's conclusion concerning the relevancy of competitive considerations.

Sawyer Transport, Inc. v. United States, a case which goes hand-in-hand with P.C. White in extending the Arkansas-Best Freight holding, determined that a contract carrier application cannot be denied solely on the basis of adequacy of existing service. The Court found nothing to suggest

26. Id. at 1328, 1329.
27. Id. at 1328. Recent decisions have continued recognizing the benefits of competition and considerations other than adequacy of existing service. See generally, e.g., May Trucking Co. v. United States, 593 F.2d 1349 (D.C. Cir. 1979); Appleyard's Motor Transp. Co., Inc. v. I.C.C., 592 F.2d 8 (1st Cir. 1979); Neidert Motor Serv., Inc. v. United States, 583 F.2d 954 (7th Cir. 1978). But see Willis Shaw Frozen Exp., Inc. v. I.C.C., 587 F.2d 1333, 1338 (D.C. Cir. 1978) holding that the Commission should guard against over-supply and accompanying deterioration of service.
29. P.C. White, 551 F.2d at 1328, n.10. How could the Commission phrase a stronger renunciation of the proposed service than this language? Apparently, to pass muster in this Court, the Commission must entitle a section of its decision, "Discussion of Possible Competitive Benefits." The Court did not specifically find the Commission's decision arbitrary and capricious, or without substantial evidence; rather it merely substituted its view of what considerations should be balanced in the decision-making process for those of the Commission. But see Arkansas-Best Freight, 419 U.S. 281, 285 (1974), and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), holding that such a substitution is not an appropriate standard of review. See also Arkansas-Best Freight, 419 U.S. at 285-86, for the proposition that if the court can discern a rational connection between its decision and the evidence, remand is not appropriate, even if the agency's decision is not of complete clarity. Query whether the Court misinterpreted Arkansas-Best Freight or was merely striving to develop new law in this area? Perhaps the decision would have been clearer had a more complete analysis been attempted. See generally Trans-America Van Serv., 421 F. Supp. 408 (N.D. Tex. 1976), for a more thorough analysis of this issue.
31. 565 F.2d 474, 478 (7th Cir. 1977).
32. Query whether many protests to this proceeding would even be allowed under recently adopted protest standards? See 43 Fed. Reg. at 50,911, 60,278, 60,288, (1978) [to be codified in 49 C.F.R. 1100.247(k),(l)] and see notes 89-106 infra, and accompanying text.
that competitive benefits had been considered by the ICC, and noted that adequacy of service constitutes only one element of Pan-American. Although this decision concedes that the benefits of competition can be overridden by other factors, Sawyer Transport and P.C. White extend the permissive analysis of the benefits of competition that was set forth in Arkansas-Best Freight to a mandatory requirement, and even seem to intimate that substantial weight should be accorded the benefits of competition in most circumstances—in effect substituting the judgment of the Court for that of the Commission.

Highland Tours, Inc., Common Carrier Application stressed, in this post-P.C. White proceeding, that the Pan-American criteria remain unchanged and have been followed consistently by the Commission. In this proceeding, competition had not yet risen to its present position of preeminence and was still somewhat submerged in the Commission’s deliberations. The Commission found, however, that diversion caused by a one bus carrier such as Highland Tours would not harm large, established carriers and granted the application. This rationale of limited damage to existing carriers could be seen as the beginning of a trend in which the Commission, while clinging to the Pan-American framework, dramatically increased the weight it accorded the presumed benefits of competition and lessened its reliance on the harm caused by diversion of traffic and revenue loss to existing common carriers.

On remand, the ICC in P.C. White II ended all doubts that protestants could succeed in blocking operating rights applications merely by showing traffic diversion and alleging that they could adequately handle the freight. Rather than focusing on the adequacy of existing service and analyzing whether supporting shippers truly “needed” overnight service, as

33. 565 F.2d at 478.
34. Id.
35. Id. at 478-79.
36. See generally note 29 supra.
38. P.C. White and progeny were not cited in this decision.
39. 128 M.C.C. at 598-99.
40. Id.
41. See generally 43 Fed. Reg. 50,909, note 6 (1978). By this rationale, it is almost impossible for any application to harm a large carrier to such an extent that it would not be able to continue operations. Query whether a more pertinent test would be harm to the large existing carriers in the relevant marketplace? Even if its overall operations were not impaired, there would be no improvement in service if one carrier withdrew from the market and simply was replaced with another. Also, a small application may not harm a large competitor’s overall operations, but the aggregate of numerous small applications certainly could. There seems to be no recognition in ICC thinking of this possibility. See notes 253-64 infra, and accompanying text.
42. P.C. White II, 129 M.C.C. 1, 8-9 (1978).
it had previously done, it agreed that more expeditious movements of goods would "benefit the conduct of their [shippers'] business operations." Answering protesters' arguments that the application would result in traffic diversion, and that the existing service was adequate, and that they could transport the commodities in question, the Commission stated that more than this must be considered in determining whether a sufficient showing of harm had been made by protesters. Still relying on the Pan-American criteria, the Commission held that it must also weigh "[t]he benefit to the public of the availability of an applicant's service . . . against the real or potential adverse effect on existing carriers and the repercussions this may have on their service to the public."

The meaning of P.C. White II is clear. Increased competition is presumed to be in the public interest, and protesters seeking to overcome this policy favoring increased competition must now assume a greater evidentiary burden and be much more specific in pinpointing the injury that will befall them (and, more importantly, the shipping public) if the application is approved. A mere allegation of possible revenue loss will not satisfy this burden; protesters must show, at a minimum, that their operations would be jeopardized, as would their corresponding ability to serve the public.

In Liberty Trucking Co., Extension—General Commodities, a decision which clarified the Commission's present interpretation of the evidentiary burdens borne by applicant and protesters, even more emphasis was placed on the benefits of competition. Still, the basic Pan-American framework, although slightly restated to highlight competitive considerations, remained the tool utilized by the Commission in its decision-making process. Once public need has been demonstrated by an applicant, prot-

43. See note 7 supra. See also Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 43 Fed. Reg. 56,978, 56,980 (1978) in which the Commission is giving added weight to the "needs and wishes" of supporting shippers.
44. 129 M.C.C. at 9.
45. 129 M.C.C. at 5, 8-9, n.2, where protesters merely introduced evidence concerning the number of shipments, total weight, and total revenues that would be subject to diversion.
46. Id. at 6.
47. Id.
48. Id.
50. 130 M.C.C. 243 (1978) [hereinafter cited as Liberty I].
51. Id. at 245. The third and most crucial Pan-American test was redefined as "[w]ill the proposed service cause protesters to suffer competitive harm of such a degree as to outweigh the benefits to the public?" When compared to the original Pan-American criterion of "whether [the public need] can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest" (1 M.C.C. 190, 203), it is clear that increased competition has been delineated by the Commission as a major, if not overriding, component in ascertaining the elusive "public interest."
52. Id. at 244-47.
estants must show that they can satisfy that need.\textsuperscript{54} Protestants must also assume the burden of demonstrating "an interest worthy of regulatory protection from competition."\textsuperscript{55, 56} As in \textit{P.C. White II},\textsuperscript{57} this evidentiary burden is to convince the Commission that new competition "is likely to materially jeopardize existing carriers' ability to serve the public."\textsuperscript{58} The burden in \textit{Liberty I}, however, was made even greater than was expressed in \textit{P.C. White II} because the Commission found it "quite possible that the benefits of heightened competition and new or improved service may outweigh the potentially substantial harm to protestants."\textsuperscript{59} Thus, the specter of bankruptcy or withdrawal of existing carriers from the relevant market may not be sufficient to overcome the presumed benefits of increased competition to the public.

Drawing from its discussion of protestants' evidentiary burden in \textit{P.C. White II}, the Commission restated that more than mere revenue loss would have to be demonstrated by protestants desiring to halt an application designed to increase competition.\textsuperscript{60} Not only must protestants show "substantial" traffic diversion and "material" revenue loss, but they must also demonstrate precisely how or why the authorization of competing service would cause these losses.\textsuperscript{61} Finally, the loss must affect protestants' oper-

\textsuperscript{53} \textit{Id.} at 244.
\textsuperscript{54} \textit{Id.} at 245.
\textsuperscript{55} \textit{Id.} at 246. Accord, Consolidated Freightways Corp. of Del., Ext.-Phoenix, 108 M.C.C. 379, 384 (1969). \textit{See generally} notes 224-64 \textit{infra}, and accompanying text, for discussion on how to demonstrate such an interest.
\textsuperscript{56} In commenting on the emerging standard that "an interest worthy of regulatory protection from competition" must be demonstrated by protestants, Commissioner Stafford, in dissent, noted that the Liberty I language "makes a mockery of our stated intention to weigh and balance the competing interests in these application proceedings," and that increased competition almost seems to be the sole criterion for granting authority. Liberty I, 130 M.C.C. at 249.
\textsuperscript{57} Almost any application for operating authority would increase competition at least in the short-run, by injecting another carrier into the relevant transportation market. If Commissioner Stafford's dissent accurately states present Interstate Commerce Commission policy, then the Commission almost completely has abdicated its authority to differentiate between helpful and harmful increases in competition. This seeming \textit{de facto} deregulation and complete reliance on increased competition in the decision-making process is not consistent with the original holding in \textit{P.C. White}, 551 F.2d 1326, 1329 (D.C. Cir. 1977), in which the Court reversed the Commission on the basis that it had not exercised its "power to weigh the competing interests." Perhaps, in the future, courts will become concerned with this \textit{de facto} deregulation which soon may become an abuse of the integrity of the Commission's decision-making process. \textit{See Argos-Collier Truck Lines Corp. v. United States}, No. 77-3373 (6th Cir. December 13, 1979), pp. 9, 10. \textit{See generally} East Texas Motor Freight Lines, Inc. v. United States, 593 F.2d 691, 699-700 (5th Cir. 1979) (Ainsworth, dissent). \textit{See also} Barnes Freight Lines, Inc. v. I.C.C., 569 F.2d 912, 923-24 (5th Cir. 1978).
\textsuperscript{58} \textit{P.C. White II}, 129 M.C.C. 1, 9 (1978).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.}
ations in a manner that would be injurious to the public.\textsuperscript{62}

In Colonial Refrigerated Transportation, Inc., Extension—Florida to 32 States,\textsuperscript{63} the Commission backed away somewhat from the emerging proposition that increased competition \textit{per se} was adequate grounds for granting an operating rights application. This decision differentiated between cases in which competition already exists and those in which new carriers are necessary to inject the elements of competition into the relevant market. The Commission noted that the traffic in question was highly sought and already the recipient of responsive service.\textsuperscript{64} It found that granting this application would not yield significant quality improvements over existing service.\textsuperscript{65}

With respect to the benefits of increased competition, the Commission believed that "the evidence of record [does not] suggest that the effect of applicant's competition would be to spur existing carriers to provide better service for shippers in the involved market."\textsuperscript{66} Furthermore, the Commission held that the proposed service might result in "unhealthy competition which could impair operations of existing carriers contrary to the public interest."\textsuperscript{67}

Thus, in balancing the benefits of increased competition to the public against the destructive impact of the application on existing carriers, the Commission seems to find that if service is already responsive, and if competition already exists, additional competition \textit{per se} will not yield better service to the shipping public and could, at least in some circumstances, cause substantial harm to the operations of existing carriers.\textsuperscript{68} When this situation occurs, \textit{Liberty I}'s newly enunciated tripartite test will not favor granting an application unless applicant can point to some innovative or improved service and/or greater efficiency or fuel economy that applicant proposes to offer. The Commission, then, is willing to recognize (at least occasionally) that excess capacity caused by the entry of new carriers into an already competitive market can lead to unsettling transportation conditions and a "disruption of the orderly flow" of freight.\textsuperscript{69} The benefits of competition \textit{per se} seem to be outweighed when this occurs.\textsuperscript{70}

\textsuperscript{62} \textit{Id.}.

\textsuperscript{63} 131 M.C.C. 63 (1979).

\textsuperscript{64} \textit{Id.} at 66, 68, 69.

\textsuperscript{65} \textit{Id.} at 68.

\textsuperscript{66} \textit{Id.} at 69.

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.} at 70.

\textsuperscript{69} \textit{Id.} See also Sam Tanksley Trucking Inc., Ext.—Holland Heating and Air Conditioning, 129 M.C.C. 470, 473 (1977), and cases cited therein.

\textsuperscript{70} The courts also are apparently willing to recognize the dangers of oversupply, and that increasing the number of carriers in a given transportation market will not automatically promote the public interest. Willis Shaw Frozen Express, Inc. v. I.C.C., 587 F.2d 1333, 1338 (D.C. Cir. 1978).
In response to the howls of protest and the cries of anguish that accompanied petitions for reconsideration of Liberty I, the Commission attempted to alleviate fears caused by what it considered “misconceptions” arising from the original decision. The ICC reiterated that it was not abandoning the Pan-American criteria, reversing the burdens of proof, or making competition the sole consideration in its deliberations. The Commission further stated that applicants have an absolute burden to establish a prima facie need for the proposed service. Once this has been done, protesters must demonstrate both their conflicting interest and their ability to fulfill the public need. At this point, and only after these burdens have been met, protesters will have an opportunity to demonstrate that the public interest is best served by protecting the conflicting interest.

All doubt is ended. Despite the Commission’s statement that it is not abandoning Pan-American, the traditional method for determining the outcome of motor carrier entry applications is no longer operational. Increased competition is now presumed to be in the public interest to a much greater extent than previously articulated. Mere conflicting authority coupled with traffic abstracts showing speculative revenue losses will not suffice to deny an application. The core of Pan-American has always been to advance the public interest, but the ICC now holds that this is entirely separate and distinct from protecting existing common carriers from competition. In Liberty II, the Commission reaffirmed its earlier position that the benefits of competition and improved service may outweigh even substantial harm to protesters, and stated that it “will not deny the public the benefits of an improved service or heightened competition merely to protect the inefficient or to insulate existing carriers from more vigorous competition.”

While the Commission professes not to have altered the long-standing

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1. Liberty Trucking Co., Ext., Gen. Commodities, 131 M.C.C. 573, 574 (1979) [hereinafter cited as Liberty II].
2. Id. at 574.
3. Id. at 574-75.
4. Id. at 576.
5. Id. at 575. See also Superior Trucking Co., Inc. Ext.—Agric. Machinery, 126 M.C.C. 292 (1977).
8. 131 M.C.C. at 576.
burdens of proof in operating rights proceedings, it has firmly placed the presumed benefits of competition in an exalted position to which they had not often been raised in the Pan-American weighing process. This public interest presumption in favor of increased competition means that protestants must resort to more sophisticated evidentiary presentations than once were necessary in order to establish an interest worthy of regulatory protection. Although this increased evidentiary standard may seem to leave protestants defenseless, it is an approach to which they can adjust. Some important considerations and protections for protestants attempting to formulate new strategies remain, and will be discussed.

Another shock may be in store for protestants, however, because the Commission has recently altered the standards of proof in operating rights proceedings. The ICC is already giving added weight to the "needs and wishes" of supporting shippers, and its decisions clearly presume that increased competition may spur motor carriers to provide more efficient, cost effective service. In order to focus more intensely on the issue of the benefits and disadvantages of increased competition in a given case, the Commission recently replaced the tripartite Pan-American criteria with a new two-pronged test in common carrier applications:

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"Although the Commission has become more liberal in granting motor carrier applications, it has still, up to now, been following entry control policies which have changed but little since the advent of federal regulation. Today, the flood of applications has made it virtually impossible for the Commission to give more than passing attention to each, and has made well-informed, precise motor carrier entry regulation difficult, if not impossible. In responding to these changing conditions and developing service needs, the Commission has recently tended to give added weight to the needs and wishes of those supporting motor carrier applications. It has also given more weight to the benefits of competition, recognizing it as an effective form for regulating prices and service quality."

See also Consolidated Carriers, Inc., Com. Car. Applic., 131 M.C.C. 104, 109 (1978) for a statement concerning the I.C.C.'s desire to encourage new entrants into the motor carrier industry.

80. See generally notes 120-223 infra, and accompanying text.

81. Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,296 (1979). The rules do not appear to endanger the ability of existing common carriers to protest new applications; quite the contrary, they seem to make the evidentiary burden on protestants somewhat less than it formerly was by removing the perfidious requirement that protestants demonstrate they are able to provide the service in question. This decreased burden, however, normally would not have an advantageous effect on the final determination of the application. The discussion accompanying the proposed rules clearly evinces the Commission's intent to apply the new test in a manner consistent with granting at least as high, and perhaps an even higher, percentage of applications as at present 44 Fed. Reg. 60,297-99 (1979). When in excess of 95 percent of all decisions on the merits presently are granted, it remains to be seen whether an increase would be possible.


83. This new policy is based on the premise that the motor carrier industry generally is well
(1) The applicant must demonstrate that the operation proposed will serve a useful public purpose responsive to a public demand or need.

(2) The Commission will grant authority commensurate with the demonstrated purpose unless it is established by those opposing the application that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to an extent contrary to the public interest.84

This new standard effectively eliminates the second Pan-American test which requires that the Commission consider "whether this [proposed public] purpose can and will be served as well by existing lines or carriers." Protestants will be protected in their attempts to prevent oversupply in a given market by the second test, which presumably will be interpreted similarly to the third Pan-American criterion it replaces. Protestants will continue to have the burden of proving that the addition of a new carrier to a relevant market would not be in the public interest.85

Given the trend in favor of increased competition, coupled with the recently adopted protest standards,86 there really is no reason for continued reliance on the second Pan-American test in the Commission’s procedural framework. This criterion adds very little substantive data to the record because, presumably, protestants would not spend time and money to litigate an operating rights application if they were not interested in suitably handling the freight subject to applicant’s new proposal. Also, only carriers which have transported, or at least formally solicited, the freight in question and which possess the necessary equipment and facilities for performing the service will be able to file protests pursuant to the new intervention standards, unless good cause is shown.87 Thus, the second Pan-American criterion is no longer needed for the benefit of applicant, and removing it probably will not diminish those few protections presently afforded protestants. The changes merely reiterate the Commission’s presumption of and emphasis on the benefits of increased competition to the public, and simply allow the ICC to focus more clearly on the advantages

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managed, profitable, and competitive, and capable of absorbing over 8,000 grants of operating authority yearly (now approaching 13,000 annually, supra note 3) in an effort to keep pace with the "apparently never-ending need for new motor carrier services." 43 Fed. Reg. 56,979 (1978). As entry controls have changed little in the past forty years, the Commission believes itself unable to continue making informed judgments about each application it receives. These new standards are more in accord with the Commission’s reinterpretation of its legislative mandate to favor eased entry controls and are more consistent with the recent, accelerating trend recognizing the benefits of increased competition to this financially healthy industry 44 Fed. Reg. 60,298-99 (1979); 43 Fed. Reg. 56,979-80 (1978).

84. 44 Fed. Reg. 60,299 (1979). Under these changes, the Commission will grant bona fide contract carrier applications unless protestants can establish that "such a grant would endanger or impair their operations to an extent contrary to the public interest." 44 Fed. Reg. 60,298 (1979).

85. Id. at 60,299-300.

86. See notes 89-106 infra, and accompanying text.

87. 43 Fed. Reg. 50,911, 60,278 (1978) [to be codified in 49 C.F.R. 1100.247(k) and (l)].
and disadvantages of increased carrier entry into a given market. While these revisions in the standards of proof do not seem to be a further erosion of existing evidentiary burdens, this revamped analysis does not offer any solace to protestants, and there is nothing contained in it which would hint at a softening of Commission policy toward the benefits of competition to the public.\footnote{88}

III. requirements for viable protests

A. intervention—out, damned protestants!

The Commission has recently promulgated rules which, in some instances, may limit protests to operating rights applications for permanent authority.\footnote{89} In order to intervene and protest an application without leave of the ICC,\footnote{90} a carrier\footnote{91} must now be able to demonstrate that it:

1. Is authorized to perform any of the services which the applicant seeks to perform;
2. Has the necessary equipment and facilities for performing that service; and
3. Has performed a service within the scope of the application either (i) for those supporting the application, or (ii) where the service is not limited to the facilities of particular shippers, from and to or between any of the involved points.\footnote{92}

\footnote{88}{See note 83 supra. Because these new policy considerations do not change substantively the Pan-American test as it is presently perceived by the Commission, the authors will continue to refer to the Pan-American criteria, although, strictly speaking, they have been abolished by the ICC in this proceeding.}

\footnote{89}{Ex Parte 55 (Sub-No. 26), Protest Standards in Motor Carrier Application Proceedings, 43 Fed. Reg. 50,908, 50,911 (1978) and 43 Fed. Reg. 60,277 (1978) [to be codified in 49 C.F.R. 1100.247(e), (k), (l), and (m)].}

\footnote{90}{43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100.247(k)(3)].}

\footnote{91}{Intervention in motor carrier proceedings without leave is accomplished for rail and water carriers by meeting the same tests that would be applicable for motor carriers. 43 Fed. Reg. 50,910 (1978). Carriers which, under joint-line operations, move freight subject to the application may protest without leave. 43 Fed. Reg. 60,278 (1978).}

\footnote{92}{43 Fed. Reg. 50,911, 60,278 (1978) [to be codified in 49 C.F.R. 1100.247(k)]. An original plus one copy of the protest must be filed within thirty days after the date notice of the filing of the application is published in the Federal Register. The protest also must be served on applicant. The protest must set forth the specific grounds for the protest and include a copy of all pertinent authority, along with a statement of each protestant’s interest in the proceeding. Finally, the protest should not allege generally the issues involved, but must state specifically the facts, matters, and other items relied on in the protest. The protest need not be verified. 43 Fed. Reg. at 50,909 (1978) [to be codified in 49 C.F.R. 1100.247(e)(1), (2), and (3)]. Substantiation of the necessary showing need not accompany petitions to intervene, but petitions to intervene without leave should set forth clearly the traffic handled by protestants that would be subject to diversion under applicant’s proposal. Petitioners should be prepared to document, by means of business records, that the necessary requirements for a petition to intervene without leave have been met. 43 Fed. Reg. 50,909 (1978). See 43 Fed. Reg. 50,912 (1978) for a sample ‘Petition To Intervene Without Leave’ [to be codified in 49 C.F.R. 1100.247, Appendix I].}
In all likelihood, the most troublesome requirement to file without leave will be demonstrating that protesters have "performed a service within the scope of the application." Protestants must have carried any commodity named in the application between any of the points for which applicant requests authority. Most importantly, transportation of named commodities between listed locations under common carrier authority does not satisfy the requisite test to intervene without leave in a contract carrier application. Thus, common carriers can intervene only with leave in contract carrier applications, and vice versa.

Parties who cannot intervene without leave may file petitions to intervene with leave, and a response, if any, to this petition is filed under an expedited procedure. In considering whether to grant intervention, and under what terms the Commission will weigh, *inter alia*:

1. The nature, if any, of the petitioner's right under a statute to be made a party.

2. The nature and extent of the property, financial, or other interest of the petitioner, including petitioner's service capabilities and the extent, if any, to which petitioner has solicited the traffic or business of those supporting the application, or (B) where the identity of those supporting the application is not included in the published application notice, has solicited traffic or business identical to any part of that sought by applicant within the affected marketplace.

3. The effect of the decision which may be rendered upon the petitioner's interest.

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93. 43 Fed. Reg. 50,911, 60.278 (1978) [to be codified in 49 C.F.R. 1100.247(k)(3)].

94. 43 Fed. Reg. 50,910 (1978). There seems to be no minimum limitation on the number of protesters' shipments corresponding to the sought authority.

If the sought authority is regular route authority which could be tacked with applicant's existing authority, the *Federal Register* notice must so state. The purpose of this requirement is to alert potential protesters to the expanded scope of the application. See generally 43 Fed. Reg. 60,278 (1978). Thus, it would appear that a carrier which had transported freight to or from any point for which authority was sought to or from any point located within applicant's existing tachable authority would meet the "within the scope of the application" test.

95. 43 Fed. Reg. 50,910 (1978). The converse of this rule is equally applicable.

96. Although common carriers cannot protest contract applications without leave to intervene, such leave will normally be granted if protesting carriers raise, in a substantial manner, the issue of whether applicant has sought the correct form of authority. 43 Fed. Reg. 50,910 (1978). This prevents a thinly veiled common carrier application from escaping scrutiny due to its contract carriage label.

97. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 CFR 1100.247(1)]. Except where inconsistent, the provisions of 49 C.F.R. 1100.247(e) relating to requests for oral hearing, cross-examination, and so on, apply to the new protest standards. See 43 Fed. Reg. 50,911, 60,277-78 (1978) [to be codified in 49 C.F.R. 1100.247(e)(9), (k)(4), and (1)(4)].

98. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100.247(1)(1)].

99. The Commission may limit the scope of a petitioner's participation in an operating rights application proceeding. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100.247(1)(3)].

100. 43 Fed. Reg. 50,911 (1978) [to be codified in 49 C.F.R. 1100.247(1)(2)].
These considerations seem to be based on allowing intervention when a protestant’s interest would otherwise be unrepresented. The purpose for the rule seems to be one of culling protestants who would merely "me too" other parties for which the Commission recognizes a stronger interest in participating during the proceeding.101

While these rules could limit intervention by parties allowed to participate in past proceedings,102 their purpose is not to ignore private interests, but rather to develop a threshold test for determining which private interests will add to the decision-making process. The ICC, then, will exercise with discretion its informed judgment concerning other interests which may, in a particular instance, advance the state of the record.103 The goal is simply to evaluate, at an early stage, the need of each protestant to intervene, while not precluding the development of a record that will reflect the potential competitive impact and other considerations which must be weighed by the Commission.104

The prospective protestant should beware. The rules are new, and are unknown in their effect at the present time. Clearly they are designed to limit the Commission’s inquiry to the narrowest issues possible and to

101. Given the emphasis in the "intervention without leave" regulations on actually having moved traffic or performed a service within the scope of the application, it is likely that the solicitation of freight from a supporting shipper, if known (or, if unknown, traffic within the scope of the application), will be pivotal in the Commission’s decision on intervention if leave is required.

A carrier seeking to intervene on the basis of solicitation efforts should include in its petition a synopsis of all such attempts. Normally, solicitations must be accomplished by means of direct contact with a shipper and must be recurring in nature. Naturally, a company such as a passenger carrier or household goods mover which cannot identify its potential customers directly could rely on indirect solicitations. The expenses incurred in solicitation efforts should be set forth, as should pertinent data concerning the carrier’s operations which relate to the degree of its involvement within the scope of the application. 43 Fed. Reg. 50,909 (1978).

As with petitions without leave, documentation need not accompany the petition, but protestants should be able to substantiate all claims at the hearing, if challenged, with records kept in the ordinary course of business. 43 Fed. Reg. 50,909 (1978). Solicitation efforts alone, however, do not guarantee that leave to intervene will be granted; the balancing test of whether, after weighing all relevant factors, the protestant has demonstrated a real interest in the traffic covered by the application still must be made. 43 Fed. Reg. 50,909 (1978).

Samples of "Petitions to Intervene With Leave" are provided in 43 Fed. Reg. 50,913 (1978) [to be codified in 49 C.F.R. 1100.247, Appendices II and III].

Any applicant or potential protestant/intervenor may appeal an intervention decision within ten days after its service date. Accompanying briefs may not exceed ten pages, and responses, if any, may be filed within five days of the service date of the appeal. The ten page limitation also applies to these responses. For purposes of the appeals process only, the date on which the material is postmarked will govern the time limitations. 43 Fed. Reg. 50,911, 60,277-78 (1978) [to be codified in 49 C.F.R. 1100.247(m)].

102. Compare these new rules with the old protest standards [49 C.F.R. 1100.247(e) (1978)] in which any interested person was allowed to protest under much less stringent guidelines than are currently articulated by the ICC.


lessen the administrative burden that the ICC faces when it must conduct extremely lengthy hearings in which numerous lawyers repetitively argue and cross-examine witnesses.\textsuperscript{105} Also implicit in these standards is the Commission’s distaste for what it feels are gratuitous, and perhaps superfluous, protests entered by carriers with little or no present connection to the involved freight, whose sole purpose is to introduce another time-consuming stumbling block into the administrative process in an attempt to protect existing authority which may be fully developed only at some future date.\textsuperscript{106} The ability to intervene is obviously crucial to protesters and, given recent developments, should not be taken for granted. Caution and care should be exercised in preparing petitions to intervene, both with and without leave.

B. THE SECOND PAN-AMERICAN CRITERION—CARRIERS DOITH PROTEST TOO MUCH, WE THINKS.

In addition to meeting the recently prescribed protest guidelines, potential protesters should also be capable of supplying evidence to convince the Commission that the second Pan-American criterion\textsuperscript{107} has been satisfied. While this second requirement has largely been ignored in recent decisions, and its lack of apparent significance is demonstrated by the reform of the Pan-American criteria (which seemingly eliminates the requirement entirely, at least from the procedural framework),\textsuperscript{108} it is still crucial, from a substantive standpoint for protesters to develop the strongest possible case regarding their ability to satisfy a demonstrated service need. Threshold intervention should not be denied because the second Pan-American test is not established at the outset, but no protestant can expect to be successful if its willingness and ability to handle the subject freight cannot be documented with some specificity.\textsuperscript{109}

In the past, when the ICC accepted the premise that existing carriers were entitled to all traffic they could transport adequately, economically, and efficiently within the scope of their authorities before a new competitive service would be authorized,\textsuperscript{110} a showing of the adequacy of existing service was almost always deemed sufficient to preclude a grant of new operating authority.\textsuperscript{111} Under the present trend, in which the desires of

\begin{itemize}
  \item \textsuperscript{105} \textit{id.}
  \item \textsuperscript{106} \textit{id.}
  \item \textsuperscript{107} The second criterion is “whether this purpose can and will be served as well by existing lines or carriers.” Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936).
  \item \textsuperscript{108} See notes 81-88 supra, and accompanying text.
  \item \textsuperscript{109} See generally Ex Parte 55 (Sub-No. 26), note 89 supra. Also, a protestant should have the necessary equipment and facilities to perform the service in question. 43 Fed. Reg. 50,911, 60,278 (1978) [to be codified in 49 C.F.R. 1100.247(k)(2)].
  \item \textsuperscript{110} See note 6 supra.
  \item \textsuperscript{111} See notes 6, 7, and 12 supra.
\end{itemize}
supporting shippers are given substantially greater weight,\textsuperscript{112} the Commission sees loathe to determine the level of service that shippers truly need, and generally is unwilling to substitute its judgment for that of shippers. It becomes apparent, then, that it is no longer a viable strategy for existing carriers to attempt to contradict shipper statements as to their need for extremely efficient, specifically tailored service by showing that the shippers desire but do not really need the service levels they request. Protestants must focus on the service actually provided, and their attempts to satisfy shippers’ reasonable transportation requirements, rather than attempting to saddle supporting shippers with the obligation of “proving” their service needs. The adequacy of existing service is now important only to the extent that it relates to the demonstration of a public need. Effectively, the burden has been shifted from requiring protestants to show the adequacy of existing service to forcing protestants to establish that the proposal would not yield a public benefit.\textsuperscript{113}

Because demonstration by applicant of a service benefit is a threshold test,\textsuperscript{114} it is vital that protestants establish, with much care, the existing level of service and attempts, if any, to introduce new, more responsive services into the relevant transportation market. At a minimum, traffic studies, including loss and damage data, transit times, availability of appropriate equipment, responsiveness to increased needs, availability of other carriers, and so on should be introduced, as should data attempting to offset the Novak evidence and any other indications of service deficiencies introduced by supporting shippers on behalf of applicant.\textsuperscript{115} While only in a rare case will existing service be found adequate for the professed needs of shippers,\textsuperscript{116} it is still absolutely crucial that the advantages to shippers offered by applicant’s “hearing room” proposal be negated to the extent possible by evidence of what protestants presently are accomplishing in the “real world” of transportation. Even if protestants are unable to demonstrate that their existing service can totally satisfy the established service need, they may be able to force a denial of the application at the next stage.

\textsuperscript{112} See note 82 supra.
\textsuperscript{113} Compare generally Liberty I, 130 M.C.C. 243 (1978), Liberty II, 131 M.C.C. 573 (1979), and P.C. White II, 129 M.C.C. 1 (1978), with P.C. White I, 120 M.C.C. 824 (1974), and note 6 supra. Cf. Liberty II, 131 M.C.C. at 574. The first two Pan-American criteria have become hopelessly intertwined and the second criterion has been submerged by the Commission’s analysis of whether the proposed new service will satisfy a demonstrated public need. Naturally, the only way the Commission can determine if a public need has been demonstrated is to weigh the needs of shippers, as stated in their testimony, against the evidence submitted by protestants concerning the quality of service presently provided.
\textsuperscript{114} See note 177 infra.
\textsuperscript{115} See note 117 infra, and accompanying text. See generally notes 197-216 infra, and accompanying text.
\textsuperscript{116} E.g., Colonial Refrigerated Transp., 131 M.C.C. 63, 66, 68, 69 (1978). See also Pre-Fab Transit Co. v. United States, 595 F.2d 384, 389 (7th Cir. 1979).
in the decision making process by minimizing the benefits derived from the proposed service and proving harm to the shipping public.\textsuperscript{117}

The first and second Pan-American criteria are now so intertwined that only one standard truly remains—does the evidence taken as a whole establish a public need for the proposed service—and the Commission’s new burden-of-proof rules\textsuperscript{118} merely recognize this already existing combination. Because there remains no reason to analyze the two criteria separately, they will be examined in tandem.\textsuperscript{119} This review is inserted merely to emphasize the necessity of going far beyond the evidence required to intervene without leave in an operating rights proceeding if a viable protest is to be mounted. Intervention is the first, and easiest, step in the protest process. Specificity with respect to all aspects of existing service within the scope of the application should be an integral part of all protests.

IV. APPLICANT’S BURDENS—DEPTH AND BREADTH

Given that the ICC’s thinking is completely dominated by the perceived benefits of increased competition and the presumption that freer entry and increased competition is consistent with the public interest, is there hope for budding protesters? The question must be answered affirmatively, although a strongly worded caveat should be added. Protests should no longer be attempted by the fainthearted or the weak-willed. Once potential protesters have met the newly-adopted protest standards,\textsuperscript{120} they must be much more diligent in developing substantial evidence showing harm to the shipping public from increased competition.

Potential protesters will also have to pick and choose their protests more carefully if they desire success. A market which is served by only one or a very limited number of carriers is not likely to be a fruitful area for protesters.\textsuperscript{121} Additionally, protesters may not be able to win a denial of the entire application, but may be successful in having its scope reduced so that it will not be as onerous to existing carriers.\textsuperscript{122} The possibility of pro-

\textsuperscript{117} If, for instance, the public benefits arising from the proposed service are slight, and if protesters can demonstrate that they and the shipping public will suffer competitive harm from the grant of the application, the third Pan-American criterion will call for a denial of the application. See, e.g., P.C. White II, 129 M.C.C. 1, Liberty I, 130 M.C.C. 243, Liberty II, 131 M.C.C. 573 and Colonial Refrigerated Transp., 131 M.C.C. 63. To the extent that the benefits to the public are seen by the ICC as minimal, it will be much easier for protesters to establish that the competitive harm from granting the application outweighs the benefits to the public.

\textsuperscript{118} See note 89 supra.

\textsuperscript{119} See generally notes 195-223 infra, and accompanying text.

\textsuperscript{120} See note 89 supra.

\textsuperscript{121} When only a limited number of carriers serve a market, it seems more probable that the addition of a new carrier would stimulate new and improved services than in a market that is also served by numerous carriers. Accord, Colonial Refrigerated Transp., 131 M.C.C. at 68. See also Red Arrow Freight Lines, Inc., Ext.-North Tex., 131 M.C.C. 232, 239 (1979).

\textsuperscript{122} Approximately 5.5 percent of all motor carrier operating rights applications are reduced in
tests remains an incentive for applicant to limit its proposals to the area it truly is willing and able to serve efficiently, rather than attempting to broaden the application in an effort to "stockpile" authority which can be developed at a later date. The "chilling effect" of the expense, both in time and money, of fighting a protest is as great on applicant as is the expense of filing the protest upon existing carriers.¹²³

While the approval rate of at least part of the requested authority is approaching 99%, a substantial increase from the traditional 80-85% levels,¹²⁴ protesters who adapt to the Commission’s new burden of proof and develop evidence in a manner suitable for these standards can still be effective.

Even under present conditions, the ICC may authorize persons to provide transportation services only if the Commission finds that:

1. the person is fit, willing, and able (a) to provide the transportation to be authorized by the certificate, and (b) to comply with this subtitle and regulations of the Commission; and
2. the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.¹²⁵

Aside from embellishing briefs with general pronouncements concerning the goals of transportation policy,¹²⁶ the main thrust of protesters' arguments clearly must be to demonstrate that the applicant is not "fit, willing, and able" to provide the proposed service and to comply with existing reg-

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¹²³ The writers do not intend to intimate that frivolous protests or protests filed merely to delay the granting of new authority should be condoned, but rather are asserting that the perceived threat of a protest will weigh heavily on applicant while formulating the scope of its application if it believes that a protest might be a viable alternative for existing carriers under certain conditions.

¹²⁴ See note 3 supra.


¹²⁶ The Interstate Commerce Act, which is designed to ensure "the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States," requires, in part, the Interstate Commerce Commission:

1. to recognize and preserve the inherent advantage of each mode of transportation;
2. to promote safe, adequate, economical, and efficient transportation;
3. to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
4. to encourage the establishment and maintenance of reasonable rates for transportation or unfair or destructive competitive practices;
5. to cooperate with each State and the officials of each State on transportation matters; and
6. to encourage fair wages and working conditions in the transportation industry.

ulations, and/or that the future public convenience and necessity does not require the proposed service.

In order to establish that applicant is not "fit, willing, and able," protestants can attack the operational and/or financial feasibility of the proposal and can attempt to have applicant labeled a "rogue carrier"—one which is unable or unwilling to comply with existing rules and regulations—by the Commission or its Bureau of Investigations and Enforcement [BIE]. These fitness and feasibility considerations attempt to force a finding by the ICC that even if the public interest requires a proposed service, applicant should not be allowed to satisfy the need because its proposal is not an efficient, financially feasible one, or because applicant cannot be expected to comply with regulatory policies designed to protect the public.

The statutory standard of "present or future public convenience and necessity" has generally been evaluated by means of the aforementioned three-part Pan-American test. Under these criteria, as restated in Liberty I and II and modified in Ex Parte No. MC-121, applicant must first set forth a public need for or benefit from the proposed service. Once this has been done, protestants assume the burden of proving the proposed service will cause competitive harm of such a degree as to outweigh the benefits to the general public. Each of these aspects of "present or future public convenience and necessity" will be discussed in turn in the following sections, with emphasis on present trends, and the positions accepted by the ICC in recent operating rights proceedings.

A. "Fit, Willing and Able"

Fitness, perhaps the most overlooked point of attack available to protestants, can also be among the most effective. It is difficult to imagine a more satisfactory strategy of opposition than one which would entangle a carrier with the ICC's fitness procedures. These provisions are designed to protect the public from carriers who are unable or unwilling to comply with appropriate ICC or Department of Transportation [DOT] rules and regulations. Although these requirements do not relate to the merits of the application, all applicants for operating authority must meet this two-part test before authority can be granted. It does not matter that a public need

127. See generally notes 138-182 infra, and accompanying text.
128. See notes 138-158 infra, and accompanying text.
130. Liberty I, 130 M.C.C. 243, 245 (1978); Liberty II, 131 M.C.C. 573, 574, 575 (1979); and 44 Fed. Reg. 60,299 (1979), respectively.
131. Liberty I, 130 M.C.C. at 246; Liberty II, 131 M.C.C. at 575. See also note 77 supra.
132. E.g., Saia Motor Freight Line, Inc., Ext.-Dallas, 131 M.C.C. 660, 661 (1979); Pulaski Highway Express, Inc., Ext.-Elkton, 130 M.C.C. 147, 151 (1978); Midwest Emery Freight Sys-
exists; the carrier must prove itself "fit, willing, and able," and cannot use strong evidence of need presented by shipper witnesses to "bootstrap" the application to success.\textsuperscript{133} The contemporary liberalization of entry requirements in other areas does not seem to have eroded traditional fitness doctrines; applicant still has the undiminished burden of proving fitness.\textsuperscript{134}

Although DOT or BIE can intervene in any proceeding to argue that applicant is not "fit, willing, and able,"\textsuperscript{135} protestants may independently challenge applicant's fitness.\textsuperscript{136} Applicant continues to bear the burden of proving fitness regardless of which party raises the issue.\textsuperscript{137}

1. The "Rogue Carrier"

The Commission regulates a massive and ever expanding conglomerate of large and small carriers, contract and common carriers, freight forwarders and brokers, and railroad and water carriers. The only way the system can work smoothly and properly is to be self-policing.\textsuperscript{138} The ICC cannot actually supervise each and every transportation activity, and must rely to a large extent on the good faith of the various carriers. Carriers that violate the expected norms of this benign regulation should be and often are dealt with severely. In a recent Fifth Circuit decision, the Court ordered the Commission to institute a fitness investigation because a carrier had, in a single instance, submitted false evidence.\textsuperscript{139} There is little doubt that the Com-

\textsuperscript{133} Pulaski Highway Express, Inc., \textit{Ext.--Elkton}, 130 M.C.C. 147, 151 (1978); Watkins Motor Lines, Inc., \textit{Ext.--To Four States}, 120 M.C.C. 92, 101 (1974); Mettler Hauling & Rigging, \textit{Ext.--Loudon County, Tenn.}, 117 M.C.C. 557, 559-60 (1972); Midwest Emery Freight System, Inc., \textit{Investigation and Revocation of Certificates}, 124 M.C.C. 105, 118-19 (1975). But see, e.g., Autolog Corp., \textit{Ext.--16 States}, 131 M.C.C. 494 (1979), where the Commission continued the steadily increasing trend of granting applications for a limited duration when the fitness of the carrier is seriously, but not irreparably, questioned. This practice is especially prevalent in cases involving new carriers and extensive expansions of new or innovative services. Accord, United Agricultural Transp. Assoc. of America Marketing Co-Op Com. Car. Applic., 120 M.C.C. 67, 76 (1974); Distributors Serv., Co., \textit{Ext.--Food and Food Products}, 118 M.C.C. 322, 330 (1973).

\textsuperscript{134} See notes 132 and 133 supra.

\textsuperscript{135} 49 C.F.R. § 1067.4, § 1067.5 (1978).


\textsuperscript{139} Barnes Freight Line, Inc. v. ICC, 569 F.2d 912, 923 (5th Cir. 1978).
mission can and will continue to deny applications when an unabated pattern of violations of Commission policy occurs.

If applicant is labelled a "rogue carrier," one that operates in blatant disregard of Commission rules and regulations, protestants may prevail in having the application denied. The simplest way to accomplish this objective is to bring the power of the fitness flagging procedures\(^4\)\(^4\) to bear. Once a threshold occurrence triggers the procedures,\(^4\)\(^5\) no certificates or authority shall issue to applicant until its fitness has been resolved in a selected proceeding.\(^4\)\(^2\)

As has been mentioned, both DOT and BIE can intervene in any application proceeding.\(^4\)\(^3\) Where this occurs, much of the burden of raising fitness deficiencies will be removed from protestants and assumed by the agencies. Additionally, the intervention of these two, presumably neutral, agencies gives the imprimatur of official recognition to the existence of a fitness problem. It must be remembered, however, that fitness flagging is usually a general proceeding, while specific fitness issues must be invoked in an individual proceeding.\(^4\)\(^4\)

Assuming no agency is willing to intervene on the basis of applicant’s fitness, protestants should explore whether applicant has committed any major violations of agency rules, regulations, or applicable law.\(^4\)\(^5\) The

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\(^4\)\(^1\) 49 C.F.R. § 1067.2 (1978) allows the:

(a) Institution of a formal Commission investigation into alleged violations of law that reasonably appear to bear on applicant’s fitness, willingness, and ability to conduct regulated carrier operations and to conform to the provisions of the Interstate Commerce Act and the requirements, rules, and regulations of the Commission or the Department of Transportation.

(b) Participation by the Bureau of Investigation and Enforcement or the Department of Transportation to develop a record concerning fitness in an application proceeding seeking operating authority or approval of a transfer under Section 5 of the Interstate Commerce Act.

\(^4\)\(^9\) C.F.R. 1067.3 (1978) sets forth the standards for denial if there is probable cause for believing that fitness standards cannot be met:

(a) Past uncorrected or other significant violations denoting an indifference by the applicant towards lawful standards of behavior, or a pattern of neglect of its duties towards the public that betokens a refusal voluntarily to meet its duties under the Interstate Commerce Act or

(b) Flagrant and persistent disregard of pertinent provisions of the Interstate Commerce Act or the requirements, rules, and regulations of the Commission or DOT (rather than, for instance, a bona fide difference of opinion or interpretation regarding applicant’s rights).

\(^4\)\(^2\) See note 135 supra.

\(^4\)\(^3\) Id.


\(^4\)\(^5\) E.g., (1) Operating without appropriate authority; (2) violating ICC or DOT rules and regulations; (3) violating state rules and regulations; (4) violating terms of existing tariffs; (5) extending credit excessively; (6) failing to file all necessary reports and documents; (7) engaging in illegal leasing activities; (8) submitting false statements; (9) violating gateway restrictions; (10) violating
mere fact that a carrier has committed one or more violations, however, does not automatically preclude a finding that it is "fit, willing, and able." In ascertaining whether applicant has successfully met its statutory burden, the Commission is guided by the standards recently reflected in *Pulaski Highway Express, Inc., Extension--Elkton, Ky.* 146 The ICC considers the nature and extent of the violations, any mitigating factors, whether applicant’s conduct is in flagrant and persistent disregard of the law, applicant’s sincere efforts to correct past mistakes, and whether applicant is both willing and able to comply with all applicable requirements in the future. 147 Negative fitness findings are not considered as punitive actions, designed to penalize a carrier for its past misdeeds, but rather are imposed to assure that the public is adequately protected. 148 Finally, civil penalties do not wipe the slate clean, and the carrier must continue to show the steps taken to rectify its problems. 149

2. The "I Think I Can" Carrier

A new carrier, or one that seeks to increase dramatically the scope of its operations, may propose large scale services and may actually produce adequate shipper support of the need for such services, but may not be able to carry out operations as proposed after authority is granted due to financial or other business limitations. The ICC still requires any applicant to provide the totality of services for which it requests authority, and this "I Think I Can" carrier should be scrutinized as to its ability to do so. 150 While

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147. *Id.* It usually is considered particularly egregious if the violations with rules and regulations designed to protect the safety of persons using the nation’s transportation system. *E.g.*, Speedway Carriers, Inc., *Ext.--Pesticides, 128 M.C.C. 60, 66* (1977); *Frigid Food Exp., Inc., Ext.--Floor Covering, 106 M.C.C. 259, 261* (1967); *Com. Car. Applic., 96 M.C.C. 100, 103* (1964). Equally important is a sincere effort to correct past mistakes. This could include such measures as bringing in new management, firing or reprimanding employees, instituting new controls or procedures, and, most importantly, avoiding new violations. Failure to take these actions may lead the Commission to conclude that a continuous and notorious pattern of unlawful conduct has developed and that applicant is unable to carry out its future operations in a lawful manner. Boyd Bros. Transp. Co., Inc., *Ext.--Farm Equipment and Gypsum, 129 M.C.C. 528, 533* (1978); Kissick Truck Lines, Inc., *Ext.--Iron and Steel Articles, 125 M.C.C. 183, 192-193* (1976).


present size alone is not a determinative element, the carrier must have access to necessary equipment and terminals to transport commodities in the manner depicted in its transit studies (if any are presented). Unrealistic transit studies and claims of impossibly quick delivery merit lengthy consideration by protestants and should be pointed out to the Commission. Furthermore, the prospective carrier must demonstrate that it either understands and can comply with the Commission’s regulations or is capable of so doing prior to commencement of its proposed operations. Finally, applicant must demonstrate an ability to provide adequate transportation services, such as pickup and delivery and processing of damage claims, as well as carriage to final destination, for all freight for which it requests authority. A carrier cannot request wide-ranging authority with the knowledge that it will actually concentrate on certain commodities or types of freight to the exclusion of others.

In addition to these factors, applicant must also prove that it has adequate experience to perform the proposed operations and that it has access to sufficient capital to provide service over all its routes. The mere fact that current assets do not exceed current liabilities will not be sufficient to have the application denied if the carrier is a young, vigorous one with an innovative service and an attractive operating ratio. The ICC may also opt for granting a limited-term certificate, which effectively gives the carrier a period of time, usually several years, to prove to the Commission that it is “fit, willing, and able” to provide the service.

3. Operational Fitness

The Commission is obligated to promote, among other things, activities that encourage efficient transportation conditions. An equally impo-

156. Consolidated Car., Inc., Com. Car. Applic., 131 M.C.C. 104, 108 (1979). Normally, the Commission determines whether the carrier can provide the proposed service without jeopardizing its financial health. The ICC typically will examine the firm’s working capital levels, debt/equity ratios, and other measures of financial well-being to decide if monetary constraints will hinder the carrier’s service.
158. See note 133 supra.
159. See note 126 supra. See also General Policy Statement Concerning Motor Carrier Li-
tant policy objective is to assure that a strong, economically viable system of carriers is maintained throughout the nation.\textsuperscript{160} Translating these general prescriptions into specific requirements relating to grants of operating authority, the Commission requests that evidence be adduced describing how equipment to be employed in the proposed operation will be returned to its point of origin. Resulting empty or partially empty vehicle movements must be disclosed, along with statistics relating to the total mileage and number of vehicles involved, and other factors concerning operational feasibility.\textsuperscript{161}

Of course, merely requesting information concerning operational feasibility and deadhead miles is quite different from actually denying an application by affording such evidence determinative weight. The energy crisis, however, spurred the Commission to reiterate standards which seem to make operational feasibility a condition precedent to the issuance of authority. In its "General Policy Statement Concerning Motor Carrier Licensing Procedures (Operational Feasibility),"\textsuperscript{162} the ICC took great pains to point out that a "balanced evaluation" of the operational feasibility of each new motor carrier operation must be made before authority could be granted.\textsuperscript{163}

Protestants should be able to convince the Commission that strong reasons exist for denying applications which result in wasted fuel, and deadhead or under-utilized miles. Applicant seems to have the burden of demonstrating that it has made every effort to minimize deadhead miles through trip-leasing or transporting exempt commodities on the backhaul.
movement, or showing that the new authority, when coupled with existing routes, provides a more efficient fronthaul-backhaul fit.164 Additionally, applicant seemingly should have to establish that it has made every reasonable attempt to minimize deadhead and under-utilized miles by designing a routing strategy that eliminates as much excess mileage as possible.165

If applicant does not supply the required information regarding operational efficiency, protestors can move to have the proceeding dismissed and the application denied because of lack of compliance with Commission requirements.166 If, however, applicant provides appropriate data which demonstrates that empty or partially empty mileage will occur and/or that deadhead movements are an inherent attribute of the proposal (or if protestors believe this to be the case), several avenues of attack should be available.167

After arguing that recent fuel shortages and long term policy considerations mandate that all agencies take appropriate steps to minimize wasted fuel, protestors could emphasize the actual amount of fuel that will be wasted should the proposed authority be granted.168 To the extent new service siphons freight from existing carriers and causes their under-utilized

164. See note 159 supra.
165. Id.
166. Id. See also ICC Form OP-MCB-95, Application for Temporary Authority for Motor Common and Contract Carriers under Section 210a[a] of the Interstate Commerce Act, which states, at page 7:

The National Transportation Policy declared by the Congress requires that this Commis-
sion, among other things, promote efficient and economical two-way operations which
eliminates or minimizes the cost of empty vehicle movements, and which benefits the
 carriers as well as the shipping and traveling public. Applicants seeking temporary au-
 thority are expected to submit information indicating how equipment is expected to be
 returned to an origin point, and other data relating to the operational feasibility of the
 proposed operation. If empty or partially empty vehicle movements will result from the
 grant of authority, applicant will be expected to disclose the mileage and number of vehi-
cles involved, as well as designate where such empty vehicle operations will take place.
Attachments with the information requested must be certified by applicant.

167. Applicant may present a routing study which purports to demonstrate the number of dead-
head miles that will occur from the institution of the proposed service. Protestors should examine
quickly the accuracy of this study, and also should determine whether the number of underutilized
miles traveled (the percentage of total available space that must, of necessity, be empty during
some portion of the route due to applicant's inability to pick up freight en route which would replace
the freight delivered) in a particular application is in excess of the percentage of deadhead miles.
Also, it may be possible to show that the routing scheme selected by applicant to minimize dead-
head mileage does not reflect accurately the routing the trucks actually will use. Protestors cer-
tainly should demand that the operating study reflect the true characteristics of the movement in
question.

168. In the case of a regular route common carrier, this argument should be particularly com-
pelling because these carriers have made commitments to provide service over a given route at
specified intervals. Until the route is abandoned, the trucks will continue to run, and use approxi-
mately the same amount of fuel, no matter how much or how little freight is available to them. See
generally Transp. Activities of Brady Transfer and Storage Co., 47 M.C.C. 23 (1947), defining
regular routes as repetitive in character, with a fixed pattern of departures and arrivals.
miles to increase, fuel consumption must rise and operational efficiency must fall when the totality of services within the scope of the proposal is considered. In many instances, applicant may attempt to meet its burden by merely asserting that trip-leasing and backhaul of exempt commodities will be attempted whenever possible. Protestants should inquire as to what commodities will be available and when, and who has been contacted regarding trip-leasing. Backhauls will not be obtainable to and from many areas due to the historical imbalance of inbound and outbound freight. In such situations, the simple assertion that deadhead miles will be avoided should be deemed insufficient by the Commission.

As always, every ointment has its fly, and this strategy of attacking operational feasibility is no exception. In recent decisions, the Commission has held that operational efficiencies can be used only as a mitigating factor weighing in favor of granting an application, and generally cannot be used as a reason for denying one. This issue has not often been discussed, and then only in a peripheral manner to the more substantive problems

169. Existing regular route common carriers should attempt to show not only that applicant's proposal is inefficient but also that the fuel efficiency of existing carriers would be lessened.

170. The Florida peninsula, for instance, receives much more freight than it ships to other areas. See generally Colonial Refrigerated Transp., Inc., Ext.–Pla. to 32 States, 131 M.C.C. 63, 70 (1978), for recognition of this historic imbalance. Cf. Saia Motor Freight Lines, 130 M.C.C. 409, 424 (1978). But see Midwest Haulers, Inc., Ext.–Fresno, Cal., 130 M.C.C. 187, 202 (1978), stating that the unavailability of back-haul freight due to a traffic imbalance in the general flow of commerce generally should not serve as a basis for denying an application where need for the proposed service has been established. See also Timlaph Corp. of Va., 129 M.C.C. 367, 380 (1978).


The Administrative Law Judge denied the application as either a contract or common carrier on the additional ground of operational feasibility, reasoning that the service sought would necessarily incur substantial deadhead operations. He analyzed the sample routings provided by the shipper and concluded that the deadhead mileage is a significant percentage of the truck haul. We believe that this conclusion was based on a misinterpretation of the evidence, and is contrary to the intent of the policy statement in (sic) operational feasibility (footnote omitted). The Commission's policy is intended to be applied as an equitable factor militating in favor of granting applications where an applicant shows that efficient traffic movements on return are a part of its proposal. It is not intended to serve generally as a basis for denying an application where a need has been established for the proposed service, but where backhauls may be unavailable or where return traffic movements are otherwise not possible (citation omitted).

131 M.C.C. at 570-71.

Joseph Moving and MDI, Inc., perhaps more than any other recent holdings, can be seen as the ICC's attempt to use competitive considerations to justify granting any and all applications even if it necessitates ignoring issues of operational feasibility which are mandated by law and the Commission's own pronouncements. The Commission's logic, more than the granting of the application itself, can be seen as a substantial setback to any rational policy of fuel conservation. Thinking
raised by protestants and answered by applicant, but the holding seems inescapably illogical. Perhaps, on further consideration, the ICC or the courts may find that operational efficiency is not a one-way street. Although the Commission may not always so find, it should have an obligation to promote efficiency by denying, as well as granting, applications. Certain, protestants should not fail to take advantage of operational feasibility arguments because of this flimsy precedent.

While this discussion is not designed to be a complete analysis of the fitness issue, it does set forth many points that should be considered by protestants. Although fitness problems will not yield a denial on the merits of an application, they remain a viable method to short circuit the process so that the public need for applicant's proposed service is not the dispositive factor. In appropriate circumstances, fitness is an easy, efficient, and often successful method of protesting an operating rights application, and it should not be casually rejected as a strategy without proper consideration of its merits.

such as this can only exacerbate the existing fuel shortage that seems likely to plague the United States for years to come.

By its holdings, the Commission seems to have made considerations of fuel consumption a one-way street. Fuel efficiency and operational feasibility can be rewarded, but, says the Commission, fuel waste and operating atrocities cannot be punished. This position is patently absurd and logically cannot be the case. If increasing fuel efficiency by obtaining a better fit between inbound and outbound traffic to lessen deadhead mileage is an "equitable factor militating in favor of granting applications," then it seems likely, as well as logically consistent, that increased deadhead miles and greater fuel consumption, along with lowered efficiency, would have to be factors militating against an application.

The Commission seems to have relegated operating efficiency, which should be a condition precedent to grants of authority, to the status of a flip-flopping afterthought. In these instances, at least, the Commission's pronouncement that it must make a "balanced evaluation of the operational feasibility of each proposed new or additional motor carrier operation" seems to be idle chatter, and the "balanced evaluation" is merely a one-sided, cursory glance.

It should be hoped that, in the future, the Commission will understand that National Transportation Policy cannot be turned on and off like a faucet. In the past, the ICC has recognized its obligations to consider operational feasibility and deadhead miles before granting applications, and it must weigh these factors in all applications—not just those applications which tend to increase operational efficiency. While the goal of administratively dictated deregulation may be foremost in the individual Commissioner's mind, the mandates of Congress and the needs of the public should not be ignored. In light of the existing fuel crunch, plain common sense, not to mention existing laws and Commission regulations, mandates that the ICC consider operating economies and diseconomies before granting or denying applications for operating rights.

173. See generally note 171 supra.
175. See notes 132 and 133 supra.
B. BETTER, CHEAPER OR MORE EFFICIENT

Although the Commission has presumed that increased entry and competition will lead to improved service, it has not retreated from the long standing proposition that applicant must first demonstrate that the proposed service will advance the public interest. In the past, this has meant that applicant had to prove that it could provide a service superior to that of existing carriers, and that shippers needed this new, improved service. Normally, this burden was met by introducing an operating proposal that improved existing service in terms of speed, efficiency, fuel consumption, damage claims, equipment, shipment tracing, daily pickups, and/or single-line service, among others. The Commission recently amended its rules so that the level of rates can also be considered when deciding if an application is in the public interest.

Although the requirement that applicant demonstrate that its proposed service meets a useful public purpose does not seem to have been eroded, the Commission appears to have become less than vigilant in ensuring that this criterion has been met. A good deal of carelessness seems to have been accepted in this phase of many operating rights proceedings. This article will not deal with specific issues of what, in the past, has constituted a useful public purpose, but it will examine recent trends with respect to the burdens that applicant must meet in demonstrating public need and/or benefit, and deal specifically with the issue of whether increased


178. E.g., Terminal Transport Co., Inc., Ext.—Mich. Points, 111 M.C.C. 343 (1970); Fernstorm Storage and Van Co. Ext.—Nationwide Serv., 110 M.C.C. 452 (1969). This is not to imply that demonstration of inadequate service was the only method of gaining Commission approval, because other considerations such as the presence of a monopoly, the need for single line service, following the traffic, emergency and seasonal needs, growth of the transportation market, need for special equipment, future needs, and balancing existing operations were considered by the ICC. Still, most applicants attempted to demonstrate the inadequacy of existing service as an integral part of their presentation.

179. See note 4 supra.

180. 44 Fed. Reg. 10,067, 10,068 (1979) [to be codified in 49 C.F.R. 1100.247(n)]. The Commission generally has not considered reduced intra-modal rates in operating proceedings unless existing rates were so high as to constitute an embargo. Any party aggrieved by rate levels was expected to challenge the justness and reasonableness of the rates in a complaint proceeding. Rate evidence has been utilized only to demonstrate the unique nature of the proposed service. 44 Fed. Reg. 10,065 (1979), and cases cited therein.

181. See generally notes 195-223 infra, and accompanying text.

182. Id.
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competition *per se* is an adequate public interest consideration for granting new authority.

1. *Reliance on Rates* 183

In recognition of the benefits inherent in all phases of competition, the Commission recently has adopted a policy that rate considerations properly may be raised to determine whether a common carrier proposal for permanent authority is in the public interest. 184 While the ICC has often been asked to consider rate differentials in a surreptitious manner under the guise of applicant’s proposal to offer a “no frills” or more economical service, rate considerations traditionally did not figure prominently in Commission thinking. 185 Quality of service has been the make or break issue, with cost evidence deemed only to be of peripheral importance, but these new rules formalize consideration of rate levels in operating rights proceedings. 186

Whether raised by protestors or applicant, the rate issue is important at two phases in the proceeding. In the first phase, during which the Commission determines whether the public interest requires the proposed service, lower rates can be the basis for approval of applicant’s proposal. 187 Protestants also may introduce rate considerations at this point, or may re-

183. Query whether rate considerations often will be advanced as the required public benefit, given the ICC’s obvious trend of invariably holding that an improved service has been demonstrated by applicant. Perhaps rate reductions will become a necessary evil for applicant to obtain shipper support.

184. 44 Fed. Reg. 10,067 (1979) [to be codified in 49 C.F.R. 1100.247(n)].


186. *Id.* While rates will be merely one factor considered, this change is designed to increase the range of services presently available to shippers and to promote innovation in pricing strategies. 44 Fed. Reg. at 10,065 (1979). Reliance on rates is optional and may be raised by either party. If protestors raise the issue, applicant will not be forced to respond if it bases its application on the inadequacy of existing service or other independent grounds. Thus, protestors cannot force applicant into relying on rate considerations in the proceeding.

An applicant which chooses to place its proposed rates in issue must give notice of this reliance and publish its tentative rates in the Federal Register. Furthermore, applicant must meet the burden of proving that the public convenience and necessity requires the proposed service, but does not have to prove that the rates are just, reasonable, and otherwise lawful. Applicant’s evidence should relate to the efficiency of its proposed operation, expected productivity increases, and the factors which make these rates possible. The evidence should also compare the tentative rates with existing rates, list attempts, if any, by supporting shippers to negotiate lower rates with existing carriers, and show that the carrier’s financial well-being will not be jeopardized by the lower rates. In granting an application, the Commission is not prejudging the lawfulness of the rates.

The Commission is empowered to force carriers to fulfill their commitment to charge the tentative rates. To facilitate this goal, the ICC expressly can require that certain rates be charged, limit the terms of a certificate to an appropriate period, or require periodic reports. The Commission can force rate hold-downs, or revoke the authority upon violation of the rate agreement, but it can also grant relief as it deems appropriate if Ex Parte increases are granted or if sudden unexpected cost increases occur. 44 Fed. Reg. 10,067, 10,068 (1979) [to be codified in 49 C.F.R. 1100.247(a)].

but applicant's rate evidence, in order to show that the proposed service does not constitute a rate improvement over existing service. Even if applicant and protesters choose not to rely on cost evidence, protesters can still cross-examine supporting shippers on the issue of whether their reason for supporting the application is based on rate considerations rather than the need for improved service.¹⁸⁸

Protestants, at this point, should attempt to show that the proposed rates are predatory, that they will harm applicant financially and weaken the overall fabric of the common carrier industry. While applicant may assert that lower rates are due to increased productivity and efficiency, protesters should point out that lower rates may be due to "cream skimming," or inadequate equipment and facilities.¹⁸⁹ Protestants could demonstrate that the reduced costs claimed by applicant will result from skimping on safety programs and equipment, unfairly low wages, failure to meet insurance requirements and other rules and regulations set up to protect the public, and by the increased utilization of owner-operators who, as they are paid a percentage of gross tariff revenues, may be forced to assume a large portion of any proposed rate reduction.¹⁹⁰ As no mention has been made about protestants' burden of proof, except that the weight of the rate evidence will vary on a case-by-case basis, it seems likely that protestants will have to accept the considerable burden of proving that applicant cannot or should not be allowed to meet its proposed commitment.¹⁹¹

Once the issue of whether the application presents a public benefit has been decided, the Commission should also consider the rate issue with respect to the third Pan-American criterion—will the new service impair the existing operations of carriers contrary to the public interest. Naturally, applicant will argue that evidence of lower rates proves the existing rate structure to be noncompetitive and unduly high, and that an influx of new carriers may spur desirable competition in that particular transportation market.¹⁹² Protestants, on the other hand, must establish that the reduced rates result from applicant's failure to fulfill all of its common carrier obligations, and that the rate reductions do not stem from increased productivity or efficiency. Protestants must point out clearly that reduced rates are not in the public interest if they result in inferior service, unfair wages, unsafe

¹⁸⁸. Id. at 10,066.
¹⁸⁹. Id.
¹⁹⁰. Id. at 10,066-67.
¹⁹¹. See generally Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,299 (1979), in which the Commission states that it will grant applications that serve a useful public purpose unless protestants can meet the burden of establishing that entry of the new service into the market would endanger existing operations in a manner contrary to the public interest.
operating conditions, or unreasonably low payments to owner-operators.\textsuperscript{193}

Rate considerations, then, can be a valuable tool with respect to the two remaining \textit{Pan-American} tests. While the arguments introduced at each stage will be primarily the same, protestants should recognize the benefits of challenging applicant's rate pronouncements as they relate to the public need for the service and as they relate to impairing the operations of existing carriers contrary to the public interest.\textsuperscript{194}

2. The \textit{Prima Facie} Public Benefit—Totality of the Evidence

An applicant for operating authority has the burden of presenting a \textit{prima facie} case that the proposed authority represents a public benefit.\textsuperscript{195} This first \textit{Pan-American} criterion normally is met by the introduction of shipper support statements which comply with the minimum requirements of \textit{Novak}.\textsuperscript{196} While applicant may base the need for its proposal on the inadequacy of existing service, traditionally a main point of contention in these proceedings, the ICC can grant an application without finding existing services to be inadequate by holding that the proposal offers the public improved transportation services that protestants are "unable or unwilling" to match.\textsuperscript{197} This benefit to the public can be demonstrated by showing that a public need exists for the expansion of higher quality service into the relevant marketplace, or that the proposed service will yield operating economies and efficiencies to the carrier which will advance the public interest.\textsuperscript{198} The public benefit can be found on the basis of present or future service needs in the relevant transportation market.\textsuperscript{199} A public benefit is easier to demonstrate now because the Commission is being much

\begin{footnotesize}
\textsuperscript{193} Id. at 10,066-67. Under certain conditions, the ICC is statutorily mandated to prescribe minimum common carrier transportation rates if it believes that rates are unreasonably low and not in the public interest. See, e.g., 49 U.S.C. § 10704(b)(1) (1978). 49 U.S.C. § 10704(c)(1) (1978) contains similar authority for contract carrier rates.

\textsuperscript{194} See note 181 supra. To the extent that the public benefit of applicant's proposed lower rates can be minimized, protestant should have a lessened burden of demonstrating that the harm to existing carriers and their ability to serve the public outweighs the benefits of applicant's new service.

\textsuperscript{195} See note 177 supra.

\textsuperscript{196} See note 2 supra. See also 44 Fed. Reg. 60,299 (1979).


\textsuperscript{199} 49 U.S.C. § 10922(a)(2) (1979). Also note 125 supra. See also, e.g. Appleyard’s Motor Transp. Co., Inc. v. I.C.C., 592 F.2d 8, 10 (1st Cir. 1979); Tri-State Motor Transit Co. v. United States, 570 F.2d 773, 777 (8th Cir. 1978), and cases cited therein; Consolidated Motor Exp., Inc., Ext.—Ky. Counties, 131 M.C.C. 629, 630 (1979); Longview Motor Transport Inc., Ext.—Gilmore Corners, Wash., 129 M.C.C. 499, 501-02 (1978).
\end{footnotesize}
more solicitous of shippers’ perceived requirements and is not second-guessing their needs, as opposed to their desires, for improved service.\textsuperscript{200} If applicant proposes, and shippers support, a quicker, safer, more convenient, economical or efficient, or single-line service which cannot be matched by the services of existing carriers, a public need ordinarily is found to have been demonstrated.\textsuperscript{201}

A minimum \textit{prima facie} showing is the presentation of evidence of support that generally complies with the Novak standards.\textsuperscript{202} Additionally, the support must still encompass the entire breadth of the application.\textsuperscript{203} If the thrust of the public need is that existing service is not adequate, and if this is proven by evidence of lengthy delays in transit, equipment shortages, inability to pick up or deliver at necessary intervals, excessive damage claims, and the like, applicant will in all probability be successful because the Commission will conclude that increased competition is necessary to provide the shipper with adequate service.\textsuperscript{204}

Normally, the Commission does not explicitly conclude that existing service is inadequate,\textsuperscript{205} but instead finds that the public benefit standard has been met by the proposed institution of a higher quality service more tailored to the needs of the shippers than is currently offered.\textsuperscript{206} The standards in this instance have become so loose that, quite frankly, it is almost impossible for applicant to fail in conceptualizing a service that is more responsive to shippers’ needs than existing service.\textsuperscript{207} Applicant need

\textsuperscript{200} See note 82 \textit{supra}.

\textsuperscript{201} See note 198 \textit{supra}.

\textsuperscript{202} See May Trucking Co. v. United States, 593 F.2d 1349, 1352-53 (D.C. Cir. 1979); Appleyard’s Motor Transp. Co., Inc. v. I.C.C., 592 F.2d 6, 11-12 (1st Cir. 1979); Ex Parte No. MC-121, note 191 \textit{supra}, 44 Fed. Reg. at 60,299.


\textsuperscript{206} E.g., Appleyard’s Motor Transportation Co., Inc. v. I.C.C., 592 F.2d 8, 10 (1st Cir. 1979); Saia Motor Freight Line, Inc., Ext.—Dallas, 130 M.C.C. 409, 418, 419-421 (1978); B.J. McAdams, Inc.—Ext. Frankfort Textiles, 129 M.C.C. 182, 187 (1978).

\textsuperscript{207} More pickups and deliveries, desire for single-line service, need for equipment better suited to shipper’s demands, easier shipment tracing, lower rates, desire to phase out present private carrier operations, fewer claims, faster service, more reliable service, need for one carrier to
merely examine existing service and if it is found lacking in any respect,\textsuperscript{208} arguments can be formulated by shippers concerning their needs for an improved service. Additionally, applicant can frequently show that the grant of authority would yield increased operating efficiency and a strengthened financial position by filling up backhauls or reducing circuity, thus possibly fulfilling the public need requirement, given the strong presumption that increased competition is in the public interest.\textsuperscript{209} Naturally, all shippers need quicker, more reliable freight service and additional back-up carriers so that inventories can be kept lower and profits increased; such support is not difficult to secure for most applications.

This analysis has not been constructed to argue for a return to the traditional standard of determining whether a shipper truly "needed" improved service or whether it was merely "desired,"\textsuperscript{210} but rather to point out the seemingly hopeless position in which protestors are often placed. Applicant can prove public need by introducing an operating proposal that ostensibly is superior in any respect to the actual service protestors have been performing, or one which improves applicant's efficiency. It is practically impossible for the demonstrated service of protestors to match the service merely proposed, but not yet delivered, by applicant. The Commission has accepted so many different types of "hearing room" operating proposals as constituting a public benefit that it is very difficult to imagine an instance in which a public benefit could not be found.\textsuperscript{211}

Only infrequently has applicant failed to satisfy this \textit{prima facie} public need test.\textsuperscript{212} Ordinarily this occurs when evidence concerning the need for the transportation services is highly speculative or does not support the entire breadth of the application. Occasionally, however, the Commission still will find that no substantial benefit has been proven, that the existing service is adequate in all respects, and that the application does not represent

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\textsuperscript{208} Id.

\textsuperscript{209} May Trucking Co. v. United States, 593 F.2d 1349, 1356 (D.C. Cir. 1979); Liberty II, 131 M.C.C. 573, 575 (1979); Midwest Haulers, Inc., Ext.--Fresno, Calif., 130 M.C.C. 187, 200 (1978).

\textsuperscript{210} See note 82 supra.

\textsuperscript{211} See note 207 supra.

\textsuperscript{212} See note 221 infra.
an innovative operating plan or improvement over existing service.\footnote{213}

In Colonial Refrigerated Transport, Inc. Extension--Florida to 32 States,\footnote{214} the Commission held that the relevant transportation market was already highly competitive, and that applicant had failed to demonstrate a public benefit. Applicant based its proposal on the need of some Florida shippers for additional refrigerated equipment during harvest seasons, and on their desire for single-line service. Also, applicant suggested that increased operating efficiencies would result from lessened empty backhauls if the authority were approved.\footnote{215} The ICC denied the application on the basis that equipment shortages were very sporadic, and that existing interline service was substantially equal to proposed single-line service. Finally, the Commission noted the extreme desirability of backhaul freight from the Florida peninsula due to the historic imbalance of freight to and from the area, and stated that the presumed benefits of increased competition could not be so readily accepted when the relevant market was already highly competitive.\footnote{216}

While Nashua, Liberty I and II, P.C. White II, and others stress that increased competition can be considered as a public benefit factor in the Commission's weighing process, proceedings such as Colonial Refrigerated demonstrate that the ICC has not reached the stage of granting applications solely on the basis of increased competition. Clearly, almost any application will yield at least a short-term increase in competition, but a diminished Novak requirement has been retained,\footnote{217} as has the necessity of demonstrating a benefit arising from the proposed service.\footnote{218} Although the possibility that competition per se could be the basis for a grant of authority has been discussed by the Commission\footnote{219} and intimated by the Courts,\footnote{220} a finding of actual benefits continues to be made before granting applications. In those few cases in which no benefit is found or in which adequate support is not presented, the Commission has not been willing to grant the application solely on the basis of increased competition.\footnote{221} The

\footnote{213}{See note 116 supra.}
\footnote{214}{Colonial Refrigerated Transp., Inc.--Ext.--Fla. to 32 States, 131 M.C.C. 63, 67-70 (1978).}
\footnote{215}{Id. at 65, 68.}
\footnote{216}{Id. at 69, 70.}
\footnote{217}{See generally notes 177 and 196 supra.}
\footnote{218}{See generally notes 177, 178, 179, and 180 supra.}
\footnote{220}{Barrett Mobile Home Transport, Inc. v. I.C.C., 567 F.2d 150, 153, n.14 (D.C. Cir. 1977).}
\footnote{221}{E.g., Colonial Refrigerated Transport, Inc., Ext.--Fla. to 32 States, 131 M.C.C. 63 (1978).}
presumption that increased competition is usually in the public interest weighs heavily on the Commission, however, and this, coupled with the slightest evidence of the existence of a public benefit from an operating proposal, is sufficient to satisfy applicant's burden.

Although this newly espoused ICC standard of granting operating rights proposals on the basis of a "public need" while finding that existing service is adequate seems quite removed from pre-1976 decisions which invariably elevated the adequacy of existing service to very high levels of importance, the recent trend represents not so much a reversal of former policy as a redefinition of "adequacy of existing service." Unfortunately, the Commission, when it decided to stop second-guessing the service needs alleged in shippers' statements, apparently felt that it was necessary to relax the "public need" test, while not explicitly rejecting the traditional adequacy tests. The tests are merely one and the same, however, because a determination that public need has been established for a new service is clearly equivalent to a finding that existing carriers simply are not providing adequate transportation services. It is a contradiction in terms to say that existing transportation services are adequate, and then to find that a public need is not being met.

The Commission, in its wisdom, recognizing that conditions in the transportation industry have changed during the last forty years, has adopted a new entry policy which, it believes, will advance the public convenience and necessity. For this it cannot be faulted. It can be faulted, however, for hiding its policy of relaxing the standards of "adequacy of existing service" under the rubric of public benefit. The Commission has succeeded for three years in muddying the waters of operating rights proceedings with this additional verbiage, attempting to rationalize its recent decisions with older ones, when all that was needed was a straightforward statement that adequacy of existing service was going to be examined much more closely, and that statements of shippers as to their need for new service and shortfalls in existing service would be accorded greater weight.

C. In Harm's Way—Robbing Peter to Pay Paul.

1. Preliminary Protest Considerations

Undoubtedly, to be successful, protesters simply must convince the Commission that the public benefit demonstrated by applicant is outweighed by the competitive harm to existing carriers, and that this harm

Accord, O.N.C. Freight Systems, Relocation of Interchange Point, No. MC-71459 (Sub-No. 67), served February 9, 1979 (Appellate Division 1); Smith & Solomon Trucking Co., Ext.—Aluminum Cans, No. MC-59264 (Sub No. 65), served December 18, 1979 (Appellate Division 1).

222. See notes 5 and 12 supra.

223. See note 7 supra.
would jeopardize or negate the ability of existing carriers (along with applicant) to satisfy the public need. This weighing test, expressed as in the third Pan-American criterion and only slightly modified by Liberty I and II and Ex Parte No. MC-121, realistically represents the only chance for protestants to prevail on the merits in an operating rights proceeding.

As this article has developed, the mere showing by protestants of revenue loss and the possible diversion of existing traffic are no longer sufficient to prevent the issuance of new operating authority for the inauguration of a service deemed to constitute a net public benefit. Protestants must go beyond demonstrating possible revenue loss and traffic diversion, and prove with some specificity how the diversion would injure them and consequently destroy their ability to serve the public. Harm to existing carriers is relevant in the weighing process only to the extent that it detracts from protestants' ability to serve the public because the Commission's responsibility is to advance the public interest, not to protect existing carriers from the effects of competition.

While the Commission, even in the pre-1978 "good old days," traditionally granted an average of 80% of all applications, protestants today face much longer odds of success. Greater care will have to be exercised in deciding when and where to protest applications. Protestants which intend merely to voice their opposition to an application by introducing general data concerning the total amount of traffic subject to diversion, asserting that existing service is adequate, and then gracefully withdrawing from active participation in the proceeding have virtually no likelihood of success. Protestants, in today's regulatory climate, must be able and willing to analyze their operations in a detailed manner to determine how, when, and where their ability to serve the public will be harmed by a grant

224. Liberty II, 131 M.C.C. 573, 574, 575 (1979). See also note 77 supra.
225. See note 75 supra.
226. E.g., May Trucking Co. v. United States, 593 F.2d 1349, 1356 (D.C. Cir. 1979); Liberty II, 131 M.C.C. 573, 575 (1979). See notes 240-264 infra, and accompanying text.
227. See note 77 supra. See also Ex Parte No. MC-121, note 191 supra, 44 Fed. Reg. at 60,298-299, and cases cited therein.
229. See note 3 supra. During fiscal year 1979, 98.4% of all applications decided on the merits resulted in full or partial grants of authority. Of that 98.4%, all but 4.3% represented total grants of authority. Surina, Interoffice Memorandum, Interstate Commerce Commission, Disposition of Motor Carrier Operating Rights Applications, (November 6, 1979).
of the proposed authority. In all probability, protestants will have to invest the same time and effort into examining their operating capabilities and determining the true scope of the resulting harm, if any, from the new authority as applicant will in developing its operating proposal.\textsuperscript{231} Once protestants decide that they are willing to meet this expenditure of time and resources, the chances of a successful protest will be greatly enhanced.

2. \textit{When not to Protest}

There are some instances, however, when prudent protestants may not wish even to consider the possibility of a protest. If there is substantial shipper unrest in a given market, and the likelihood is great that the Commission would find existing service inadequate in some respect, the application almost assuredly will be granted on the basis that existing service deficiencies highlight the need for increased competition.\textsuperscript{232} Additionally, if a monopoly currently exists so that a shipper has access only to one carrier,\textsuperscript{233} or if a relevant transportation market is so dominated by one carrier that the other smaller carriers are effectively forced to follow the transportation practices of the dominant carrier,\textsuperscript{234} it will be extremely difficult to convince the Commission that the public interest would not be served by a grant of the proposed authority. If protestants presently do not transport large portions of the freight subject to the application, or if existing carriers "lack enthusiasm" for the freight,\textsuperscript{235} competitive harm to existing carriers will be almost impossible to establish. This is especially true if the shippers have found it beneficial to utilize private carriage, and support the application so that they can switch to common carriage.\textsuperscript{236}

If a large increase in expected freight traffic occurs due to general economic growth or the location or expansion of an industry in a transportation market, ICC policy is not to deny carriers operating in reasonable proximity

\textsuperscript{231} Why should a carrier even consider protesting? Would it be more advantageous to seek new authority rather than to fight an uphill struggle to deny another carrier competing authority? Perhaps a carrier presently may have a sound, economical, and efficient operating system. While it may not desire to expand, it would prefer not to see its present authority eroded.

\textsuperscript{232} See note 204 supra. But could this poor service be the result of too much, rather than too little, competition in the relevant marketplace? See generally notes 240-264 infra, and accompanying text.


thereto the right to compete for this new traffic even though they presently do not have the requisite authority. 237 Finally, if protests are large both in size and scope of operations vis-a-vis applicant, the Commission may grant the proposed authority on the basis that the harm to protesters is unlikely to be so substantial as to jeopardize their operations. 238 This precedent would seem to give small carriers the right to move, with impunity, into almost any territory presently served by large carriers; however, this statement is somewhat misleading because the Commission has begun recognizing that harm can occur not only to the overall financial fabric of existing carriers, but can also crop up in individual markets. 239 The overall financial viability of a large carrier might not be threatened by a single grant of authority, but its ability to perform in a given market conceivably could be threatened by the entry of even a small carrier. This latter argument merits careful scrutiny and consideration by large carriers.

3. Potentially Successful Protests

Both the courts and the Commission have recognized the possibility that oversupply can occur in a given transportation market, and that the benefits of increased competition would not outweigh the harm to the public in such an instance. 240 Additionally, the introduction of a new carrier into an already competitive market would not tend to bring about improved transportation services, and could cause disruptions to the existing transportation system, with accompanying harm to the shipping public. 241 Thus, the concept of destructive competition is not foreign to the courts or the Commission. With the proper presentation of appropriate evidence,

237. McLean Trucking Co., Ext.—McCorry, Ark., 130 M.C.C. 880, 888 (1978), and cases cited therein.

238. E.g., Red Arrow Freight Lines, Inc., Ext.—North Tex., 131 M.C.C. 232, 240-41 (1979); Saia Motor Freight Line, Inc., Ext.—Dallas, 130 M.C.C. 409, 422-423 (1978). That a small carrier could jeopardize the system-wide operations of a large, national carrier through the relevant application is highly unlikely, but a more appropriate inquiry by the ICC should focus on the relevant transportation marketplace and determine if the grant would harm protesters' service over that particular route.


241. Id.
findings such as these could become more than interesting footnotes in ICC critiques.

Although identifying the traffic subject to diversion and estimating the maximum revenues that could be lost clearly is not satisfactory evidence that existing carriers would be competitively harmed, contrary to the public interest, in their ability to serve the public, 242 this data continues to represent the starting point for protestants. After identifying this maximum potential diversion, protestants will have to break down the gross data to establish representative points of diversion and list shipments likely to be diverted. 243 For this step, it will be necessary to superimpose the proposed operating plan over the level of existing service in a relevant market and attempt to make a reasoned analysis of the likely outcome. In a case with several protestants, a consolidated brief may be necessary to cover this important concept.

242. See note 75 supra. When protesting, a carrier should include:

1. A precise description of its pertinent operating authority;
2. A description of the type and amount of equipment and facilities that it has available to meet the avowed purpose of the application;
3. A discussion of its present operation, including a description of the specific service it is providing those supporting the application;
4. The amount of traffic which it has handled that would be subject to diversion to the applicant if the authority sought is granted, and the impact of that diversion on its profitability;
5. A description of the probable impact on operations which are directly competitive with the service which the applicant proposes;
6. A statement concerning other adverse impacts of a grant of authority on its business generally and on the public such as:
   a. Need to close particular terminals or other facilities;
   b. The number of employees that would be furloughed or dismissed;
   c. The imbalance of its operations and other inefficiencies;
   d. Its ability to continue its existing service to the public due to a reduction in total business, loss of particular traffic in a geographic area, or other factors; and
   e. Effects on fuel efficiency.


243. Id. See also Jones Truck Lines, Inc.--Purchase (Portion)--Deaton, Inc., 127 M.C.C. 428, 436 (1978) holding that:

There are several types of proof a protestant might submit to substantiate its projected traffic losses. It might establish the size of the relevant transportation services market which the transaction would effect. Then it might establish whether the relevant transportation services market is static, expanding, or contracting. A protestant could also show its market share and how much of the demand is being met by existing competitors. When this evidence is considered along with the vendors' projected increase in revenues, a basis for the projection is demonstrated. In pursuing this line of proof, protestant might offer the opinion of qualified economists and other experts.

A protestant might also show a causal connection between a sudden decrease in its revenues attributable to the relevant transportation market and the revenues generated by the buyer while holding temporary authority. In this regard, we expect that holders of temporary authority will live up to their common carrier obligations and fully use such authority. Where the buyer fails to use its temporary authority, the protestants could establish that the applicants are not operationally fit to consummate the transaction. Our insistence that the applicant exercise the temporary authority will afford protestants a means to show harm. Cf. No. MC-F-12787.
Naturally, the courts and the Commission recognize that any data dealing with the future has to be speculative to a degree, but protesters should endeavor to construct these projections by means of a reasoned approach. For instance, all carriers face the same general economic conditions—driver wages, fuel and equipment costs, and so on—and there is no reason to think that, on an overall basis, one prudently operated carrier is substantially more efficient than any other or that transit times for similar services will differ markedly. Thus, in estimating traffic diversion, a reasonable assumption might be that, for any given future shipment, a shipper is likely to select the carrier which can pickup and deliver that particular freight most conveniently.

If an existing less-than-truckload (LTL) carrier makes three regular runs per week to a location, and a new carrier proposes an additional three or more runs per week to that location, it might be reasonable to assume that the existing carrier will lose half its present freight. If the existing carrier operates on Monday-Wednesday-Friday schedule, a new carrier would, in all probability, choose to pickup and deliver on the alternate days. Other things being equal, the freight available on those days would be diverted to the new carrier.

Once a reasoned analysis of the potential diversion at representative points has been attempted, protesters will have to establish how this diversion will affect existing operations and harm the shipping public. While applicant can demonstrate that its proposal will increase its efficiency or improve service to the public, protesters must show that this perceived benefit is merely "robbing Peter to pay Paul"—that resulting inefficiencies to existing carriers, or cutbacks by these carriers in the level of service to shippers in the area, offset the benefits of the proposal. For example, if three carriers offer direct LTL service between two points, the addition of another carrier may cause the present direct freight to be relegated to a break-bulk operation by existing carriers, and perhaps even by applicant itself, if the amount of freight available to each carrier is diluted to such an extent that it is inefficient for all carriers to provide direct service. In this instance, the grant will yield a diminution in the quality of service available to the public. This type of showing must be the heart of any protest that attempts to deny an application on its merits.

244. See note 199 supra. Also, present operations of applicant under temporary authority can be used by protesters to demonstrate. Id.

245. This is not to intimate that past experience, shipper loyalties, rate agreements, consignee preferences, and the like do not enter into the selection of a carrier; but for analyzing expected future trends in erosion of business due to a new entry in the relevant transportation market, it would not be unreasonable to assume that, "other things being equal," the shipper would select the most convenient and (presumably) quickest pickup and delivery for the shipment.

246. See notes 77, 224, 226, and 227 supra.
In the case of a small carrier whose existing territory is being eroded by a larger carrier’s application, protesters might show that the relevant diversion represents such a significant portion of the small carrier’s total revenues that its overall ability to serve the public would be crippled. This may cause a cutback in the totality of existing services. The injury to shippers served by the small carrier, but not subject to the new carrier’s authority, may offset the public benefit previously established by applicant. Despite its desire to increase entry of new carriers, the Commission at times still seems somewhat more solicitous and protective of small existing carriers and often is willing to grant them some relief from an application that could be overwhelming. To some extent, this policy also is reflected in the ICC’s acceptance of less than “crystal clear” evidence of the effects of the potential diversion once the protesting carrier has established that it is subject to substantial diversion.

Rather than the overall crippling of protesters’ operations, a more normal situation will be one in which the ability of protesters to compete in the relevant transportation market is impaired as a result of new entry. Protesters must show specifically how the grant of authority would promote inefficiency and waste and destroy protesters’ ability to compete, with accompanying public harm. As has been indicated, protesters must first establish that their present service is efficient, because the Commission will not deny the public the benefits of increased competition in order to protect the monopolies of inefficient carriers. After this has been accomplished, protesters typically should argue that granting this authority would cause excess capacity in the relevant transportation market and force existing carriers to cut back on the service they presently offer. These service de-

247. For instance, a new carrier requests authority between points A and D, via C. An existing carrier that also serves A and D, but via B, might be able to demonstrate that it would be forced to withdraw from the market if the new authority becomes effective. Shippers from B should be asked to testify concerning the harm that would befall them as a result of increased competition between A and D, but decreased service to B.


249. Id. See generally Sam Tanksley Trucking, Inc. Ext.—Holland Heating and Air Conditioning, 129 M.C.C. 470 (1977). This approach may reflect an understanding by the Commission that smaller carriers do not have the financial resources to develop the data desired by the ICC. Also, the Commission may grant a limited term certificate so that it can analyze the effect of the new grant of authority on smaller competing carriers. E.g., Saia Motor Freight Inc., Ext.—Dallas, 130 M.C.C. 409, 423 (1978). Perhaps this is implicit recognition that the public (especially shippers relying on these small carriers) will not be served properly if certain carriers are forced into bankruptcy.

250. The Commission has begun recognizing this problem. See note 239 supra.


252. See note 77 supra.

253. See generally note 239 supra.
clines may substantially harm some shippers and may promote inefficiencies, fuel waste, and increased circuitry in the operations of existing carriers, all contrary to the public interest.254

A large carrier may not be able to establish that its overall operations would be impaired if the ICC grants a small carrier conflicting operating rights, but it may be able to prove that its ability to compete in the relevant transportation market would be destroyed. A large carrier may transport profitably enormous volumes of freight in the Los Angeles-New York transportation market, and this operation might not be jeopardized by a grant of authority to a small truck line competing over the carrier’s Chattanooga-Baton Rouge route. These markets, however, are operated independently, and the mere fact that increased competition between Chattanooga and Baton Rouge will not damage the Los Angeles-New York market or the carrier’s overall operations should not be dispositive of the issue. Each of the carrier’s terminals is an autonomous, independent economic unit and will be operated only so long as an appropriate return on investment is maintained. Los Angeles-New York freight is economically irrelevant to the question of whether increased entry will damage or curtail a carrier’s Chattanooga-Baton Rouge traffic contrary to the public interest.

If an application is supposed to benefit both the public and applicant by increasing the latter’s efficiency or balancing its traffic, protestants should attempt to show that this balancing will cause a corresponding imbalance to their traffic, and will simply increase applicant’s efficiency at the expense of their efficiency. In the many areas in which trucks are forced to deadhead home due to a lack of back-haul freight, there is no net gain in efficiency to the overall transportation system from a new back-haul balancing proposal.255 If this freight already is highly sought (i.e., if competition already exists), there is no benefit to the public from a grant that results in an oversupply of carriers and a disruption of the services of existing carriers.256

In order to show that this excess capacity will occur, protestants could compare the present or future needs of the transportation market with existing services.257 It is also appropriate to compare the size of applicant’s

254. See notes 159-194 supra, and accompanying text.
255. See notes 166-174 supra, and accompanying text. But see Joseph Moving, 131 M.C.C. 561 (1979), for the proposition that decreased circuitry and fuel consumption and increased operational efficiency can be used to grant applications, but increased circuitry and fuel consumption and decreased operational efficiency cannot be the basis for a denial. See also Saia Motor Freight Lines, Inc., Ext.–Dallas, 130 M.C.C. 409, 424 (1978); Midwest Haulers, Inc., Ext.–Fresno, Cal., 130 M.C.C. 187, 202 (1978), and cases cited therein for the proposition that historic imbalances of freight normally should not be the basis for denying an application.
256. See note 240 supra.
257. See note 199 supra. If the present or future needs of the transportation market can be used as the basis for a grant of authority, the present or future needs of the market also should be
operation with those of existing carriers. Naturally, if the market is an expanding one, it will be more difficult to show that excess capacity is likely to occur. Data showing the current market share of the various existing carriers also can be helpful in establishing that competition already exists for the freight and that the introduction of another carrier would not bring about service improvements.

In terms of the effect of increased competition on the operations of existing carriers, cost studies and other evidence should be introduced to show monetary losses, laid off employees, cutbacks in service, resulting deadhead traffic miles, idle equipment, inefficient terminal operations due to reduced traffic, and a generally declining financial condition, if applicable. Finally, it may be appropriate to supplement this data with the testimony of shippers not served by the new carrier, which would establish the harm these shippers would suffer if their service from existing carriers was reduced because of economic forces resulting from this application.

For the purposes of illustrating these considerations, assume a traffic market in which seven carriers currently compete from point A to point D. Each makes one run per week between the points, leaves A with a full load, and returns from D with a full load. Five of the carriers pick up and deliver freight to point B en route, while two have authority to deliver to point C en route to D. Daily overnight service is available between A and D, while the service to B is overnight five times weekly and to C is overnight twice weekly. In order to balance its traffic, a new carrier proposes to serve A and D once a week, with a stop off at B en route. The transportation market from A to D is relatively stable. The transportation service presently is adequate to all locations. One of the two carriers hauling to point C has the smallest terminal facility at point A, and is barely breaking even on its service between A, C, and D.

This carrier might argue that the introduction of new service would di-appropriate as reasons to deny an application. For instance, the amount of available freight in some locations may shrink, or new inter- or intra-modal competition for the freight may arise.


261. See Sam Tansley Trucking, Inc., Ext. –Holland Heating and Air Conditioning, 129 M.C.C. 470, 473 (1977); Jones Truck Lines, Inc. –Purchase (Portion)–Deaton, Inc., 127 M.C.C. 428, 436 (1978); Ex Parte No. MC-121, note 191 supra, 44 Fed. Reg. at 60,299-300. If applicant is operating under temporary authority, these factors should be reasonably easy to pinpoint. Accord, Overnite Transp. Co., Ext. –Cincinnati, Ohio-Portsmouth, Ohio, 129 M.C.C. 294, 299 (1978). In many instances, however, projections will again have to be made.

262. See notes 244-254 supra, and accompanying text.
vert approximately one-seventh of its present freight from A to D to the new carrier. Fixed costs of its point A terminal remain constant and, in a small operation, its variable costs may not fall proportionately to the decline in freight. Because of its current financial status, the carrier would not be able to absorb this loss, and would have to curtail its weekly service between A and D, holding up each truck until a full load was obtained. This lessened service would necessitate reducing the number of its employees and limiting terminal operations. As service further erodes, more freight will be diverted to other carriers which provide a more regular service. At that point, the carrier might be forced to withdraw from the market entirely. In either event, service to point C would deteriorate markedly, and shippers from that location could be called upon to testify concerning their need for at least twice weekly service, and the problems that disruption of existing service would cause.

In this situation, a compelling case seems to have been made for the denial of the application, or at least for restrictions to it. Good service presently is available from A to D, and there is little, if any, benefit to the public from the proposal. The harm to the existing carrier and to its shippers quite clearly outweighs any possible advantages of introducing a new carrier into the market place. A logical extension of this analysis may even demonstrate that applicant itself could be harmed by the grant and its subsequent inefficient operations.

This simplified example by no means represents all the arguments that can be made by protestants, and is inserted merely as an illustration. In actual situations, however, protestants should be able to protest with some degree of success if they are willing to adopt a more sophisticated and comprehensive approach to the problem of proving that the harm caused to existing carriers and shippers from oversupply and excess competition often outweighs the benefits of the proposal. Protestants will have to consider the economic ramifications of operating rights applications and attack them on that basis, rather than relying on the traditional adequacy of service considerations.

263. For instance, in a terminal operation with only one local driver, variable expenses would not fall proportionally if a reduction in available freight caused the driver to be idle part of the time. His salary would be constant, vehicle costs would remain nearly constant, and so on, but revenues would fall.

264. If applicant cannot function economically and efficiently in the relevant market due to existing overcapacity brought about by its entry into the market, it would be harmed by the grant. While a business normally should be allowed to make its own judgments, and succeed or fail on the basis of its officers’ acumen, rather than the dictates of a government agency, this premise must be tempered in instances in which the exercise of applicant’s judgment would lead to disruptions and shipper problems in the transportation market.
V. O, ICC, ICC! WHEREFORE ART THOU ICC?—COMMENTS AND CONCLUSIONS

The loosening of entry standards by the ICC cannot be perceived solely as an example of deregulation by administrative fiat, rather than by Congressional authorization. The Commission has not totally abolished entry standards (although it may be getting close), but merely is interpreting them differently than it did in the run-of-the-mill pre-1978 operating rights proceeding (if, indeed, the Commission was ever as protective as critics claim). The presumption now favors increased competition as being in the public interest, rather than protection of existing carriers. The ICC is choosing not to second-guess the business judgments of shippers as to their transportation needs, and is giving much greater weight to their testimony.265

There still are substantial constraints to motor carrier entry; they merely differ from those pre-1978 Commission imposed barriers to entry. The cost of applying for additional authority remains a factor. Filing fees, professional services, in-house development of operating proposals, and support therefor require substantial outlays of time and money. Frequently, there is also an excessive time lag between initial application submission and ultimate issuance of authority. Obtaining shipper support for the entire breadth of the application may be difficult, and applicants may be somewhat hesitant to initiate a battle for new authority when other contract or common carriers also would be able to apply for authority at a later date and cause overcrowding in a market that currently seems reasonably ripe for additional service. Applicants may find it necessary to tailor their proposals to avoid the expense and time consumed by a more comprehensive, but protested application, as opposed to the relatively quick granting of a limited, but uncontested application. Finally, financial institutions may be much more reluctant to loan carriers money as they recognize the increased financial risks that accompany greater entry freedom.

There continue to be numerous Department of Transportation, Department of Energy, and Interstate Commerce Commission rules and regulations pertaining to safety and fitness that must be complied with prior to the institution of new operations. Additionally, the chance of failure still lingers. The Commission has shown itself, on occasion, willing to listen to protestants’ arguments concerning the harm caused by new authority. If protestants are willing to adopt a more sophisticated approach in attacking operating proposals, the number of grants may well shrink. The Commis-

265. Under the new Commission policy of giving great weight to the needs of shippers and not second-guessing these needs (see note 82 supra), it would seem that shipper testimony of possible service problems if an existing carrier is forced to withdraw from the relevant transportation market should be given great weight by the ICC.
sion has always granted a large proportion of applications for authority, however, and the present trend is not likely to moderate dramatically in the immediate future.

With the prodding of protesters who accept the burden of introducing much more specific evidence of harm into the record, the Commission should begin to look more at each individual situation in the involved transportation market and move away from the presumption that competition per se usually advances the public interest. The Commission should undertake a continuing study to explore the effects of new grants on existing service levels. This can be accomplished if the ICC will utilize conscientiously its available tools of limited term grants and true scrutiny of protesters' and applicant's presentations.

The Commission seriously examines only those applications in which protesters demonstrate harm. Although limiting consideration to those situations is not totally unreasonable, the ICC should move away from its present put-out-the-fire crisis management style and attempt to consider, in a more critical manner, the public benefit proposed by each application. The cumulative impact upon existing carriers that results from numerous different, small infringements on their current level of business merits greater ICC attention. The Commission truly will have a crisis on its hands if it does not act until a major carrier topples in Lilliputian fashion from the weight of many small applications. The Commission should recognize that operational efficiency is a two-way street. If it is to be used as a reason for granting applications, it should also be used to deny them if inefficiencies such as wasted fuel result therefrom. Allowing entry to carriers on the basis of flimsy, highly speculative efficiency or service benefits without careful consideration of the potential side effects may not truly benefit the public.

This is not to intimate that protesters should passively await a change in present ICC policy. Protestants must affirmatively shoulder the burden of bringing these issues to the Commission's attention in appropriate proceedings. Protestants will have to exercise greater care and increased diligence in their protests, and will have to determine, in a judicious manner, those applications in which telling arguments can be presented feasibly. Public convenience and necessity cases will have to become cost and economically oriented proceedings, with an intensified financial sophistication, and can no longer be argued in the traditional adequacy of existing service manner.

The Commission clearly has the right to adopt a policy of greater entry freedom and to experiment with the transportation market, but it may not abdicate its administrative duties by granting all applications on the basis of increased competition; nor may the Commission stack the decision making deck in a manner which makes successful protests an impossibility. Such actions would seem to be a clear abuse of the administrative process, for
the Commission would be making its decisions on the basis of a predeter-
mined, all-encompassing criterion, rather than on the evidence presented.
A continuation of this policy is certainly not consistent with P. C. White and
other decisions which mandate that the Commission consider all relevant
factors before reaching a decision. Factors other than competition also
merit consideration. In its attempts to comply with court edicts, the ICC
now seems to be violating the requirements of those very decisions. This
policy is rapidly approaching an abuse of the administrative process and
should be carefully and thoughtfully reconsidered by the Commission.

At least one court already believes that the ICC has overstepped its
authority by granting applications solely on the basis of increased competi-
tion. In Argo-Collier Truck Lines Corp. v. United States, the Sixth Circuit
recognized that an ICC decision would be arbitrary and capricious if based
solely on the advantages of increased competition, and in total disregard of
other national policies and regulatory considerations articulated by Con-
gress. Whether this decision portends increased judicial scrutiny of the
ICC's reliance on increased competition in operating rights proceedings
should be apparent during the early years of this decade as more recent
grants of operating authority are examined by the courts.

Future ICC policy somehow will emerge from the present uncertainty.
The Commission currently is sinking into a morass of ever increasing motor
carrier applications, whose sheer weight prevent Federal Register notice in
a reasonable time and absolutely preclude rational review. The present
Alice in Wonderland regulation should be halted, either by some judicious
denials, or by abolition of the Commission. Certainly there is no need for
regulation and a regulatory framework filled with red tape and pitfalls for the
unwary if its ultimate function is to act as a middleman by publishing sum-
mary grants in the Federal Register and to rubber stamp all proposals. It
does seem clear that the ICC cannot allow itself to become a parasitic shell
agency, and must choose between rational regulation or some clearly de-
defined systematic abdication of a viable role in transportation entry regula-

Transportation costs represent a very small part of the delivered cost of
most goods. Nevertheless, effective transportation is essential for almost
every business. Continuity of and access to transportation are vital, and the
touchstone of any transportation regulatory system should be to avoid dis-
ruption and confusion in the marketplace of transportation services. The
Commission's willingness to jeopardize the operations of some existing car-
riers in order not to deprive the public of the purported benefits of increased
competition could lead to disruptions unless other carriers can take up the
slack in such situations and the ICC can act with unusual rapidity in sanc-

266. No. 77-3373 (6th Cir. December 13, 1979), pp. 9, 10.
tioning additional carriers. The possibility also exists that service to smaller communities may be substantially reduced, or may become dramatically more expensive. Either of these occurrences would have the effect of forcing more and more businesses into the larger transportation centers, an urban migration which may be contrary to the intent of the Commission and other federal policies.

The final question, however, is whether the present system of eased entry produces a better, more efficient and effective transportation system which meets the needs of shippers and the public. Will safety standards erode as more and more smaller and less experienced truckers flood various markets? Can the Commission react quickly enough to prevent service deficiencies when carriers withdraw from certain markets? Will other carriers be available, with necessary equipment and facilities, when disruptions occur? In all likelihood, the ICC does not know whether overall service will be improved and prices minimized by this new policy, and neither does anyone else. The Commission, and outside analysts as well, need to reflect on the present trend and attempt more than superficial, after the fact rationalizations for it. The present system may be an improvement, or it may turn out to be unsatisfactory in some as yet undetermined aspects. At the present time, the questions remain unanswered.
Antitrust Considerations in Motor Carrier Ratemaking—Rate Bureau Operations and Alternatives

WILLIAM E. KENWORTHY*

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I. INTRODUCTION

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

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

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

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

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

II. TRANSPORTATION AND THE ANTITRUST LAWS

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

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

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

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

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8. United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897).
9. 49 U.S.C. § 10706 (1979). Prior to the recodification of the Interstate Commerce Act in 1978 (which was not a substantive recodification), this provision was set forth in section 5a of the Act. Although the citation has been changed, this author has employed the traditional statutory reference throughout this article.
the policies and standards laid down in the Interstate Commerce Act or by the Department of Justice through its concept of how the Sherman Antitrust Act should be enforced.11

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

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

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11. Smith, The Interstate Commerce Commission: An Independent Tribunal or a Subordinate of the Department of Justice, 12 ICC Prac. J. 73 (1944); The Sherman Antitrust Act may be found in 15 U.S.C. § 1, et seq.
15. 49 U.S.C. § 10101 (1979), Transportation policy, which provides as follows:
(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—
(1) to recognize and preserve the inherent advantage of each mode transportation;
(2) to promote safe, adequate, economical, and efficient transportation;
(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
(5) to cooperate with each State and the officials of each State on transportation matters; and
language makes the National Transportation Policy the sole guide to exercise of the Commission’s discretion under the Act.

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

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

That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good.


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

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


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

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

The legal concept of common carriage with service and rates equally available to all on a nondiscriminatory basis is an ancient and well tested concept. Furthermore, in drafting the U.S. Constitution in 1789, the framers readily agreed that a national government must have the power to foster, encourage and regulate domestic and foreign commerce in order to assure the free flow of essential goods and services.²¹ For the better part of the next hundred years, the commerce clause²² was invoked from time to time primarily for the purpose of precluding state regulation.²³ During the latter part of the Nineteenth Century, however, it was realized that the excesses of free market competition in for-hire transportation required the establishment of a system of affirmative regulation. Competition had degenerated into commercial warfare. Discrimination was the order of the day in transportation, and the Standard Oil monopoly had been built through the exploitation of transportation advantages.²⁴ Dissatisfaction with the laissez-faire environment in which the carrier industry operated ultimately led to the passage of the Act To Regulate Commerce and the establishment of the Interstate Commerce Commission in 1887.²⁵ Subsequently, in 1890, the first of the antitrust laws, the Sherman Act, was passed for the purpose of controlling and limiting monopolistic abuses occurring in industry generally. Thus, the Interstate Commerce Act established the primacy of the Interstate Commerce Commission in the regulation

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²¹. The Federalist Papers, Essays Nos. 7, 14, 22, 24, 42 and 45.
of interstate commerce even prior to adoption of the Sherman Act. The most recent and fundamental expression of Congressional intent in the field of transportation is the National Transportation Policy adopted in 1941.\textsuperscript{26} That policy serves as the primary guide for both the Commission and the courts in the field of transportation.\textsuperscript{27}

III. RATE BUREAUS AND MOTOR CARRIER COMPETITION

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

A. INTERMODAL COMPETITION

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

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} 49 U.S.C. § 10101, supra note 15.
\item \textsuperscript{27} The history of the National Transportation Policy suggest that the policies of the antitrust laws determine "the public interest" in railroad regulation only in a qualified way. McLean Trucking Co. v. United States, 321 U.S. 67, 83 (1944).
\item \textsuperscript{28} 49 U.S.C. § 10101(a), supra note 15.
\item \textsuperscript{29} See chart page 72.
\end{enumerate}
\end{footnotesize}
### Modal Market Shares, 1972

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<th>Commodity</th>
<th>Tons of Shipment (# by mode)</th>
<th>% of total</th>
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<th>Motor carrier</th>
<th>Private truck</th>
<th>Air</th>
<th>Water</th>
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<td>29.7</td>
<td>0.3</td>
<td>0.3</td>
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_Dept. of Transportation, A Prospectus for Change in the Freight Railroad Industry_ 17 (1978).
Another indicator of the healthy state of intermodal competition faced by the motor carriers is the extent of rate activity generated by such competition. In 1975, the transcontinental motor carriers alone considered more than 500 dockets for the express purpose of meeting the competition of the freight forwarders, who utilize rail rates for linehaul service. Generally speaking, those dockets represented reductions in the prevailing level of rates, and the great majority of those proposals were approved by the rate committee. In other instances, even if not approved by the rate committee, the carrier proponent subsequently took independent action to publish the rate. In addition to these dockets for the purpose of meeting the competition of freight forwarders, other dockets were proposed to confront the direct competition of the railroads. Much of this activity was initiated as a result of reviews of the tariffs issued by those competing modes. Likewise, railroads and the freight forwarders subscribe to and closely monitor motor carrier bureau tariff publications.

The rail competitive rates are primarily in the truckload category, since the railroads have effectively embargoed LTL (less than truckload) or LCL (less than carload) traffic. On the other hand, the freight forwarder competition runs the entire gamut of shipments, from minimum charges to truck-
load. In addition, there is competition on many of the longer hauls from the air freight companies. This competition is particularly acute for some of the higher valued freight in LTL shipment sizes.

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

B. SPECIALIZED CARRIER COMPETITION

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

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


33. Tariffs published by Rocky Mountain Bureau provides rates on traffic moving in interstate commerce between eleven western states as well as Transcontinental territory. For a discussion of the territorial scope of motor carrier rate bureaus see D. Cross, Motor Carrier Rate Territories and Bureaus, TRANSPORTATION LAW INSTITUTE, IN TARIFF RATES AND PRACTICES - PART I, 193 (1972).

34. For example, RMB carriers must take into account in whole or in part competitive rates filed under the tariffs of the following motor carrier rate bureaus: Western Motor Tariff Bureau; Intermountain Tariff Bureau; Motor Carriers Traffic Association; National Association of Specialized Carriers; Machinery Haulers Association; Willamette Tariff Bureau (Section 5a Application pending); and Heavy and Specialized Carriers Tariff Bureau.
The sheer volume of competitive rate activity in the motor carrier field is reflected in the Commission's statistics from its 1977 Annual Report, indicating that the Commission received 221,874 motor carrier tariff filings in that fiscal year.\textsuperscript{35} By no stretch of the imagination can such extensive tariff activity be ascribed to a stagnant or non-competitive common carrier system. In addition to the activity by other regulated common carriers, the RMB motor carriers also face active competition for the transportation of freight in truckload quantities from the agricultural cooperatives. There are a large number of such cooperatives, both genuine and sham, which are active in the transportation of general commodities throughout the United States.

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

C. PRIVATE CARRIAGE COMPETITION

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

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

\textsuperscript{35} Interstate Commerce Commission, Annual Report, 113 (1977).
\textsuperscript{37} Unpublished contract research through Ohio State University.
\textsuperscript{38} U.S. Dep't of Commerce, 1972 Census of Transportation (1974).
\textsuperscript{39} Supra note 36, at 394.
private carriage tend to retain the services of common carriers for the higher cost, smaller shipments.

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

**D. INDEPENDENT ACTION**

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

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

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

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

\footnote{40}{49 U.S.C. § 10101, supra note 15.}
\footnote{41}{Posner, \textit{A Program for the Antitrust Division}, 38 U. CHI. L. REV. 500 (1971).
\footnote{43}{United States \textit{v. Trans-Missouri Freight Association}, supra note 8.
\footnote{44}{G. Davis and C. Sherwood, \textit{Rate Bureaus and Antitrust Conflicts in Transportation}, 75 (1975). This is confirmed by the experience of RMB. See note 8 supra, and accompanying text.}
increase in concentration in the industry, leading to a less healthy, oligopolistic marketplace. At the very least, this is likely to be the situation for the transportation of LTL traffic by the regular route general commodities carriers. Conversely, it is conceivable that truckload traffic could deteriorate into a highly chaotic and fragmented situation through the operations of numerous independent owner-operators.

E. ECONOMIES OF SCALE

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

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

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

IV. RATE BUREAUS IN THE ABSENCE OF IMMUNITY

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

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

\textsuperscript{46} Spady and Friedlaender, Hedonic Costs and Economies of Scale in the Regulated Trucking Industry, 9 Bell. J. of Econ. 159 (1978).


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

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

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

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

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

49. In the synopsis to his bill to repeal the immunity for rate bureaus, Senator Kennedy also contends that the bureaus could continue to perform their beneficial functions without immunity.
50. Southern Motor Carriers Rate Conference, supra note 10.
52. Id. at 848.
conference that date, asserted that the legislation would not eliminate rate bureaus and that rate bureaus could continue to perform, without antitrust immunity, their beneficial activities in the collection of industry data and publication of rates having joint-line application. Similar assertions have been made by the Department of Justice and Federal Trade Commission in the pending *Ex Parte No. 297 (Sub-No. 4)* applications. Therefore, the issue to be faced is whether the admittedly beneficial activities of the rate bureaus could, and would be carried on in the absence of antitrust immunity. It is the position of this commentator that they would not be maintained.

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

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

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

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56. 246 U.S. 231 (1918).
57. 273 U.S. 392 (1926).
antitrust laws, rather than being held illegal per se. This argument overlooks the impact of this jeopardy from the standpoint of the businessman potentially subject to the threat of felony prosecutions, treble damages and hundreds of thousands, if not millions, of dollars in legal fees. This "chilling effect" might ultimately lead to abandonment of such activity, rather than a confrontation of these potentially lethal risks.

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

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

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

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

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

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

\(^{58}\) See note 55 supra, at 11-12.
\(^{59}\) Id. at 12.
\(^{60}\) See note 55 supra, at 13.
A. Tariff Publication

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

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

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

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

B. Collecting and Disseminating Trade Information

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

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67. The major motor carrier rate bureaus maintain a continuous random sampling of the characteristics of the tariff moving subject to their tariffs. By this method they are able to develop information concerning the volume of traffic and the cost-revenue relationships under the various tariffs. The Commission requires the submission of this type evidence in all general rate increase proceedings.
could be continued without antitrust immunity. However, closer study reveals that this argument also is erroneous.

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

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

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

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

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68. 268 U.S. 563 (1925).
69. Compare Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956); with Sleeves v. Rodman, 10 F.2d 212 (D.R.I. 1926).
litigation. The case involved a civil antitrust action charging a price-fixing agreement in violation of section 1 of the Sherman Act. This was a suit against the savings and loan associations in the Philadelphia area who made home mortgage loans to plaintiffs. The plaintiffs, homeowners, alleged that the defendants, collectively agreed to add an additional "interest charge" at the settlement of the loan. The plaintiffs' conspiracy claim relied upon four allegations: (1) the additional "interest charge" was a peculiar practice, (2) it was improbable that defendants independently adopted such a practice, (3) the defendants had opportunities to conspire through common membership of trade associations, and (4) defendants had an economic motive for agreeing. Defendants moved for a summary judgment on the grounds that the charge was an acceptable interest charge used in standard accounting procedure. This technique of collecting an additional interest charge, the defendants argued, was a conventional one. The Court found that the four factual allegations alone were sufficient to overcome a motion for summary judgment.

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

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

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

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

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

74. Trist v. First Federal Savings & Loan Ass'n of Chester, supra note 72, at 581.
75. Id.
76. Id. at 587.
ply to motor carriers or freight forwarders. there is no reason to suppose that this exemption would be continued if meaningful I.C.C. control of rates and practices were substantially removed.

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

C. JOINT-LINE RATES

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

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

472 (1942); Western Confectioners Ass'n, Inc., 34 F.T.C. 1431 (1942); Mercerizers Ass'n of America, 15 F.T.C. 1 (1931); and Typothetae of America, 6 F.T.C. 345 (1923).
80. Ex Parte No. 297, Rate Bureau Investigation, supra note 51.
pricing by itself never has been sufficient for a conviction under the antitrust laws. But parallel pricing, coupled with prior discussion on either process or costs of each competitor, may suffice.

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

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

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

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

\(^{85}\) Supra note 83, at 335-336.
\(^{86}\) Supra note 83, at 336-337.
\(^{87}\) United States v. Container Corp. of America, supra note 83.
have placed the carrier in jeopardy under the criminal provisions and the civil treble damage penalties of the antitrust laws. And, the carrier would be thus jeopardized because it had done its best to comply with the mandate of the Interstate Commerce Act requiring just and reasonable rates.

D. SHIPPER LIABILITY

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

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

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

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

90. Id. at 1134.
91. Id. at 1153.
Furthermore, basing point pricing systems have been held to constitute
discriminatory pricing in violation of the Clayton Act.\textsuperscript{92} Carrier-shippers ne-
gotiations on freight rate levels covering broad marketing territories could
well result in antitrust liability under the same doctrine, in the absence of
section 5a immunity.\textsuperscript{93}

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

\section{V. ALTERNATIVE FUNCTIONS FOR RATE BUREAUS}

If rate bureaus cannot continue to provide their present services with-
out antitrust immunity, what is the future of rate bureaus? Are there possi-
bile alternatives? Paul Gardiner has recently published an article addressing
these questions.\textsuperscript{95} In his article he agrees with the consensus in the industry
that it would be impractical for rate bureaus to continue to provide the
present services if antitrust immunity is removed. However, he disagrees
with the view that rate bureaus could not serve any useful purpose. He
believes that the bureaus could offer alternative services to the industry by
providing information on exchange of rates and routes to carriers and ship-
ners across the nation through the use of an electronic computer network.
To provide such a service, he proposes that the motor carrier industry build
an electronic data exchange network, similar to the network utilized in the
airline industry.

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

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

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


\textsuperscript{95} Gardiner, \textit{Rate Bureau Functions Without Antitrust Immunity: A Suggested Strategy for
Motor carrier tariffs presently lack sufficient standardization to allow fully computerized rate retrieval, although the rate bureaus, carriers, and tariff users have been seeking solutions to the problems. Definitions of groupings for commodity rates, rate basis groupings of communities, minimum weights and rules vary from tariff to tariff within the bureau territories as well as among the bureaus. If collective ratemaking were eliminated, all progress toward standardization which has been made over the past years would be lost in the morass of individual carrier tariffs. The goal of computerized rate retrieval would become completely unattainable.

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

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

VI. CONCLUSION

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

96. Mid-South Distributors v. F.T.C., 287 F.2d 512 (5th Cir. 1961).
97. Within the Rocky Mountain Bureau territory, for example, approximately 1,710 common carriers participate in the tariffs issued by virtue of Section 5a Agreement No. 60 and approximately one-third of the traffic moves under the through routes and joint rates made possible by the Agreement.
The essential goal of a national transportation system, as envisioned by the National Transportation Policy, cannot be accomplished by some method short of collective action under antitrust immunity. The potential liability of the carriers, absent such immunity, would render it necessary for the carriers to resort to publication of individual tariffs having local application only. This would result in destruction of a coordinated system of transportation and lead to higher combination rates upon joint-line traffic.

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

PAUL STEPHEN DEMPSEY**

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* The author would like to thank Michael Shea (J.D. candidate, University of Denver College of Law) for his assistance in the preparation of Part III of this article.

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I. Introduction

The 95th Congress will be remembered as Jimmy Carter’s first. It will also be remembered as the least productive, in terms of numbers of pieces of legislation passed than any since the 73rd, which was Franklin Roosevelt’s first. Yet, it was the 95th Congress that gave away the Panama Canal, created 152 federal judgeships for President Carter to fill, intro-
duced a mild civil service reform act, and promulgated the most significant
case of legislation in the field of transport regulation in the past forty years.

In 1938, President Roosevelt signed into law the Federal Aviation Act¹
which established the Civil Aeronautics Board² [CAB] as an independent
regulatory agency designed to provide classic public utility type regulation
over the air transportation industry, then deemed to be in its infancy. Es-
entially, the agency was given authority to regulate three broad areas of
economic activity:

1. ENTRY—prescribing which routes shall be flown, which communities will
   receive air service, and designating the specific carrier(s) which will be
   permitted to serve such markets; the authority to grant or deny certificates
   of "public convenience or necessity."³

2. RATES—the authority to suspend or establish air fares, and determine
   whether proposed rates are "just and reasonable."⁴

3. ANTITRUST—the authority to approve or disapprove a host of intercarrier
   transactions, some of which are patently anticompetitive.⁵ Approval has
   traditionally conferred immunity from the effects of the Sherman and Clay-
   ton Acts.⁶

In 1978, following an exhaustive evaluation of the past forty years of
regulation, Congress passed and President Carter signed into law the Air-
line Deregulation Act⁷ which will (a) dismantle the regulatory umbrella which
has traditionally shielded the industry from the competitive influences of the
marketplace, and (b) abolish the Civil Aeronautics Board altogether by
1985.

But even prior to the promulgation of this revolutionary piece of legis-
lation, the Civil Aeronautics Board, under the leadership of Chairman Alfred
E. Kahn, had already made incredible strides toward deregulation from
within, without legislative guidance. The Board had already adopted the

¹. 49 U.S.C. §§ 1301-1551 (1979). Actually, as originally promulgated in 1938, it was
   named the "Civil Aeronautics Act." It was not until 1958, when Congress established the Federal
   Aviation Administration, that the legislation was given the title, the "Federal Aviation Act." 72 Stat.
   731. The 1958 Act was not a substantive recodification, however, insofar as it impacted eco-
   1705, which is discussed extensively in this article, does not constitute a separate body of legisla-
   tion, but instead amends several pieces of existing legislation, of which the Federal Aviation Act is
   the most significant.

². Actually, as originally created in 1938, the agency was titled the "Civil Aeronautics Au-
   thority." The name was changed the following year.


⁶. See 49 U.S.C. § 1384 (1979). These constitute the three primary areas of economic
   regulation. Other important responsibilities include entry of foreign air carriers, 49 U.S.C. § 1372
   (1979), regulation of mail carriage, 49 U.S.C. §§ 1374, 1376 (1979), and (since 1978) assuring

most liberal entry and rate policies in the history of transport regulation—
reversing a full 180 degrees the prior course of government in this field. Actu-
ally, the legislation did little more than sanction what the Board had
already done, moot the serious questions raised by many carriers as to the
legality of the Board's radical course, and extend to the Board a few addi-
tional tools to accomplish the policy objectives it had already adopted.

But prior to the promulgation of the Airline Deregulation Act, the pro-
cess of deregulating from within was a novel one, and the Board recognized
the real possibility of judicial reversal. Query: how could the courts find a
regulatory scheme of deregulated entry consistent with a legislative scheme
of regulated entry? In light of these dangers, the Board under Alfred Kahn
proceeded on two fronts:

(1) The CAB correctly recognized that many of its decisions were directly
contrary to the legislative history and congressional intent, if not the language,
of the Federal Aviation Act, and that therefore it would suffer setbacks from the
jurisdiction on many of its decisions. Consequently, it proceeded with a "shot-
gun" approach, making significant strides toward deregulation in a multitude
of entry, rate, and antitrust proceedings, and doing so expeditiously. A revers-
sal here or there would not diminish significantly the overall impact of the mass
of decisions being rendered, and even those relatively few reversals would be
issued only after years of litigation—well after the market had felt their deregul-
yatory effects. Chairman Kahn's explicit philosophy was to "so scramble the
eggs that no one will ever be able to get them back into their shells again."

(2) The CAB correctly recognized that the possibility of reversal could be
minimized if all interested parties were afforded an adequate opportunity to
comment upon each policy decision, and great pains were taken to explain
away the policy objections. Thus, the Board moved closer and closer to its
policy objectives, explaining in great detail how and why it was proceeding,
giving virtually no credence to the carriers and communities who urged the
Board to proceed with caution, and who strongly felt that the ultimate results
would be deleterious to the industry and the traveling public it serves.

Subsequent to the promulgation of the Airline Deregulation Act, the
CAB proceeded on a course of wild abandonment, awarding operating au-
thority in an indiscriminate manner to virtually all who sought it. It far sur-
passed even the intent of Congress as expressed in this revolutionary
legislation. We are now left with a voluminous record in the public domain
which explains, in detail, the arguments on both sides, and the rationale
behind the policies which prevailed at the Board and in Congress.

This article shall endeavor to explore that record. Although the legal
arguments are now virtually moot, the policy arguments remain, for it is too
early to grasp the full impact of these decisions upon the airline industry,
small communities, and the public. Both the Board and Congress made a
plethora of predictions as to the effect of deregulation; all were optimistic.

Although the Civil Aeronautics Board is designated by the new legisla-
tion to self-destruct in 1985, it must prepare a report to Congress the preceding year explaining these effects. If the results of airline deregulation prove to be less than beneficial to certain sectors of the economy, or if the self serving predictions of the CAB prove ultimately to have been erroneous, Congress may well have second thoughts about the demise of both airline regulation and the CAB. The importance of this analysis lies not only in the compilation of a record with which to judge the market effects of a radical change in governmental policy, it lies also in its relevance to the contemporary debate over deregulation of surface modes of transportation (i.e., motor carriers and railroads). An identical objective is sought and many of the same arguments are being made in support of surface deregulation.

The instant discussion will confine itself to a review of the policy arguments in support of and opposed to the traditional regulatory scheme. It will also endeavor to examine and analyze the issues of whether the Board traditionally applied quasi-judicial entry criteria consistent with the legislative history of the 1938 legislation, and whether it now regulates entry in a manner consistent with the intent of Congress as expressed in its 1978 amendments. The focus here shall be the subject of regulated entry in domestic scheduled passenger air transportation. Obviously, it is difficult to discuss entry without also discussing the rate objectives in, or the antitrust consequences of, deregulation. In order to comprehend the magnitude and implications of contemporary developments, it is necessary to begin with a discussion of how and why entry in air transportation came to be regulated.

II. THE LEGISLATIVE HISTORY OF THE ORIGINAL ENTRY PROVISIONS

The legislative history of the Civil Aeronautics Act of 1938, the predecessor of the Federal Aviation Act of 1958, reveals that Congress recognized the air transport industry to be in its infancy, and believed that the existing competitive environment could, in the absence of regulation, inhibit or impede its sound development. The existing air mail legislation was believed to have imposed certain undesirable influences upon the industry. Moreover, in order to avoid the deleterious consequences of "cutthroat", "wasteful", "destructive", "excessive" and "unrestrained" competition, and the economic "chaos" which had so plagued the rail and motor carrier industries, Congress sought to establish a regulatory structure similar to that which had been devised for those industries which had also been perceived as "public utility" types of enterprises. Such a system, it was believed, would enhance economic stability and thereby contribute to the sound economic growth and development of air transportation, which was thought to

be an industry potentially of vast significance to the economic development of the nation. It would insure service to small communities and the protection of smaller carriers. It would not be a system of regulated competition which might prohibit the entry of new carriers. The regulatory scheme would assure adherence to the highest standards of safety, and would satisfy the needs of commerce, the public interest and the national defense.

A. An Infant Industry in a Hostile Economic Environment

At the outset, the perspective from which Congress viewed the aviation industry prior to the promulgation of the Civil Aeronautics Act should be examined. As has been indicated, the air transportation industry was perceived to be in its infancy, and potentially of such fundamental importance to the national economy as to require regulation for its orderly development and economic growth. The Senate Commerce Committee expressed serious concern with the "intensive," "extreme," and "destructive" competition in which all transport modes were engaged; such an economic environment was having injurious effects upon the industry and its ability adequately to provide the service required to satisfy the needs of commerce, the public interest and the national defense. By establishing


11. Among the primary proponents of air transport regulation, and the author of the original bills, was Senator Patrick McCarran, who emphasized the significance of the pending legislation by stating that, "there was never anything before this country more vital from the standpoint of national development, particularly at this hour of the world's history, and at this hour in our national history, than the legislation which is now pending before this subcommittee, because we are dealing with an infant industry, and we are dealing with it from the standpoint of what it can do for this country commercially, industrially, and as an arm of national defense." Civil Aviation and Air Transport; Hearings in S. 3659 Before a Subcomm. on Interstate Commerce, 75th Cong., 3rd Sess. 7 (1938) [hereinafter cited as Senate Hearings on S. 3659].

The significance of the air transport industry is also reflected in these remarks by Colonel Edgar S. Gorrell, the president of the Air Transport Association, and perhaps the most effective proponent of the pending legislation:

We realize that our industry is, peculiarly, one affected with a public interest. No other is so intimately bound up with demands of our national government both in peace and in war time. We realize, likewise, that no one can hazard an intelligent prediction as to what the future holds in store for our industry, for in our whole national history there is no other transportation industry, and perhaps no other industry of any kind whatever, that is subject to such rapid, kaleidoscopic, and revolutionary technological and commercial changes.


12. The report of the Senate Committee on Interstate Commerce expressed the Congressional perspective as follows:
a system for the orderly development of air transportation analogous to that employed in the regulation of public utilities and other modes of transportation, it was believed that these deleterious consequences could be avoided.

Among the difficulties faced by air carriers prior to 1938 was an inability to attract sufficient investment capital.\textsuperscript{13} It was argued that the order and stability insured by public regulation would create a situation in which this inability would be diminished. Indeed, governmental regulation was viewed as fundamental to the creation of an economic environment of sufficient order and stability to insure the attraction of capital sufficient to maintain the requisite growth of the aviation industry.\textsuperscript{14}

\begin{footnotesize}
In recent years, there has been an extraordinary growth of transportation by air. The air lines . . . are engaged in intensive competition with each other and with . . . other carriers. This competition is being carried to an extreme which tends to undermine the financial stability of the carriers and jeopardize the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest and the national defense. Aviation in America today, under the present laws, proves unsatisfactory to investors, labor, shippers, and carriers themselves.


13. It has been contended that the difficulty in attracting investment capital may be attributed to the following factors:

The public faith in the industry had been severely undermined by the Black hearings [\textit{i.e., the hearings of the Special Committee on Investigation of Air Mail and Ocean Mail Contracts chaired by Senator Hugo Black of Alabama}]. The numerous air crashes also dampened public enthusiasm. Then, too, airline dependence on an unsympathetic and unpredictable Congress for necessary subsidies restrained investment. Lastly, the general depression of the national economy and the added costs of complying with the National Recovery Act hindered the generation of capital.


14. Thus, Mr. Gorrell emphasized the unfavorable economic circumstances with which the industry was faced, and the urgency with which the proposed legislation was viewed:

The fact that financial support and access to new sources of capital are critically needed, is well known. Since air transport was launched into meteoric growth, approximating $120,000,000 of private capital has been devoted to it. but, of that sum, there remains today scarcely 50 percent. Since the beginning of air transport, a hundred scheduled lines have traversed the airways in a struggle to build this newest avenue of the sky. But today scarcely more than a score of those companies remain. The industry has been reduced to the very rock bottom of its financial resources. . . .

There are only two ways whereby the necessary capital can be provided to this industry. One is the way toward which the governments of foreign lands increasingly tend—the way of mounting governmental subsidies, whereby public funds are poured without stint into a air transport. The other way is the traditional American way, a way which invites the confidence of the investing public by providing a basic economic charter that promises the hope of stability and security, and orderly and intelligent growth under watchful governmental supervision.

It is the second way . . . which is here proposed. It is a way which protects the public through stringent regulation. . . .
\end{footnotesize}

\textit{Senate Hearings on S. 3659}, supra note 11, at 30-31; \textit{See Civil Aeronautics Authority; Hearings
B. The Regulatory Environment Prior to 1938

Among the difficulties which the pending legislation sought to alleviate were those arising under the existing structure of air mail legislation. In 1918, air mail service was inaugurated by the Army. The Kelly Act (Air Mail Act of 1925) established economically feasible commercial air transportation autonomous from the military by permitting the Postmaster General to award contracts to private air lines for the movement of mail.\footnote{See Kennedy Report, supra note 13, at 195; R. Burkhardt, The Civil Aeronautics Board 4 (1974) [hereinafter cited as Burkhardt]; S. Richmond, Regulation and Competition in Air Transportation 4 (1961) [hereinafter cited as Richmond]; H. Knowlton, Air Transportation in the United States 4 (1941) [hereinafter cited as Knowlton]; C. Puffer, Air Transportation 2-3 (1941) [hereinafter cited as Puffer]; and L. Keyes, Federal Control of Entry into Air Transportation 65-66 (1951) [hereinafter cited as Keyes].} The Air Commerce Act of 1926 vested jurisdiction over safety and the maintenance of airways and navigation facilities in the Secretary of Commerce.\footnote{See Kennedy Report, supra note 13, at 195; R. Burkhardt, The Civil Aeronautics Board 4 (1974) [hereinafter cited as Burkhardt]; S. Richmond, Regulation and Competition in Air Transportation 4 (1961) [hereinafter cited as Richmond]; H. Knowlton, Air Transportation in the United States 4 (1941) [hereinafter cited as Knowlton]; C. Puffer, Air Transportation 2-3 (1941) [hereinafter cited as Puffer]; and L. Keyes, Federal Control of Entry into Air Transportation 65-66 (1951) [hereinafter cited as Keyes].} The McNary-Watres Act of 1930 established a formula for air-mail payments based upon the amount of mail transported.\footnote{See Kennedy Report, supra note 13, at 195; R. Burkhardt, The Civil Aeronautics Board 4 (1974) [hereinafter cited as Burkhardt]; S. Richmond, Regulation and Competition in Air Transportation 4 (1961) [hereinafter cited as Richmond]; H. Knowlton, Air Transportation in the United States 4 (1941) [hereinafter cited as Knowlton]; C. Puffer, Air Transportation 2-3 (1941) [hereinafter cited as Puffer]; and L. Keyes, Federal Control of Entry into Air Transportation 65-66 (1951) [hereinafter cited as Keyes].} Congressional discontent with the administration of this legislation by the Postmaster General led to an investigation by a Senate Special Committee chaired by Senator Hugo Black.\footnote{See Kennedy Report, supra note 13, at 195; R. Burkhardt, The Civil Aeronautics Board 4 (1974) [hereinafter cited as Burkhardt]; S. Richmond, Regulation and Competition in Air Transportation 4 (1961) [hereinafter cited as Richmond]; H. Knowlton, Air Transportation in the United States 4 (1941) [hereinafter cited as Knowlton]; C. Puffer, Air Transportation 2-3 (1941) [hereinafter cited as Puffer]; and L. Keyes, Federal Control of Entry into Air Transportation 65-66 (1951) [hereinafter cited as Keyes].} The outrageous activities revealed by this investigation led President Roosevelt to respond by terminating all existing air-mail contracts on the ground that there had been collusion between air carriers and the Post Office Department in route and rate establishment.\footnote{See Kennedy Report, supra note 13, at 195; R. Burkhardt, The Civil Aeronautics Board 4 (1974) [hereinafter cited as Burkhardt]; S. Richmond, Regulation and Competition in Air Transportation 4 (1961) [hereinafter cited as Richmond]; H. Knowlton, Air Transportation in the United States 4 (1941) [hereinafter cited as Knowlton]; C. Puffer, Air Transportation 2-3 (1941) [hereinafter cited as Puffer]; and L. Keyes, Federal Control of Entry into Air Transportation 65-66 (1951) [hereinafter cited as Keyes].}
The legislative history of the Civil Aeronautics Act reflects general displeasure with the existing regulatory structure under the air-mail legislation. The Report of the House Committee on Interstate and Foreign Commerce stated that:

Under existing law there is little economic regulation of air carriers. Routes are awarded not upon the basis of the ability of the particular air carrier to perform the service or the requirements of the public convenience and necessity, but upon the letting of air-mail contracts to the lowest responsible bidders. A route once secured, however, does not protect the air carrier from possible cutthroat competition, for air carriers are not required to secure a certificate or other authorization from the government before beginning operations, other than one based on safety requirements. Nor, is there any authority in the federal government under existing law to prevent competing carriers from engaging in rate wars which would be disastrous to all concerned.20

C. The Surface Carrier and Public Utility Analogy

The legislative history also reveals a concern that the past unfortunate economic experience of surface carriers might be repeated in the air transport industry. The Great Depression was, undoubtedly, the most intense economic calamity of the Century. It was an era of economic upheaval and uncertainty during which the fatality level of business was accentuated. Certain industries were deemed so fundamental to the existence of a sound national economy that the federal government intervened to regulate competition, restore order and diminish the uncertainty which prevailed. Among those industries perceived as essential to recovery and therefore entitled to the benefits of "public utility" regulation, was that of transportation. In 1935, Congress promulgated the Motor Carrier Act which established federal regulation of motor carrier entry and rates, and placed such jurisdiction in the Interstate Commerce Commission [ICC] (which already held extensive regulatory authority over rail carriers).21 Commissioner Joseph East-

20. House Committee Report on CAB, supra note 14, at 2. When comparing existing legislation with the proposed system of entry regulation, Mr. Gorrell stated, "the existing air-mail law contributes in some ways, more to the promotion of monopoly than would a system of certificates of convenience and necessity . . . [U]nder the present law, although convenience and necessity might be proven, no air-mail contractor may be permitted to fly parallel to the line of another air-mail contractor, or be allowed to maintain passenger and express service off the line of his air-mail route which in any way competes with passenger or express service available on another air-mail route." House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 70. He proceeded to indicate that in the absence of a regulatory system approximating that contemplated under the pending legislation, destructive competition would ensue. Id.

man of the ICC stated:

"[I]mportant forms of public transportation must be regulated by the government. That has been accepted as a sound principle in this country and... in practically every country in the world."

Transportation is of such vital importance to the public welfare and the business is so affected with a public interest that some measure of government regulation is... necessary. Present competition between the several forms of transportation has increased that need. Perhaps the primary reason for creating the Interstate Commerce Commission was the disturbance of business conditions and the peril to stability and financial prosperity to the railroads themselves brought about by uncontrolled competition.\(^{22}\)

Transportation was viewed by some to be on the order of a public utility, for which regulation was deemed essential. For example, a representative of the National Association of Railroad and Utilities Commissioners testified that:

"[A]ny important public-utility industry requires regulation in the public interest..."
and will be regulated sooner or later. . . . [T]he full purpose of regulation can be accomplished only by regulation from the beginning of the development of the industry. . . .

[Congress must establish] such conditions that there may be an encouraged development of the aircraft business . . . and [create] conditions—and this is of paramount importance—which will avoid the wastes and losses which will be inevitable if the business is left to struggle to establish itself in open competition.23

D. Avoidance of Excessive Competition

In light of the economically catastrophic experience of other transport modes, it was believed that regulation might insure that such consequences might be avoided for the air transport industry. Mr. Gorrell stated that, "Cutthroat competition is nowhere so dangerous as in transportation. And in no form of transportation would it be more disastrous . . . [than] in the case of air carriers."24

A system of economic regulation was envisioned which would avoid the consequences of excessive competition.25 In fact, the legislative history repeatedly reveals that destructive competition was among the injurious activities to which the Act was addressed. For example, the Senate Reports which preceded its promulgation indicate that the air carriers were "engaged in intensive competition with each other and with the railroads and other carriers [which] is being carried to an extreme which tends to undermine the financial ability of the carriers and jeopardize the mainte-

25. Senator McCarran submitted the following material for inclusion in the records of the Senate Subcommittee hearings:

Following the principles generally recognized in connection with other forms of transportation, it is believed to be sound public policy that an air-line operator who makes the necessary investment to establish and maintain service on a given route should be entitled to protection against unlimited competition so long as he renders adequate and efficient service at reasonable rates. . . .

In general, for the present at least, only one operator should be given a certificate for operation between any two given points, except in the case of larger metropolitan centers where the needs of through traffic, together with those of intermediate points, may justify the establishment of two or more services via different routes by different operators.

Id. at 376-377. Thus, it was contemplated that the regulation of entry would so limit competition as to avoid the inherent consequences which were believed undesirable. A representative of the National Association of Railroad and Utilities Commissioners asserted:

[Ev]ery important public utility industry requires governmental regulation in the public interest. . . .

The only way in which the public can be protected in respect to an industry such as this is by providing for public regulation at the outset, so that the future will not be burdened by overcapitalization . . . which are indigent to the passage of the industry through a period of cutthroat competition, and of difficulties when large losses are incurred, which might be avoided under the control of a government agency.

Senate Hearings on S. 3659, supra note 14, at 17.
nance of transportation facilities and service appropriate to the needs of commerce and required in the public interest and the national defense." The Senate Committee on Interstate Commerce felt that the proposed legislation would not only "promote an orderly development of transportation in the United States," but would also "prevent the growth of bad practices and uneconomic capital structures resulting from a period of destructive competition. . . ." 26 The House Committee on Interstate and Foreign Commerce, in its 1937 report recommending adoption of the proposed legislation, maintained that, "The government cannot allow unrestrained competition by unregulated air carriers to capitalize on and jeopardize the investment which the government has made during the last 10 years in the air transport industry through the mail service. . . ." 27

The Federal Aviation Commission, which was established by the Black-McKellar Act of 1934, submitted 102 recommendations in its report to Congress of January 30, 1935. 28 It contended that the orderly development of air transportation required two fundamental ingredients. First, in the interest of safety, certain minimum standards of equipment, operating methods and personnel qualifications should be maintained. Second, "there should be a check in development of any irresponsible, unfair, or excessive competition such as has sometimes hampered the progress of other forms of transport" (Recommendation 5). However, it was never maintained that competition among carriers should be prohibited. 29

Congressman Randolph contended that "unbridled and unregulated competition is a public menace," citing as examples that the air transportation industry was then subjected to such unfortunate economic conditions as "rate war[s], cutthroat devices, and destructive and wasteful practices." 30 Other Congressmen emphasized that the legislation was in-

27. Quoted in Richmond, supra note 15, at 8.
29. See 83 Cong. Rec. 6852 (1938) (remarks of Sen. McCarran [the author of the original Senate bill]). A representative of the Treasury Department testified that, "this new proposed legislation embodies standards to guide the Board in the exercise of its authority to issue these certificates so as to require the Board to see to it that we have competition where it is in the public interest to have competition and where it would be healthy to do so." Senate Hearings on S. 3760, supra note 14, at 5.
30. 83 Cong. Rec. 6507 (1930).
tended to inhibit or prohibit monopolization in the industry.\textsuperscript{31}

E. **Competition vs. Monopolization**

The legislative history of the Civil Aeronautics Act of 1938 indicates that although Congress was generally concerned with "cutthroat," "wasteful," "destructive," and "unrestrained" competition, it was nevertheless opposed to monopolization of transportation services and sought to insure that such services would be provided in a competitive economic environment. Recommendation 9 of the Federal Aviation Commission focused on the element of competition in entry regulation: "It should be the general policy to preserve competition in the interest of improved service and technological development, while avoiding uneconomic paralleling of routes or duplication of facilities."\textsuperscript{32} The Commission rejected the European concept of the formation of national transportation monopolies operating under close governmental supervision, by stating that:

We are convinced that the results of anything of that sort would be intolerable. . . .

On the other hand, too much competition can be as bad as too little. To allow half a dozen air lines to eke out a hand-to-mouth existence where there is enough traffic to support one . . . would be a piece of folly . . . . Even though air transport is not a natural monopoly . . . a certain restriction on competition is plainly necessary if government funds are to be conserved and if the community is to get its money's worth from all its expenditures on civil aviation. . . . There must be enough competition to serve as a spur on the eager search for progress, but there must not be so much as to raise costs materially through the duplication of facilities.\textsuperscript{33}

The Commission contemplated that an applicant promising superior service would be permitted to enter the market, and that the promotion of competition would be a fundamental consideration in the issuance of operating authority. It concluded this discussion by emphasizing the discretion to be afforded to the governing agency in the performance of its regulatory responsibilities, stating that "We urge that the body responsible for airline regulation should be given a general outline of policy, along the lines of this discussion, as a guide, and that it then be left free to apply the policy in particular cases as circumstances may dictate."\textsuperscript{34} Recommendation 13 also expressed the policy that activity which might "reduce the effectiveness of any competition, the preservation of which could serve the public

\begin{itemize}
  \item \textsuperscript{32} Federal Aviation Commission, supra note 28, at 61. See \textit{Senate Hearings on S. 2 & S. 1760}, supra note 22, at 704. See \textit{Richmond}, supra note at 8; and \textit{CAB Staff Report}, supra note at 40.
  \item \textsuperscript{33} Federal Aviation Commission, supra note 19, at 61-62.
  \item \textsuperscript{34} Id. at 62.
\end{itemize}
interest" should be prohibited.  

F. The Regulatory Regime Contemplated Under the Pending Legislation

The preceding discussion of competition and monopolization leads us to a review of the regulatory scheme envisioned by Congress under the then pending legislation. Karl Crowley, Solicitor of the Post Office Department, contended that

This is an infant industry. It is something that has grown up with competition. . . . This bill would freeze the present air service. It would create a monopoly with the present contractors. No little fellow with a new idea, with plenty of capital, could go out and establish a line from, say, Wyoming to California. He would have to get a certificate of convenience and necessity before he could do it. The law right now does not prohibit an independent citizen from establishing an air line. . . .

Senator Pat McCarran vehemently disagreed; he responded to these remarks of Mr. Crowley by insisting that:

35. Id. at 69. Mr. Gorrell testified that "the great field of transportation, and the convenience to the public, may actually be subjected to a more serious threat from unbridled and irresponsible competition than from any threat of monopolistic control." House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 67. He acknowledged that the air transportation industry was not a natural monopoly. "When railroad regulation began, the railroads in a sense constituted a definite transportation monopoly. In the case of the air carriers, however, the industry is in constant, active competition with an extraordinarily developed highway and railroad system. . . ." Id. at 66. Mr. Gorrell also testified that:

[T]here is no great economic barrier to the inauguration of new service, such as prevails in the case of railroads or water carriers, and . . . competition is in fact very keen. . . .

Consequently, in order to avoid the stultifying grip of monopolistic tendencies, the problems is one, not of attempting to break up existing industrial units, but of attempting to introduce measures conducive to stability, measures which will give to the smaller and weaker lines some promise of order and a chance to survive, and measures which will make forever impossible the secret and unlimited acquisition of centralized control.

The necessary stability in the industry is sought . . . through the medium of certificates of convenience and necessity, a familiar regulatory device buttressed by salutary and tested conceptions of law in the course of an experience of regulation which antedates even the original Interstate Commerce Act. It is a device which, in one way or another, is rooted in very early common-law conceptions.

Id. at 341-342. David Behncke, President of the Air Line Pilot's Association, contended that:

Practically all modes of interstate carriers in this country today are monopolies.

In my opinion that is about the only way the situation can be handled, because if it were not handled in this manner, cutthroat competition would get in its destructive work and would destroy all proper and decent standards, both from an economic and a safety point of view. . . .

Certainly the air lines would like to be protected from the uncontrolled competition of would-be competitors. They are quite willing to have the government give them certificates so that no one else can come into their territories and fix rates and undercut them.

Senate Hearings on S. 3659, supra note 11, at 81-82.

36. Senate Hearings on S. 2 & S. 1760, supra note 22, at 118; Senator Harry Truman expressed the view that, "We are not interested in the individual fellow who wants to go into the business, but we are interested in protecting life and property on the roads and seeing that 'fly-by-night' operations do not start up and bring down prices and create chaos." Id. at 303-304.
It is true that there is nothing in existing legislation to prohibit an individual citizen from establishing an airline. But it is likewise true that in the proposed bill there is nothing to prevent "a little fellow with a new idea, with plenty of capital" from establishing an airline. . . . If it has plenty of capital, and if it can show to the expert transportation by a new line, then it is entitled to a certificate. The certificating procedure does nothing except to prevent someone with inadequate facilities, or without responsibility, from entering the public service and to prevent the inauguration of service when it would be unjustified. The principle of convenience and necessity is indispensable if we are to have adequate transportation.37

Thus, it was contemplated that additional carriers would be certificated to perform air transport services in competition with existing carriers where the applicant could demonstrate that "the public interest will be served." During the hearings, Senator Harry S. Truman insisted that the proposed legislation was not designed to "throttle" competition in the airline industry.38 It was predicted that the inauguration of services by a new entrant would not be prohibited, except where the applicant was incapable of performing its operations consistent with the public interest or where the proposed operations would not satisfy a public need and would cause injury to both the existing carriers and the applicants. No carrier would have the right to enjoy exclusivity in the markets it serves.39 The Federal Aviation Commission

37. Id. at 409-410.
38. Id. at 303-305. The initial bills proposed for the regulation of air transportation contemplated that jurisdiction over entry and rates in the industry would be vested in the Interstate Commerce Commission, which already held authority over rail and motor carriers. See supra, note 21. When asked by Congressman Boren whether a limitation upon entry through the certification process might impose a hardship upon a party that was competent or capable of inaugurating service, Commissioner Eastman responded:

No; I do not. If a public need can be shown—and the Commission has always been very liberal in the interpretation of the words "public convenience and necessity." It has never construed them in any narrow sense . . . . [T]he Commission has never shown any desire to unduly limit entry into the field and it has always recognized the need for encouraging a reasonable degree of competition.

House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 40. Amelia Earhart testified as to the ambiguity of the concept of public convenience and necessity in licensing proceedings, stating that "I defy anyone at the present period to define convenience or necessity as applied to aviation. I feel that mere study cannot determine that matter, as we have no background yet of sufficient experimentation to afford adequate interpretation." Regulation of Transportation of Passengers and Property by Aircraft: Hearings on S. 3027 Before a Subcomm. of the Senate Comm. on Interstate Commerce, 74th Cong., 1st Sess., 100 (1935) [hereinafter cited as Senate Hearings on S. 3027].

39. Colonel Gorrell testified that:

[T]he requirement of a certificate of convenience and necessity prior to the inauguration of a service is in no sense a provision for monopoly. . . . The certificate does two things, and only two. [First], it prevents the inauguration of a service by one who is incapable of rendering [it] according to the standards which are necessary to protect the public. [Second], it prevents a service which cannot be justified by any considerations of public need and which would result only in disaster both to the new proposed service and to existing services. In no sense does this encourage monopoly. No one will have any exclusive rights. The provision merely assumes that those minimum qualifications which
believed that entry into air transportation should remain regulated even in the absence of federal subsidization. With respect to parallel route authorizations, it was felt that although the practice should be avoided, the governing agency should exercise its discretion in the determination of whether duplicative operating authority should be granted.\textsuperscript{40} Moreover, it was anticipated that new authorizations which would "meet an unsatisfied public need" or "materially improve upon the service previously available" would be issued.\textsuperscript{41}

It is significant that, in drafting this legislation, Congress explicitly required that competition be considered by the Board as a principle element of the public interest.\textsuperscript{42} Indeed, as originally promulgated, Section 102 of

\begin{quote}
are necessary to an orderly transportation system must be met before anyone undertakes the obligation of public transportation.
\end{quote}

\textit{Senator Hearings on S. 2 & S. 1760, supra note 22, at 503-504}. Mr. Gorrell believed that promulgation of the pending legislation would have the effect of stimulating participation in the air transportation industry by new entrants and over new routes. "We feel that enactment of H.R. 5234 will bring in a number of new companies and there will be additional air line service." \textit{House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 75}. See also \textit{Senate Hearings on S. 2 & S. 1760, supra note 22, at 334}.

\textsuperscript{40} The Federal Aviation Commission elaborated on its position regarding entry as follows:

[\textit{Where} a service of high quality exists, with governmental support and under governmental control, and where there is just enough traffic to justify its existence, it seems to us plainly destructive of the general welfare that a new operator should be permitted to appear on the same route with an inferior service and to wean traffic away from the established enterprise by rate-cutting. . . . The ultimate result in such a case is likely to be that both lines will survive on a very inferior plane of service. . . .]

The arguments for control over entry into the field seem to us compelling. . . . We recommend that certificates should be issued in the discretion of a commission set up for that and other purposes, and that although a direct duplication of certificates for the same route should normally be avoided, their form should carry no explicit guarantee of exclusiveness of franchise. Whether or not routes should be paralleled should be for Commission discretion to determine, in the light of all the circumstances in the area concerned.

Cases are likely to arise, if our recommendation on this point should be accepted, of two or more operators seeking the issue of a newcomer arguing that he should be accepted, of two or more operators seeking the issue of the same certificate for a new route or of a newcomer arguing that he should be allowed the privilege of paralelling or displacing an existing service on the ground that it is not of as high a quality as he would be willing to provide. Such conflicts of desire would of course be nothing new in the history of regulatory commissions, and it would in our opinion be essential that the appropriate agency of government should be free to exercise wide discretion in dealing with them.

\textit{Federal Aviation Commission, supra note 28, at 54-55}.

\textsuperscript{41} Even after air transport shall have attained a purely commercial footing, needing no direct support from the government, we consider that it will still require control as a public utility and one which in some cases must take on a monopoly character. . . . Both during the governmentally-aided period and thereafter, in our opinion, there should be a certain measure of control by the government of the right of entry into the business in order that proper standards may be enforced and irresponsible campaigns of mutual destruction on the part of operators averted.

\textit{Id. at 52}; see \textit{House Comm. on Interstate Commerce, Regulation of Transportation of Property and Passengers by Air Carriers, H.R. Doc. No. 911, 75th Cong., 1st Sess. (1937)} [hereinafter cited as \textit{House Committee Report on Transport Regulation}].

\textsuperscript{42} See \textit{83 Cong. Rec. 6726} (1938).
the Act required, *inter alia*, that the Board adhere to the principle of competition "in the exercise and performance of its powers and duties."43 This statutory provision has been interpreted to require that the Board foster competition as a means of enhancing the development and improvement of air transport services on those routes generating a sufficient volume of traffic to support competing carriers.44

G. Providing Order & Stability for the Growth of An Infant Industry

Among the essential purposes of the promulgation of the Civil Aeronautics Act was to shield the air transport industry from the hostile economic forces prevalent in an unregulated economic environment, so that it could enjoy the order and stability required for the acquisition of capital and long-term growth.45 A concern was also expressed that service provided to small communities should be guaranteed. Thus, an airline executive stated,

One of the most important features of the pending legislation will be the issuance of route certificates of public convenience and necessity. This will prevent monopoly and insure adequate service where traffic is heavy. In the more sparsely settled areas, it will give air lines the assurance hitherto lacking, that


44. Continental Air Lines, Inc. v. CAB, 519 F.2d 944, 946 (D.C. Cir. 1975).

45. One airline executive stated, "As we see it, the Civil Aviation Authority, when created, will have two broad policy functions: first, to reestablish develop, and expand American aviation, both domestic and foreign, on a sound basis; and second, to maintain a healthy condition and growth through proper regulation and control." Senate Hearings on S. 3659, supra note 11, at 149. Existing carriers supporting the proposed legislation sought regulation as a means of enhancing stability in the air transport industry. A representative of United Air Lines stated that, "If some degree of permanency can be assured and the investments of already existing carriers be safeguarded, it will allow those air carriers to intelligently and effectively plan for the future . . . ." Senate Hearings on S. 3027, supra note 38, at 38. The Report of the House Committee on Interstate Commerce stated:

[This bill when enacted will greatly stabilize the air-transport industry of the United States, and will thereby materially contribute to its sound growth and economic advancement . . . .

The present air-transportation system . . . is now seriously threatened by unregulated airlines, unhampered by any duty to perform the governmental service of carrying mails and not covered by the present law. The government cannot allow unrestrained competition by unregulated air carriers to capitalize on and jeopardize the investment which the government has made during the past 10 years in the air-transport industry . . . .

Federal Aviation Commission, supra note 19, at 170. Thus, regulation was deemed necessary not only to protect the capital investment made by the private sector in the air transport industry, but also to insure security for the investment made by the government.
they can operate with reasonable security as to their routes.\textsuperscript{46}

Additionally, the government sought to protect the operations of small carriers from the dangerous effects of predatory competition. Congressman Randolph contended that, "Permanent long-term legislation covering the economic phases of the industry is required to make possible the carrying out of a healthy long-range planning on the part both of management and of government, and to avoid rate wars, cutthroat devices, and wasteful practices of which there have been disturbing signs. Economic power and reckless management should not be permitted to injure the smaller lines, the employees of the companies, and the public."\textsuperscript{47} It was also contended that the position of smaller carriers vis-à-vis larger carriers should be protected. Mr. Gorrell contended that, "In spreading out into the regions of light-density traffic and developing smaller communities, the small lines have performed an incalculable service to the country. It must be assured, through certificates, that they may continue to perform such a service, and they must be given an opportunity to protect themselves against even the possibility of oppressive competition."\textsuperscript{48}

When asked by Congressman Boren whether entry should be regulated, Mr. Gorrell responded by saying, "I think it should be restricted to an extent needed for an orderly expansion of our industry. I think any person going into the common-carrier business should have a certificate of convenience and necessity so that the growth of this industry might be orderly and not 'cutthroat.'"\textsuperscript{49} He proceeded to express the belief that had entry in the rail carrier industry been regulated during its infancy, the destructive tactics which prevailed prior to regulation might have been prevented.\textsuperscript{50}

III. THE TRADITIONAL ENTRY CRITERIA

As originally promulgated, the Federal Aviation Act authorized the issuance of operating authority to any applicant who was "fit, willing, and able," under circumstances where the transportation in question was "required by the public convenience and necessity."\textsuperscript{51} In performing such responsibilities, the CAB was obligated by the Act to "foster sound economic conditions" in transportation, to promote "adequate, economical, and efficient service by air carriers at reasonable charges"\textsuperscript{52} to promote "competition to the extent necessary to assure the sound development of

\begin{itemize}
\item \textsuperscript{46} Senate Hearings on S. 3659, supra note 11, at 170.
\item \textsuperscript{47} 83 Cong. Rec. 6501-6515 (1938).
\item \textsuperscript{48} House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 90.
\item \textsuperscript{49} Id. at 69. See also Burkhardt, supra note 15, at 12.
\item \textsuperscript{50} House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 69.
\item \textsuperscript{51} Former Federal Aviation Act § 401(d)(1), (d)(2), and (d)(3); 49 U.S.C. & 1371(a)(1), (d)(2), and (d)(3) (1977).
\item \textsuperscript{52} Former Federal Aviation Act § 102; 49 U.S.C. § 1302 (1977).
\end{itemize}
an air transportation system" and to avoid "destructive competitive practices."

In interpreting the statutory concept of public convenience and necessity, the Board traditionally weighed and balanced a number of criteria (including the relative service benefits of proposed operations, and such considerations as historic participation in the involved market, the ease with which the involved segment would integrate with the applicant's existing route structure, and the carrier's needs for subsidy reduction and/or route strengthening), and no single criterion was deemed to be controlling. Most such proceedings involved essentially a two-step process: (1) determining the number of carriers the market in question could reasonably and profitably support; and (2) selecting from among the various applicants which carrier(s) should be designated to receive (a) certificate(s) of public convenience and necessity.

In the years immediately after the Act was passed, the Board was principally concerned with the issuance of "Grandfather" certificates under section 401(e)(1) of the Act, which required that a certificate of Public Convenience and Necessity be issued to any applicant only upon proof that during the grandfather period (May 14, 1938—August 22, 1938), it was an air carrier, continuously operating over the segment for which operating authority was sought (unless the service provided during such period was inadequate and inefficient).

During this period, the Board began to set the stage for its policy of discriminating against new entrants in favor of grandfather carriers. Thus, two carriers which attempted to acquire certificates of Public Convenience and Necessity failed on the basis of lack of service during the grandfather period. Airline Feeder Systems, Inc. was denied a certificate because it had carried only eleven passengers in nine roundtrips during the grandfather period; another airline was denied a certificate because the Board found that there was an existing carrier (Braniff) which could also serve the route.

Each of these carriers operated aircraft, and had carried passengers safely. The Board made no mention of the applicants' present ability to conduct operations, nor that their service was required by the "public convenience and necessity." The Board did not inform the applicants that they

56. Fort Myers-Atlanta Case, CAB Order 76-1-81 (1976), at 11, and cases cited therein.
could apply under one of the other provisions of section 401,\textsuperscript{60} nor did the Board exercise its power under the exemption provision of the Act. It would appear that the Board looked to the grandfather provision under section 401(e)(1) as the only means that a carrier might enter the industry.

When Northwest Airlines applied for operating authority, and had a portion of it denied, the Board set down its interpretation of what Congress intended:

"[I]t was not the Congressional intent that the air transportation system should be "frozen" to its present pattern. On the other hand, it is equally apparent that Congress intended the [CAB] to exercise a firm control over the expansion of air transportation routes in order to prevent the scramble for routes which might occur under a "laissez faire" policy. Congress, in defining the problem, clearly intended to avoid the duplication of transportation facilities and services, the wasteful competitive practices, such as the opening of non-productive routes, and other uneconomic results which characterized the development of other modes of transportation prior to the time of their government regulation.\textsuperscript{61}"

The Board here was reflecting the country’s mood towards the evils of excessive competition that had been witnessed in surface transportation. The Board appeared to overlook the point, however, that the airline industry was at that time, highly physically mobile. Large stations weren’t required at airports; aircraft could be moved with ease; if a given route couldn’t support two or more carriers, then those that were less efficient could (assuming liberal exit policies) easily leave and retreat to other markets.

Finally, the CAB set as its criteria for authorizing new route service the policy that all routes had to be self-supporting prior to certificate operation, without any regard to the potential traffic that could be generated, or the potential benefit to the public of the new service.

"[I]n determining whether the inauguration of a new service will result in carrying out the objectives of the act as set forth in the declaration of policy, [the CAB must] consider not only the need of the particular community or section for the proposed operation but also the relationship which service bears to the development of a nationally adequate and economically sound air transportation system. . . . [T]his determination must be made in the light not only of the cost to the public incident to the inauguration and operation of the service but also of the regulation of the expansion of the industry at a crucial period of its development in a manner which will not only foster sound economic conditions in air transportation at the present time but also in the future. One of the factors directly related to the interests of the public and to the economic welfare of the industry is the relationship between the estimated commercial reve-

\textsuperscript{60} It is not known whether the applicants did apply under the other provisions of the act, but the evidence indicates that neither Condor nor Feeder Systems appear as certificated carriers in any of the Board’s records.

\textsuperscript{61} Northwest Airlines, Inc.—Certificate of Public Convenience and Necessity, Duluth-Twin Cities Operation, 1 C.A.A. 573, 577-578 (1940).
nues and operating costs of the proposed service.\textsuperscript{62}

In a 1941 case, the CAB stated that four questions were to be considered in any application for new service:

1. Will the new service serve a useful public service, responsive to a public need?
2. Can and will this service be served adequately by existing routes or carriers?
3. Can the new service be served by the applicant without impairing the operations of existing carriers contrary to the public interest?
4. Will any cost of the proposed service to the government be outweighed by the benefit which will accrue to the public from the new service?\textsuperscript{63}

Dixie Airlines was a newly organized corporation formed for the purpose of developing and operating a proposed airline upon the issuance of operating authority. The Board justified its denial by turning the issue of competition against the carrier, saying that "The number of air carriers now operating appears sufficient to insure against monopoly in respect to the average new route case, and we believe that the present domestic air-transportation system can by proper supervision be integrated and expanded in a manner that will in general afford the competition necessary for the development of the system in the manner contemplated by the Act."\textsuperscript{64}

The Board thus constructed the policy it was to follow for the next three decades in applications proceedings for trunk line entry. It would issue operating authority only to those carriers which had been operating under the grandfather clause. Furthermore, it was not inclined to issue competitive route authority unless substantial evidence existed that the additional carrier would not only meet all of its costs, but would also not appreciably divert traffic from the incumbent carrier.

Nevertheless, the entry criteria employed vacillated from year to year and, in some instances, from case to case. In later decisions, the CAB emphasized that no criterion was controlling. As the CAB stated in the Service to Tri City Case:\textsuperscript{65}

The Board has never established a hierarchy among the various carrier selection criteria but has rather examined all the relevant criteria in reaching a determination in a given case. The Board's policy has been that the weight afforded a particular decisional factor must be determined in the context of the specific needs of the markets and, on occasion, in light of broader public inter-

\textsuperscript{62} Id. at 579.

\textsuperscript{63} Delta Air Corporation, Service to Atlanta and Birmingham, 2 C.A.B. 250, 251-252 (1940). These criteria are strikingly similar to those developed by the Interstate Commerce Commission in the regulation of common carrier entry of motor carriers in Pan American Bus Lines Operations, 1 M.C.C. 190 (1936). See Dempsey, Entry Control Under the interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation, 13 Wake Forest L. Rev. 729, 735-753 (1977).

\textsuperscript{64} Delta Air Corporation, Service to Atlanta and Birmingham, 2 C.A.B. 250, 280 (1940).

\textsuperscript{65} CAB Order 77-3-132 (1977).
est considerations. 66
In the *Sacramento-Denver Nonstop Case*, 67 the Board elaborated, saying that "[o]nly rarely is there but a single reasonable candidate and quite often the selection of a particular carrier reflects either an applicant's incremental advantage or its ability to combine several factors." 68

In the *Miami-Los Angeles Competitive Nonstop Case*, 69 the Board enumerated ten different factors it has weighed in determining which, among multiple applicants, should or should not receive certificated authority to serve a particular market:

(1) route integration as evidenced by the ability to convenience beyond-segment traffic;
(2) frequencies to be operated over the involved segment;
(3) the type of equipment to be employed;
(4) the fares to be charged;
(5) the identity of the involved points;
(6) the historic participation in the involved traffic;
(7) efforts to promote and develop the involved market;
(8) the need of the applicant for route strengthening;
(9) the profitability of the route for the applicants and the existing carriers; and
(10) the potential of diversion of traffic from existing carriers. 70

As can be seen, only the first four of these criteria have as their objective the protection of the consumer interests. Most relate to how a regulated carrier's operations might become more profitable by diminishing the potential adverse influence of competition.

Traditionally, the CAB sought to improve the competitive posture of smaller carriers vis-à-vis the larger incumbents, and reduce industry concentration, by favoring the issuance of operating authority to the small carriers. 71 This policy of route strengthening "was intended to combat excessive concentration and to maintain a balance of competitive opportunities within the industry by strengthening the smaller carriers who were at a disadvantage because of their route system. 72

Enhancing the competitive posture of smaller carriers by issuing segments of potentially lucrative route authority was viewed as being "of great importance in perfecting the route structure of the nation." 73 Thus, the Board frequently scrutinized the competitive positions of various applicants

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66. *id.* at 3.
69. CAB Order 76-3-93 (1976).
70. See *id.*, at 31.
71. Oklahoma-Denver-Southeast Points Investigation, CAB Order 77-4-146 (1977), at 7; Transpacific Route Investigation, 51 C.A.B. 161, 287 (1968).
72. Oklahoma-Denver-Southeast Points Investigation, CAB Order 77-4-146 (1977), at 15.
and their relative requirements for route strengthening. By enhancing the competitive posture of smaller carriers, the Board could bring a concomitant reduction in their subsidy requirements, which in itself, became another important criterion of carrier selection.

In other cases, the Board concluded that the potential service benefits offered by larger carriers outweighed the need of smaller carriers for subsidy reduction. For example, in the Fort Myers-Atlanta Case, the Board recognized that a carrier "having access to the largest volume of support traffic will be in the best position to provide the greatest frequency and capacity and flow the maximum number of passengers over the . . . segment [and thereby] convenience the largest number of beyond-segment passengers. . . ." Similarly, the ease with which a proposed segment integrated with a carrier's existing route structure was frequently perceived as a factor weighing in favor of the carrier, for such a coherent structure might enable it to convenience a larger segment of the traveling public.

The relative beyond-segment capabilities of the applicants frequently was perceived as an important criterion of carrier selection. For example, the Board in the Memphis-Twin Cities/Milwaukee Case recognized that, flow traffic is important in developing a thin market because it helps support the frequencies necessary to permit service levels sufficient to attract and hold new customers. In addition, it generates systemwide profits and benefits passengers by increasing single-plane and single-carrier alternatives. Because beyond traffic contributes significant benefits to carriers and passengers it has become an important element in selecting a carrier to serve this sort of market.

The Board also made efforts, from time to time, to strengthen the financial posture of even large carriers facing financial difficulties through the issuance of lucrative segments of operating authority. Concern with

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76. CAB Order 75-10-119 (1975).
77. id.
81. See Oklahoma-Denver-Southeast Points Investigation, CAB Order 77-4-146 (1977), at 16. It has also occasionally favored the most aggressive carrier the competing applicants. id. at 17; CAB Order 77-7-40 (1977), at 5-7.
the financial strength of carriers subject to its regulation frequently led the Board to view the potential diversion of traffic from incumbent carriers and consequential revenue loss as a factor militating against the issuance of operating authority to a new entrant.\textsuperscript{82} Similarly, the Board scrutinized route proposals to determine whether the inauguration of service pursuant thereto might cause financial injury to the applicant, or as the Board has stated, "whether the proposed operation would result in a revenue deficiency that would weaken the carrier and impair its ability to properly serve its route."\textsuperscript{83}

In weighing and balancing these criteria, the Board vacillated between favoring competition as policy objective, and giving it almost no weight at all, with little consistency, and made only shallow attempts to justify or explain this inconsistency. On the whole, it appears that the purported attributes of competition were traditionally given less weight by the Board than the need to protect existing certificated incumbents.\textsuperscript{84}

As to the weight which ought to be afforded competition as an entry criterion, the D.C. Circuit prescribed that "there is no presumption in favor of competition \textit{per se} because competition may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act. . . ."\textsuperscript{85}

IV. CAB REGULATION 1938-1975: THE CONGRESSIONAL PERSPECTIVE

Congressional scrutiny of arguments for deregulating the airline industry began with a series of hearings in 1975 under a Senate Subcommittee chaired by Edward Kennedy. Such Congressional analysis was subsequently expanded by Senator Howard Cannon, Chairman of the Senate Commerce Committee, who held a parallel series of hearings. Together, these two senators are largely responsible for the legislation which ultimately resulted.

Whether their conclusions were accurate or inaccurate is an issue which must be left to future commentators. The significance of the instant


\textsuperscript{83} See Comment, \textit{An Examination of Traditional Arguments On Regulation of Domestic Air Transport,} 42 J. Air L. & Com. 187, 203-04.

\textsuperscript{84} Id. at 206.

\textsuperscript{85} Continental Air Lines v. CAB, 519 F.2d 944 (D.C. Cir. 1975). In so concluding, the court reviewed the legislative history of the Federal Aviation Act, finding that Congress intended that air transportation be regulated both to protect the public and the industry against the deleterious effects of unrestrained competition and the potential of monopoly. Congress established the regulatory structure to provide for the benefits of "regulated competition" to achieve the attributes of competition without the injurious consequences of unrestrained entry or rate wars. Id. at 952-955.
summarization lies not in the accuracy of these allegations; but right or wrong, this summary represents the perspective from which Congress viewed the airline industry and CAB regulation, and the foundation upon which Congress acted.

A. Entry

The legislative history of the 1938 Act reveals that Congress intended that Board implement a cautious, yet moderately liberal approach to entry, permitting new enterprises to compete as the air transportation market expanded. Yet, entry into the industry has been effectively prohibited by the restrictive regulatory policies of the CAB. Between 1950 and 1974, the CAB received 79 applications from firms seeking to obtain operating authority to provide scheduled domestic service. None was granted.\(^{86}\) Moreover, between 1969 and 1974, the CAB imposed a "route moratorium," a general policy of refusing to grant or even hear any applications to serve new routes.\(^{87}\) As a result of these policies, the big four in 1938—United, American, Eastern, and TWA—are the big four today. In 1938, United controlled 22.9 percent of the market; in 1975 it accounted for 22.0 percent.\(^{88}\)

Actually, not a single new domestic trunkline carrier has been authorized. Although there were sixteen such carriers "grandfathered" in 1938, there are only ten such carriers today. The CAB had not permitted a single bankruptcy. This sixteen domestic trunkline carriers of 1938 merged into the ten which exist today; the nineteen local service carriers licensed shortly after WW II merged into the nine which existed in 1975.\(^{89}\)

B. Rates

Traditionally, the Board has applied classical ratemaking to the airline industry. Classical ratemaking is ordinarily employed to set the rates of a regulated monopolist, such as a public utility, and utilizes the following formula: 

\[ \text{costs + reasonable return on investment = revenue requirement} \]

Prior to 1978, the CAB followed this approach with significant modifi-

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87. Id. at 6. During the late 1960s, Chairman Secor Brown led the CAB to implement the moratorium on the grounds that there was excessive capacity in the industry. As a result, no entry applications were even set for hearing for several years. Id. at 7. See id. at 84-96. See e.g., *Additional Service to San Diego Case*, 64 C.A.B. 634 (1974); *Atlanta-Detroit/Cleveland/Cincinnati Investigation*, 64 C.A.B. 647 (1974); *Mohawk Segments 8 and 9 Renewal*, 63 C.A.B. 338 (1973); and *Twin Cities-Des Moines-St. Louis, Nonstop Service*, 53 C.A.B. 580 (1970).
89. Id. at 6.
90. Id. at 10, 109.
cations developed in its *Domestic Passenger Fare Investigation* [DPFI].

First, it examined the cost and revenue figures, not of the individual carriers subject to its jurisdiction, but of the industry as a whole. Second, it adjusted these figures in order to determine what industry costs and revenues would have resulted had load factors of fifty-five percent been achieved (i.e., it assumed that planes were flying fifty-five percent full). To costs determined on this basis was added a twelve percent return on investment. Finally, fares were set at a level adequate to generate this "revenue requirement." 

Every three months, the CAB published a compilation of industry cost and revenue figures with these adjustments, simplifying the task of determining what fare level the industry was entitled to set. Where a carrier proposed a tariff embracing that fare level, it could be reasonably certain that the CAB would approve it as "just and reasonable."

Congress concluded that this system, although administratively efficient, tended to keep air fares at an unreasonably high level. The load factor level of fifty-five percent was deemed to be too low. The California and Texas intrastate experience, where carriers regularly achieved sixty to seventy percent load factors, revealed that passengers would accept moderately more crowded aircraft if they could enjoy correspondingly lower fares. The fifty-five percent assumption was based on an industry average, and did not take into account the ability of individual carriers to exceed this standard, or their inability to achieve it, generally or on particular routes.

The Board traditionally prohibited selective price reductions by requiring that carriers charge equal fares for equal distances. Thus, it became difficult for carriers to lower fares in less densely traveled markets in order to stimulate demand. The CAB also inhibited across-the-board price cuts by generally refusing to approve such reductions unless, assuming all competitors participated in the reduction, each would achieve the target twelve percent return on investment.

Congress concluded that, by preventing selective price reductions and inhibiting general price cuts, the Board had encouraged carrier inefficiency, for it became difficult for the more efficient firms, by lowering their prices, to take business away from the less efficient. Moreover, Congress con-

91. See, e.g., CAB Order 74-3-82 (1974); CAB Order 74-12-109 (1974); CAB Order 72-12-18 (1972); CAB Order 73-5-2 (1973).
93. Id. at 113-115.
94. Id. at 10.
95. Id. at 10-11, 124-125.
96. Thus, the Subcommittee concluded that the Board's policies had caused fares to be higher than they would be in a competitive market, and inhibited industry efficiency. Id. at 113.
cluded that the Board’s policies had little effect in stimulating increased industry profits. The level of profits had, in recent years, regularly been well below the Board’s twelve percent target.97

The absence of carrier profits is probably attributable to the fact that the airline industry is structurally competitive. The inability to engage in route and rate competition has led various firms to engage in costly service competition. By purchasing larger aircraft in greater numbers, and by increasing frequencies, they have tended to lower their load factors. By offering lavish in-flight amenities and increasing their advertising budgets and operational expenditures, they have tended to diminish their profits.98 As their costs increased and profits diminished, they tended to seek fare increases, causing prices to spiral continuously upward.

The fundamental deficiency of the Board’s rate policies during this period was its failure to recognize the elasticity of demand inherent in passenger transportation—that by lowering fares air carriers might well stimulate new traffic and thereby fill empty seats.99 The discretionary traveler, one who might take a vacation or visit his relatives only if the price were right, was a wholly unexploited source of potential revenue.100

C. Antitrust

In the late 1960’s, excessively optimistic CAB and industry demand projections led the industry to invest in large numbers of wide bodied aircraft. Yet the economic circumstances of the first part of the 1970s led passenger demand to fail to live up to these expectations.101 The diminution of disposable income engendered by the recession of the early 1970s, coupled with the tendency of air carriers to raise their prices, led load factors to drop and carrier profits to turn downward.

In response, a number of the major carriers (i.e., United, TWA, and American) agreed to a collective reduction of service provided on several of the major domestic routes.102 The Board continually approved these agreements between 1971 and 1975, first as an emergency response to overinvestment and excessive capacity, and after 1973, as a necessary response to fuel shortages which allegedly existed after the Arab oil embargo.103

97. Id. at 11.
98. Id. at 25, 39.
99. See id. at 123-124, 128.
100. Note that this argument is almost wholly inapplicable to the transportation of freight, which has relatively little demand elasticity. See Waring, Rate Adjustments on Specific Movements in Transportation Law Institute, Rate Regulation & Reform (1979).
102. Id. at 143-144.
103. Id. at 12-13.
Although capacity limitation agreements can theoretically bring about lower carrier costs and correspondingly lower fares, the latter did not materialize. The airline industry was, in fact, the only major industry which raised its prices during the recession of the early 1970s. The report of the Kennedy subcommittee concluded that "The classic regulatory response to defects in regulation is to create more regulation: the Board's response to the problem of excess capacity was to introduce capacity restricting agreements. Yet, to do so in this highly competitive, complex industry brought the consumer the worst of both worlds, high prices, and poor service." Congress found that consumers desire lower fare service, and that increased route and rate competition is likely to induce carriers to offer such lower fares. It recognized the inherent difficulty in applying classical rate and entry regulation to a competitive, economically volatile industry.

It was generally concluded that the traditional system of airline regulation: (a) caused air fares to be considerably higher than they otherwise would be; (b) resulted in a serious misallocations of resources; (c) encouraged carrier inefficiency; (d) denied consumers the range of price/service options they would prefer, and; (e) created a chronic tendency toward excess capacity in the industry.

The Kennedy Subcommittee concluded that:

The airline industry is potentially highly competitive, but the Board's system of regulation discourages the airlines from competing in price and virtually forecloses new firms from entering the industry. The result is high fares and security for existing firms. But the result does not mean high profits. Instead the airlines—prevented from competing in price—simply channeled their competitive energies toward costlier service: more flights, more planes, more frills...

The remedy is for the Board to allow both new and existing firms greater freedom to lower fares and ... to obtain new routes. This freedom should lead the airlines to offer service in fuller planes at substantially lower prices, a form of service that most consumers desire.

This, in fact, was precisely the policy adopted by the Civil Aeronautics Board under the Chairmanship of Dr. Alfred E. Kahn.

V. THE CAB UNDER ALFRED KAHN: THE ORIGINS OF DE FACTO Deregulation

President Gerald Ford became firmly convinced that the air transportation industry should be substantially deregulated. In 1975, he submitted his own version of a deregulation bill to Congress, and appointed John...
Robson as Chairman of the CAB. As CAB Chairman, Robson reversed many of the anticompetitive regulatory features for which the Board had been soundly criticized. The route moratorium and the capacity limitation agreements were terminated. Yet, as a lawyer, he found himself constrained by the provisions of the Federal Aviation Act from advancing too radically in the direction of liberalizing pricing and entry.

His successor, Alfred Kahn, an economist appointed CAB Chairman by President Carter, was not so inhibited. By 1978, the CAB had turned a full 180 degrees. It began to grant operating authority by the bushel basket full, at first to any carrier which preferred a low fare proposal, and subsequently, to virtually any "qualified" applicant under an "experimental" policy labeled "multiple permissive entry." The Board in 1978 amended its rate policies in the DPFL by essentially providing downward pricing flexibility under certain circumstances of up to seventy percent, and upward flexibility of ten percent. These efforts encouraged carriers to offer the lowest fares in history. The lower fares, and the general economic recovery of the mid-1970s stimulated demand which increased capacity, enabling carriers to realize the highest profits in the history of commercial aviation.

A. Competition Embraced as the Overriding Policy Objective

The Board under Dr. Kahn enthusiastically embraced the observations of the Kennedy subcommittee and those academicians sharing its conclusions. The CAB admitted that the traditional regulatory structure had created significant incentives for service and quality competition, but had almost wholly ignored the potential for innovative pricing proposals and rate competition. It acknowledged the public benefits of "increased service frequencies, better connecting possibilities, more extensive single-plane service" and the other quality improvements, engendered under the traditional regulatory regime.

Nevertheless, it was felt that this system had led fares to be set at a level higher than they might have been in a freely competitive market, and had thereby deprived travelers of low fare alternatives. In order to strike

109. The Board noted that "Commentators, after studying the cumulative effects of both the Board’s and the industry’s orientation towards service improvements rather than fare competition, are virtually unanimous in concluding that today’s public would benefit from a system in which there was more fare competition and greater price/service variety. This is our judgement as well." Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-3-121 (1978), at 2.

110. Id. at 1-2.

111. Id. at 2. The Board noted that, "The result of our expansionist route policies, and the years in which carriers have competed aggressively in terms of service, is an existing high general quality of air service throughout the United States, measured by such indices as the general availability of nonstop service and a choice of carriers, the comprehensive network of existing routes, and flight frequencies." Id.

112. Id. at 3. The Board asserted that "Part of the reason for the historic disinclination among
a proper balance between service and price, which the public desired, the Board felt compelled to establish a regulatory environment in which both price and service competition were encouraged. The Board believed that lower fares would attract the discretionary traveler, and thereby enable carriers to make more efficient use of their equipment. Thus, the following entry policy was adopted:

In determining whether it would be to the public’s benefit to authorize competitive service in a market, we must consider the benefits to be derived from fare competition and fare/service variety as well as traditional factors and that in choosing among various applicants for competitive rate authority, carrier proposals to offer significantly lower fares, or a greater variety of price/service combinations deserve far greater weight than they have been accorded in the past.

In order to create an atmosphere conducive to these objectives, the Board also began to certificate a larger number of carriers than it would have under its traditional criteria, stressing the value of liberal entry as a means of sustaining price competition. And, in order to accomplish its objective of increasing rate competition between carriers, the CAB began a novel approach of evaluating the low fare proposals of particular applicants as an entry criterion of significant, even determinative, weight. Where none of the applicants had submitted a low fare proposal, the CAB returned to its traditional carrier selection criteria.

The Board began to emphasize its belief that "competition is the best guaranty that the traveling public will receive service responsive to its needs," and adopted a policy that "competition on the basis of fares as carriers to [engage in rate competition] may be attributable to our past policies of placing in a market only the number of carriers that could be reasonably assumed of profits at the existing fare level." id. at 9.

113. Id. at 3. The Board noted that "Competition on both levels is necessary because each places a check on the other; and only the provision of a range of price/service options from which travelers may choose provides an assurance that what the industry finally provides best meets their needs." Id.

114. The Board recognized that, "These fares not only seem to satisfy the desires of a large segment of the traveling public; they also broaden the demand for air service in general by attracting a segment of the public that wouldn’t or couldn’t travel by air at the regular price." Id.

115. The Board believed that lower fares "enable carriers to use more efficiently resources currently dissipated in greater numbers of low load factor high-cost flights", particularly where such fares are structured according to peak pricing principles. Id.

116. Id. at 4.

117. Id. at 9; CAB Order 78-7-116 (1978), at 1.

118. See Miami-Los Angeles Low-Fare Case, CAB Order 78-1-35 (1978).

119. Midwest-Atlanta Competitive Service Case, CAB Order 78-4-13 (1978), at 7; Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 27. See supra notes 51-65, and accompanying text.

120. Midwest-Atlanta Competitive Service Case, CAB Order 78-4-113 (1978), at 2.
well as service is not only permissible, but compelled.\cite{footnote122} The Board believed that because "the freedom to enter markets provides the best assurance of price and service competition, we are now actively expanding the opportunities for airlines to serve new routes."\cite{footnote123}

The issuance of operating authority to a number of carriers on a permissive (rather than mandatory) basis also was perceived as a means of stimulating increased price competition.\cite{footnote124} In granting permissive authority, the Board left to the business judgment of carrier management the extent to which competitive service would be offered.\cite{footnote125} Mandatory authority was not perceived as an effective means of insuring that a responsive level of service would be provided, for the Board had traditionally been rather lax about enforcing such certificate obligations.\cite{footnote126} Moreover, the Board did not want to place itself in a position where it would be forced to "compel an airline to provide unsubsidized service which turns out to be uneconomic."\cite{footnote127}

Latent permissive authority (i.e., operating authority which had been issued to a carrier but which the carrier is not actively using) was also viewed as posing a beneficial competitive stimulus to incumbents, for "it represents a threat of entry and therefore provides a competitive spur to incumbents; if they fail to meet the public's service needs or if the market grows to the point that it can support another airline, the dormant carrier is free to enter at once without the need for a costly and time-consuming certi-

\begin{footnotes}
\footnote{121} Id. Query: Compelled by what? Certainly not by the legislation which then governed regulation of the industry.
\footnote{122} Id.
\footnote{123} Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4. The purported benefits of permissive vis-à-vis mandatory operating authority are discussed in Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 5; U.S.-Latin America All-Cargo Service Investigation, CAB Order 78-4-44 (1978), and Baltimore-Detroit Nonstop Proceeding, CAB Order 78-5-112 (1978).
\footnote{124} Eastern Air Lines-Piedmont Aviation Route Exchange, CAB Order 77-12-76 (1977), at 1.
\footnote{125} This traditional policy may have been inconsistent with the then existing statutory provision of Section 401(j) of the Federal Aviation Act, 49 U.S.C. § 1371(j) (1977), which required Board approval as a condition precedent to the abandonment of a route.
\footnote{126} Eastern Air Lines-Piedmont Aviation Route Exchange, CAB Order 77-12-76 (1977), at 2. In U.S. Latin-America All-Cargo Service Investigation, CAB Order 78-4-44 (1978), the Board enumerated four reasons favoring the issuance of permissive authority:
\begin{itemize}
\item[(1)] the difficulty of predicting traffic flows and costs, and hence, risk, especially when initial or new service is involved,
\item[(2)] the desirability in most cases of permitting carriers at least the chance to try their proposals in the marketplace,
\item[(3)] the desirability in terms of resource allocation of encouraging carriers to provide only the service justified by demand, and
\item[(4)] the undesirability of forcing carriers in effect to subsidize service which cannot be justified in terms of profits.
\end{itemize}\
\end{footnotes}
fication proceeding. Furthermore, each operating authority had significant value in forcing carriers to adhere to the notion of threshold pricing (i.e., the threat of potential competition will encourage carriers to maintain prices at a level sufficiently low to forstall entry by new competitors; the carrier will, in a market it dominates, set a threshold price—a price above cost but low enough to make the market unattractive to potential competitors).

Elimination of the traditional process of carrier selection was viewed as resulting in a reduction of procedural burdens and delay, enabling carriers to respond to market demand more expeditiously, and diminishing regulatory expenditures for both government and the industry. The Board was convinced that diminishing regulatory barriers to entry would facilitate the prompt issuance of operating authority, resulting in a greater likelihood that carriers would seek to enter new markets and inaugurate new service.

The CAB was convinced that multiple awards, combined with downward pricing flexibility, would insure that the traveling public would enjoy the benefits of carrier innovation and rate competition. Carrier management would have increased freedom to manage their affairs in response to consumer demand. Market forces would enable consumers to enjoy service by those carriers best suited to participate in the traffic. Indeed, the market was viewed as a superior mechanism (vis-à-vis governmental regulation) for selecting both the most efficient and economical participants, and the most desirable combination of price and service options. Consumer choice was also perceived as the best means of ascertaining the appropriate number and identity of carriers which should serve any particular market. Although the CAB traditionally designated the number and identity of participants in a given market, it ordinarily did not reexamine those choices for a number of years subsequent to their designation. In contrast, market forces could work continuously to select and reselect the optimum (most efficient and economical) competitor(s) and the most desirable balance of price and service options. Moreover, the market could weigh and evaluate (on a continuing basis) a wider range of factors than could the Board.

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127. Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4; Atlanta-Charleston Competitive Nonstop Case, CAB Order 78-2-114 (1978), at 3.
128. The level of the threshold price depends upon how easy it is for other firms to enter. In contrast, where a monopoly is guaranteed either by regulatory barriers to entry or by the inherent market characteristics of the entry, the monopoly firm is free to set an excessively high price and reap monopoly profits, without fear of competition.
129. See Oakland Service Case, CAB Order 78-4-121, at 38-40, 42, 52-53, 55.
130. See Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 77-7-116 (1978), at 11.
131. Oakland Service Case, CAB Order 78-4-121 (1978), at 34, 38.
132. In Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), the Board emphasized its belief that
Although determined to inject more competition into air transportation, the CAB proceeded with caution at first, refusing to overload markets with too many carriers\textsuperscript{133} (so as to protect the carriers serving them from the harmful effects of excessive competition), and issuing operating authority to only that number of carriers it believed each market could adequately support.\textsuperscript{134} Subsequently, the Board became less concerned with certificating only that number of carriers which the market could profitably support. In fact, it began (at first implicitly, and later explicitly) to authorize a number potentially larger than that which could reasonably maintain profitable operations, saying that:

It may happen that one (or more) of the carriers will find it unprofitable to continue operating in this market, and will withdraw. Should that occur, we would interpret that as a sign that the type of service provided by it is not desired by the public. The choice is more efficiently made by the marketplace than by the Board.\textsuperscript{135}

Further, it began to move more and more expeditiously to implement its implicit objective of eradicating regulatory barriers to entry, admitting that “we are moving rapidly in adopting regulatory policies of permitting and encouraging a greater degree of price competition and freer entry into markets.”\textsuperscript{136}

\[\text{Competition is the best incentive to provide service reasonably responsive to the present and future needs of the traveling public and the best means by which we can encourage the introduction of lower fares and alternative types of service.}\]

\[\text{There should be no mistaking this Board’s dedication to the principle that competition is an extremely important goal of the existing statutory scheme, because of the public benefits which can flow from an environment in which carriers are free to compete. There may be the benefits of additional, higher quality service, which has been a traditional objective of the Board’s route program, and there are the possible benefits of price competition—lower fares and more varies [sic] price/service options. While price competition has not always been encouraged in the Board’s history, we think that experience has shown that it is not only possible, but highly desirable. We intend to encourage it. To this end, we have permitted a number of low-fare proposals to go into effect, and have emphasized the price dimension as a key factor in route proceedings. A necessary corollary of greater pricing freedom is greater freedom for carriers to enter new markets, since entry and the threat of it provide the best incentive for pricing innovations. We believe that the Board’s renewed emphasis on competition will, over time, strengthen and promote the air transportation system by encouraging efficiency and providing the traveling public with a greater array of services attuned to various present and future needs, with a wider choice of price. Competition, by fostering innovation and thoughtful planning by airlines, will create sound economic conditions in the industry as a whole.}\]

\textsuperscript{133} See Memphis-Twin Cities/Milwaukee Case, CAB Order 78-6-20 (1978), at 2.

\textsuperscript{134} See, e.g., Cincinnati-Washington Subpart M Proceeding, CAB Order 77-10-4 (1977), at 2; Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 3.

\textsuperscript{135} Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 29; see Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4; Phoenix-Des Moines/Milwaukee Route Proceeding, et al., CAB Order 78-1-116 (1978), at 29.

\textsuperscript{136} Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 2 [emphasis supplied].
The Board quickly began to consider the issuance of permissive authority to all "qualified" applicants, convinced that "market forces would more likely result in optimum service at optimum fares, for the market selection process operates continuously and efficiently." The issuance of permissive (as opposed to mandatory) authority, it was presumed, would enable the carriers a wide range of discretion to tailor their services to demand.

Reliance on market forces is the rule, rather than the exception, in other sectors of the economy. The Department of Transportation argued that increased competition would lead to lower prices and improved service without subjecting the industry to destructive competition or excessive concentration, and without subjecting passengers to the dangers of unsafe operations.

Several parties argued that the traditional regulatory structure should be maintained. They contended that the objectives of increased rate and route competition could be adequately accomplished without the indiscriminate issuance of permissive authority to all applicants. Automatic route awards would eliminate the strongest incentive for pricing competition—the existing emphasis on low fare proposals as a carrier selection criterion. Indeed, a preferable approach to the adoption of a policy of multiple permissive entry would be to retain carrier selection, by stressing policies of fostering new entrants, rewarding low fare innovations, and encouraging industry competitive balance by strengthening smaller carriers.

But the traditional system of carrier selection was perceived by the Board as having fostered a less efficient system than a policy of multiple permissive entry, a policy which would permit the market place to make ultimate determinations with respect to price and service. The Board asserted that establishing opportunities for dormant authority would keep the potential of new entry alive and thereby "keep incumbent carriers on their toes."

140. Brief of the Department of Transportation in Improved Authority to Wichita Case, et al. (on file with the CAB in Docket 28848, April 27, 1978).
141. Brief of North Central Airlines, Inc., in Memphis-Twin Cities/Milwaukee Case, et al. (on file with the CAB in Docket 29186, April 21, 1978); Brief of National Air Lines in Improved Authority to Wichita Case, et al. (on file with the CAB in Docket 28848, April 27, 1978).
142. See Brief of Pacific Southwest Airlines, Inc., in Improved Authority to Wichita Case, et al. (on file with the CAB in Docket 28840, April 27, 1978).
143. Id.
144. Oakland Service Case, CAB Order 78-4-121 (1978), at 42.
In promulgating the Civil Aeronautics Act, the predecessor of the Federal Aviation Act, Congress emphasized the promotion and development of an infant industry.\textsuperscript{145} By 1978, the air transportation industry was deemed to be no longer a subsidy-based fledgling "infant," but had matured into a sophisticated demand-based system.\textsuperscript{146} Therefore, it was believed that the laws of the free market should replace protectionism as the primary policy objective.

Certain parties urged the Board not to apply a policy of multiple permissive entry on an indiscriminant, universal basis. They generally emphasized the drastic differences between markets, and contended that rational regulation must be tailored to serve the spectrum of interests which exist within them. The needs of individual communities, it was contended, would continue to vary widely regardless of the regulatory policies ultimately adopted by the Board. A flexible formula adaptable to the facts and circumstances of each case would be a far more rational means of regulation than would adoption of an inflexible general rule which could not be molded to satisfy the peculiar needs of individual markets.\textsuperscript{147}

Other parties argued that ad hoc entry deregulation would create a destructive equilibrium through a process of route-by-route freedom of entry, while the bulk of the regulatory structure remained structurally unchanged. A policy of multiple permissive entry would, it was argued, create an irrational economic structure consisting of small enclaves of "free" entry within a comparatively closed and restricted environment. To apply such a policy would create a gerrymandered national route structure in which certain markets would be open to multiple entrants on a permissive basis, while in others certificated carriers holding mandatory authority would be obligated to provide service.\textsuperscript{148}

Still others urged the Board to proceed with caution during a gradual transitional period from direct, pervasive regulation to greater reliance upon

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\textsuperscript{145} See supra notes 10-14, and accompanying text.

\textsuperscript{146} Oakland Service Case, CAB Order 78-4-121 (1978), at 22-23, 47.

\textsuperscript{147} See Brief of Southern Airways, Inc. in Improved Authority to Wichita Case, et al. (on file with the CAB in Docket 28848, April 27, 1979); Brief of North Central Airlines, Inc., in Minneapolis-Twin Cities/Milwaukee Case, et al., (on file with the CAB in Docket 29186, April 27, 1978); Comment of the Indianapolis Airport Authority in Las Vegas-Dallas/Fort Worth Nonstop Service Investigation et al. (on file with the CAB in Docket 29445, April 27, 1978); and Brief of Hughes Airwest, Inc., in Improved Authority to Wichita Case, et al. (on file with the CAB in Docket 28848, April 27, 1978).

\textsuperscript{148} Brief of Continental Air Lines and Comment of the Houston Pacific in Improved Authority to Wichita Case, et al. (on file with the CAB in Docket 28848, April 27, 1978). The Board dismissed the dangers of loss of service as a result of a permissive authorization, vis-à-vis the purported benefits of a mandatory authorization in Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 5, and Phoenix-Des Moines/Milwaukee Route Proceeding, CAB Order 78-1-116 (1978), at 27.
free market forces.\textsuperscript{149} For example, Allegheny insisted that after maintaining a "hot-house of protectionism" for forty years, the Board should not move too rapidly to throw the industry to the wolves of the marketplace, for such hasty action could be highly disruptive for consumers and the industry without any compensatory public benefits.\textsuperscript{150}

These local service airlines argued that the entry policies of forty years of regulation placed large trunkline carriers in an inherently superior position in terms of route system capabilities and equipment. They urged the Board to phase in an open entry policy gradually in a manner that would offer them compensatory route segments and preferential treatment to offset the clearly onesided economic posture that regulation had established.\textsuperscript{151} In response, the Board stated that

[A] general policy of multiple entry . . . should not be limited to a few routes or areas; . . . it should be extended to the very core of the system and be broad enough (and carried out rapidly enough) to create substantial new competitive opportunities for all segments of the industry, including small trunklines and local service carriers.\textsuperscript{152}

A number of small communities expressed the fear that unlimited entry might disrupt, inhibit, or effectively impede continuous or nonstop service, and the ability to finance airport construction or expansion. They were also concerned that the "permissive" nature of new authority deprived them of any assurance that service, once inaugurated, would be maintained.\textsuperscript{153} Further, there was no assurance that a carrier receiving a permissive authorization would even begin the new service, despite the Board's finding that the public convenience and necessity required new service.

The Board was implicitly unconcerned with the fate of those communities whose market demand was insufficient to attract or retain new service.

\textsuperscript{149} See Comment of the Indianapolis Airport Authority in Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, \textit{et al.} (on file with the CAB in Docket 29445, April 27, 1978); and Comment of the Federal Trade Commission in Improved Authority to Wichita Case, \textit{et al.} (on file with the CAB in Docket 21162, April 27, 1978).

\textsuperscript{150} See Brief of Allegheny Airlines in Ohio/Indiana Points Nonstop Service Investigation, \textit{et al.} (on file with the CAB in Docket 21162, April 27, 1978).

\textsuperscript{151} Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 4.

\textsuperscript{152} Id. at 5.

\textsuperscript{153} See \textit{id. at 4}. Thus, certain local parties believed that should multiple carrier competition prove so uneconomic that all carriers holding permissive authorizations withdraw, no carrier would be the first to reenter for fear of suffering the same fate. Where a number of carriers held dormant authority to serve the market there would be some reluctance of any of them to expand the requisite start-up costs and enter the market. The enhanced risk of inaugurating such service would lead carriers to emphasize other markets in their service offerings and neglect newly granted authority. \textit{See Oakland Service Case, CAB Order 78-9-96 (1978), at 37-41, 47-50. Comments of the Louisville and Kansas Parties in Improved Authority to Wichita Case, \textit{et al.} (on file with the CAB in Docket 28848, April 27, 1978); Brief of the State of Minnesota in Memphis-Twin Cities/Milwaukee Case (on file with the CAB in Docket 29816, April 27, 1978).
It felt that the market would best distribute carriers and their aircraft according to the laws of supply and demand, and that markets unable to generate sufficient traffic to support trunkline carriers or nonstop service might nevertheless be able to attract local carriers or multiple stop service. If not, it was in the best interests of nationwide industry economies and efficiencies that they not be served.\(^{154}\)

As to the question of airport financing, certain carriers and civic parties argued that distortions in carrier behavior and system-wide market perversities arising as a result of the artificial hybrid of heightened competition in some markets and a close regulatory system in others would impede future efforts to finance and construct the airport facilities necessary to accommodate the type of traffic growth the Board was seeking to encourage.\(^{155}\) The Board was unconvinced, saying only that the issuance of permissive authority would not relieve carriers of their contractual obligations at those airports where space is leased.\(^{156}\) Similarly, although it was pointed out to the Board that an inherent barrier to entry for new carriers might exist in the absence of landing slots at major airports (e.g., Washington National and Chicago O’Hare), the Board wholly refused to take into account the scarcity of such slots in its certification policies.\(^{157}\)

In the *Oakland Service Case*,\(^{158}\) and the *Chicago-Midway Low-Fare Route Proceeding*,\(^{159}\) the Board abandoned its traditional approach in entry proceedings in favor of a revolutionary policy of granting permissive, subsidy-eligible operating authority to any qualified carrier that applied for it.\(^{160}\) In *Oakland*, the Board granted permissive nonstop, subsidy ineligible authority to virtually every carrier which applied for it, between Oakland on the one hand, and sixteen other cities (i.e., Albuquerque, Atlanta, Boston, Chicago, Dallas/Fort Worth, Denver, Detroit, Houston, Kansas City, Los Angeles, Minneapolis/St. Paul, Philadelphia, Phoenix, Portland, Salt Lake City, and Seattle) on the other.\(^{161}\) And, in *Chicago-Midway*, the Board granted virtually indiscriminatory authority between Chicago, on the one hand, and Cleveland, Detroit, Kansas City, Minneapolis/St. Paul, Pittsburgh, and St. Louis, on the other, restricted to service at Midway Air-

\(^{154}\) See *Oakland Service Case*, CAB Order 78-9-96 (1978), at 34-35, and *infra* notes 171-174, and accompanying text.

\(^{155}\) See the position of Delta Air Lines quoted in *Oakland Service Case*, CAB Order 78-9-96 (1978), at 34, and Comment of the Houston Parties in Improved Authority to Wichita Case, et al. (on file with the CAB in Docket 28848, April 27, 1978) [hereinafter cited as Houston Comment].

\(^{156}\) *Oakland Service Case*, CAB Order 78-9-96 (1978), at 35.


\(^{158}\) CAB Order 78-4-121 (1978).

\(^{159}\) CAB Order 78-7-40 (1978).

\(^{160}\) *Oakland Service Case*, CAB Order 78-4-121 (1978), at 19.

\(^{161}\) *Id.*
C. Profitability of Proposed or Existing Operations Deemed Irrelevant

The Board abandoned any effort to scrutinize whether a proposal would be profitable within a reasonable period after its inauguration, leaving the investment decision solely to the discretion of business management. The agency began to permit carriers to experiment freely with their transportation proposals in the marketplace, giving little consideration to the economic injury incumbent carriers (which may, in fact, have been providing an exemplary level of service at a reasonable rate) might suffer. Potential profitability of proposed operations became an increasingly less important factor as the Board issued permissive authority, leaving "the responsibility for providing good service to the public in a way that is profitable to the carrier . . . with the latter's management." By awarding permissive, rather than mandatory, authority to the new entrant, the carrier would be free to withdraw from the market should its experimental service prove unprofitable.

The Board also explicitly became less and less concerned that existing carriers might suffer economic injury as a result of the implementation of its novel policies. Where existing carriers began to suffer financial injury as a result of new competition, the Board was confident that they would take steps to reduce their losses or withdraw from the market. Although new entry might well divert traffic and revenue from the incumbent and reduce its profits, so long as increased competition did not impair the carrier's ability to fulfill its certificated obligations, the Board was content to permit market forces to run their course. There was some doubt, however, that

162. In fact, initial Board efforts to generate air service at Midway airport proved unsuccessful; the CAB subsequently attempted to rectify its inability to generate service at the airport in the Chicago-Midway Expanded Service Proceeding, CAB Order 78-7-41 (1978), CAB Order 79-1-7 (1979).
even under circumstances where it could be convincingly demonstrated that such diversion of traffic and revenue might so jeopardize the economic viability of the incumbent’s operation as to cause it to withdraw from the market (in which the CAB was inclined to inject a new entrant), or where its financial condition might be so impaired that it would be forced to terminate all of its operations, whether even under these egregious series of events the Board might exhibit some restraint in the application of its new entry approach.\textsuperscript{170} 

In fact, under the former alternative, the CAB began to view incumbent withdrawal from a market as "prima facie evidence that a more efficient carrier had replaced a less efficient one, to the long-run benefit of the traveling public."\textsuperscript{171} And, as to the latter, the Board did not interpret the Federal Aviation Act to require that it "try to guarantee the continued existence of any particular firm in the industry."\textsuperscript{172} Ultimately, the Board announced that it no longer felt particularly inclined to protect the financial health of the carriers subject to its jurisdiction by moderating its entry policies, saying ""In healthy competition, producers who are inefficient or make bad decisions may fail, but efficient and well-managed producers can operate profitably. . . . The occasional failure can serve a useful purpose, not only by eliminating the inefficient or imprudent operator, but also by flashing a yellow light to others.""\textsuperscript{173} Diversion of traffic from existing carriers was perceived as having a useful purpose in "signaling consumer preferences to the industry and thereby serving as both an inducement and a prod to innovative and efficient operations."\textsuperscript{174} The Board no longer felt any responsibility to protect the revenues or market shares of any particular carrier subject to its jurisdiction no matter how

\textsuperscript{170} Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 8, n.8. In the Oakland Service Case, CAB Order 78-4-121 (1978), the Board stated that "'diversion will not be of decisional significance unless it threatens an affected carrier's ability to perform its certificate obligations, or will necessarily result in termination of essential services which will not be replaced by an applicant or by other carriers.'" Id. at 15. Virtually identical language was employed in Application of Piedmont Aviation, Inc., et al., CAB Order 78-4-69 (1978), at 12; Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 25.

\textsuperscript{171} Greenville/Spartanburg-Washington/New York Case, CAB Order 77-10-1 (1977), at 9. See Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 30; and Atlanta-Charleston Competitive Nonstop Case, CAB Order 78-2-114 (1978). Similarly, in the Oakland Service Case, CAB Order 78-4-121 (1978), the Board repeated its view that "'we would be inclined to regard the replacement of an incumbent carrier in a market by a more efficient and enterprising newcomer as representing a net gain to the public interest.'" Id. at 15-16.

\textsuperscript{172} Application of Piedmont Aviation, Inc., et al., CAB Order 78-8-97 (1978), at 9, n.18. The Board admitted that diversion of revenue cannot be avoided in the competitive system which it was seeking to impose, but argued that such diversion was not "'unhealthy so long as all carriers are afforded expansion opportunities.'" Id. at 10.

\textsuperscript{173} Oakland Service Case, Order 78-4-121 (1978), at 25.

\textsuperscript{174} Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 25.
efficient or economical its historic performance.\footnote{175}

D. Potential for Destructive Competition Dismissed

Several carriers\footnote{176} contended that the absence of entry controls would lead to a situation where "more carriers will enter markets than the market can sustain, capacity will be offered for which there is no demand at a price which covers the cost of offering it, and all competitors will suffer losses in these markets."\footnote{177} This, in turn, would depress industry profits, discourage investment and the introduction of more technologically sophisticated aircraft, and lead to a deterioration in service. The long-term result would be a general oligopolization in the market.\footnote{178}

"Destructive" or "cutthroat" competition\footnote{179} was defined by the Board as a competitive situation where (a) a powerful competitor seeks to drive his rivals out of a market through the utilization of predatory tactics, with the hope of securing monopoly profits after their exit, or (b) all competitors operate at a price which consistently fails to meet the costs of even the most efficient.\footnote{180} As to the former, the Board was convinced that multiple awards would probably not result in the type of destructive competition which the agency was compelled, by its governing statute, to prevent.\footnote{181} The Board felt that it had ample alternative means to deal with the problem, such as its authority over rates and its powers to deal with unfair competition.\footnote{182}

The latter type of destructive competition was perceived to exist only under circumstances where "capital is long-lived and immobile, and through miscalculation competitors irretrievably commit too much capital to a particular market. . . ." a situation thought not to exist in the airline industry.\footnote{183} The airline industry was believed to have relatively insignificant

\footnotesize{\textit{Note:} 175. See id. in the Atlanta-Charleston Competitive Nonstop Case, CAB Order 78-2-114 (1978), at 3, the Board stated:

We are convinced that carriers can, by and large, adjust their schedules to permit profitable operations. . . . We see no public purpose in protecting an incumbent's existing share of a market unless a failure to do so will impair its ability to perform its certificate responsibilities. . . . Carrier management is unlikely to plunge recklessly into unprofitable operations. . . . The basic responsibility for providing service to the public in a way that is profitable for both an incumbent carrier and the new entrants should rest with their respective managements.

176. The carriers which made this argument were, predominantly, smaller carriers.
177. Oakland Service Case, CAB Order 78-4-121 (1978), at 25.
178. id.
179. See supra notes 24-31, and accompanying text.
180. Oakland Service Case, CAB Order 78-4-121 (1978), at 25.
181. id. at 24-32, 41.
182. Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4.
183. Oakland Service Case, CAB Order 78-4-121 (1978), at 26. The Board believed that: in air transportation . . . the principal form of capital investment, flight equipment, is only moderately long-lived and is exceptionally mobile. Apart from regulatory constraints,
economies of scale, low barriers to entry, reasonably elastic demand, and highly mobile resources.

Neither did the Board believe that the contemporary economic environment was such that the destructive competitive wars that Congress sought to preclude by promulgating the Act\textsuperscript{184} would occur as a result of unlimited entry. The industry was perceived to be prosperous and stable, with fleet size in approximate equilibrium with demand,\textsuperscript{186} thereby depriving any predatory minded carrier from an opportunity to dump excess aircraft into markets already adequately served by existing carriers.\textsuperscript{187} Additionally, it was believed that the capital markets had been disciplined by the traffic recession of the early 1970s and by increased fuel costs, and therefore would probably not support irrational or uneconomic service.\textsuperscript{188}

The Board alleged that its implementation of a policy of multiple entry would not result in a number of carriers serving any market significantly greater than that which would serve it had the Board employed traditional entry criteria and engaged in carrier selection.\textsuperscript{189} This prediction was essential to support two of its other fundamental assertions: (1) that a multiple entry would not result in destructive or wasteful competition; and (2) multiple entry would not result in profligate fuel consumption and concomitantly increased noise and air pollution.

E. **Potential For Oligopolistic Market Dismissed**

Several carriers were concerned that unlimited entry would lead to a long-term oligopolization of the airline industry. The Big Five (United, American, TWA, Eastern, and Delta) already enjoyed seventy-five percent of domestic trunkline operating revenue.\textsuperscript{190} Thus, the structural problem of the

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\textsuperscript{184} See supra notes 24-31, and accompanying text.

\textsuperscript{185} Oakland Service Case, CAB Order 78-4-121 (1978), at 32.

\textsuperscript{186} Id.; CAB Order 78-9-96 (1978), at 48-49; Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 4-5.

\textsuperscript{187} Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 4.

\textsuperscript{188} Oakland Service Case, CAB Order 78-4-121 (1978), at 32.

\textsuperscript{189} Id. The Board stated that, "The number of carriers that can profitably operate in any particular market at any time is limited by such underlying factors as the local traffic demand, its price elasticity, the extent to which it can be stimulated by better service or new price/service options, the availability of connecting traffic and beyond-market traffic flows to support service, available aircraft and their unit costs, and so forth." Id.

\textsuperscript{190} Brief of Pacific Southwest Airlines in Improved Authority to Wichita Case, \textit{et al.} (on file with the CAB in Docket 28848, April 27, 1978).
industry was not that it lacked potential competition, but that it was dominated by concentration, with oligopolistic tendencies already apparent. Such oligopoly power would probably increase as a result of multiple permissive authorizations, because large carriers possess the resources which can be selectively employed to preempt those relatively few markets open for entry and capable of sustaining multiple carrier competition. Concurrently, the potential value of those few routes open for entry would be seriously diluted for newcomers as a result of excessive authorizations.

These parties argued that, given the capital requirements of air transportation and the interrelationship of traffic flows which place a premium on the ability of a carrier to marshall traffic support from as many sources as possible, any type of open market structure affords the dominant carriers inherent advantages which are exceptionally difficult to overcome. The most effective means for an incumbent, particularly a large and financially stable incumbent, to deter new entry would be to demonstrate that it would respond sharply and swiftly to the inauguration of new service. Because potential entry could be deterred by potential response, the elimination of competition through the employment of predatory tactics would be economically rational regardless of the number of entrants certificated by the Board. Although the traditional regulatory scheme permitted competition at reasonable costs, avoided destructive route and rate wars, and created meaningful opportunities for smaller carriers, the inevitable result of an implementation of a policy of multiple permissive entry, the parties argued, would be an increase in systems costs, short-term rate wars materially injurious to both the carriers and the public, and a practical limitation on entry opportunities to large, powerful carriers.

The Board did not believe that unlimited entry would lead to excessive concentration in the industry. It felt that the industry had relatively few economies of scale, beyond those of a relatively low initial threshold. Equipment was viewed as being exceptionally mobile, and could be shifted from market to market, or sold. "Therefore, even if more carriers initially move into a market than it can support, there is little irretrievable commitment of

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192. Supra note 190.
194. See Comment of the Houston Parties in Improved Authority to Wichita Case et al. (on file with the CAB in Docket 28848, April 27, 1978).
195. Oakland Service Case; Order 78-4-121 (1978) at 37, citing "R. Caves, AIR TRANSPORT AND ITS REGULATORS (1962); Crane, The Economics of Air Transportation, 22 HARV. BUS. REV. 495 (1945); Koontz, Domestic Air Line Self-Sufficiency: A Problem of Route Structure, 42 AM. ECON. REV. 103 (1952); Report of the CAB SPECIAL STAFF STUDY ON REGULATORY REFORM 102-07 (1975). . . ." Id. n.46.
resources to prevent one or more . . . from withdrawing or reducing service and turning their attention to other markets where their capital assets can be better used and the public’s demands better served.\footnote{196} The Board asserted that there are numerous markets in which smaller carriers compete successfully with larger ones, and that \"we fully expect that the industry will continue to have many healthy members, nor do we fear for a disappearance of profitable expansion opportunities for small and medium-sized carriers.\"\footnote{197}

VI. THE ENTRY PROVISIONS OF THE AIRLINE DeregULATION ACT

One would have imagined that the revolutionary shift in regulatory policy from a traditional closed entry structure to one in which the flood gates are thrown open wide might placate those who felt that the regulatory structure should be reformed in a manner which encouraged competition as an overriding policy objective. Nevertheless, the fear existed that if the Board’s regulatory posture could turn 180 degrees from one of excessive protectionism, to one, which by encouraging downward pricing flexibility and increased entry, sought to inject competition and free markets forces as the sole determinant of the price and quality alternatives which would be made available to the general public, then it could also turn 180 degrees again, and return to protectionism and restraint of competition. Moreover, most of the liberalizing efforts had not yet undergone judicial scrutiny, and the possibility existed that the courts might conclude that many of the efforts were inconsistent with the Federal Aviation Act and/or its legislative history. Hence, Congress concluded that legislation was required in order that the deregulatory efforts of the preceding two years might not be reversed.

In introducing the Airline Deregulation Act to the full Senate, Commerce Committee Chairman Howard Cannon, one of the bill’s chief architects, described the legislation as follows:

Mr. President, I bring to the Senate today one of the most significant pieces of legislation in the past several decades. Important not so much by itself, but because it represents one of the only opportunities this body has had in recent years to vote for less government regulation and more free enterprise for a major U.S. industry.\footnote{198}

The new legislation substitutes increased reliance upon competition for classical price, profit and entry regulation.\footnote{199} It reflects the modern eco-

\footnote{196} Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 3. See Oakland Service Case, CAB Order 78-4-121 (1978), at 41.
\footnote{197} Oakland Service Case, CAB Order 78-4-121 (1978), at 37.
\footnote{198} Congressional Record § 5849 (April 19, 1978).
\footnote{199} The Conference Committee emphasized that the purpose of the Act is \". . . to encourage, develop, and attain an air transportation system which relies on competitive market forces
nomic view that increased competition in the airline industry will force prices down and eliminate excess capacity; if firms were free to set prices and enter markets without regulatory constraints, they would experiment in offering different combinations of price and service. Thus, the underlying theory of this legislation is that liberalized entry and pricing will force carriers to adhere to the competitive pressures of the marketplace to provide the range of price and service options desired by the public.

A. The New Policy Declaration

The statutory criteria governing all modes of transportation has traditionally been couched in inherently vague, if not vacuous, terminology. Congress recognized that it hadn’t either the expertise or the time to fulfill properly its obligations under Article 1, Section 8, of the Constitution, to regulate commerce between and among the several states. Therefore, it created regulatory bodies to develop the requisite expertise, and gave them rather wide discretion to regulate the industry as they best perceived the fulfillment of the Congressional intent. Furthermore, Congress recognized that the needs of the public would not remain static, but that the optimum regulatory structure would evolve to meet the dynamic growth and maturity of our nation’s commerce.

Hence, such statutory criteria as “public convenience and necessity,” standing alone, have virtually no inherent meaning. Nevertheless, Congress set forth its Declaration of Policy in section 102 of the Act to indicate more specifically its interest as to precisely how transportation should be regulated, to give the agency some indication of the Congressional purpose and the ultimate objectives for which the agency should strive, and to thereby breathe life into what might otherwise be virtually vacuous statutory phraseology.

The Airline Deregulation Act amended the Federal Aviation Act to establish a new declaration of policy for interstate and overseas transportation.200 The declaration includes ten subsections which specify the criteria to be deemed by the Board to be consistent with the public interest and the public convenience and necessity.

The first two of these subsections stress the importance of safety, emphasizing that it shall be a policy objective of the highest priority,201 and that the Board shall prevent any deterioration in established safety procedures.202 There can be no doubt that Congress intended that there be no

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202. 49 U.S.C. § 1302(a)(2) (1979). Indeed, the Act further provides that “The Congress in-
diminution in the Board’s safety evaluation.

Two of these provisions also deal with the role to be accorded competition as a policy objective. Prior to the 1978 amendments, this section’s only reference to competition was that the CAB should promote “Competition to the extent necessary to assure sound development of the air transportation system.” Today, competitive market forces (including actual and potential competition) are to be employed “to provide the needed air transportation system, . . . to encourage efficient and well managed carriers to earn adequate profits and to attract capital . . . .” and “to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.” The Senate has emphasized that

[The new declaration of policy . . . is designed to give the Board a clear and firm mandate to regulate in a manner which places primary reliance on competition. The Board is instructed to make every effort to utilize competition and market forces to achieve regulation goals, such as low-cost, efficient air transportation. And, the policy statement designates a competitive industry as a goal in itself.]

Low fares are to be encouraged, as is the adequacy, economy and efficiency of service, but “without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices.” Similarly, the Board must guard against “unfair, deceptive, predatory, or anticompetitive practices . . . .” and avoid “unreasonable industry concentration, excessive market domination . . . .” and similar occurrences which might enable “carriers unreasonably to increase prices, reduce services, or exclude competition . . . .”

In addition to promoting rate competition, as a policy objective, the Board is also directed to encourage new entry and route expansion by existing air carriers. The Board is also obligated to strengthen smaller carriers so as to assure a more competitive and effective industry. Curiously, the Conference Report indicates that the CAB is not to interpret this language “to mean that the Board must engage in carrier selection in its route proceedings to preclude large carriers from new routes.” Instead, the Board is to “continue providing opportunities for small carriers in as many
ways as possible and not restrict them solely because they have historically had operations limited in area or extent."210

Finally, three other subsections promote the prompt procedural disposition of regulatory proceedings,211 encourage use of satellite airports in urban areas,212 and attempt to insure that reasonably adequate service is provided to small communities, with Federal subsidies where appropriate.213

The report of the Conference Committee emphasizes that:

This legislation establishes specific programs for increased competition.
The legislation also includes a new policy statement which gives the CAB broad discretion to establish other programs to encourage competition, such as the multiple permissive authority program recently established by the Board.
Such programs are needed in the gradual and phased transition to a deregulated system.214

Actually, the CAB had never adopted a general policy of multiple permissive entry, although it had proposed to experiment with the idea in the Oakland and Midway proceedings.215 Hence, the Conference was wholly erroneous if it believed that the Board had actually adopted such a policy.

B. PC & N and the Burden of Proof

Traditionally, entry in air transportation by domestic carriers has been governed by two statutory criteria:
1. That the proposed service is required by the public convenience and necessity [PC & N]; and
2. That the applicant is fit, willing, and able.216

The burden of proof in application proceedings was, under section 556(d) of the Administrative Procedure Act,217 on the applicant.

210. Id
215. Such a liberal approach had also been adopted in one international routes decision, the Philadelphia-Bermuda Nonstop Proceeding, Order 78-12-192 (1978), which had been submitted to the President for approval under Section 801 of the Federal Aviation Act, 49 U.S.C. § 1461 (1979), but had not yet been approved by him. For a review of this provision and the role the Chief Executive plays in international aviation decisions, see Dempsey, The International Rate and Route Revolution in North Atlantic Passenger Transportation, 17 Colum. J. Transnat’l L. 393, 420-423, 434-438 (1978).
The 1978 Act left these provisions unchanged for carriers seeking to serve international routes. However, it significantly amended the entry criteria for domestic and overseas transportation (between points located within the territories and possessions of the U.S., albeit over international waters) by requiring it to issue a certificate where the proposed service is consistent with the PC & N. The fitness standard remains unchanged. However, the burden of proof has been shifted to an opponent (typically an incumbent carrier), who must now demonstrate that the proposed operations are not consistent with the PC & N. In order to deny an application for operating authority, the CAB must conclude "based upon a preponderance of the evidence that such transportation is not consistent with the public convenience and necessity." The burden of proof on the fitness issue remains unchanged.

C. Automatic Market Entry

During the first month of 1979, 1980, and 1981, each certified passenger carrier may apply for nonstop route authority between any one pair of points (which has not been protected) by filing a notice. It need not demonstrate consistency with the public convenience and necessity. It must, however, satisfy the fitness test.

Each carrier may also protect from automatic entry one pair of points between which it already holds nonstop authority. The Act also includes an escape clause enabling the Board to modify the program should it cause substantial harm to the national transportation industry, or a substantial reduction in service to small and medium sized communities.

D. Dormant Authority

A certificate authorizing transportation between two points is considered dormant where the certificated carrier has not provided at least five roundtrips a week for thirteen weeks during the preceding twenty-six week period. The Board must award the dormant route within sixty days to the first carrier submitting an application which demonstrates that it has

225. Id.
satisfied FAA regulations and is able to comply with the Board’s regulations, unless the Board concludes that the issuance of such a certificate is not consistent with the public convenience and necessity. However, there is a rebuttable presumption that the authority sought is consistent with the PC & N. Where no more than a single carrier serves the route, the Board must suspend the dormant incumbent’s authority for a twenty-six week period, unless it concludes that such suspension is unnecessary to encourage continued service by the newly authorized carrier.

E. Experimental Certificates

Where the CAB concludes that a test period is required to evaluate proposed new operations, it may issue a certificate for a temporary period. Should such a certificate be issued on the basis that the carrier will provide innovative or low-cost transportation, and the carrier fails to provide such service, the Board may modify, suspend or revoke the authority.

F. Other Entry Provisions

Carriers may carry domestic fill-up traffic on flights in foreign transportation. This privilege is limited to one round trip daily.

Carriers operating aircraft seating of fewer than fifty-six passengers, or with cargo service of 18,000 pounds or less, are exempted from the certificate requirements of section 401. The Board’s regulations had previously limited the commuter carrier exemption to aircraft seating thirty or fewer passengers.

On December 31, 1981, the CAB will terminate its licensing function insofar as it determines consistency with the public convenience and necessity. It will, however, continue to make fitness determinations until it goes out of existence on January 1, 1985.

234. Id.
238. Other provisions which are likely to enhance entry opportunities are those providing for elimination of restrictions on certificates, 49 U.S.C. § 1371(e)(7) (1979), and those requiring the establishment of expeditious and simplified procedures for the disposition for operating authority applications. 49 U.S.C. §§ 1371(c)(1)(B), 1371(d)(7)(A)(ii), 1371(e)(7)(B), 1371(p) (1979).
VII. ENTRY CRITERIA SUBSEQUENT TO THE AIRLINE Deregulation Act

A. Indiscriminate Multiple Permissive Entry Explicitly Rejected

As the Board was stripped of much of its regulatory authority, it also lost its charismatic Chairman, Alfred Kahn, who was designated by President Carter to assault inflation (in a manner perhaps analogous to his war on regulation). He was replaced by a man having virtually no experience in transport regulation or the aviation industry, Marvin Cohen.

The most visible immediate effect of the promulgation of the Airline Deregulation Act was the line of carrier representatives which formed on Connecticut Avenue outside the offices of CAB. They stood there exposed to the elements for the several days between the passage of the Act by Congress and the media signing ceremonies of President Carter. With their sleeping bags, folding chairs, and portable radios, scores of airline employees waited patiently in the cold of October for Mr. Carter to lay his pen to paper. Like the pioneers of the Oklahoma land rush, the air carriers were poised to storm the CAB to take advantage of the dormant authority provisions of the new Act.239 Within a month, the CAB had awarded operating authority to serve 238 dormant routes.240 Virtually overnight, carriers such as Braniff had expanded their route systems by as much as one-third.

Within two months of the promulgation of the Airline Deregulation Act, the CAB in Improved Authority to Wichita Case, et al.,241 directly confronted the issue of whether it should adopt a broad policy of issuing multiple permissive authority to all “qualified” applicants in markets able to support some service. Its tentative conclusion, rendered prior to the enactment of the deregulation legislation in Las-Vegas-Dallas/Ft. Worth Nonstop Service Investigation,242 had been that adoption of such a policy “will in most, and possibly in all instances best meet the transportation goals of the Federal Aviation Act for the present and foreseeable future.”243 Although it

239. See supra notes 228-232, and accompanying text. The Board had interpreted the new provisions to require the issuance of dormant authority on a “first come-first served” basis. Thus, conceivably, the first individual in line (which, incidentally, represented the nation’s largest air carrier, United Air Lines), could have applied for and received all of the segments which were dormant. There was no sanction for nonperformance, except perhaps loss of the route to another applicant under the dormant authority provisions once the statutory 26 week period had expired.

Actually, none of this would have been necessary had the Board not taken such a strict and absurd interpretation of the statutory language. It would have been far more equitable, and probably far closer to the intent of Congress, had the CAB viewed all applications for dormant authority filed on the day the legislation was signed by the President as contemporaneously filed. It could then award the segments through either a lottery approach, or a system analogous to the NFL draft of college football players.

243. Id. at 2.
had felt confident that the economic and policy issues had been adequately addressed, the legal and environmental issues posed serious obstacles to the adoption of de facto deregulation of entry. Thus, the Board had been reluctant to go forward with such a radical departure from the traditional regulatory structure, and the legislative history and the Act itself, until it had prepared a comprehensive legal analysis which had at least some possibility of surviving judicial scrutiny. The Board’s legal staff was actively engaged in the preparation of a legally defensible justification for such a policy when Congress passed the deregulation bill.

Of course, the Airline Deregulation Act laid to rest much of the legal opposition to the adoption of a more liberal entry approach. Under the new Act, the Board would continue to evaluate the PC & N of proposed operating authority applications until 1982. Even during the interim, the burden of proof would be reversed; before an application could be denied, opponents of new entry would be forced to prove, by a preponderance of the evidence, that proposed operating authority is not consistent with the PC & N. This, coupled with the other liberalized entry provisions (e.g., dormant authority, automatic market entry), made it clear that Congress sanctioned the CAB’s general policy of moderately liberalized entry. The Board interpreted the legislative mandate as confirming and strengthening its “earlier conclusion that a general policy of multiple permissive licensing is the approach likely to produce the greatest transportation benefits.”

244. See supra notes 109-197, and accompanying text.
245. The author was, in fact, among the attorneys in the Board’s Office of General Counsel who were delegated the responsibility to prepare the legal justification for application of a general policy of multiple permissive entry.
246. See supra note 237, and accompanying text.
247. See supra note 221, and accompanying text.
248. See supra note 224-236, and accompanying text.
249. Improved Authority to Wichita Case, et al., CAB Order 78-12-106 (1978), at 6. The Board further argued that the new Act effectively rendered moot the issue of whether it could issue “permissive” operating authority. The CAB felt that, under the new Act, Section 401(j), 49 U.S.C. § 1371(j) (1979), had been amended to delete the PC & N requirement of Board approval as a condition precedent to route abandonment. The new provision merely required prior notice for termination, suspension, or reduction of service, and no more, or so the Board argued. Hence, the Board seemed to believe that virtually all operating authority was how to be permissive in nature. See Improved Authority to Wichita Case, et al., CAB Order 78-12-106 (1978), at 11-12; Northeast Points-Puerto Rico/Virgin Islands Service Investigation, CAB Order 78-12-105 (1978), at 5; Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-78 (1979), at 6. The Board asserted that Congress intended that “unless important air transportation goals are threatened, we are to leave decisions of when to enter or leave a market to individual carrier’s management fettered by competitive, not regulatory constraints.” Dallas/Fort Worth-Tuscon Investi-
gation, CAB Order 79-5-35 (1979), at 3.

Actually, this conclusion was not compelled by the language of the Airline Deregulation Act. First, Section 401(j)(1)(B), 49 U.S.C. § 1371(j)(1)(B) (1979), provides that “The Board may . . . authorize such temporary suspension of service as may be in the public interest.” This language would seem to suggest some requirement of Board approval as a condition precedent to a “tempo-
further found that these provisions created a rebuttable presumption in favor of issuing operating authority to any "qualified" carrier that requested it.\textsuperscript{250}

In the Improved Authority to Wichita Case, et al.,\textsuperscript{251} the CAB directly confronted the issue of whether it was prepared to abandon its statutory obligation to weigh and balance the PC & N in individual operating authority application proceedings. Its conclusion appears, in retrospect, to have been rather moderate:

Despite the new Act, however, we are not prepared to conclude that a general policy of multiple discretionary entry, if adopted, should be applied universally. There might still be circumstances in which the public interest may be better served by giving only one or less than all qualified applicants immediate authority. (The Act obviously contemplates this possibility by retaining for three years a public convenience and necessity standard for route awards).

For example, it is at least arguable that in some small markets, where no service is feasible without an initial developmental effort or where demand is just on the verge of being able to support service, one airline should be given temporary protection from competition, in the first case to provide it with the incentive to make the developmental investment and in the second to make sure that service is not delayed because potential entrants are scared off by temporary suspension of service." The new provisions made no mention of what, if anything, was to be done with a proposed termination or reduction in service. In an effort to permit the Congress to adjourn promptly, the Conference Committee prepared the legislation with such haste that the prevailing view at the CAB was that this was an unfortunate, yet egregious, example of sloppy drafting.

Moreover, the new Act established new procedures under section 419, 49 U.S.C. § 1389 (1979), to guarantee essential air transportation to small communities. Included among these provisions is one requiring an incumbent carrier (notwithstanding its compliance with the section 401(j) procedures) to continue to provide "essential air transportation" (see section 419(f), 49 U.S.C. § 1389(f)) to an eligible point (see sections 419(a)(1), and 419(b)(1), 49 U.S.C. §§ 1389(a)(1), 1389(b)(1)) for consecutive periods of thirty days, under circumstances where the CAB is unable to find a replacement carrier, even utilizing the inducement of subsidy. 49 U.S.C. § 1389(a)(2)(B)(6) (1979). Under such circumstances, the Board is powerless to permit exit; it must require the incumbent to continue its operations. In this sense, operating authority is clearly mandatory, the Board's arguments to the contrary notwithstanding. See contra Northeast Points-Puerto Rico/British Virgin Islands Service Investigation, CAB Order 79-9-178 (1979), at 2-8.

250. Improved Authority to Wichita Case, et al., CAB Order 78-12-106 (1978), at 10. "This presumption will not be overcome unless the record contains an affirmative showing that the public interest requires a different result." Iowa/Illinois-Atlanta Route Proceeding, CAB Order 78-12-35 (1978), at 2. The CAB has also concluded "that the grant of multiple permissive awards is the approach which generally produces the greatest transportation benefits." Louisville Service Case, CAB Order 79-1-101 (1979), at 2; Improved Authority to Wichita Case, CAB Order 79-3-43 (1979), at 2. Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 2-3; West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), at 6; Spokane-Montana Points Service Investigation CAB Order 79-4-80 (1979), at 2; Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-78 (1979), at 3-4; Dallas/Fort Worth-Tucson Investigation, CAB Order 79-5-35 (1979), at 2.

251. CAB Order 78-12-106 (1978).
multiple authorizations and the prospect of immediate competition.\textsuperscript{252}

B. **Indiscriminate Multiple Permissive Entry Implicitly Adopted**

The policy purportedly adopted in Wichita has not been, however, the approach implemented by the Board. In every case arising since the promulgation of the Airline Deregulation Act, the CAB has rejected the arguments of carriers and civic parties that fewer than all "qualified" applicants should be certificated. The policy implemented has been one of indiscriminant multiple permissive entry, the Board's assurances in Wichita\textsuperscript{253} to the contrary notwithstanding.\textsuperscript{254}

A number of smaller carriers argued that Congress intended that the Board utilize the interim three year period (between promulgation of the Airline Deregulation Act of 1978, and the elimination of PC & N as an entry criterion on January 1, 1982) as an era of gradual transition during which the Board would protect and strengthen the smaller carriers.\textsuperscript{255} To this, the Board responded that the objective of strengthening was not intended by Congress to be a "justification for noncompetitive awards."\textsuperscript{256}

Small carriers alleged that the Board was "moving too fast toward deregulation, that multiple awards . . . will undermine the goals of strengthening small carriers and avoiding unreasonable industry concentration, excessive market domination, and monopoly power. . . ."\textsuperscript{257} The Board was unconvinced, arguing that "the superior traffic flows available to some large carriers can be largely offset by the advantages unique to the small carriers, such as their ability to develop regional service plans, and, in any event, such advantages as the large carriers may enjoy . . . may well be

\textsuperscript{252} *Id.* at 8-9. The Board reaffirmed that it had "not yet adopted a universal policy of making multiple awards" in Northeast Points-Puerto Rico/Virgin Islands Service Investigation, CAB Order 78-12-105 (1978), at 7. It indicated that applicants would still be required to "submit some sort of service proposal," but that such "operating proposals will be deemed sufficient if they show that they are reasonably calculated to meet some present or future demand in the market." *Id.* See Louisville Service Case, CAB Order 79-1-101 (1979), at 8; West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), at 16-17; California-Nevada Low Fare Route Proceeding, CAB Order 79-4-85 (1979), at 6; Transcontinental Low-Fare Route Proceeding, CAB Order 79-3-133 (1979), at 5-6. Even that *de minimus* requirement has since been diluted significantly. See Florida Service Case, CAB Order 79-9-177 (1979), at 4.

\textsuperscript{253} CAB Order 78-12-106 (1978).

\textsuperscript{254} See *supra* note 252, and accompanying text.

\textsuperscript{255} See St. Louis-Louisville and San Francisco Bay Area Nonstop Case, CAB Order 79-4-79 (1979), at 4. For example, Allegheny argued that "A wholesale of granting all applications in all cases would violate the intent of Congress and would vitiate the automatic entry program of the Act, which was intended to be the heart of the transitional phase." *Id.* [citation omitted]. *Id.*

\textsuperscript{256} *Id.* at 8. See also Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-79 (1979), where the Board held, "The transition period must be used to expand the operations of smaller carriers, not to restrict the operations of larger ones, as Allegheny would have it." *Id.* at 5.

\textsuperscript{257} Norfolk-Atlanta Subpart M Proceeding, CAB Order 79-10-202 (1979), at 1.
ereoded as the result of free entry in the overall air transportation system."\(^{258}\)

Certain smaller carriers argued that certificating more carriers than the market could support would likely encourage large carriers to drive them out, or under. Thus, in the *Southeast Alaska Service Investigation*,\(^{259}\) Alaska Airlines [ASA] argued that multiple authorizations would endanger its ability to satisfy its certificate obligations, thereby causing "a reduction or loss of service to the smaller southeast Alaskan communities and bush points served by ASA."\(^{260}\) This argument, too, was flatly rejected by the CAB, saying that its approach to strengthening small carriers was one of enabling them to take advantage of new route competition, rather than shielding them from competition.\(^{261}\) The Board continued, "We recognize that the greater reliance we now place on competition . . . means that airlines will be increasingly less willing and able to cross-subsidize loss operations with monopoly profits on other routes. . . . We no longer consider this a valid reason for restricting competition."\(^{262}\)

Even under circumstances where the Board recognized that small, remote communities would lose air service by a small carrier as a result of the application of its unrestrained liberal entry policies, the CAB still refused to modify them unless it was convincingly established that indiscriminate entry will result in the loss of service that cannot be replaced.\(^{263}\) No party could meet such a standard, and none did.

To the argument of several civic parties in the *Louisville Service Case*\(^{264}\) that the indiscriminate issuance of operating authority "would involve an unacceptably high risk of less service" the Board argued that as a result of the new Act it could no longer make authority "mandatory,"\(^{265}\) that its discretion to limit competition had been restricted, and that it had already concluded that "multiple awards will generally produce the greatest transportation benefits."\(^{266}\) Nashville, the Board stated, had failed to prove that the loss of service in its market was directly related to the Board’s issuance of multiple awards, "i.e., no party has shown that the same result

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\(^{258}\) *Id.* at 3. The Board believed that "Multiple awards . . . is the proper remedy for curing high traffic shares." *Id.*

\(^{259}\) CAB Order 78-4-168 (1978).

\(^{260}\) *Id.* at 7.

\(^{261}\) *Id.*

\(^{262}\) *Id.* at 8.

\(^{263}\) See Spokane-Montana Points Service Investigation, CAB Order 79-4-80 (1979), at 3. Here, again, the Board has established evidentiary obstacles on opponents of new entry which are difficult, if not impossible, to overcome.


\(^{265}\) See supra notes 123-127, 151, 249, and accompanying text.

\(^{266}\) Louisville Service Case, Order 79-1-101 (1979), at 4.
would not have occurred had we made a single award." 267 Similarly, the Board rejected the arguments of Louisville, which alleged that American and Delta should not receive nonstop authority "because the incumbent trunks have the financial resources to drive Allegheny out of the market and the incentive to do so. . . ." 268 The CAB felt that it had appropriate sanctions at its disposal to deal with predatory behavior, and was confident of "the ability of small carriers to compete quite successfully with larger carriers." 269

To the argument that certain markets are too small to support all applicants, the Board in the Iowa/Illinois-Atlanta Route Proceeding 270 responded:

The number of carriers a market can support is no longer a decisive consideration in determining how many carriers should be authorized. It only becomes relevant if it is established that certificating more carriers than the market can support will have adverse consequences to the public that outweigh the benefits of multiple awards. 271

Actually, the Board has weighed the scales of decisionmaking so heavily in favor of competition that no party has been able to convince the Board that the deleterious consequences of multiple permissive entry outweigh the "benefits" to be derived therefrom.

For example, small carriers have argued (to no avail) that they should be protected in certain markets against entry by large trunk carriers. Despite the admission in Iowa/Illinois-Atlanta that the market could support only a single carrier, and despite the arguments of the Cedar Rapids, Iowa, parties and Ozark Airlines that only Ozark should be certificated, the CAB proceeded to award operating authority to Northwest as well, saying that "if Ozark were to be driven out of the market by the entry of Northwest . . . we would be inclined to interpret such a result as prima facie evidence that the carrier offering the more attractive combination of benefits had won the competitive battle. . . ." 272

267. Id.
268. Id. at 5.
269. Id. at 6.
270. CAB Order 78-12-35 (1978).
272. Iowa/Illinois-Atlanta Route Proceeding, CAB Order 78-12-35 (1978), at 5. See Northeast Points-Puerto Rico-Virgin Islands Service Investigation, CAB Order 78-12-105 (1978), at 4; Midwest-Atlanta Nonstop Service Investigation, CAB Order 79-3-80 (1979). "[W]e consider the diversionary effect of competition on even a certificated incumbent to be of little decisional significance as long as the public continues to receive needed service." Chicago-Albany/Syracuse-Boston Competitive Service Investigation, CAB Order 79-1-408 (1979), at 4.
Similarly, in the Northwest Points-Puerto Rico/Virgin Islands Service Investigation,\textsuperscript{273} where Eastern argued that the indiscriminant issuance of multiple permissive authority would cause it to suffer diversion of revenue which "could amount to tens of millions of dollars more than the $34 million estimated by applicants," the Board responded:

[D]iversion from an incumbent is not a significant consideration. . . . Eastern might be driven out of one or more of the markets. . . . Were this to occur. . . . we would assume that the carrier offering the most attractive combination of benefits had won the competitive battle, to the ultimate advantage of the traveling public.\textsuperscript{274}

The CAB has also refused to modify its indiscriminate entry policies to adhere to the Congressional directive under Section 102(a)(6) of the Act which requires the Board to encourage the development of satellite airports.\textsuperscript{275} Thus, in the Oakland Service Case,\textsuperscript{276} despite the pleas of Oakland that the Board "not foreclose the possibility of route protection if actual service is not provided in the Oakland markets,"\textsuperscript{277} the CAB flatly refused, insisting that "route protection is a disfavored method of satellite airport development."\textsuperscript{278} The Board would do little more to encourage service at satellite airports than inaugurating additional route proceedings to issue additional segments of operating authority.\textsuperscript{279}

In the Austin/San Antonio-Atlanta Service Investigation\textsuperscript{280} civic parties argued that multiple licensing would be undesirable because of "the critical shortage of airport terminal space," particularly at Austin, and that multiple awards "could greatly inconvenience the public by congesting present airport facilities."\textsuperscript{281} These arguments, too, were rejected by the CAB in

\textsuperscript{273} Order 78-12-105 (1978).
\textsuperscript{274} Id. at 4. The overwhelming burden placed upon carriers by the Board was as follows: "[D]iversion from existing carriers will not be given decisive weight in rejecting applications for new authority except upon an extraordinary showing of financial jeopardy on the part of one or more existing air carriers, with the consequent loss of essential air service which cannot be immediately replaced. . . ." Northern Tier Snow-Cause Proceeding, CAB Order 79-3-60 (1979), at 13. See Spokane-Montana Points Service Investigation, CAB Order 79-4-80 (1979), at 3.
\textsuperscript{276} CAB Order 79-10-89 (1979).
\textsuperscript{277} Id. at 2. Apparently, the Oakland parties were fearful that they might end up with as much service as that generated by the Board at Chicago's Midway Airport through the multiple permissive entry policy employed in the Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978)—none! See supra note 162, and accompanying text.
\textsuperscript{278} CAB Order 79-10-89 (1979), at 3.
\textsuperscript{279} See Baltimore/Washington-St. Louis Route Proceeding, CAB Order 79-11-2 (1979), at 5-6.
\textsuperscript{280} CAB Order 79-3-9.
\textsuperscript{281} Id. at 10. Similarly, the Texas Aeronautics Commission argued that:

In making route awards, the Board must recognize the gravity and severity of airport terminal capacity problems. If a number of new carriers are certificated into a market over a short period of time, the demand for gate, ticketing, and baggage facilities will greatly increase. The airport authority will be required to accommodate the increased demand by
much the same manner as it had previously rejected a similar argument that the application of its liberal entry policy should be modified to reflect the scarcity of landing slots at certain airports. Here again, the Board refused to temper its "liberal certification policy for the sole purpose of trying to avoid possible practical problems that new entrants could pose to airport authorities." Further, the Board emphasized that "we are now inclined to deny entry to any qualified applicant, simply in order to avoid airport congestion."

The decision of the CAB in Wichita had been unanimous. But by the time Austin/San Antonio-Atlanta had been rendered, CAB Member Richard J. O'Melia had begun to realize that the majority had no intention of deviating from a strict application of a multiple permissive entry policy, and had no intention of moderating this policy along the lines suggested in Wichita. Member O'Melia dissented vigorously to the majority's decision in Austin/San Antonio-Atlanta, saying, "I dissent because the Board . . . is unnecessarily and . . . woodenly imposing a multiple permissive award policy designed to bring about deregulation today rather than after the transition period prescribed by Congress, and because it appears more concerned with the doctrinal concept of competition than with the real-world demands for air service." Member O'Melia proceeded to cite the policy adopted in Wichita, that there "might still be some circumstances in which the public interest may be better served by giving only one or less than all qualified applicants immediate authority." He proceeded in a manner which suggested that he felt deceived by the majority's assurances in Wichita:

It is because this recognition of an obvious truth was included in Wichita, because the policy of multiple permissive awards was not declared to be an inflexible imperative, that I supported and approved the Board's conclusions in that case. And it certainly is not an unpopular proposition; the civic parties uniformly in this case and in [other] cases . . . have begged the Board not to inflict on their respective communities the alleged benefits of multiple permissive awards. Indeed, it should give the Board pause that its multiple permissive policy . . . is being greeted around the country with dismay and outright

new construction. If the route will only support one additional carrier and the others are forced to withdraw, the airport authority will be left with excess, wasted capacity and no protection for its revenue bonds.

Id. at 10-11.


284. Austin/San Antonio-Atlanta Service Investigation, CAB Order 79-3-9 (1979), at 12.

285. Id., dissent at 1.

286. See supra note 252, and accompanying text.
hostility. If the benefits of multiple permissive authority are that evident, why is there such widespread lack of enthusiasm for it?

The fact is that communities and civic parties recognize that multiple permissive awards provide no assurance of effective and predictable service. . . . [T]he Board is no longer interested in selecting the carrier or carriers that might best serve a market . . . in determining when service will commence . . . [or] with whether service is to be viable, or reliable, or continuous. We are going to turn over those concerns to the marketplace. It is my view that the wholesale abdication of responsibilities during the licensing transition period is not what Congress had in mind, and is not consistent with the Deregulation Act.287

By the time the Board had decided the Boise-Denver Nonstop Proceeding,288 the example preferred in Wichita seems to have become the rule. Unless the market was small, and "no service is feasible without an initial developmental effort or where demand is just on the verge of being able to support service. . . .",289 no carrier would be given protection from competition.290 Nothing (but perhaps this) would deter the CAB from certificating all qualified applicants in every market able to support some service.

Without admitting it, the CAB had in effect adopted a generally applicable indiscriminate policy of multiple permissive entry, for it had systematically rejected every argument made by carriers and civic parties that it should moderate its approach. The burdens it placed upon opponents of new entry were so onerous that, realistically, they could not be overcome. The Board was determined to deregulate, no matter what arguments were made about the deleterious consequences of the blind application of an

287. Austin/San Antonio-Atlanta Service Investigation, CAB Order 79-3-9 (1979), dissent at 2. As to the failure of the Board to give credence to the concerns of the Texas civic parties in the instant decision, Member O'Melia was equally outraged, saying that

The Board should be more concerned with the immediate practical effects of its actions in particular markets during the transition period than with adhering unbendingly to its preconceived economic theories. Deregulation has been scheduled to arrive in the future, and that day will inexorably arrive. It isn't necessary to impose deregulation today in order to prepare for deregulation tomorrow. And today there are service requirements in many markets and operational impediments in many airports that call for the exercise of our still effective regulatory powers and regulatory responsibilities.

288. Id. at 3.
289. Supra note 252, and accompanying text.
290. See Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 3. Although the Board claimed that these two examples did not constitute an exhaustive list of situations in which a more restrictive entry approach might be employed, it regularly concluded that no party had satisfied these, much less had tendered convincing evidence that other, analogous such circumstances existed. See St. Louis-Louisville and San Francisco Bay Area Nonstop Case, CAB Order 79-4-79 (1979), at 6-7. For example, in the West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), the Board found that certain Alaska markets were not "developmental," and that therefore their "variable pricing and service needs . . . will best be served in both the short and long run by a determination to provide the maximum in competitive opportunity to all of the carrier applicants. . . ." Id. at 9.
economic philosophy cast in concrete. In the CAB's own words, it was
determined to extend competition to the very core of the national transpor-
tation system.\textsuperscript{291}

C. Show Cause Proceedings: The Flood Gates Burst

In the months immediately preceding promulgation of the Airline De-
regulation Act, the CAB began to grant new entry opportunities to air car-
rriers through the procedural vehicle of a "Show Cause Order"—a means of
disposing of issues without an oral evidentiary hearing. Thus, it granted
numerous applications for certificate amendment,\textsuperscript{292} route realignment,\textsuperscript{293}
and even the addition of new segments (where the amendment appeared to
be in the nature of restriction removal),\textsuperscript{294} through the show cause vehicle.
Although the Board had begun to issue operating authority more liberally
and hastily than ever before, it nevertheless tended to restrict such proce-
dures to only those instances in which it could be claimed that there existed
no material facts or complex economic issues.\textsuperscript{295} In part, this caution
stemmed from the procedural requirement of a "public" hearing set forth in
Section 401(c) of the Federal Aviation Act,\textsuperscript{296} which the CAB had tradition-
ally interpreted to constitute a requirement for a full "trial-type" evidentiary
hearing held before an Administrative Law Judge.

With the promulgation of the Airline Deregulation Act, the obligation of
a "public" hearing in routes proceedings was eliminated,\textsuperscript{297} and new ex-
peditious procedures were substituted therefor.\textsuperscript{298} Within the first month
under the new provisions, the Board had issued a plethora of "boiler-plate"
orders setting applications for show cause disposition, explicitly adopting a
policy of multiple permissive entry in these proceedings, thereby creating

\textsuperscript{291} Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 5, n.21.
\textsuperscript{292} See, e.g., Application of Hughes Airwest, CAB Order 78-10-120 (1978); Application of
Wien Air Alaska, Inc., CAB Order 78-10-96 (1978); Application of Allegheny Airlines, Inc., CAB
Order 78-10-95 (1978); Application of Piedmont Aviation, Inc., CAB Order 78-10-93 (1978); Ap-
lication of American Airlines, Inc., CAB Order 78-9-89 (1978); Application of Braniff Airways,
Inc., CAB Order 78-9-57 (1978); Application of National Airlines, Inc., \textit{et al.}, CAB Order 78-8-192
(1978).
\textsuperscript{293} See, e.g., In the Matter of United Air Lines, Inc., CAB Order 78-9-59 (1978); In the Matter
Order 78-8-178 (1978).
\textsuperscript{294} See, e.g., Application of Piedmont Aviation, Inc., \textit{et al.}, CAB Order 78-9-148 (1978), at
5, n.10.
\textsuperscript{295} See Colonial Airlines, Inc., CAB Order 78-6-184 (1978); Application of Hughes Airway,
\textsuperscript{296} Former 49 U.S.C. § 1371(c) (1977).
\textsuperscript{297} 49 U.S.C. § 1371(c) (1977). The Board could still set a routes application for public
hearing, \textit{id.} § 1371(c)(1)(A), but it was no longer compelled.
\textsuperscript{298} See \textit{supra} note 211, and accompanying text.
significant new segments of entry opportunities for air carrier applicants.\textsuperscript{299} Soon, the CAB was issuing instituting orders by the "bushel basketful," as quickly as its secretaries could type and its copying machines could duplicate. The Board was not ashamed to issue orders of incredible redundancy, each employing virtually identical language. Again and again, the Board repeated essentially identical paragraphs:

Under the Airline Deregulation Act of 1978, we must approve an application for certificate authority unless we find, by a preponderance of the evidence, that approval would not be consistent with the public convenience and necessity. The new Act creates a presumption that the grant of all applications is consistent with the public convenience and necessity. It places on any opponents of these applications the burden of proving them inconsistent with the public convenience and necessity. To give such opponents a reasonable opportunity to meet their burden of proof, it is our view that applicants must indicate what type of service they would provide if they served the markets at issue. This does not mean that an applicant must show that it will provide service if it receives authority.

[N]otwithstanding [our] conclusions in support of multiple authority we in no way desire to deter objections that might be asserted under the 1978 Act by air carriers, civic interests or other interested persons. . . . For example, while diversion from existing carriers will not be given decisive weight in rejecting applications for new authority except upon an extraordinary showing of financial jeopardy on the part of one or more existing air carriers, with the consequent loss of air service which cannot be immediately replaced other provisions suggest that the Congress desires us to take into account other factors. These include, but are not limited to, satellite airport questions, the degree of concentration within the industry and safety.\textsuperscript{300}


\textsuperscript{300} Application of Piedmont Aviation, Inc., et al., CAB Order 79-1-104 (1979), at 5-6. Similarly, the Board stated, again and again:

Upon review of all the facts and pleadings in this case, we have tentatively determined that there is no reason why we should not grant multiple awards. Our tentative conclusions comport with the letter and spirit of the Airline Deregulation Act of 1978, particularly the declaration of policy set forth in section 102 which instructs us to rely, to the maximum extent possible, on competitive forces, including potential competition. See our general conclusions about the benefits of multiple permissive authority in Improved Authority to Wichita Case, et al. . . . Accordingly, we conclude that it is desirable to award the additional authority sought by the applicants, whether or not services are in fact operated. The existence of additional operating rights in markets now being served by incumbent carriers or authorized to be served will best effect the statute's policy objective
The parties and the markets might vary from case to case, as might the name of the proceeding, but the language, the intent, even the ultimate

of placing maximum reliance on the decisions of the marketplace. This will occur because newly authorized carriers may actually enter the market in order to exploit unmet demand, both in terms of price and service, or because incumbents will be encouraged by the realistic threat of entry to meet that demand. Because demand is dynamic in character and therefore constantly changing, the most effective means to assure that competitive forces will operate quickly and efficiently is to award multiple operating authority to carriers that are fit, willing, and able to provide service.


conclusion was essentially the same—authority would be granted to any and all who applied for it. 302

The haste and carelessness with which the Board was issuing massive quantities of certificated operating authority through the show-cause vehicle ultimately led Member O'Melia to register a vigorous dissent in the Milwaukee Show-Cause Proceeding. 303 The majority in Milwaukee had tentatively decided to grant all applications filed by "qualified" carriers for any conceivable domestic route with which Milwaukee could be linked. Unlike its predecessor orders in which specific markets at issue were designated, Milwaukee was virtually geographically infinite. Member O'Melia was outraged, saying:

Ever since the Board catapulted off the regulatory springboard in April 1978 with the unprecedented and precedental Oakland Service Case, I have found it necessary to dissent . . . each time that the Board has . . . unnecessarily and improperly ignored and departed from statutory guidelines and from established due process concepts. Although I cannot pretend that these lonely outcries have influenced the course of the Board's trajectory nor assured anyone outside the Board of our willingness to temper innovativeness with prudence, yet I feel compelled to dissent again in this case. . . . Like Oakland, like Midway, like Wichita, and like a not insignificant number of other cases that dot the path of the Board's orbit, Milwaukee being issued today is another amazing leap off the springboard.

[T]he "unusual" step we are taking will undoubtedly be of turning-point significance in our program of deregulation. . . .


This is the first time that the Board has used the show cause procedure to mount a handout of route awards of undefined geographic magnitude. . . . The door is being thrown open to any application for any market so long as it involves Milwaukee authority. . . .

There are two consequences that particularly concern me. The first is that rather than the phased and orderly transition to deregulation that Congress mandated, the clear meaning of the Board’s action here is instant deregulation. . . .

The second is that we are unnecessarily, improperly and in a very shameful manner destroying one of the strengths of an administrative agency like the Board—its quasi-judicial nature and function. The shameful part is that the destruction is being carried out not with clean direct surgical strokes, but by draining out the reason for being of our judicial process. With no facts to be analyzed, with no law to be interpreted and followed, what is the point of having a judicial process? . . .

Is it worth it to assemble parties, counsel, recorder, and judge in these route cases merely to bear witness to an act of ritualistic genuflection?

Why don’t we put an end to this pretense of being a quasi-judicial agency? We are making a mockery of the formal adversary proceeding as the traditional way of determining factual and legal issues in licensing cases. Why don’t we discontinue all other pending proceedings on route applications—there must be a couple dozen of them actively being processed—and tell the applicants that we will mail them their route awards after we show-cause them? We don’t need a law judge to recite the catechism of multiple permissive authority. . . .

This gutting of our judicial process, this mockery of evidentiary hearings, combined with the telescoping of the transition period, is not, in my opinion, what the Airline Deregulation Act contemplates. . . . And I feel ever so strongly that this is not in the best interest of the consumers, the carriers, and the communities of our country.304

In the Newark Show-Cause Proceedings305 the Board took another leap toward deregulation by launching a routes decision to serve an infinite

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304. Id., dissent at 1-6 [citations omitted]. See also Northern Tier Show-Cause Proceeding, CAB Order 79-3-60 (1979), dissent. Member O’Melia reaffirmed this position in the Boise-Portland/Seattle/Spokane Show-Cause Proceeding, CAB Order 79-8-160 (1979), dissent at 1:

I indicated [in Milwaukee] my concerns that the Board was not following the Congressional mandate of an orderly transition to deregulation of carrier licensing in the air transport industry; it was making a mockery of the administrative process by the meaningless, noncogent licensing process used to mass produce certificates, but not service; and, most important of all, I was concerned that we were more interested in “theoretical goals” and “doctrinal conclusions” than we were in air service. . . .

The majority have not proved too accurate in their prior predictions of new service. Only now, well over a year after our Midway I decision, and with considerable hoppla, because it is considered such a rare and special occasion, a new carrier will hopefully begin Midway Airport service this fall. None of the literally thousands of one-way flights per week proposed by applicants in that case are being provided. . . . Many other cities have had the same experience with multiple permissive awards. I’m concerned about what our policy of multiple permissive awards is doing to the ability of incumbent carriers to continue service to small and medium-sized communities.

305. CAB Order 79-6-79 (1979).
number of markets (i.e., between Newark and any point in the United States) even though not a single carrier had filed an application requesting Newark authority. The decision concluded that Newark airport was not adequately utilized, being overshadowed by the far more popular New York airports—Kennedy and LaGuardia. The Board had confronted a similar situation in the Oakland and Chicago-Midway proceedings, and reached a similar conclusion in Newark, by asserting that "new entry or the realistic threat of entry which is created by multiple awards offers the greatest hope of revitalizing Newark airport."

But Member O'Melia was not convinced that the Oakland and Chicago-Midway approach would improve service at Newark airport. Indeed, he had argued in Chicago-Midway that rather than indiscriminantly licensing all applicants, the CAB should instead certificate only two small carrier applicants, affording them a protective corridor against competition by the larger carriers for a limited period of time. Member O'Melia feared that indiscriminate licensing would lead to a situation in which numerous carriers held operating authority, but few or none provided service. But the Board in Chicago-Midway rejected Member O'Melia's proposal that small carriers be given a period within which to develop the Midway airport market and grow to a level sufficient to withstand entry by the established trunk line giants of the industry, for the Board was "convinced [that indiscriminate entry] will assure the reactivation of Midway airport. . . ." Yet, more than a year later, NOT A SINGLE CARRIER HAD INAUGURATED NEW SERVICE AT MIDWAY AIRPORT! The Board's efforts to revitalize Midway and Oakland by employing the multiple permissive entry vehicle had proven to be a dismal failure—this, despite the fact that the Board had inaugurated subsequent proceedings to issue even more operating authority to additional points.

It is no wonder then, that Member O'Melia again found himself at odds with the majority, over what he perceived to be the mindless deregulatory frenzy of a majority which had failed to learn any lessons from the failures of

306. Id. at 1.
307. Id. at 7. See supra notes 158-162, and accompanying text.
308. CAB Order 79-6-79 (1979), at 10.
309. CAB Order 78-7-40 (1978), dissent.
310. Id.
311. Id. at 3.
313. As of October, 1979, only two carriers were providing new service at Oakland, one of which i.e., Braniff had announced its intention to terminate such operations. Oakland Service Case, CAB Order 79-10-89 (1979), dissent at 1.
Oakland and Chicago-Midway. He lamented the decision to proceed on an equally fatal course in Newark:

The sausage-machine has ground exceedingly fine so that now we do not even need carrier applications to provide service or supporting requests for a show-cause order before we undertook this Newark-everywhere proceeding. I could overlook our contortion of the statutory procedures and of the Deregulation Act call for gradualism that are committed in the name of multiple permissive entry if I thought the public was being served well by it all. But [in light of the Chicago-Midway experience, it is not].\(^\text{315}\)

Member O'Melia consistently argued, with great fervor, that the majority's approach violated the congressional intent that there be an orderly transition to entry deregulation, that it was "making a mockery of the administrative process by the meaningless, noncognitive licensing process used to mass produce certificates, but not service; and, most important of all, [that it was] more interested in 'theoretical goals' and 'doctrinal conclusions' than . . . in air service."\(^\text{316}\) Although he recognized that many larger markets were receiving additional service as a result of the Board's liberalized entry policies, many small and medium sized communities were not. Moreover, many carriers (e.g., Northwest) were complaining of their inability to continue providing service at smaller communities under circumstances where the Board's indiscriminate entry policies diluted their strength in larger, lucrative markets.\(^\text{317}\) These, and every other arguments made by carriers and civic parties were consistently rejected by a majority of the Board under the compelling conviction that indiscriminate entry was a panacea for any problems which might be created by the application of its multiple permissive entry policy. A vivid example arose in a proceeding involving Dallas/Ft. Worth-Greensboro/Raleigh authority.\(^\text{318}\)

The boilerplate language instituting all show-cause proceedings guarantees the opportunity to object to the application of the "tentatively" adopted policy of multiple permissive entry on the grounds, inter alia, that the application of such a policy in the markets at issue would not best serve the various objectives of the Airline Deregulation Act.\(^\text{319}\) In Dallas/Ft. Worth-Greensboro, Piedmont vigorously argued (with substantial supporting evidence) that (a) Congress, in promulgating the Airline Deregulation Act, contemplated a "gradual and phased transition" during which the CAB would strengthen smaller carriers by offering them unique route opportunities, and (b) the Board's general application of indiscriminate entry

\(^{315}\) CAB Order 79-6-79 (1979), dissent at 1 [footnote omitted].

\(^{316}\) Boise-Portland/Seattle/Spokane Show-Cause Proceeding, CAB Order 79-8-160 (1979), dissent at 1.

\(^{317}\) Id.


\(^{319}\) See supra note 302, and accompanying text.
contravenes the Congressional directive to strengthen small carriers, avoid unreasonable concentration, and encourage efficient and well-managed carriers to earn adequate profits and attract capital.\textsuperscript{320} Piedmont admitted that all carriers' including local service carriers, were receiving a plethora of new routes. Nevertheless, Piedmont argued that particularly in a period of equipment shortage and fuel restraint, it will take time to convert these new routes to system operations with cost and revenue characteristics competitive with the trunk carriers. It will take time for the locals to acquire more efficient equipment and to develop organizations with fuel capacity of operating efficiently routes with longer hauls and hope and greater density. It will take time for them to develop beyond segment networks producing a competitive traffic flow for new route awards. It will take time to establish market identity in major markets.\textsuperscript{321}

Emphasizing that the Board had effectively adopted a policy of multiple permissive entry under the show-cause procedural mechanism in virtually all routes proceedings arising since the Deregulation Act had been promulgated, Piedmont contended that the CAB was adjudicating route applications without reference to the surrounding factual circumstances, including such criteria as the traffic levels and special characteristics peculiar to individual markets, the degree of industry concentration, and the size and strength of particular carriers (both applicants and incumbents).\textsuperscript{322} The markets at issue were, in Piedmont's estimation, thin, and would not support additional service by any of the four new applicants. Moreover, if Braniff were to enter, Piedmont might be forced to abandon the market, for Braniff held an extensive route system beyond Dallas/Ft. Worth, from which it could funnel traffic on to the segment at issue.\textsuperscript{323} In effect, the carrier was contending that the Board's indiscriminate entry policy was leading to undue concentration in the domestic airline industry, was failing to strengthen small carriers and was impairing their ability to attract capital—all in contravention of the policy objectives set forth in section 102 of the Airline Deregulation Act.\textsuperscript{324} Piedmont asked for no more than an oral evidentiary proceeding with which to develop these lines of argument.\textsuperscript{325}

This, the CAB denied; it proceeded to grant operating authority to each of the four new applicants. The Board maintained that it was irrelevant that Piedmont might be driven out of the market,\textsuperscript{326} and generally responded to the carrier's other arguments with the language it has repeatedly employed (summarized throughout this article) in its other routes decisions. In none,

\begin{itemize}
\item \textsuperscript{320} CAB Order 79-10-186 (1979), at 1-2.
\item \textsuperscript{321} \textit{Id.} at 2.
\item \textsuperscript{322} \textit{Id.} at 3-4.
\item \textsuperscript{323} \textit{Id.} at 6.
\item \textsuperscript{324} See supra notes 203-208, and accompanying text.
\item \textsuperscript{325} CAB Order 79-10-186 (1979), at 2-3.
\item \textsuperscript{326} \textit{Id.} at 11.
\end{itemize}
has the present Board "found the particular facts asserted to be relevant and material or sufficient to warrant a conclusion different from that proposed in the original show-cause order. . . ."327

Member O'Melia was outraged, and justifiably so. As has been indicated, the boilerplate paragraphs instituting show-cause proceedings guarantees opponents of new entry the opportunity to be heard, assures that such objections will be carefully evaluated, and promises that where appropriate, such matters will be set for hearing. But opposition has been a futile undertaking, for in every such proceeding, the Board has refused to set the matter for hearing, and has awarded operating authority to all applicants, no matter what the objections of carriers and/or civic parties.328 Member O'Melia argued that "the Board should for once make good on the boilerplate offer to seriously consider filed objections."329 He believed that Piedmont had presented a well-documented case which deserved more than "the appalling arrogance of this put-down of its concerns."330 He characterized the majority's dismissal of Piedmont's objections as giving

to any pretense that the Board will pay any attention to substantive arguments demonstrating that material issues of fact are unquestionably present and unquestionably in controversy.

Piedmont is made the culprit here for daring to comment on the Board's show-cause order, for taking issue with the insensitive importation of the multiple permissive award doctrine, for arguing once again that the Deregulation Act cares for a "gradual and phased transition" to free entry, for pointing out that the Act compels the Board to concern itself with strengthening small carriers and assuring them to earn adequate profits and to attract capital, for pointing out that the Act places certain obligations on the Board to set forth "findings of fact" on which to base its orders and to comply with the Administrative Procedure Act, and finally, in a desperate, last-gasp, reaching-back-into-history gesture, for asking for an oral evidentiary hearing.331

Member O'Melia also objected to the majority's "blatant disregard of the congressional mandate to administer a transition period and tailor our acts to the practical needs of the industry and the public."332 Further, he

327. _Id._ at 4.
328. _Id._, dissent at 1.
329. _Id._
330. _Id._
331. _Id._, dissent at 3.
332. _Id._, dissent at 4. He elaborated as follows:

Congress meant the period before we lose our domestic licensing authority in 1982 to be a period of transition. Yet the Board is abdicating completely its obligation to observe the law, to act judiciously in handling public property interests, to act evaluatively in dealing with matters affecting the nation's transportation system, to act responsively in considering the pleas and objections of interested parties, and to act with human-like selectiveness—not with robot-like automation in looking at markets, services and carriers.

Congress has embarked on an experiment of limiting regulation of a major common carrier industry. It ill behooves the Board to fix blinders on its head and to refuse to recognize individual market problems that demand some flexibility and improvisation from us.
saw "only a single-minded push to complete deregulation among my colleagues." If the majority was content to proceed in this mindless deregulatory frenzy, the consequences be damned, he had a novel suggestion for the future regulatory mechanism:

If the recent voting pattern of the Board is to continue, we might just as well reprogram the sausage-machine. . . . Then all we have to do is turn the machine to "automatic" and it will turn out multiple permissive awards as efficiently and quickly as we can. That being the case, I have one final suggestion. Assuming, arguendo, that the majority is correct, that there is no transition period, then I see no need for any present or future Board members. Our resignations would be a savings to the American taxpayers.

By granting operating authority to any and every carrier that applied for it, despite the deleterious consequences to carriers and communities that might result, and by refusing even the opportunity to be heard orally, the Board had become, in Member O'Melia's estimation, little more than a "sausage machine," grinding out grants of operating authority as fast and thoughtlessly as the wheel would crank.

Our ego is a small price to pay if the public interest is enhanced by a deviation from our monolithic norm. I am convinced that the Board is insensitive to what is happening in the market and I want the Board at some point—why not at this point?—to hold up its headlong rush to unrestricted entry for just one unprejudiced analysis of multiple awards.

The Board's signal to the world from this order is a clear denial of the congressional intention.

Id.

333. Id., dissent at 5. The Board, he pointed out, was no longer concerned about the public's air travel convenience or its necessity for reliable service to all points on the national air transportation system. Rather we are only interested in a grand experiment in transportation economics—complete deregulation of air transport. If the experiment fails because carriers can no longer afford to serve marginal markets that fact will merely be a footnote in some professor's textbook.

Id., dissent at 4.

334. Id., dissent at 5. If the voting patterns in favor of indiscriminate entry were to continue, Member O'Melia felt that "we have become no more than overpaid rubberstamps." Id.

In the final order in the Oakland Service Case, CAB Order 79-10-89 (1979), Member O'Melia summarized the existing route policy of the CAB by saying, "we only require carriers to express an interest in a route and it will be granted." Id., dissent at 1. He expressed chagrin that the majority had consistently refused to modify its policies so as to assure that communities actually receive the air service they need. As recently as October of 1979, he lamented:

Experience shows that even with the sausage machine on automatic and with multiple certificate awards issuing each day, service results from the new policy have been mixed. Even though most all carriers have asked for all the routes up for award in the multiple entry cases, service has been instituted in only 180 markets out of the 2246 awards made since December 1978.

Id.
D. Fitness Rendered Impotent as an Entry Criterion: Is Safety the Sacrificial Lamb of Indiscriminate Entry?

(1) The Traditional Fitness Criteria

Pursuant to Section 401(d) of the Act, the CAB is directed to issue certificated operating authority where it concludes, inter alia, that the applicant is "fit, willing and able" properly to perform the proposed air transportation services and to conform to the provisions of the Act and the Board's rules, regulations, and requirements promulgated thereunder. Although the Act does not define the terms "fit, willing and able," the Board traditionally evaluated three primary factors in its analysis of the applicant's operations: (1) the existence of a proper organizational basis for the conduct of air transportation, (2) the presence of a plan for the conduct of the service made by personnel shown to be competent in such matters, and (3) the availability of adequate financial resources.

The issue of fitness, willingness and ability to perform certain air trans-


336. It has been emphasized that, as a condition precedent to the issuance of operating authority, an applicant must demonstrate that it is fit, willing and able to perform the specific transport services for which the authority is sought. United Air Lines v. Civil Aeronautics Board 278 F.2d 446, 449 (D.C. Cir. 1960).

337. This statutory language is almost identical for both scheduled and supplemental carriers (compare 49 U.S.C. §§ 1371(d)(1), (d)(2), and (d)(3) (1979)).


In Additional Service to Latin America, 6 C.A.B. 857, 899-900 (1946), the Board indicated that among the criteria employed in the selection of a carrier to perform proposed operations is the following:

The applicant's ability to develop the service must be adequately demonstrated before a certificate can be granted. The Board must be satisfied that the applicant has adequate capital or is in a position to raise capital economically. It must also appear that it possesses or can create an organization qualified for the task which it undertakes; that it has access to the technical know-how to operate aircraft; that it is familiar with the problems involved in providing common-carrier transportation, and that the management is capable of assuring an economical and efficient operation.

See also United States-Alaska Service Case, 14 C.A.B. 122, 136 (1951).

In applications seeking operating authority to perform interim supplemental air transport services, the Board has frequently held that:

In order for [an applicant] to meet the statutory tests of fitness, willingness and ability, it must demonstrate to the Board's satisfaction that it is operationally fit to perform properly supplemental air services with due regard to the convenience and needs of the traveling public; that it possesses the requisite disposition and ability to comply with the Act and the Board's rules and regulations thereunder; and that it has the necessary ability and disposition to comply with the rules and regulations pertaining to safety.

port operations was not a matter of degree. Either a carrier was deemed "fit, willing and able" to perform proposed air transportation services, or it was not. There was no weighing and balancing between competing applicants to ascertain which carrier was most or least "fit, willing and able."\(^{339}\) Indeed, once the Board determined that, for some reason, a particular carrier did not satisfy this statutory criterion, the Board was not compelled to evaluate whether the carrier might otherwise be more fit, willing and able than are other applicants.\(^{340}\)

The fitness, willingness and ability of an applicant to perform proposed certificated operations required a consideration of the applicant's competence to operate the transport services for which authority was sought, and its financial capacity to do so.\(^{341}\) As was emphasized by the Federal Court of Appeals for the District of Columbia in *Western Air Lines, Inc. v. Civil Aeronautics Board*:\(^{342}\)

Before the Board may issue a certificate authorizing air transportation to any carrier it must find that the carrier is "fit, willing and able properly to per-

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339. The Board may consider the issue of "comparative fitness" as a public interest factor in selecting a carrier to operate over a proposed route. "For example, where there is little or no difference between applicants on economic grounds (e.g., cost, diversion, integration, etc.), the comparative fitness of the applicants may be decisive in the selection of one carrier over another. In weighing these factors, the Board is not passing on the fitness of the applicants—both are deemed to be fit, willing and able within the meaning of the statutory standard—but rather is evaluating their qualifications (financial strength, type, and availability of equipment, management capability) to determine which applicant will best meet the requirements of the public convenience and necessity." *New York-Florida Renewal Case*, 41 C.A.B. 404, 408-409 (1964).


341. However, where it is concluded that an applicant is fit, willing and able, the Board may proceed to an evaluation of the public interest factors involved in route proceedings. For example, in *Twin Cities-California Service Investigation*, 52 C.A.B. 1 (1969), the Board, in considering the applications of a number of carriers seeking additional operating authority, recognized that each had adequately demonstrated its operational plans to perform the proposed operations and could obtain the requisite capital, personnel, and equipment. Considering these factors in conjunction with their experience in providing trunkline air transport services, the Board concluded that each was fit, willing and able to perform the proposed operations. Consequently, it proceeded to evaluate the comparative public interest factors which dominate the issue of which carrier should be selected to provide the service. *Id.* at 22. However, the failure of an applicant to demonstrate that it possesses sufficient experience, ability, or financial resources to perform its proposed services may lead to a finding that the applicant is not fit, willing and able to receive such operating authority. *See North Central Case* 7 C.A.B. 639, 672 (1946). The failure of an applicant to prove that it has an appropriate "organizational plan to provide personnel having sufficient transportation experience to conduct satisfactorily the proposed operation, or that it has adequate capital resources to inaugurate such service. . ." may lead to a denial of the application. *Southeastern States Case*, 7 C.A.B. 863, 897 (1947).


495 F.2d 145, 154 (D.C. Cir. 1974).
form the transportation authorized. The Board has given content to this language through its decisions, focusing mainly on the adequacy of (1) technical and managerial resources and (2) financial resources available to the carrier.343

In Pan Am. Airways Company (of Delaware)—Certificate of Public Convenience and Necessity,344 the Board expressed the following policy in the evaluation of applications for certificated operating authority:

Title IV of the act is concerned primarily with air carrier economic regulation, and accordingly the findings of the [Board] as to the applicant’s fitness, willingness and ability to perform the transportation covered by the application, to conform to the provisions of the Act and the rules, regulations, and requirements of the [Board] thereunder . . . is primarily concerned with the economic aspects of the questions involved.345

Consequently, the financial posture of an applicant seeking authority to perform either supplemental or scheduled air carrier service was of paramount importance in the evaluation of its fitness, willingness and ability.346 Thus, in United States Overseas Airlines Inc., Interim Certificate Proceeding,347 the Board stated:

[T]he meaning of the phrase "[fit, willing and able]" . . . must be determined in the context of the problems Congress saw and the objectives it intended to accomplish. Looking at the pattern of the supplemental legislation and its legislative history, we are convinced that Congress viewed the financial fitness of supplemental carriers as having a direct bearing on safety of operations and fair treatment of the public; that it contemplated that such carriers should have

343. Id. at 154. Similarly, among the criteria which have been assessed in the evaluation of the fitness, willingness and ability of an applicant properly to perform proposed supplemental services are its experience, financial posture, compliance disposition, and equipment availability. Transatlantic Charter Investigation, 40 C.A.B. 233, 263 (1964).

344. 1 C.A.A. 118 (1939).

345. Id. at 120-121. See also National Airlines, Inc., et al.—Certificates of Public Convenience and Necessity, 1 C.A.A. 612, 637 (1940).

346. Although a carrier may have experienced financial difficulties, the performance of past unprofitable operations does not preclude the Board from finding that the issuance of additional operating authority, by improving an applicant’s financial posture, will enable it to perform reasonably adequately air transportation services, and that the applicant is financially fit to perform the proposed operations. Western Air Lines, Inc. v. Civil Aeronautics Board, 495 F.2d 145, 154-155 (D.C. Cir. 1974). Although carriers have been found to have experienced a net loss in their operations, they may nevertheless be found to be financially fit under circumstances where the payment of stockholder subscriptions will satisfy their existing liabilities and where they have never defaulted on the performance of their existing transportation commitments. Airadia Ltd., CAB Order 73-4-47 (1973). The issue of a carrier’s financial fitness cannot adequately be evaluated exclusively by reference to its financial statement. A carrier which may have an economic deficiency with respect to a particular item under generally accepted standards employed in the evaluation of financial statements may be able to demonstrate mitigating circumstances which outweigh the deficiency. United States Overseas Airlines, Inc., Interim Certificate Proceeding, 41 CAB 461, 465 (1964). Moreover, the Board has construed the ability of a carrier to serve and promote a market, despite its financial handicaps, to be far a more valuable indication of the carrier’s fitness than its monthly balance sheets. Transatlantic Charter Investigation, 40 C.A.B. 233, 264 (1964).

and maintain a minimum financial strength and stability sufficient to protect the public from risk and abuse; and that it intended for the Board to eliminate from the supplemental field carriers who did not meet such minimum standards before financial weakness could translate itself into injury to the public rather than withholding action until after the financial unfitness had evolved into damage or injury to the public.\textsuperscript{348}

Congress intended that only those carriers which could convincing demonstrate minimum financial strength and sufficient stability to protect the public from abuse or risk should be authorized to perform air transport operations.\textsuperscript{349} In general, the Board evaluated an applicant’s financial history and current and future resources, in order to determine its potential benefits to commerce and for sustain operations, and to operate efficiently without exposing the public to financial risk or unsafe operations.\textsuperscript{350} As recently as 1977, the Board interpreted its primary responsibility on fitness requirements to insure that carriers have “the wherewithal and willingness

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{348} \textit{Id.} at 463-464.  
\item \textsuperscript{349} Supplemental Air Service Proceeding, 45 C.A.B. 231, 267 (1966). In evaluating the financial and operating ability of an applicant seeking operating authority to engage in supplemental air transportation, the going-concern status of an air carrier as evidenced by existing supplemental operations has traditionally been accorded heavy weight.

Although a carrier may be experiencing financial difficulties at the time it submits an application for operating authority, it might nevertheless have been found to be financially fit. For example, in evaluating a carrier’s economic fitness for interim authorization to perform charter operations, the Board in United States Overseas Airlines, Inc., Interim Certificate, 37 C.A.B. 424 (1963), concluded that although the applicant’s financial position was unfavorable, its past performance record, its existing cash position and demonstrated ability to attract a significant volume of traffic, and its future earnings potential were indicative of the temporary nature of the economic difficulties, and that such difficulties were not such as to impair the applicant’s ability to conduct safe and reliable air transportation services. Consequently, the Board resolved that the applicant was financially fit, but that because of the marginal nature of its financial posture, it would remain under close scrutiny by the Board in order to assure the applicant’s continued fitness. \textit{Compare} World Wide Airlines, Inc., Interim Authority, 37 C.A.B. 142 (1962); Sourdough Air Transport, Interim Authority, 37 C.A.B. 153 (1962); with Air Cargo Express, Inc., d/b/a Columbia Airlines, Interim Authority, 37 C.A.B. 208 (1962).

Undoubtedly, a carrier’s financial stature is an essential element to be evaluated in assessing its fitness and ability properly to perform air transport operations. \textit{Large Irregular Air Carrier Investigation,} \textit{CAB Order E-18342} (1962). An additional factor which required consideration in the determination of whether a carrier should receive renewal authority is whether it has adequately performed the operations authorized by its certificate with sufficient consideration for the convenience and requirements of the traveling public. \textit{Id.}

\end{enumerate}
\end{footnotesize}
to operate properly and in accordance with the law, and to protect the public from undue risk. \(^{351}\) Although the Board recognized that the criteria for measuring these requirements could not be determined with mathematical precision, financial posture, experience, operating plans, and compliance disposition have historically proven to be among the most important factors considered.

Traditionally as important as the evaluation of an applicant’s financial posture, has been the determination of whether an applicant is operationally fit. Both the applicant’s experience and its operating proposal have been deemed relevant to this issue. \(^{352}\) Among the multitude of factors which have been evaluated by the Board in its determination of whether an applicant is operationally fit were those expressed in American Flyers Airline Corp., Interim Certificate, \(^{353}\) where a finding of operational fitness was predicated, \textit{inter alia}, upon the following factors: (a) the applicant’s financial position was relatively secure and it appeared able to satisfy its obligations as they matured; (b) it possessed a substantial fleet of insured flight equipment; (c) it had established a satisfactory maintenance program; (d) its management held extensive experience in airline operations; and (e) it had satisfactorily demonstrated a willingness and ability to provide the proposed operations with due regard for the protection of the travelling and shipping public (by maintaining sufficient liability and property insurance, and by expressing a willingness to adhere to the Board’s regulations involving reasonable guarantees to the public). \(^{354}\) In Eugene Horbach Acquisition Proceeding, CAB Order 77-1-98 (1977), at 34, and Eugene Horbach Acquisition of Modern Air Transport, Inc. CAB Order 77-3-68-89 (1977), at 5.

\(^{351}\) See Supplemental Renewal Proceeding, CAB Order 77-1-98 (1977), at 34, and Eugene Horbach Acquisition of Modern Air Transport, Inc. CAB Order 77-3-68-89 (1977), at 5.

\(^{352}\) In evaluating the financial and operating ability of an applicant seeking operating authority to engage in air transportation, the going-concern status of the carrier as evidenced by existing operations has traditionally been accorded heavy weight. This, in a number of proceedings, the Board concluded that an applicant is fit, willing and able to perform air transport operations where it has a long record of successful operations and a sound financial condition. See, e.g., Supplemental Air Service Proceeding, 45 C.A.B. 231, 267 (1966), and Pennsylvania Cent. Air., Youngstown-Erie-Buffalo Op., 1 C.A.A. 811 (1940). Where the applicant could not demonstrate going-concern status as an air carrier, it was required to demonstrate its operational and financial ability by a stronger array of other evidence. Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 310 (1959).


Among the factors which have been evaluated by the Board in its determination of whether an applicant is operationally fit were those expressed in Zantop Air Transport, Inc., Interim Certificate, 37 C.A.B. 12 (1962), in which the Board rested its conclusion of fitness on the following considerations: (a) the applicant’s financial position was relatively sound and it was able to satisfy its financial obligations as they fell due; (b) the applicant had been engaged in air transportation for a number of years, and it had demonstrated an ability to conduct extensive and continuing transport operations in an efficient and economical manner; and (c) it had exhibited a willingness and ability to perform its operations with due regard for the protection of the traveling and shipping public by carrying
tion of Modern Air Transport, Inc., the acquiring party was not a carrier already in operation, and Modern had ceased operations for some time. There the Board based its determination of operational fitness on the factors that the applicant had "submitted a reasonably defined plan for future operations," that it intended, and felt it could implement the plan, and that there was a reasonable possibility that the operations of the type proposed could be profitable.

However, where an applicant fails to submit a reasonably defined plan for its proposed operations, has not demonstrated that said operations would eventually be profitable, and has not proven that its financial condition is of sufficient strength to sustain those services then, even assuming that the public convenience and necessity requires their institution, the authority has ordinarily been denied.

Traditionally, an applicant seeking operating authority was also required to establish its compliance disposition, or its willingness and ability to comport with the requirements of the Act and the Board's rules and regulations promulgated thereunder. In the Large Irregular Air Carrier Investigation, the Board expressed the following attitude regarding a carrier's compliance disposition:

Evidence of wrongdoing is not appropriate for consideration . . . for any purposes of punishment. Rather, such evidence has been evaluated solely from the viewpoint of its indications concerning the respective applicants' qualification to engage in air transportation in the future. Particularly, it has been concluded that the Board desires an appraisal as to whether each applicant can and will comply with the provisions of the Act and the Board's regulations. In such an appraisal, a negative conclusion on qualification would not follow from the finding of relative unimportant, isolated violations. Failure to qualify on account of violations has been found only in situations where the evidence shows that the violator whose disregard of the Act and the Board's regulations, considered in conjunction with all other evidence, shows that it can be expected to violate the Act and the regulations if given the authority covered herein.

The failure of an applicant to adhere to its responsibilities under the Act and the Board's rules and regulations thereunder does not constitute a legal

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adequate insurance and expressing a willingness to provide reasonable performance guarantees to the public. Id. at 13-15. See also Saturn Airways, Inc., Interim Certificate, 37 C.A.B. 45, 47-49 (1962).


356. Specifically, the Board noted that they "have clearly described the nature and method and manner in which they will operate, and have provided sufficient detail relating to the proposed areas they will serve, the charters they will offer, the equipment they will use, and the traffic they will most likely carry . . . ." Id.


359. Id. at 310-311 (citation omitted).
prohibition to future certification, but it is a factor of importance to be evaluated in determining whether the applicant should receive the authority sought.\textsuperscript{360} A determination that a particular carrier has not satisfied the statutory criteria of fitness, willingness and ability properly to provide the proposed operations has not been imposed for punitive reasons, for that is not the purpose of Section 401. In so concluding, the Board has merely evaluated the fitness of the applicant pursuant to the statutory standard and the prospects for its reliability in the future in comporting with the Act and the regulations.\textsuperscript{361}

In evaluating fitness issues on currently operating certificated carriers, the Board has recognized that a carrier’s record of successful existing service, as well as its sound financial condition, may be sufficient to establish its fitness, willingness and ability to perform proposed operations.\textsuperscript{362} The Board has frequently recognized that, in evaluating the fitness and ability of an applicant, an existing carrier is on a different footing than an applicant seeking entrance into the air transport industry.\textsuperscript{363} With respect to the former, the Board has appraised the carrier’s balance sheet and operational experience.\textsuperscript{364} Where the applicant is an uncertificated entity seeking its initial segment of operating authority, the Board has been inclined to scrutinize its financial condition more closely.\textsuperscript{365} Such an applicant traditionally

\textsuperscript{360} Transatlantic Cargo Service Case, 21 C.A.B. 671, 689 (1954); see Hawaiian Intraterritorial Service, 10 C.A.B. 62, 67 (1948); Twentieth Century Air Lines, Inc., et al., 21 C.A.B. 133, 159 (1955). The Board has concluded that, despite a carrier’s violations of the Act and the rules and regulations promulgated thereunder, operating authority should nevertheless be issued. Such a conclusion is preceded by a weighing and balancing of the factors involved, including the nature of the violation and the requirements of the public convenience and necessity. New York-Florida Case, 24 C.A.B. 94 110 (1956).

\textsuperscript{361} New York-Chicago Service Case, 22 C.A.B. 973, 990 (1955). Similarly, where an applicant fails to demonstrate the compliance disposition required for the issuance of supplemental air carrier operating authority, the Board need not proceed to a consideration of the applicant’s financial and operational fitness to perform the proposed operations. Paramount Airlines, Inc., Supplemental Air Service Case, 39 C.A.B. 350, 352 (1963).

\textsuperscript{362} United Air Lines Transport Corporation-Certificate of Public Convenience and Necessity, 1 C.A.A. 778, 790 (1940); Pennsylvania-Central Airlines Corporation-Amendment of Certificate of Public Convenience and Necessity, 1 C.A.A. 811, 821 (1940); Braniff Airways, Inc.-Certificate of Public Convenience and Necessity, 2 C.A.B. 199, 205 (1940).


\textsuperscript{364} Trans-Pacific Airlines, Ltd., Renewal Case, 21 C.A.B. 253, 257 (1955). The existence of financial resources sufficient to insure inauguration of proposed services and operation thereof for a period sufficient to test their usefulness is an essential ingredient to a finding of fitness, willingness and ability. Samoan Airlines Case, Reopened, 18 C.A.B. 533, 538 (1954).

\textsuperscript{365} Cf. Pioneer Air Lines, Inc., Amended Certificate, 18 C.A.B. 11, 12 (1953) (with respect to the Board’s financial evaluation of supplemental carriers); see, e.g., United States Overseas Airlines, Interim Certificate, 38 C.A.B. 1114, 1116 (1963); and Riddle Airlines, Transatlantic Pas-
was required to

shoulder a substantial burden in establishing that it is fit to be entrusted with a
certificate of public convenience and necessity. The fact that certain of the
deficiencies in their showings might not be disqualifying for a going concern
which has demonstrated through continuous operations its ability to cope suc-
cessfully with the ups and downs of financial fortune, does not warrant a find-
ing that they too are fit. 366

Where an existing carrier seeks a renewal or extension of a segment of
its route system, the Board has held that the "continued performance of
operations is convincing if not conclusive proof of the ability to operate sat-
isfactorily, in the absence of proof to the contrary." 367 The Board in the
West Coast Case 368 expressed the following sentiments regarding existing
vis-a-vis noncertificated carriers in application proceedings:

In passing upon the fitness, willingness and ability of an applicant the
Board has required it to show adequate financial resources. It is clear, how-
ever, that the position of an existing carrier operating pursuant to certificates of
public convenience and necessity authorizing the carriage of persons, prop-
erty, and mail differs from that of a new company seeking entrance into the air
transportation industry. Route extensions, if they are not too great in relation to
the carrier’s other operations, can usually be added to existing operations of a
carrier and successfully operated despite the fact that the carrier has not
shown that it intends or is able to obtain new capital financing.369

(2) Fitness in the Post Airline Deregulation Act Environment: Erosion of
the Traditional Standards

As has been indicated, the Airline Deregulation Act did not diminish
the fitness issue as a potential barrier to entry in any way. The burden of
proving fitness remains with the applicant; 370 and the CAB is obligated to
continue its fitness scrutiny of carriers until 1985—long after its PC & N

366. Supplemental Air Service Proceeding, 45 C.A.B. 231, 267 (1966). Moreover, the dis-
continuance of existing air carrier operations may reasonably be interpreted as demonstrating a
lack of willingness or ability to provide transport services, to operate, or to conform to the Act and
the Board’s rules and regulations thereunder. However, despite the discontinuation of air services,
an applicant might nevertheless demonstrate its fitness, willingness and ability to perform proposed
air carrier operations on the basis of other evidence, such as previously successful operations,
financial ability, a competent organization, and available equipment. Large Irregular Air Carrier
Investigation, 28 C.A.B. 224, 310 (1959).

367. Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 238 (1959); New York-Florida

368. 8 C.A.B. 636 (1947).

369. Id. at 638-639. Boston-New York-Atlanta-New Orleans Case, 9 C.A.B. 38, 57-58
(1948). The existence of financial difficulties may not be an impediment to a finding of fitness
where the applicant is a going concern and where its financial situation is improving. Airlift Inter-
national, CAB Order 73-3-58 (1973).

370. See supra note 223, and accompanying text.
obligations have expired.\textsuperscript{371} The first two subsections of the new Declaration of Policy strengthen and emphasize the overriding importance of safety as a regulatory obligation of the highest priority.\textsuperscript{372}

One would have assumed then, that Congress intended that the Board continue, if not make more stringent, its quasi-judicial interpretation of its fitness responsibilities, discussed above. Incredibly, the Board did precisely the opposite.

The first import regulatory diminution of the fitness standards came in the \textit{Chicago-Midway Low-Fare Route Proceeding}.\textsuperscript{373} In \textit{Chicago-Midway}, the Board acknowledged an interrelationship between fitness and safety. Although it argued that operational safety was principally the obligation of the Federal Aviation Administration, it admitted that passengers could reasonably assume that the issuance of operating authority by the CAB represented a determination by the Board that the carrier had the requisite personnel, compliance disposition, and financial ability to operate properly.\textsuperscript{374} Nevertheless, the Board felt compelled to relax the traditional fitness standards so that they would be compatible with the thrust of multiple permissive entry\textsuperscript{375} and "would not unnecessarily discourage new entry into the industry in the name of consumer protection."\textsuperscript{376}

As a result, the Board in \textit{Chicago-Midway} designed a simplified, streamlined test whereby a carrier could easily establish its fitness. The CAB required that an applicant adduce evidence that it:

1. will, before inaugurating its operations, have the requisite managerial skills and technical ability to operate safely;
2. if not internally financed, has a plan for financing which, if implemented, will generate resources sufficient to commence operations without undue risk to consumers;
3. has a proposal for operations reasonably satisfactory to meet a part of the demand for service in the city-pair markets embraced in its application; and
4. will comply with the Act and the rules and regulations promulgated thereunder.\textsuperscript{377}

In the \textit{Transcontinental Low-Fare Route Proceeding},\textsuperscript{378} the Board further expanded the second criterion of \textit{Chicago-Midway}. Although the Board, as recently as 1977, had required a new operator to demonstrate

\textsuperscript{371} See \textit{supra} note 238, and accompanying text.
\textsuperscript{372} See \textit{supra} note 202, and accompanying text.
\textsuperscript{373} CAB Order 78-7-40 (1978). See \textit{supra} notes 159-162, and accompanying text.
\textsuperscript{374} Id. at 49-57.
\textsuperscript{375} Id. at 49-50.
\textsuperscript{376} Transcontinental Low-Fare Route Proceeding, CAB Order 79-1-75 (1979), at 25.
\textsuperscript{377} Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 50; see Chicago-Midway Expanded Service Proceeding, CAB Order 79-9-55 (1979), at 8-9.
\textsuperscript{378} CAB Order 79-1-75 (1979).
that it possessed "resources commensurate with the nature and scope of its under-taking" sufficient to enable it to operate safely (i.e., that the firm possessed either sufficient capital to operate the proposed service, or commitments from investors or lending institutions to provide the requisite capital).\textsuperscript{379} The Board in Transcontinental believed that this requirement "could impose a serious barrier to entry. . . ."\textsuperscript{380} It therefore eliminated the obligation that a carrier demonstrate its ability to actually obtain the requisite capital to commence reasonably safe operations. An applicant for operating authority now need merely proffer a financial plan which, if implemented, will generate sufficient financial resources to commence operations.\textsuperscript{381}

The Board claimed that relaxation of the fitness criteria would not impair the safe operations of carriers subject to its regulations (and thereby endanger the lives of passengers), saying that if a carrier "cannot operate, the carrier will exist on paper only."\textsuperscript{382} True, but would it not be possible for shoestring operators to secure the capital necessary to inaugurate some \textit{de minimus} service for a limited period of time, while skimping an equipment, maintenance, and replacement parts? The Board had repeatedly emphasized that there are relatively few economic barriers to entry or economies of scale in the airline business.\textsuperscript{383} In the highly competitive environment the Board was attempting to create, as prices approached marginal costs, would not a real incentive exist even for established incumbents to cut costs and defer maintenance? Deferred maintenance is already characteristic of another transportation industry—rail carriage. In an era of intense price competition, could not the same injurious consequences occur in the airline industry, at even greater risk to the lives of human beings? Incredibly, the majority did not even address these reservations.

Member Richard J. O'Melia recognized the potentially deleterious consequences to passenger safety which were likely to occur as a result of this deterioration of the traditional fitness criteria. He issued a vigorous dissent on the fitness issue:

[My colleagues today have . . . [enshrined] some multiple permissive dogma to control the meaning of "fit, willing, and able," and have gone on to impale the Board on a dangerous notion of what constitutes fitness. The pronouncement on "qualifications" is tantamount to a determination that the financial resources of an applicant for route authority have practically no relation to its fitness to provide air transportation. This key determination of what is a critical, statutorily mandated prescription—one which is legislated to endure

\textsuperscript{379} Eugene Horbach, Acquisition of Modern Air Transport, CAB Order 77-3-88 (1977), at 7-9.
\textsuperscript{380} CAB Order 79-1-75 (1979), at 26.
\textsuperscript{381} Id.
\textsuperscript{382} Id.
\textsuperscript{383} See supra notes 183 and 195, and accompanying text.
even after the Board’s licensing authority has terminated—has been reached with a slight-of-hand maneuver that has in terms of its potential impact no parallel in my experience with agency action... From this day forward an aspiring entrepreneur need only show that in a set of perfect circumstances the proposed operations could be feasible.\(^{384}\)

Where carriers already provide scheduled certificated operations, the Board’s fitness scrutiny is perfunctory, at best.\(^{385}\) Most are not even required to adduce evidence consistent with the Chicago-Midway criteria (even as diluted by Transcontinental); instead, their fitness is regularly established by “officially noticeable data.”\(^{386}\)

Since Transcontinental, the Board has proceeded on a course which has further eroded the traditional fitness standards. For example, in the Florida Service Case,\(^ {387}\) Administrative Law Judge Dapper, concerned with the poor financial condition of Southeast Airlines; limited its operating authority to a period of one year so at the end of this trial period, the Board could reexamine the carrier’s financial health.\(^ {388}\) This has been the traditional means employed by the Board to assure that such a poor economic position would not endanger the safety of a carrier’s operations. And, traditionally, this has had a prophylactic effect; carriers recognized that if they allowed their financial posture or, more significantly, the safety of their operations, to deteriorate further, they would jeopardize renewal of their certificates.

The term-limitation approach was abandoned in Florida in favor of the

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384. Id., dissent at 1. Member O’Melia continued:

[Under the revolutionary fitness criteria adopted by the majority, it is now irrelevant] that the new entrant may not be able to afford the cost of insurance... or even the cost of maintenance of its equipment. All that matters is proliferation of permissive authority, erosion of entrance requirements, and a vision of more planes in the air.

In my opinion the Board has not sufficiently considered the safety implications of the fitness test now being proclaimed. The Board traditionally has considered fitness to be inseparable from a fundamental level of financial resources, at least to the point of stability over the first year of operations. The elimination of this nexus poses a threat... to the safety and best interests of the traveling public.

Id. In his dissent, Member O’Melia submitted a prophesy which, in retrospect, seems to have been fairly accurate:

Apparently a carrier will soon be able to obtain a certificate to engage in domestic and overseas air transportation by presenting a single document proposing service in a purely hypothetical market. The Board will simply rubber-stamp them... The transformation of the Board’s decision-making function to something akin to a “sausage machine”... should never be permitted to occur with an issue as critical as carrier fitness.

Id.


388. Id.
imposition of several conditions intended "to assure that consumers would not suffer unduly if the company's financial condition were to deteriorate further."\textsuperscript{389} Such conditions were primarily in the nature of bonding requirements\textsuperscript{390} and obligations to file certain documents.\textsuperscript{391} Although the Board was confident that if Southeast was unable to solidify its poor economic position, it "would terminate the service rather than allow its corporate finances to deteriorate further,"\textsuperscript{392} the Board made no mention of the possibility that the carrier might instead defer maintenance in order to reduce costs.\textsuperscript{393}

As the Board had diluted the financial aspects of the fitness question, it also began to relax its traditional requirements involving compliance disposition. In the \textit{Chicago-Midway Expanded Service Proceeding},\textsuperscript{394} Administrative Law Judge Yoder questioned Federal Express' compliance disposition, for it had filed false and misleading information, and failed to adduce requested evidence concerning interlocking relationships in which it was engaged and prior safety violations.\textsuperscript{395} The Board reversed the Judge on this issue, finding that prior violations of the regulations of the CAB and/or the FAA would not necessarily warrant denial of an application on fitness grounds.\textsuperscript{396}

\begin{itemize}
\item 389. \textit{Id.}
\item 390. \textit{Id., appendix C at 1.} The Board admitted that the carrier's "current cash flow problems are serious enough to raise the real possibility that the carrier will not be able to continue operating the expanded service, and as a result, may be unable to provide transportation for which passengers have paid in advance, or to refund their money." \textit{Id.}
\item 391. \textit{Id., appendix C, at 2.}
\item 392. \textit{Id., appendix C, at 1.}
\item 393. The author finds these omissions reprehensible, if not alarming.
\item 394. CAB Order 79-5-55 (1979).
\item 395. The standard evidentiary request of new applicants required a response to these questions:
\begin{enumerate}
\item Provide a description of each formal or docketed complaint lodged against the applicants, any predecessor or affiliate thereof . . . in the past five years regarding compliance with the Federal Aviation Act or the rules, regulations, and requirements thereunder. Indicate the final disposition, if any, of the matters.
\item State whether any of the persons and/or companies listed in Item A above, either as a partner, officer, director, or stockholder, have been affiliated with, controlled, or participated in control of any air carrier which during such association, was found to have committed knowing willful violations of the Act, or of any order, rule, or regulation issued pursuant to the Act. If so, list orders covering the period from ten years ago to date.
\item Indicate any action taken by the FAA under 14 CFR 13.15 (involving civil penalties of $500 or more per violation), 13.17, 13.19, and 13.23 and the disposition of each.
\end{enumerate}
\textit{Id.} at 12, n.32.
\item 396. More specifically, the Board held:
\begin{quote}
Our primary concern [in evaluating the issue of fitness] is that the consumer's interest in safe, reliable air transportation be protected in the competitive environment. We must examine the evidence to discern whether the applicant is favorably disposed to comply voluntarily with the regulatory protections that the Act provides the public and to comply with our rules and regulations. If the applicant has a previous operating record, we want
\end{quote}
In the *Northwest Alaska Service Investigation*, the Board proceeded even further, concluding that even serious violations of the statutes and regulations might not result in a finding that an applicant is unfit. In this proceeding, the Board concluded that the violations by Alaska Airlines of the control provisions of Section 408 of the Act were "not the sort that brings into question its ability to serve the public effectively and safely, and with little financial risk to consumers." Although the Board indicated that it had a number of sanctions at its disposal for contumacious disregard of the Act and the applicable rules and regulations thereunder, it did not specify what those sanctions were, or whether it might even be inclined to employ them.

Finally, the issue of fitness involves an evaluation of an applicant's "fitness, willingness, and ability." In the *Dallas/Fort Worth-Tucson Investigation*, the CAB diluted the obligation of "willingness." Administrative Law Judge Kolko had concluded that operating authority could not lawfully be granted to all of the applicants, for only two had indicated a present intention to enter the market regardless of the number of competitors, and therefore not all could be found "willing" within the meaning of the Act. The Board reversed, arguing that the statutory prerequisite of "willingness" did not embrace "any requirement of an actual intent to inaugurate service." The requirement of "willingness" refers instead to an applicant's obligation:

1. to perform properly, under its obligations as a common carrier, the transportation covered by its application;
2. to operate suitable and safe aircraft; and
3. to conform to the Act and to Board regulations.

Yet, under the approach adopted by the Board, the applicant need not be willing actually to provide any of the operations, either immediately or ever,

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398. *Id.* at 5.
401. *See id.*
403. *Id.* at 4.
404. *Id.*
405. *Id.* at 5.
for which authority is sought. Today, in order to receive certificated operating authority, a carrier need only be "willing" to file an application.

E. Energy Consumption and Environmental Pollution

Under Section 102(2)(C) of the National Environmental Policy Act of 1969,\textsuperscript{406} the CAB is obligated (as are all federal agencies) to evaluate whether a given decision is a major federal action "significantly affecting the quality of the human environment. . . ." Similarly, under Section 382(a)(3) of the Energy Policy and Conservation Act of 1975,\textsuperscript{407} the Board must determine whether a given decision is a "major regulatory action which . . . has the effect of requiring, permitting, or inducing the inefficient use of the inefficient use of petroleum products. . . ." Incredibly, the CAB has uniformly concluded that none of the route decisions described herein (either individually or collectively) have had a significant effect upon environmental pollution or fuel consumption.

In rationalizing its new policy of relaxing entry barriers and encouraging rate flexibility, the Civil Aeronautics Board has emphasized the elasticity of the passenger market, and the ability of carriers, if free to compete, to generate new sources of traffic.\textsuperscript{408} Yet, in assessing the environmental implications of multiple awards, the CAB has repeatedly insisted that:

while multiple awards are likely to encourage price competition and generate traffic, they are not likely to significantly increase the number of flights operated. Rather the lower fares resulting from increased competition will force carriers to operate with higher load factors. Thus most, if not all, of the newly generated passengers are likely to fill seats which would otherwise have been empty.\textsuperscript{409}

This boilerplate language has been repeated in a number of CAB entry proceedings.\textsuperscript{410} Occasionally, the Board would add its conclusion that, "The

\textsuperscript{408} See supra notes 114-115, and accompanying text.
\textsuperscript{409} Improved Authority to Wichita Case, \textit{et al.}, CAB Order 78-12-106 (1978), at 17.
\textsuperscript{410} See, e.g., Phoenix-Las Vegas-Reno Nonstop Service Investigation, CAB Order 78-12-38 (1978), at 6; Louisville Service Case, CAB Order 79-1-101 (1979), at 11; Austin/San Antonio-Atlanta Service Investigation, CAB Order 79-3-9 (1979), at 13; Phoenix-Las Vegas-Reno Nonstop Service Investigation, CAB Order 78-12-38 (1978), at 6; Norfolk-Atlanta Subpart M Proceeding, CAB Order 79-1-15 (1979), at 5; Improved Authority to Wichita Case, CAB Order 79-3-45 (1979), at 4; Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 6; Spokane-Montana Points Service Investigation, CAB Order 79-4-80 (1979), at 5; Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-78 (1979), at 7; Norfolk-Atlanta Subpart M Proceeding, CAB Order 79-10-202 (1979). \textit{Compare} Straszheim, \textit{The Scheduling and Route Impacts of Increased Fare Flexibility}, \textit{10 Transp. L.J.} 269 (1978). The Board contended that:

[M]ultiple awards force both the incumbent(s) and the awardees to reevaluate their plans in light of the increased competition and higher load factors which accompany multiple awards. The carriers' reevaluation has led them to provide less service than they had originally planned, with the end result being that multiple awards do not significantly increase the level of operations.
higher load factors which multiple awards are likely to induce will allow many more people to fly without significantly increasing fuel consumption or any of the other environmental consequences associated with an increase in operations.\textsuperscript{411}

The quoted language is misleading, if not wholly inaccurate. Although load factors have increased significantly, according to the statistics compiled by the CAB, so too have flight frequencies and carrier purchases of and orders for new aircraft. With respect to the quantitative effects of deregulation, the Board has emphasized that "Airline service has increased significantly. Comparing February 1978 to February 1979 service, measured by weekly aircraft departures at each point, scheduled service was up 8.4 percent for the nation, with increases experienced in all regions of the country and in communities of all sizes."\textsuperscript{412} As of September, 1978, 3,697 aircraft were available for service, while 1,024 were on order and on option.\textsuperscript{413} The Board itself, has admitted that, "Investment in aircraft of all sizes is . . . on the rise."\textsuperscript{414}

Even assuming that no single routes proceeding is a "major federal action" within the meaning of the aforementioned statutes, what of the combined effect of the hundreds of such decisions issuing literally thousands of new routes? For example, the state of California has argued that the Board is obligated to evaluate, from an environmental and energy standpoint, the cumulative impact of its plethora of entry decision.\textsuperscript{415} The

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West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), at 23; see also Dallas/Ft. Worth-Tucson Investigation, CAB Order 79-5-35 (1979), at 6. The Board cited no statistics to support these allegations. See Oakland Service Case, CAB Order 79-10-89 (1979), at 6.
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\textsuperscript{411} Midwest-Atlanta Competitive Service Case, CAB Order 79-1-64 (1979), at 5. With respect to the potential for excessive fuel consumption arising as a result of indiscriminate entry, the Board has argued:
\end{flushright}

\begin{quote}
[ ]Increased competition will promote energy efficiency by providing an incentive for carriers to increase load factors on their flights. As carriers cut prices in their effort to increase market shares, they will be forced to make their operations profitable. Second, while there may be some increased fuel consumption, we do not [believe] . . . that multiple awards . . . offend EPCA . . . [nor that they will] waste fuel as they produce a prolonged competitive battle during which the markets will be flooded with excess capacity. . . . [E]ven assuming that there may be a competitive struggle in which carriers initially schedule some excess capacity, there is no basis for concluding that this struggle will be so prolonged or so fierce as to require us to throw away the benefits of multiple permissive awards on the grounds that they are inconsistent with EPCA . . . . This consideration, coupled with our finding that multiple awards will produce greater transportation benefits in these markets, more than justifies any additional fuel usage that may be required.
\end{quote}

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Transcontinental Low-Fare Route Proceeding, CAB Order 79-1-75 (1979), at 33-34.
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\textsuperscript{412} CIVIL AERONAUTICS BOARD, REPORT ON AIRLINE SERVICE, STATUS ON FEBRUARY 1, 1979, 1 (1979).
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\textsuperscript{413} Id. at 108-109.
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\textsuperscript{414} CIVIL AERONAUTICS BOARD, PRESENTATION BEFORE THE SUBCOMMITTEE ON AVIATION, SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION 35 (1979).
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\textsuperscript{415} California-Arizona Low-Fare Route Proceeding, CAB Order 79-9-176 (1979), at 1-2.
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Board rejected this argument, saying, "Absent a further showing indicating, at a minimum, what prospective route awards pose the potential for a cumulative impact on a specific point, we reject the argument that we are required to undertake a cumulative analysis." 416 Nonsense! This nation can no longer afford the luxury of callously shirking its responsibility to diminish its wasteful and profligate consumption of fuel. 417 Regulatory policies such as these seem pompous, and worse, grossly inconsistent with national energy objectives.

And, what of the impact of liberalized entry upon aircraft noise? Would not increased service (resulting from both the issuance of new route opportunities and the enhanced demand generated by price competition) have a deleterious affect upon noise levels in areas surrounding major airports? Perhaps, but, the Board was unwilling to modify its entry policies or impose appropriate restrictions in order to alleviate the aircraft noise problem, leaving the issue in the laps of the local governmental authorities to "take whatever steps they deem necessary to curtail noise." 418 The CAB felt that if it were to impose any such restrictions, "such action might have serious anticompetitive consequences and create an undue burden on interstate commerce." 419 But, if such federal action might unduly burden interstate commerce, how then could such state action survive judicial review when challenged on the grounds that it violates Article I section 8 of the Constitution? The Board did not directly confront the issue, saying only that such matters are best left to local authorities. 420

VIII. CONCLUSION

The experience of the Civil Aeronautics Board reveals that economic regulation can be like a swinging pendulum. Over a period of time regulatory philosophy can swing in either direction; and it may swing too, too far. In one direction, the pendulum may swing in favor of protecting the industry from the deleterious effects of "excessive," "wasteful," or "destructive" competition. This was the regulatory philosophy which characterized the CAB between 1938 and 1975, when the Board gave excessive protection to tightly regulated carriers against route and rate competition. 1975 to 1978 was an interim period for the Board, when the pendulum began to move away from protectionism in favor of increased reliance upon free market forces. Since 1978, the pendulum has swung fully in the direction of

416. Id. at 2.
418. Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-8-203 (1978), at 11.
419. Id.
420. Id. at 11-12. See British Airways v. Port Authority of New York, 558 F.2d 75, 83 (2d Cir. 1977).
unlimited, unrestrained competition, so that today there is virtually no regulation at all; indeed, the pendulum has swung almost off the clock.

Both extremes violated the congressional intent. That intent has recently been described by the U.S. Supreme Court as imposing upon transport regulatory agencies the obligation "to strike a fair balance between the needs of the public and the needs of the regulated carriers."421 This "fair balance" has been lost both in the era of excessive protectionism (1938-1975), and the era of excessive competition (1978-present).

In enacting the 1938 legislation, "Congress made it clear that while it was moving to safeguard against the excesses of destructive and unrestrained competition, it was in favor of the competitive principle and opposed to a principle of monopoly."422 In its fervent determination to protect the industry from excessive competition, the CAB refused to permit the entry of a single new trunkline carrier; it refused to allow the bankruptcy of a single inefficient carrier; it virtually eliminated air fare competition; and it ultimately imposed a moratorium on the issuance of new operating authority. As a result, by 1975, there were fewer competitors; the industry suffered from excessive investment, excessive non-price competition (i.e., "frills"), excessive capacity, and inadequate profits; and passengers paid unnecessarily high prices for air travel. In general, the Board failed to allow the industry to enjoy the beneficial effects of regulated competition—the increased economies and efficiencies of operation which would have arisen as a result of reasonably increased pricing and entry competition.

The interim period (1975-1978) proved that by encouraging carriers to compete they would offer passengers new, innovative combinations of price and service options. This would, in turn, stimulate passenger demand (which was inherently elastic), and thereby enable carriers to fill empty seats on aircraft. Although the Board during this period probably exceeded the Congressional intent and the perimeters of the Federal Aviation Act, increased capacity levels and decreased "frills" led to the highest industry profit levels in history. Carriers were encouraged to improve the economy and efficiency of their operations; passengers were permitted to enjoy air fares set at a more competitive level.

Yet, the Board since 1978 has violated the congressional will at least as reprehensibly as did the agency during the worst excesses of the protectionist era. Certainly, Congress intended that air transportation be deregulated, and established a specific timetable for the elimination of regulatory scrutiny over various carrier activities. But clearly too, Congress did not intend for the Board to deregulate entry until 1982; it implicitly designated 1978-1982 as a transition period during which the Board would gradually

expose the highly regulated common carrier system to the rigors of the marketplace, and allow communities to adjust to the evolving traffic patterns of an air carrier system which was responding to the needs and demands of the market. Congress also encouraged the CAB to employ the transition period as a vehicle to insure continued and viable service at small communities, and to enhance the possibility of long-term competition by strengthening small carriers. Had Congress intended that there be no transition period, it would most certainly have opened the floodgates in 1978.

Although de jure deregulation of entry in air transportation is not scheduled to arrive until 1982, de facto deregulation is here today. Not in a single instance, no matter how persuasive or vehement the objections of affected parties, has the Board awarded operating authority to fewer than all “qualified” applicants in a single domestic routes proceeding consummated since the promulgation of the Airline Deregulation Act.423 In the author’s opinion, the blind application of such a regulatory policy satisfies the definition of fanaticism. Pandora’s box has been opened wide. Thousands of segments of operating have been created for virtually any entity willing to file an application.424 Like a pack of ravenous sharks, the CAB has attacked its prey in a deregulatory frenzy. The ultimate tragedy, however, may well be that communities, carriers, and passengers must suffer the irresponsible and ill-conceived policies of a misguided majority of the CAB.

Had the Board lived up to its promise in Wichita, and equitably evaluated the needs and requirements of communities and carriers on a case-by-case basis, structuring route awards to meet these specific needs and requirements, the congressional will might have been satisfied. But Wichita was a lie. The current majority of the Board has weighed the scales so heavily in favor of increased new entry that no party could, under any conceivable circumstances, convince it that fewer than all applicants should receive operating authority.425 And, the Board should be severely reprimanded for falsely leading communities and carriers to believe that it might actually mold its regulatory policies to conform to the needs adduced by these parties in particular markets at issue. Query: what were the aggregate legal expenses incurred in this futile effort to encourage the Board to

423. “The Board has granted all certificate applications of all comers in all cases, domestic or foreign, with only incidental exception.” Letter from Richard J. O'Melia to Paul Stephen Dempsey (December 18, 1979).

424. So loading the scales so strongly in favor of a conclusion was held unlawful by the United States Supreme Court in an analogous context in I.C.C. v. J.T. Transport, 368 U.S. 81, 89-90 (1961).

425. See supra note 423. As of December, 1978, the CAB had issued 2,242 segments of operating authority in 422 markets on a multiple permissive entry basis. CAB Order 79-10-186 (1979), dissent at 6. Such issuances, coupled with the dormant authority provision of the Airline Deregulation Act (see supra notes 228-232 and accompanying text) have together created virtually an infinite number of route opportunities. The floodgates have, quite clearly, burst.
utilize its regulatory powers in a prudent manner, and give the nation something more than a mindless deregulatory frenzy? The author finds himself agreeing with the frustration and exasperation of Member O'Melia, who regularly lamented the Board's "sausage machine" approach to entry—an approach of awarding operating authority to every applicant in every conceivable market. The author cannot believe that Congress was so irresponsible as to impose the continuation of regulatory scrutiny over entry until 1982, when it actually intended that the Board effectively abandon its regulatory responsibilities over entry immediately. But this is the contorted assumption that must be made if we are to conclude that the Board's contemporary entry policies are consistent with the congressional intent.

Deregulation should not be viewed as an end in itself; it should instead be perceived as a means to an end, a tool with which to secure a much more important objective—competition. Viewed from this perspective, regulatory means may frequently accomplish the objective of enhanced competition more efficiently than the reckless abandonment of regulatory means which now characterizes the Board's approach. For example, long-term competition may be most effectively enhanced by strengthening small carriers during the transitional period (strengthening them may increase the likelihood that they will be able to withstand the aggressive, and perhaps predatory, competition of larger carriers). But again and again, the Board has refused to modify its entry policies to encourage these long-term benefits. While unlimited entry may increase short-term competition, it may unnecessarily impair the ability of smaller carriers (many of which own their modest size to the regulatory policies of the CAB) to compete on a long-term basis.

Another example: many small communities have urged the Board to shield a carrier or two from unlimited entry in particular markets so that they might be encouraged to provide service. This, the Board has refused to do, awarding operating authority to every applicant no matter how small the market. Again, the loss of competitive service (or all service) in many of these markets may well have an unfortunate long-term impact upon competition. This is, in fact, the lesson of even some rather large markets, such as those considered in Chicago-Midway and Oakland, where the Board refused to employ regulatory means to rectify the absence of competition which existed because of a free market choice of most carriers to serve alternate airports. Thus, although the Board seems to encourage competition through its unlimited entry policies, the purported effects of the Board's policies are not always those which arise in the "real world." Indeed, one might argue that the present Board has no idea of what goes on in the "real world." Certainly, the agency seems almost fanatically determined to apply its inflexible deregulatory philosophy no matter what the consequences to the public or the industry.
The Board has lost sight of the ultimate objective of increased competition. It has instead followed a false prophet, deregulation, promoting deregulation as an end in itself. Paradoxically, the Board has vehemently insisted that unlimited entry will be a panacea for all of the ills which may be incurred as a result of unlimited entry. It will not; and the industry and the public may ultimately suffer the consequences of this unfortunate confusion.

Because of the Board's misguided fury there may ultimately be less competition and fewer competitors than there are now. As a result, passengers may pay more for travel than they would have had the Board employed the transitional period in the manner that Congress intended. The Board's inflexibility may well exacerbate our nation's excessive energy consumption. And, perhaps more significantly, the public's safety may well be jeopardized because the Board has so watered down the "fitness" criteria, despite specific congressional directives to the contrary. In the end, history may record Member O'Melia as the sole and lonely voice of reason in a sinking ship of fools.

It is too early to draw conclusions as to the precise effect of the Board's policies. Yet, this has not stopped some from applauding the purported "benefits" of deregulation. For example, in introducing the administration's "Trucking Competition and Safety Act of 1979" \(^\text{426}\) last June, Senator Kennedy said:

Eight months ago, Congress enacted and President Carter signed into law the Airline Deregulation Act of 1978, which loosened substantially the restrictive economic regulations which had interfered with the efficient performance of that industry. The results of the legislation have indeed been impressive. Airline deregulation has meant:

- More people can afford to fly;
- More industry jobs;
- Increased entry and service;
- More revenues and higher profits for the airlines themselves;
- Reduced bureaucracy with substantial savings to the industry and the taxpayers;
- And, of course, lower prices for consumers. \(^\text{427}\)

Again, it is probably too early to make any definitive statements with respect to the impact of airline deregulation. But one cannot help but be disturbed by such a one-sided account of its purported "benefits." One could easily compile a parallel list of problems and injuries which have arisen as a result of the legislative initiatives in this field.

For example, the aforementioned quotation (a) fails to address the loss


\(^{427}\) 125 Cong. Rec. S. 8416 (June 25, 1979).
in quantity and quality of service which has been incurred by small and remote communities. 428 (b) ignores the significantly increased and discrimi-

428. Between February 1, 1978, and February 1, 1979, 260 cities suffered a decrease (most, a significant decrease) in aircraft departures. CIVIL AERONAUTICS BOARD, REPORT ON AIRLINE SERVICE, STATUS ON FEBRUARY 1, 1979, 43-50 (1979) [hereinafter cited as AIRLINE SERVICE]. See also id. at 56. Even the Chairman of the CAB, Marvin Cohen, admitted that, "We have heard the complaints about service cutbacks, and there is no denying that the carriers have been using their new freedom to exit cities as well as their new freedom to enter them." CIVIL AERONAUTICS BOARD, PRESENTATION BEFORE THE SUBCOMMITTEE ON AVIATION, SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, 23 (1979) [hereinafter cited as CAB PRESENTATION BEFORE SENATE COMMERCE COMMITTEE]. Certainly, the nation as a whole experienced an aggregate increase in service, when measured solely in terms of departures performed. Id. at 34. In many communities, a new entrant (frequently, a small commuter carrier) is willing to replace service lost by the departure of an incumbent (frequently, a large scheduled air carrier). But the community may be left with a smaller carrier which, although it may provide as many departures, may nevertheless provide service to less convenient points at less convenient time, will ordinarily provide far less service when measured in terms of capacity (e.g., the replacement carrier may be flying 30-seat aircraft, while the departing incumbent was providing an identical number of frequencies with 120-seat aircraft), and may provide far less satisfactory service in terms of dependability and safety. Thus, the loss of service must be measured from two perspectives: (1) quantitatively (which the CAB has emphasized); and (2) quantitatively (which the CAB has virtually ignored). Although the Civil Aeronautics Board has provided elaborate departure statistics in an attempt to prove that deregulation was a brilliant success, it has provided no statistics with respect to the corresponding qualitative loss that many small communities have experienced. The CAB Chairman has acknowledged only that:

Some cities will receive replacement service that is not as convenient as the service provided by the departing carrier. The new carrier may provide service with smaller aircraft or to a less convenient airport.

Id. at 39. Small communities find little consolation in statistics which prove that, when measured solely in terms of departures, the nation is receiving improved service. From their perspective, the qualitative loss is not reflected in such statistics. And, many such communities are not even receiving the purported benefits of increased departures; indeed, as has been mentioned, 260 suffered a quantitative loss in service between February 1, 1978 and February 1, 1979. Member O'Melia has pointed out that the Board's own data proves

that at the 663 cities surveyed, July 1979 over July 1978, departures declined at 37 percent of the cities. All scheduled service has apparently been lost at 49 cities, involving 974 weekly departures last year. 44 percent of the cities experienced a reduction in available seats—including points at which the study shows an increase in frequencies. . . .

I should also note, with quiet understatement, that the July 1, 1979 date used here for service comparisons probably reflects a high point in domestic service this year.


When Congress promulgated the Airline Deregulation Act in October of 1978, it gave air carriers a great deal of flexibility to abandon routes or communities which were deemed insufficiently profitable, so that the carriers would be able to behave like rational businessmen and shift these resources to more lucrative routes in higher density markets. See Conference Report to Accompany S. 2493, Airline Deregulation Act of 1978, Rep. No. 95-1779, 95th Cong., 2d Sess. (Oct. 12, 1978); Improved Authority to Wichita Case, et al., CAB Order 78-12-106 (1978); Iowa/Illinois-Atlanta Route Proceeding, CAB Order 78-12-35 (1978); see Sims, International Air Transportation: The Effect of the Airline Deregulation Act of 1978 and the Bermuda II Agreement, 10 TRANSP. L.J. 239, 248-249 (1978). On the whole, it was thought, the public interest would be better served by permitting carriers to deploy their resources in response to market demand. Rather than retain the traditional system of cross-subsidization, whereby a carrier took profits derived from its lucrative routes to subsidize service provided on its unprofitable ones, Congress ex-
natory rates, as well as the limitations on liability imposed by air cargo carriers,\textsuperscript{429} (c) ignores the significant increases in aviation fuel consumption and


 Yet, many small communities were extremely disturbed when major carriers began to drop routes or to pull out of these markets altogether. Chambers of Commerce realize that a loss of air passenger service diminishes their ability to attract new industry and tourism. So, too, are so many small communities distraught when rail carriers propose to discontinue service and abandon trackage with which they are linked to distant markets. And, many remote communities are concerned that the deregulation of surface transportation may eliminate the obligation of trucking companies to provide essential service. Clearly, there is more at stake than the sanctity of the laws of the marketplace. There is a public interest in assuring that the fundamental ingredients of economic growth are abundant in all regions of our nation, so that the fruits of such growth might be enjoyed by a larger segment of the population. This is, of course, a distribution of wealth concept. A geographic disbursement of economic growth offers the potential for a more equitable distribution of regional growth rates. Moreover, by removing industry from the concentrated urban areas where the industrial revolution was born, the quality of life might ultimately be improved as workers, by following industry like a magnet, enable population to become more geographically disparate.

 Clearly, transportation is, like communications and energy, a fundamental component of national, regional, and local economic development. If any of these vital components is deficient, either from a qualitative or quantitative standpoint, investment in industrial plant will not be forthcoming, and existing industry may relocate elsewhere. Traditionally, it has been thought that these essential industries were too important to be left to the rigors of the marketplace. Several of these industries were natural monopolies (e.g., the early railroads, telephone, telegraph, gas, and electric companies, and to some extent, television and radio), which if unregulated, would produce in lower quantities and at higher prices than would industries in a competitive market. Regulation seeks to substitute that which is lacking in the marketplace, by insisting that such natural monopolies produce at a lower price and higher volume than they otherwise might.

 Recognizing this distinction, virtually every major industrial nation on the planet treats these industries in a manner significantly different from the rest. In most, the industries are owned and operated by the state. In transportation, most of the rail, motor, barge, and air carriers are socialized, even in western Europe.

 In the United States, the services of transportation, communications and energy have largely been performed by the private sector, with government serving the role of a vigorous regulator of a wide variety of activities, weighing and balancing the public interest against what would otherwise be the economic laws of the marketplace. The government plays a dual and perhaps schizophrenic role——on the one hand, it seeks to stimulate the inherent economies and efficiencies of the regulated industries; on the other, it seeks to protect the public from the abuses which these industries might otherwise perpetrate. For the most part, the United States has been able to avoid nationalizing these industries, for private ownership thereof under governmental regulation has, on the whole, proven successful.

 429. See Augello, Rate Making Without Regulation in TRANSPORTATION LAW INSTITUTE, RATE REGULATION & REFORM 101 (1979) [hereinafter cited as Augello, Rate Making].

 The legislative history of the Air Cargo Deregulation Act reveals that Congress specifically intended that the CAB not eliminate the tariff filing requirement for all cargo carriers. See Conference Report accompanying H.R. 6010, No. 95-733 (Oct. 27, 1977), at 14-15. The obligation to
air pollution attributed to increased flights and frequencies in the densely

file tariffs insures that each shipper will be apprised of the “going rate,” not only for itself, but also for its competitors. Discrimination is inhibited because of the self-policing nature of the pricing scheme—publicly filed tariffs reduce the ability of carriers to deviate therefrom in order to discriminate between their customers. See O’Neal, Price Competition and the Role of Rate Bureaus in the Motor Carrier Industry, 10 Transp. L.J. 309, 317 (1978). Discrimination, in fact, was among the primary motivating factors which initially led Congress to regulate transportation in 1887. See Alchichon, The Evolution of the Interstate Commerce Act: 1887-1937, 5 Geo. Wash. L. Rev. 289, 292-296 (1937).

Today, as a result of the elimination of the tariff filing requirement, there is widespread discrimination by air cargo carriers between shippers. Because the CAB no longer regulates air tariffs, air carriers have been free to increase cargo rates significantly. Between January 1978, and January 1979, such rates rose 89% on minimum charge shipments, 21% on 100 pound shipments, 76% on 5,000 pound shipments, and up to 900% on accessorial charges. See Augello, Rate Making, supra. Deregulated carriers are no longer under an obligation to maintain “just and reasonable” rates; they can now charge whatever the market will bear. Aside from discrimination and significantly increased rates, air cargo shippers are also faced with a plethora of paperwork, for there is now no uniformity in tariff charges between carriers, and no stability in rates, for the tariffs of air carriers may change from one day to the next. Moreover, the CAB has specifically exempted all cargo air carriers from the obligation to establish reasonable rates or to carry upon reasonable request! 14 C.F.R. §§ 241, 242, 249, 291 (1979). See EDR-359, Proposed Rules for All-Cargo Air Carriers and Domestic Cargo Transportation by Section 401 and 418 Air Carriers (July 25, 1978).

An even more serious problem for shippers lies in the limitations on liability imposed by air cargo carriers. Such liability has now been reduced from 50 cents per pound total shipment, to $9.07 per pound per package; special or consequential damages have been eliminated; the time within which a claim may properly be filed has been reduced to 180 days; and “fuel shortages” have been imposed as a bill of lading exception from recovery on loss and damage claim. See Augello, Rate Making, supra. (For an excellent review of the limitations on air carrier liability which have arisen as a result of the Air Cargo Deregulation Act and the CAB’s liberal interpretation thereof, see W. AUGELLO, FREIGHT CLAIMS IN PLAIN ENGLISH 55-62 (1979)).

These are hidden transportation costs. To the extent that they pragmatically reduce the incentive of carriers to maintain the highest standard of care in handling shippers’ commodities, loss and damage will suffer a corresponding increase, to the detriment of the national economy. The lack of uniformity and stability in rates may also characterize the regulated motor carrier industry should Senator Kennedy’s S. 710 become law. Compare Popper, Collective Ratermaking: A Case Analysis of the Eastern Central Region and a Hypothesis for Analyzing Competitive Structure, 10 Transp. L.J. 365 (1978), with Rose, Surface Competition and the Antitrust Laws: Let’s Give Competition a Chance, 8 Transp. L.J. 1 (1976). Senator Kennedy’s bill would repeal the Reed-Bulwinkle Act, 49 U.S.C. § 10706 (1979), and thereby subject carrier agreements on rates, accessorial charges and rules to the meat cleaver of the antitrust laws.

The Carmack Amendment now prohibits regulated motor and rail carriers from limiting their liability for loss and damage in transit, except under specifically approved released rates, or from reducing the time limits for reporting losses or filing claims. 49 U.S.C. § 11707 (1979). The ICC has recently expanded the ability of surface carriers to limit their liability through the released rates option, permitting, for example, such released limitations on shipments of less than 500 pounds. 49 CFR § 1100.225(i) (1979); Released Rates in Conjunction With a Small Shipments Tariff, 361 I.C.C. 404 (1979).

Presumably, total deregulation of such carriers will lead to limitations on liability and reductions on filing times (if not rate increases) analogous to those imposed by deregulated carriers. This will, in the long run, remove existing incentives for carriers to give commodities the highest care while in
populated markets,\textsuperscript{430} (d) ignores the inherent market barriers to entry confronting small carriers and aviation entrepreneurs, such as the unavailability of aircraft and fuel (and the rapidly rising cost of both) and lending slots at major airports,\textsuperscript{431} (e) ignores the overcrowding of airports ill-equipped to handle the surge in traffic generated by potentially predatory fares,\textsuperscript{432} (f) ignores the tendency of major carriers to seek to merge or consolidate (e.g., North Central-Southern, Continental-Western, Tiger-Seaboard, and Pan Am-National)\textsuperscript{433} and the long-term potential for market oligopoly such behavior may portend, (g) ignores the deteriorating safety records of air car-

their possession, and will subject the shipping public to a long term increase in loss and damage in transit, for which recovery will be difficult and prescribed.

\textsuperscript{430} See supra notes 406-417, and accompanying text. Air transportation is the most fuel consumptive of the various modes. The relative energy efficiencies are as follows:

- Pipeline 420 BTU's per Ton-Mile
- Rail 675 BTU's per Ton-Mile
- Waterways 750 BTU's per Ton-Mile
- Truck 3,440 BTU's per Ton-Mile
- Air 37,500 BTU's per Ton-Mile

Letter from William J. Augello to Jimmy Carter (April 12, 1979), republished in \textit{Your Letter of the Law} 44-45 (1979). As air cargo prices fall, more and more freight leaves the surface modes and is instead tendered to the air freight industry, thereby exacerbating our national energy crisis.

\textsuperscript{431} With respect to the inaccessibility of access at congested airports, CAB Chairman Marvin Cohen has acknowledged:

The problem of airport access is a . . . troublesome one . . . . We know that much that we do affects airport access and we recognize our obligation to reduce public inconvenience on the ground as well as in the air. Clearly at congested airports, the increase in traffic and service has exacerbated an existing problem.

\textit{CAB Presentation Before Senate Commerce Committee}, supra note 428, at 40. Nevertheless, the CAB has been wholly unwilling to modify its \textit{de facto} policy of multiple permissive entry in all markets able to support some service to reflect the scarcity of landing slots at airports, see Applications of Colonial Airlines, Inc., \textit{CAB Order} 78-6-183 (1979), or the inability of airports to withstand terminal capacity problems associated with unlimited entry in large markets, see Austin/San Antonio-Atlanta Service Investigation, \textit{CAB Order} 79-3-9 (1979), at 10-11. Curiously, the Board's merger policies apparently have been altered to reflect the "constraints on entry imposed by airport rules or limitations . . . ." Continental/Western Merger Case, \textit{CAB Order} 79-9-185 (1979), at 2.

Hence, the problems of congestion and inaccessibility due to FAA landing slot limitations are given no weight in entry proceedings, and are given determinative weight in merger proceedings. One can only speculate as to the reason for this inconsistency, for the Board has never attempted to distinguish or explain it.

\textsuperscript{432} See Austin/San Antonio-Atlanta Service Investigation, \textit{id.}, and accompanying discussion.

riers (particularly commuter carriers),\textsuperscript{434} (h) ignores the 26 percent increase in passenger fares since the beginning of the year,\textsuperscript{435} (i) ignores the significant reductions in airline profits beginning the third quarter of 1979,\textsuperscript{436} and (j) ignores the recent decision of a number of major carriers (e.g., United, Pan Am, Braniff, TWA) to reduce service, increase rates, and lay off employees.\textsuperscript{437}

434. Recently, much media attention has been focused on the safety problems of DC-10s, as a result of the tragic crash near Chicago. And, a number of major carriers (e.g., Braniff) have come under intensive governmental scrutiny and sanction for failure to adhere to FAA safety regulations.

As has been indicated, commuter carriers have replaced the larger scheduled carriers in many small and medium sized communities, resulting in a qualitative (and, frequently, a quantitative) loss in service. See supra note 4. The fatality rate for passengers boarding commuter carriers is 300 times worse than the rate for the larger carriers. Panetta, \textit{Commuter Airlines: Taming the Wild Blue, Colorado/Bus.} (November 1979), at 17.

435. Actually, coach fares increased almost 28 percent during the first ten months of 1979. Karr, \textit{Airline-Industry Decontrol in First Year Boosts Competition, Fails to Slash Fares, Wall St. J.} (October 23, 1979), at 6, Col. 1. Curiously, although the CAB granted 416 new segments of operating authority during this period, carriers inaugurated service only on 8 percent of these routes. \textit{Id.}

The recent increase in passenger fares has been widely attributed to the increase in the cost of aviation fuel. See, \textit{e.g.}, \textit{Fasten Seat Belts, Newsweek} (Nov. 5, 1979), at 89. Does it not, however, seem somewhat inconsistent to argue that last year's rates (which were declining) were a direct consequence of the new liberal pricing and entry policies of the CAB, as sanctioned by Congress with the promulgation of the Airline Deregulation Act, while this year's rates (which are increasing) are wholly unrelated to the pricing and entry determinations of our new deregulatory regime?

Much attention has been focused on the assertion of CAB Chairman Marvin Cohen, made on April 25, 1979, that "We have estimated that consumers have saved almost $2.5 billion over the past year." \textit{CAB Presentation Before Senate Commerce Committee, supra note 428, at 3. Actually, he provided no data to substantiate that allegation. Moreover, how can the American public be deemed to have saved anything, when the aggregate amount spent on air transportation, generated by the price elasticity of the passenger market, increased during this period? The CAB itself has repeatedly recognized that lower fares tend to lure the "discretionary traveler" to take the trip or vacation of which he might never have dreamed. As the Board has said, lower fares "broaden the demand for air services in general by attracting a segment of the public that wouldn't or couldn't travel by air at the regular price." \textit{Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-3-121 (1978), at 3. How then, does one, by spending money, save it?}

436. Virtually all of the major airlines have suffered a serious reduction in profits during the third quarter of 1979 (vis-à-vis the same quarter, the preceding year). Indeed, two carriers (i.e., United and Braniff) together actually lost over $30 million during this period. See \textit{Fasten Seat Belts, Newsweek} (Nov. 5, 1979), at 89.

437. \textit{Id.} The Air Transport Association anticipates that traffic will continue to decline during 1980. \textit{Id.}

Whether one views the CAB’s policies on having desirable or undesirable effects will depend upon one’s perspective. Large carriers which increase their market shares, and high density markets which may enjoy increased air service will surely view this approach as heaven sent. Small carriers which suffer economic injury (or bankruptcy), and small communities which lose service, will view CAB Chairman Marvin Cohen as Satan incarnate.

In the end, the absolute effects of the Board’s policies may be obscured. Increased air fares will be blamed on higher fuel prices. Small carrier bankruptcies will be blamed on ineffective management. Increased industry concentration will be blamed on free market forces. Loss of service at small communities will be blamed on insufficient market demand. Loss of life will be blamed on aircraft design, pilot error, weather, or the inadequacies of the Federal Aviation Administration. In the end, the Civil Aeronautics Board will probably receive much less blame for the unfortunate results of its mindless approach than it deserves. And, it can probably be relied on to provide a less than objective analysis of the impact of its indiscriminate entry policies.

If indeed, one accepts the author’s conclusion that the Board has abrogated the congressional will, and that effects of the agency’s actions will be far less beneficial than it would have us believe, what are the lessons Congress should derive from this experience? After all, our elected representatives are now contemplating proceeding on an analogous course in the fields of motor and rail carriage. How can the Congress avoid the growing erosion of its constitutional powers over interstate and foreign commerce?

First, Congress should be much more specific in its statutory directions and much more careful in drafting the legislation. Ambiguous terminology such as “public convenience and necessity,” “public interest,” “fit, willing, and able” should be defined in a much more precise manner, or abandoned.438 If a regulator is adamantly dedicated to a particular economic or political philosophy, as are the members of the present Board, he will resolve all ambiguities in his favor. Which leads us to the second lesson.

The Senate should carefully scrutinize all Presidential appointees to the regulatory agencies, so as to insure that they aren’t so dedicated to a particular regulatory ideology that they are willing to bend, twist, or indeed, abrogate the congressional will. The President and the Congress should

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438. Such terms are employed not only in air transport regulation, but also to the regulation of rail carriers, see 49 U.S.C. §§ 10901, 10903, 10909 (1979), motor and water carriers, see 49 U.S.C. §§ 10922, 19023 (1979); brokers of motor carrier transportation, see 49 U.S.C. § 10924 (1979); and communications, see 47 U.S.C. §§ 214(a), 307(a)(d), 309(a) (1977).
abandon the political patronage system and begin to appoint individuals who are (a) reasonably intelligent, (b) reasonably well educated in the legal and economic intricacies of the regulated industry, and (c) not so fanatically obsessed with a particular crusade (e.g., deregulation) that they lose sight of both the congressional intent (as expressed in the relevant legislation and its history) and that which is in the best interests of the nation. Unfortunately, President Carter has attempted to "pack" both the CAB and the ICC with fervent deregulators. This trend must be reversed.

Finally, whatever the benefits of deregulating air transportation, they may not be repeated should Congress choose to deregulate other modes. Prior to 1975, the airline industry suffered from excess capacity and low profits. By lowering prices, air carriers were able to appeal to the discretionary traveler, thereby filling seats which might otherwise have flown empty. In so doing, air carriers increased the economies and efficiencies of their operations, and thereby increased their profits. As has been mentioned, these benefits were rather short lived.

Nevertheless, even these temporary attributes of airline deregulation may not be repeated in the surface transportation of commodities. As has been indicated, the passenger market is price elastic—lower prices may generate demand from discretionary travelers. However, in the aggregate, the commodities market is relatively demand inelastic with respect to the use of transportation services.\textsuperscript{439} Between carriers and modes there may be some demand elasticity, but the total market, at any point in time, is virtually finite. Hence, while air passenger deregulation led to price competition which, in turn, enabled air carriers to fill seats which might otherwise have flown empty, deregulation is unlikely to fill empty areas in motor carrier trailers or rail boxcars.

The overriding purpose of this article has been to set forth, in great detail, the primary allegations made by the CAB regarding the postive impact it has assured us we will enjoy as a result of its deregulation of entry (and its repeated insistence that despite the vehement objections of a plethora of parties, no deleterious effects will arise). If, indeed, such beneficial consequences do occur, they will certainly be evident if only we examine the airline industry and the passenger service it provides. Let us now begin to scrutinize carefully the results of these policies to discern whether the Board's contentions were correct, or whether they were erroneous, and place the appropriate credit or blame, respectively, upon the shoulders of those who deserve it. Let the reader, the traveling public, and the Congress be the judge of whether the nation is left with a superior or a deficient na-

\textsuperscript{439} See Waring, \textit{Rate Adjustments on Specific Movements}, in \textit{Transportation Law Institute, Rate Regulation & Reform} 145 (1979).
tional transportation system.\footnote{440}

\footnote{440. The importance of these issues should not be underestimated. As this author has emphasized elsewhere: Air transport regulation is perhaps the most rapidly developing area in all of administrative law; certainly, the developments here have been among the most revolutionary in the history of governmental regulation. The extent to which these innovative policies succeed or fail will undoubtedly affect not only civil aeronautics, but all of regulated transportation, if not all of governmental regulation. Dempsey, \textit{The International Rate \\& Route Revolution in North Atlantic Passenger Transportation}, 17 \textit{COLUM. J. TRANSNAT'L L.} 393, 441 (1978).}
Service and Methods Innovations in Urban Transportation in the United States

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I. INTRODUCTION

This article describes current U.S. developments and Federal initiatives related to service and methods innovations in urban transportation. The term "service and methods" refers to a broad spectrum of innovative concepts which are directed toward more efficient utilization of existing transportation resources. These strategies are often distinguished from technological innovations on the basis of cost and the time needed for implementation. That is, while technological innovation is generally associated with new transportation systems requiring large capital expenditures on vehicles and guideway facilities and long planning and construction horizons, service and methods innovations typically focus on low-cost modifications to existing equipment, improvements in management and operational procedures, and implementation of novel service concepts.

This article is divided into five sections. Following this introduction, Section II presents a brief overview of urban transportation in the United States. Its purpose is to identify the issues which U.S. urban transit operators must currently address and the constraints under which they function. Section III describes the Federal role in transportation research and development, and identifies several specific Federal programs designed to encourage improvements in urban transportation services and methods. Section IV summarizes the major research, development, and demonstration activities underway in the United States in the area of service and methods improvements. The emphasis in this section is not so much on presenting specific findings related to individual strategies, but rather on illustrating the diversity of service and methods innovations being examined and applied in the United States. Finally, Section V presents a concluding assessment of the current status and future directions of service and methods innovations.

II. A HISTORICAL PERSPECTIVE OF URBAN TRANSPORTATION IN THE UNITED STATES

Urban transportation in the United States has evolved in response to a variety of long-term trends and changes in urban structure, lifestyle, and economic conditions. To better understand the problems which innovative transit services must presently address, it is useful to review briefly some of these factors.

Perhaps the most influential force on urban structure in general, and on urban transportation in particular, was the trend toward suburbanization ex-
experienced in nearly every U.S. city during the 1950's and 1960's. Initial migrations of middle income households to the fringes of urbanized areas were soon followed by the development of suburban shopping centers and the relocation of employment sites. As the inner suburbs became more densely populated, new growth moved further and further out. This movement was aided substantially by Federally subsidized construction of radial urban freeways, which connected outlying suburbs with their central cities.

As the suburbs grew, the central city tax base was eroded. This resulted in higher taxes and reduced services for remaining urban residents and further hastened the suburbanization process. By the late 1960's, most U.S. cities had experienced some degree of deterioration in their central cities, characterized by increasing proportions of low income households, high rates of unemployment, decreasing retail sales, and high vacancy rates for residential and business property.

The impact of suburbanization and the resultant decline of central cities on urban transportation has been significant. As residential development became more decentralized, it became apparent that conventional fixed-route transit service could not economically provide acceptable levels of service to low-density areas. Substantially better transportation service could be achieved with the private automobile, particularly on relatively congestion-free suburban streets during off peak-hours. As patronage declined in the suburbs, transit service was curtailed to reduce operating costs. This initiated a spiral of further declines in patronage, followed by more service cutbacks until suburban off-peak transit service was all but eliminated.

Transit service in the central city was also adversely affected by suburbanization, but for different reasons. As the residential and business tax base migrated to the suburbs, central city governments were forced to reduce local services or significantly increase local property taxes. Public transportation was among the first services to be cut back because cost savings could be achieved without conspicuous changes in service.

Peak-hour commuter service fared somewhat better in response to suburbanization. Despite the growth of suburban employment sites, a large proportion of the metropolitan work force still traveled to jobs in the central city. The resultant high volumes of radially oriented trips made conven-

2. Id. at 185-187.
3. Id. at 248-252.
5. For example, by eliminating expenditures on preventive maintenance, operating budgets could be reduced in the short run. The long term consequences of these actions seemed relatively unimportant at the time because the automobile appeared destined to be the dominant mode of urban transportation in the foreseeable future.
tional fixed-route transit not only economically feasible from the operator's viewpoint, but competitive with the automobile in terms of level-of-service. However, in order to provide adequate capacity for the peak periods, a transit operator must be prepared to accept excess capacity during the off-peak. Transit drivers are typically unwilling to work split shifts and many labor agreements include provisions that preclude extensive use of part-time drivers. Thus, while commuter operations represent the most productive aspect of urban transit service in the United States today, the inefficiencies arising as a result of idle equipment and operating personnel during the off-peak hours undermine the overall financial viability of transit.

Although suburbanization, with its resultant adverse influence on urban public transportation, is still a powerful force in most U.S. cities, there is evidence that some recently emerging factors are beginning to offset this trend. One such factor is the high rate of inflation presently being experienced throughout the United States.\textsuperscript{7} Housing costs have increased at even higher rates. In major U.S. metropolitan areas, the median price of a new home is now over $70,000.\textsuperscript{8} These escalating costs are making it more and more difficult for young families to purchase homes in the suburbs.

Inflation is also having a reinforcing influence on certain family lifestyle trends which became prominent in the late 1960's. These trends include a significant increase in the proportion of women in the work force, a general decrease in family size, and a significant increase in the number of childless families.\textsuperscript{9} Inflation has increased the need in a number of moderate income households for both husband and wife to work, and has created strong economic disincentives to having a large number of children.

The combined effects of inflation and changing lifestyles have begun to influence many of the values which prompted the trend to suburbanization. While the ideal of a single family home may still be a goal of the average American family, it is becoming unattainable for many because of housing costs. The best housing buys today in many U.S. metropolitan areas are in the central cities, in the form of old rowhouses which can be renovated or new high rise urban condominiums. Moreover, many of the motives for suburban living which centered around children (e.g., high quality public schools or open space for play) are less relevant for young child-

\textsuperscript{7} According to the Bureau of Labor Statistics, U.S. Dep't of Labor, Handbook of Labor Statistics 239 (1977), the consumer price index or CPI has risen at a rate of over 6% per year since 1967.

\textsuperscript{8} For example, in August 1978 the median price of a single family home in California was $71,452. Famous Last Word? Forbes, (Oct. 30, 1978) at 50.

less couples. These motives are often replaced by a desire for such urban amenities as proximity to cultural and entertainment centers, closeness to the workplace, and diversity of shopping opportunities.

The cumulative effect of these factors has been to create a social and political climate in the United States which is supportive of central city revitalization. Since public transportation is seen as a critical element in structured urban development, most plans for revitalization of U.S. cities call for major improvements in the quality of service of their urban transit systems.

Moreover, as a consequence of the widespread movement for social reform which began during the 1960’s in the United States, there has been a conscious effort in national domestic policy to focus on the needs of disadvantaged segments of the population. Since public transportation is the primary means of mobility and access to employment for autoless people in urban areas, recent urban transportation policies have focused on the need to provide public transportation which is accessible to all urban residents.\(^{10}\)

This combination of generations of neglect, followed by a reviving interest in urban public transportation, has placed a tremendous burden on local transit operations. Transit operators are suddenly being besieged with demands for improved service from all segments of the population. New, middle-class urban dwellers want improved levels of service to make public transportation an attractive alternative to the automobile. Local and national transportation policymakers want expanded transit coverage to attract suburban commuters out of their automobiles for the work trip. Special user groups, such as the transportation handicapped, want public transit to be accessible to them.\(^{11}\) Additionally, everyone wants transit operations, as well as other public services, to hold down costs and local property taxes.

Because of these demands, local transit managers are currently faced with two overriding problems in their operations. The first problem is how to utilize existing resources more efficiently to provide better service at a lower cost. The second problem is how to make transit service attractive to new user groups within the constraints imposed by local financial resources. The solution to these problems lies in more effective management strategies and in technological and service innovations.

The scope of service and methods innovation goes beyond improving the quality and efficiency of transit operations. Planners and policymakers acknowledge that the automobile will continue to be the dominant mode of transportation in the United States for the foreseeable future (as evidenced,

\(^{10}\) See, e.g., B. Adams, Transportation Policy for a Changing America (1978).

for example, by recent statements of the Secretary of Transportation). Consequently, the achievement of broader national goals, such as energy conservation and improved air quality, requires innovative strategies whose objective is the more efficient utilization of the private automobile.

Local transit agencies, planners, and elected officials are reluctant, however, to develop and implement new, unproven techniques. One reason for this is concern over cost. Since most urban public transportation systems in the United States are currently operating at a deficit, there is a justifiable resistance to any additional expenditure of public funds unless an obvious return on the investment can be expected. Fiscal constraints have a strong dampening effect on local and private sector interest in underwriting research and development activities. Another barrier to innovation is a basic aversion to risk, characteristic of local elected officials who want to be reasonably sure that anything they sponsor will produce more positive than negative public reaction. A final reason for reluctance to innovate is inadequate knowledge and experience regarding the operational feasibility and impacts of novel service concepts and techniques. Bridging this barrier requires a combination of demonstrated success in relevant settings and adequate information transfer.

III. THE ROLE OF THE FEDERAL GOVERNMENT IN FOSTERING URBAN TRANSPORTATION INNOVATIONS

Because of the above-mentioned barriers to innovation in urban transportation, the Federal Government has assumed a lead role in the research and development [R&D] of new transit technologies, innovative management, and operational strategies. This Federal R&D effort is conducted within the U.S. Department of Transportation largely through programs administered by the Urban Mass Transportation Administration [UMTA].

The UMTA R&D effort for urban transportation innovation spans the entire spectrum of research activities with:

- basic research on innovative concepts, travel behavior, vehicle and guideway technology, and urban structure;

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12. See, e.g., B. Adams, Keynote Speech [delivered at the Conference on Basic Research Directions for Advanced Automotive Technology, Boston, MA. February 13, 1979].

13. The legislative mandate to carry out urban transportation research and development was provided in Section 6(a) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1605 (1978). This statute authorizes the Secretary of Transportation to "undertake research, development and demonstration projects in all phases of urban mass transportation . . . which he determines will assist in the reduction of urban transportation needs, the improvement of mass transportation service, or the contribution of such service toward meeting total urban transportation needs at minimum cost." The Act also authorizes "the development, testing and demonstration of new facilities, equipment, techniques and methods." The basic commitment of UMTA to fostering and conducting urban transportation research and development has been reinforced through numerous policy statements issued since passage of this Act.
• development of prototypes for new technologies, services, and methods;
• demonstration and deployment of innovative technologies and strategies in operational environments;
• evaluation of demonstrations to determine institutional and operational feasibility, assess transportation and socioeconomic impacts, and gain new insights for further application and innovation;
• transfer of new technology information to transit operators, planners, and decision-makers.

UMTA currently spends about $70 million annually in support of its R&D activities.\textsuperscript{14} Relatively little of the actual research is conducted by UMTA staff, however. Instead, research contracts and demonstration grants are awarded in order to make the most effective use of the wealth of transportation expertise available both in the United States and elsewhere in the world. Recipients of UMTA research funds include state and local transportation agencies, universities, private consultants, equipment manufacturers (both domestic and foreign), and other Federal agencies.

A unique organizational component contributing to the Department of Transportation's research program is the Transportation Systems Center [TSC]. TSC is a multimodal systems research, analysis, and development organization within DOT's Research and Special Programs Administration. The technical staff at the Center is comprised of over 600 personnel reflecting a broad range of engineering, scientific, socioeconomic and other analytical skills. It therefore provides the Department of Transportation with a strong in-house technical capability to look at intra- and intermodal transportation problems from a multidisciplinary perspective.

The Center conducts high priority technological and socioeconomic research for the Secretary of Transportation and all of the modal administrations within DOT. TSC currently performs over $60 million worth of transportation research annually.\textsuperscript{15} In terms of urban transportation research, TSC received over $21 million, or 30 percent of UMTA’s research budget in fiscal year 1978.\textsuperscript{16} Research related to service and methods innovations is conducted principally within three UMTA program areas which are briefly described below.

A. TECHNOLOGY DEVELOPMENT AND DEPLOYMENT

The objective of the Technology Development and Deployment Program is to direct current and future transportation technology to be responsive to critical issues in urban transportation. Research activities sponsored

\textsuperscript{14}. \textit{Urban Mass Transportation Administration, U.S. Dep't of Transportation, Innovation in Public Transportation: A Directory of Research, Development and Demonstration Projects—Fiscal Year 1977;} (1977) [hereinafter cited as \textit{Transport Innovations}].

\textsuperscript{15}. \textit{Research and Special Programs Administration, U.S. Dep't of Transportation, TSC Annual Report 18} (1978).

\textsuperscript{16}. \textit{Id.}
under this program include the development, testing, demonstration, and evaluation of selected new vehicle technologies, development and review of equipment specifications, promotion of standardization of transit vehicles and equipment, and qualification of new and improved transit products.\textsuperscript{17}

The program also sponsors evaluations and assessments of existing technology in the United States and abroad,\textsuperscript{18} and transmits relevant information to its client groups through conferences, seminars, workshops, technical papers, and project and special reports.

\textbf{B. \textit{Service and Methods Demonstrations}}

The Service and Methods Demonstration [SMD] Program is intended to develop new techniques for using the current generation of transit equipment to provide improved quality, quantity, and efficiency in public transportation. A large number of innovative methods for increasing the level of service and productivity of transit have been developed both by UMTA and by various transit properties throughout the world over the past few years. The SMD Program focuses on evaluating the effectiveness of these techniques in real-world operational environments, and in promoting the most promising of them to local transit operators. Current SMD projects and evaluations are being conducted in the areas of conventional transit service innovations, paratransit, pricing policies, and services to special user groups.\textsuperscript{19} This program also includes an information dissemination element to insure that local transit operators are kept up to date on promising innovations.

\textbf{C. \textit{Transit Management Techniques and Methods}}

The Transit Management Program is designed to assist local transit operators in making the most effective use of their limited funds. Assistance takes the form of research and demonstration projects to develop new and improved management techniques for the transit industry, as well as

\textsuperscript{17} Specific projects sponsored under this program include TRANSBUS—the standardized transit bus design, Automated Guideway Transit Technology, and the Morgantown People Mover Demonstration Project. For a more complete listing of projects funded in FY1978, see \textit{Transport Innovations}, supra note 14, at 1-67.

\textsuperscript{18} For example, the U.S. Department of Transportation has consummated Memoranda of Understanding with both the Ministry of Transportation and the Ministry of Research and Technology of the Federal Republic of Germany, which include exchange of information and cooperation in the field of urban transportation, among other subjects. Specific joint, cooperative projects have been negotiated under the umbrella of these agreements, including assessments of automated guideway systems and paratransit services.

\textsuperscript{19} Many of the projects sponsored under this program are identified in Section IV of this article. For a summary and discussion of all current SMD demonstrations and activities see \textit{Urban Mass Transportation Administration, U.S. Dept of Transportation, Service and Methods} (B. Spear ed. 1979) [hereinafter cited as \textit{Service and Methods Report}].
efforts to implement these techniques in the day-to-day operations of transit systems.  

IV. SELECTED STRATEGIES FOR IMPROVING THE COST-EFFECTIVENESS AND QUALITY OF URBAN TRANSPORTATION

This section describes specific service and methods innovations which are being developed and implemented in operational environments with the objective of improving the efficiency and/or quality of urban public transportation. 21 These strategies are indicators of current directions of change within the U.S. urban transportation sector; they also serve to illustrate the varied roles of the Federal government in promulgating innovation. The service concepts and methods to be examined fall into five broad areas:

1. Transit operations and management techniques
2. Traffic management techniques
3. Paratransit services
4. Transit pricing and fare payment techniques
5. Special user group services

A. TRANSIT OPERATIONS AND MANAGEMENT TECHNIQUES

The improvement strategies in this category are all aimed at achieving more efficient deployment of resources available to the transit operator for the production of transit services. Some are designed to improve the process by which services are planned and managed, while others relate directly to improved service configuration and operations. These improvements may provide the transit operator with the choice of increasing the quantity and quality of transit at small additional cost, or maintaining existing levels of service at lower cost.

In recent years, the concept of automated scheduling has been receiving increasing attention within the transit industry as one means of improving the efficiency of operations and reducing operating costs. One such system is the Vehicle Scheduling and Driver Run-Cutting (RUCUS) system, developed by UMTA’s Offices of Transit Management and Planning Methods and Support to assist transit operators in the preparation of service, vehicle, and driver schedules. 22 RUCUS produces optimized vehicle schedules by minimizing vehicle layover and deadhead travel time, and has

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20. Specific projects sponsored under this program include transit marketing demonstrations in Baltimore, MD, and Nashville, TN, a computerized program to assist transit operators in vehicle scheduling (RUCUS), and the creation of a centralized data bank for mass transit financial and operating information. For a more complete listing of projects funded in FY1978, see TRANSPORT INNOVATIONS, supra note 14, at 113-117.

21. As noted earlier, these strategies all have a common orientation toward near-term improvements, relying for the most part on existing technology, and relatively small capital investment.

22. TRANSPORT INNOVATIONS, supra note 14, at 114.
a driver run-cutting procedure that minimizes the number of driver run assignments, driver pay-hours, overtime, and other resources, subject to the constraints of labor union contract rules.\textsuperscript{23}

Since 1974, the Urban Mass Transportation Administration and the Transportation Systems Center have been actively involved in promoting the implementation of RUCUS within the transit industry. Financial support in the form of capital and operating assistance grants has been provided by UMTA to transit authorities for RUCUS implementation projects. TSC has provided on-site technical support to transit operators and state/local transportation agencies in the implementation and application of RUCUS. Additional research and development efforts have included: (1) a review and assessment of current RUCUS implementations; (2) the publication of guidelines for implementing the system; and (3) the development of RUCUS software improvements.\textsuperscript{24} At the present time, the RUCUS system is operational or in the process of being implemented in over 30 transit authorities in the U.S. and Canada.\textsuperscript{25}

The procedures used by transit operators to plan and evaluate route modifications are unstructured and informal.\textsuperscript{26} Two Service and Methods Demonstration projects to be implemented in Omaha, Nebraska and Columbus, Ohio are designed to provide transit operators with improved, more cost-effective data collection and analysis tools to assess the operational characteristics, costs, and patronage of individual routes and to identify new markets or transit service.\textsuperscript{27} These demonstrations will emphasize the development of: (1) quantitative service evaluation criteria which explicitly specify the service goals and policies that transit management seeks to attain; (2) efficient surveying and sampling techniques to collect appropriate data; and (3) an easy-to-use software package which can apply the service criteria to evaluate existing routes, and utilize statistical techniques to identify new transit markets.

The Service and Methods Demonstration Program is currently sponsor-

\textsuperscript{23} Urban Mass Transportation Administration, U.S. Dep't of Transportation, Vehicle Scheduling and Driver Run Cutting—RUCUS Package Overview (The MITRE Corporation ed. 1973).

\textsuperscript{24} Recent publications resulting from this research include: Urban Mass Transportation Administration, U.S. Dep't of Transportation, RUCUS Implementation Manual (The MITRE Corporation ed. 1975), and Urban Mass Transportation Administration, U.S. Dep't of Transportation, Service, Inventory and Maintenance System Computer System Description (the MITRE Corporation ed. 1975).

\textsuperscript{25} Urban Mass Transportation Administration and Federal Highway Administration, U.S. Dep't of Transportation, Transportation System Management: State of the Art 150-152 (Interplan Corporation ed. 1977).

\textsuperscript{26} Transportation Systems Center, U.S. Dep't of Transportation, A Preliminary Analysis of the Requirements for a Transit Operations Planning System (M. Couture, R. Waksman & R. Albright ed. 1978).

\textsuperscript{27} Service and Methods Report, supra note 19, at 128-129.
ing the study, development, and evaluation of a number of techniques designed to improve the quality of conventional transit service with little or no increase in resource consumption. Several of the techniques are specifically intended to improve the speed, reliability, and coverage of transit service in the growing suburban travel market, which has been dominated by the private automobile. One concept, variously known as timed transfer, focal-point or pulse-point service, modifies existing transit schedules so that routes are synchronized to intersect at activity centers or other transfer points at the same time, thereby minimizing transfer times. This technique has been utilized in the Canadian cities of Vancouver and Edmonton for several years and is about to be implemented in a few U.S. cities as well. The SMD Program plans to sponsor a special evaluation of the Canadian and U.S. applications of this concept to obtain accurate information on the impacts on transit service, operations, costs, and traveler response.

Another technique designed to enable transit operators to provide improved suburban service without increasing costs is the zoned bus system. This concept, which was implemented successfully in Osaka, Japan, involves the conversion of a radially oriented bus system into a system comprised of trunk lines and feeders. The SMD Program is interested in examining the applicability of this concept for U.S. transit operations via a demonstration project and evaluation.

The SMD Program is also sponsoring a special in-depth evaluation (but not the implementation) of a major restructuring of bus routes in Denver, Colorado. This is the first example of a system-wide revision of service at one point in time in the United States. The transformation of the bus network from a radial to grid-line pattern is intended to provide improved service to Denver area residents (whose travel patterns are currently less focused on the downtown).

Current SMD efforts in the area of transit service reliability improvements provide an example of the full cycle of Federal involvement in the R&D process. As a first step, a comprehensive study was conducted by TSC on the subject of transit reliability. The study examined the impact of service reliability from the perspective of the transit operator as well as the traveler, developed empirical measures of service reliability, determined causes of reliability problems, explored techniques for improving reliability,

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29. Service and Methods Report, supra note 19, at 128-129.
and made recommendations for future research and demonstrations. A key finding of the study was the significant influence of reliability on (a) mode and departure time choices, and (b) the cost of providing service. This suggests that operators could, by improving reliability, reduce operating costs and possibly induce additional ridership. On the basis of this research study, planning is currently underway for two SMD-sponsored demonstrations aimed at alleviating problems of headway and run time variability without incurring significant additional operating costs. Under consideration are relatively simple strategies such as scheduling changes and route modifications, as well as strategies involving real-time monitoring and control of operations. These demonstrations will be thoroughly evaluated by TSC; and resulting information derived therefrom regarding the feasibility, operational effectiveness, and impacts of the demonstrated strategies will be disseminated to transit operators, planners, and researchers.

Another major technological innovation which has been the focus of a full-cycle, Federally-sponsored R&D effort is the automatic vehicle monitoring [AVM] system, which is aimed at improving transit fleet management and operations. AVM applies modern electronic tracking and communication technologies to provide continuous information on the status and location of each vehicle in a fleet to a central dispatcher. The dispatcher, in turn, can use real-time strategies to control headways, respond to emergency situations, and notify waiting passengers of service and schedule status. In addition, the AVM system provides a full record of all vehicle operating and passenger load data which can be used for planning and modifying routes and schedules. Since 1974, TSC has been serving as UMTA’s Systems Manager for this multi-million dollar program, with the responsibility for performing feasibility studies of multi-user AVM system concepts (including several in operation in Europe), developing technical specifications for a U.S. system, field testing alternative tracking subsystems, and conducting and evaluating a trial deployment of a complete system in the Los Angeles area (the latter phase to be initiated later this year).

B. Traffic Management Techniques

The preceding section focused on a variety of strategies which could be implemented by transit operators for the purpose of improving the quality and efficiency of their own service operations and management. This section describes a set of techniques which are considerably broader in scope and intent (and thus outside the direct or sole purview of the transit

operator), affecting not only the quality and efficiency of transit service, but also the operating environment for the private automobile. Traffic management techniques have as their primary objective the more efficient utilization of existing urban roadspace through the encouragement of high-occupancy vehicles [HOV's] and/or the discouragement of solo-occupant vehicles. Aside from the obvious benefit of avoiding costly new construction of highway and parking facilities, these techniques support broader societal objectives such as energy conservation, improved air quality, and downtown revitalization. Current UMTA R&D efforts (undertaken principally through the SMD Program) involve two main types of innovative traffic management techniques: preferential treatments for HOV's and several concepts which have, at their core, the restriction of automobile traffic and enhancement of the pedestrian environment.

Over the past decade, the SMD Program and one of its predecessors, the joint UMTA/FHWA Urban Corridor Demonstration Program, have sponsored a variety of projects involving preferential freeway lanes and access ramps for buses and carpools. Specific techniques which have been demonstrated include separated exclusive lanes (Shirley Highway in Northern Virginia), nonseparated concurrent flow lanes (Santa Monica Freeway in Los Angeles and Interstate I-95 in Miami), contraflow lanes (Houston, Texas and the approach to the Lincoln Tunnel in New Jersey), and ramp metering (Minneapolis). In general these projects have emphasized positive incentives for high-occupant vehicle usage, such as the travel time and reliability improvements afforded by the preferential treatments, and the addition of express bus service and park-and-ride lots to improve the convenience of using buses and carpools. The widespread dissemination of planning and operational guidelines and evaluation findings from these demonstrations has been an important factor in the growing adoption of the techniques in a number of urban areas.

Recent SMD experience with physically nonseparated concurrent flow reserved lanes is illustrative of two noteworthy points regarding the R&D process: first, the desirability of multiple experiments involving a particular concept, and second, the valuable role of project failures, as well as successes in advancing the state of knowledge. Aside from sponsoring demonstrations of this concept in Los Angeles and Miami, the SMD Program performed a special evaluation of a similar locally initiated project on Boston's Southeast Expressway. The three projects offered considerable variation on the basic concept in terms of site characteristics, operational design, and most notably, degree of public acceptance. The Miami project still operates with only minor operational changes, whereas the Santa

Monica and Southeast Expressway projects met with severe public opposition and early demise. Careful analysis and comparison of the implementation process, operational characteristics, and impacts of these varied applications have revealed the many generic weaknesses of this concept compared to other HOV preferential treatments. Moreover, valuable lessons regarding safety, enforcement, and public information have been learned for application in future projects.\textsuperscript{35}

To complement its efforts aimed at improving the performance of high-occupancy modes on the freeway or line-haul portion of the trip leading to the downtown, the SMD Program has also sponsored demonstrations and research involving preferential treatment techniques for buses on urban arterials. Techniques under examination include concurrent flow, contraflow, reversible, and median bus lanes as well as priority signalization.\textsuperscript{36} In this area as in others, the SMD Program attempts to enhance the effectiveness of its own resources by designing R&D activities which supplement and synthesize the progress and experience gained through local initiative.

Turning now to auto restriction/pedestrian enhancement strategies, the two major areas of research and demonstration within the SMD Program have been auto restricted zones [ARZ's] and transit malls. ARZ's are areas in which auto traffic is restricted or prohibited, and represent a promising means of revitalizing the downtown environment by improving transit operating conditions and pedestrian access. The ARZ concept is not new; several successful applications exist in cities throughout Europe and the Far East.\textsuperscript{37} However, it was felt that a major Federal R&D effort encompassing detailed studies, multiple demonstrations, evaluations, supporting research and information dissemination was warranted in order to assess and demonstrate the potential applicability, public acceptance, and impacts of the concept in the U.S. urban environment. A comprehensive ARZ feasibility and site selection study completed in 1977 concluded that there were substantial opportunities for ARZ's in American cities with a strong activity base.\textsuperscript{38} Based on recommendations from this study, the SMD Program is sponsoring four ARZ demonstrations in Boston, Massachusetts, Memphis,

\textsuperscript{35} Urban Mass Transportation Administration, U.S. Dep't of Transportation, A Comparative Analysis of Results from Three Recent Non-Separated Concurrent Flow High Occupancy Freeway Lane Projects: Boston, Santa Monica, and Miami (H. Simkowitz ed. 1978).


\textsuperscript{37} Well over 130 cities in Europe and the Far East have initiated some form of auto restriction including Besancon, France, Munich, West Germany, Leeds, England, Vienna, Austria, and Singapore, Malaysia. For an overview of this concept and a comparative analysis of the European experience, see Urban Mass Transportation Administration, U.S. Dep't of Transportation, Auto Restricted Zones: Background and Feasibility (W. Herald ed. 1977).

\textsuperscript{38} Id.
Tennessee, Providence, Rhode Island, and New York City. These projects offer considerable variation in terms of area characteristics, mix and design of project elements, and geographic and financial scope. They are expected to provide valuable information for planners, transit operators, and local decision-makers on a broad range of issues, including impacts on transit and auto level-of-service and costs, travel behavior, and environmental and economic impacts.

Although smaller in scale than ARZ's, transit malls are gaining increasing popularity in the U.S. as a means of improving the operating efficiency and attractiveness of public transit, while concurrently providing an improved environment for pedestrians and shoppers. A transit mall is a street on which transit vehicles are given exclusive or near-exclusive access, sidewalks are widened, and pedestrian amenities are added. Access for automobiles is denied or strictly limited, except for cross-street traffic. Since a number of transit mall projects have been implemented under local auspices, there has not been a need for Federally sponsored demonstrations of the concept. However, the SMD Program has worked to foster the understanding and diffusion of this traffic management strategy by sponsoring a major evaluative study of the malls implemented to date. The study has produced valuable transferable information on the planning and implementation process, operational effectiveness, costs, and impacts of transit malls.

C. Paratransit Services

As noted earlier, the process of urban decentralization has created new travel markets which cannot be served in a cost-effective manner by conventional transit. During the past few years, increased attention has been focused on the potential of paratransit services to satisfy these needs as well as provide mobility options in smaller, low-density communities. Paratransit services are defined as "those forms of intra-urban passenger transportation which are available to the public, are distinct from conventional transit (scheduled bus and rail), and can operate over the highway and street system." Included within this definition are pre-arranged ridesharing systems such as carpooling, vanpooling and subscription bus, and street-hail or phone-requested services such as shared-ride taxi, demand-responsive transportation, and jitney. The possibilities for variation within each of these basic service concepts are numerous, since there is a

wide range of options with respect to specific operating policies, service levels, providers (public and private), and target markets served. Moreover, there are many possibilities for incorporating individual paratransit services within a "family" of integrated urban transportation services, the specific composition of which can be tailored to the particular activity patterns, local objectives, and financial resources of the urban area.

The SMD Program has taken a lead role in studying and experimenting with a variety of paratransit service concepts, beginning with small-scale, single-concept demonstrations, and then progressing to more complex projects involving multiple service concepts in larger operating environments. The Program has sponsored nearly 20 paratransit demonstrations, plus several special evaluations of public and privately funded paratransit systems. A major feature distinguishing the paratransit demonstrations from other SMD-sponsored projects is their emphasis on alleviating the institutional barriers to service provision, as well as examining operational, behavioral, and cost aspects of the individual service concepts.

One area of concentration within the Program has been the development and promulgation of the transportation brokerage concept. In most urban areas, the agencies traditionally responsible for transportation planning and operations tend to have a skeptical view of the potential role of novel paratransit services. This skepticism may stem from lack of information about such services, general resistance to implementing new concepts, fears about the competitive position of conventional transit services, or other factors. There is typically no established mechanism for determining the travel needs of specific market segments and identifying the most appropriate providers for serving those needs. Underutilized transportation resources may be available in the private sector (e.g., the taxi industry), but there is no functioning channel for tapping these resources and integrating them with ongoing services in an efficient, cost-effective manner.

SMD projects in Knoxville, Tennessee, Westport, Connecticut, Chicago, Illinois, and other locales have developed and are refining the brokerage approach, which is intended to fill this institutional void. The transportation broker can perform a variety of functions, including the identification and coordination of demand and supply, as well as lobbying to remove institutional obstacles to the efficient use of existing transportation resources in the public and private sectors. Moreover, the scope of brokerage operations can vary in terms of geographic area and number of target markets served. The Knoxville demonstration, initiated in 1975, constitutes the first implementation of the brokerage concept on a regionwide basis. While the local mode shift impacts of this project have not been substantial,

42. Service and Methods Report, supra note 19, at 139-190.
43. Id. at 161-169.
the demonstration has had a significant impact from a national perspective. Its accomplishments on legislative, insurance, and other institutional fronts and its wealth of operating experience have been widely disseminated to provide guidance for emerging brokerage operations in other areas.44

UMTA has sponsored research and development related to demand-responsive transit since the mid-1960's, with a full spectrum of activities ranging from concept feasibility studies to demonstrations (the earliest being in Haddonfield, New Jersey45). Recent UMTA efforts in the area of demand-responsive transit have focused on the major operational and institutional issues which have not been adequately explored in previous local or Federally sponsored efforts. Primary areas of emphasis have been: (1) experimentation with and analysis of a variety of service options across a wide range of service areas and target groups; (2) development and assessment of different models for combining paratransit services and integrating them with conventional fixed-route services; (3) testing of different mechanisms for encouraging the private sector to provide such services in a cost-effective manner; and (4) development, deployment, and testing of computer dispatching technology.46

SMD-sponsored demand-responsive demonstrations in Rochester, New York, Westport, Connecticut, and Xenia, Ohio have collectively explored a variety of areawide and feeder service options.47 They have provided useful empirical evidence on level-of-service, demand, and cost characteristics as well as transferable experience with respect to planning, implementation, and operational issues. For example, findings from the Rochester and Xenia projects suggest that demand-responsive services are generally not successful replacements for existing fixed-route systems, but are better suited to providing areawide and many-to-one coverage in low-density areas or acting as a feeder service to existing fixed-route systems.48 Computerized dispatching techniques and hardware are being developed under the auspices of UMTA's Technology Development and Deployment Program. Operational testing and evaluation at two SMD sites (Rochester and a forthcoming demonstration in Orange County, California) will provide

46. SERVICE AND METHODS REPORT, supra note 19, at 140-161.
48. SERVICE AND METHODS REPORT, supra note 19, at 158-161.
information on the service efficiency and cost impacts of computerized dispatching which can be disseminated to operators of such systems nationwide.

The final area of Federal initiative within the broad category of paratransit services has been ridesharing, here defined to include carpooling and vanpooling. Although carpooling is by no means a novel mode of transportation (accounting for some 27% of work trips in 1970), the five-year period since the energy crisis has witnessed an increasing flurry of activity aimed at the formal encouragement and organization of carpooling and, more recently, vanpooling. Various Federal agencies have had different areas and degrees of responsibility over this period, making it very difficult to provide a cohesive summary here.

However, the efforts of UMTA’s SMD program in the area of vanpooling are illustrative of the manner in which the Federal government has attempted to complement ongoing non-Federally initiated efforts so as to advance the state-of-the-art. Despite the proliferation of areawide and employer-sponsored ridesharing programs throughout the country, there have been rather limited efforts and funds devoted to systematic evaluations of the operational effectiveness, costs, and impacts of these programs. The four SMD-sponsored projects in Knoxville, Tennessee, Marin County, California, Norfolk, Virginia, and Minneapolis, Minnesota are intended to overcome this deficiency through carefully designed, comprehensive evaluations being performed by TSC. At a more operational level, these four projects are developing and testing a variety of third-party, multi-employer approaches to vanpooling which would probably not be attempted by an individual employer or local area due to market and institutional barriers.

D. TRANSIT PRICING AND FARE PAYMENT INNOVATIONS

A major objective of most of the innovative strategies discussed above has been to achieve more efficient utilization of existing transportation resources. Pricing strategies, applied alone or in combination with physical or operational strategies, can potentially play an important role in meeting this objective by controlling the volume, pattern, and composition of traffic. Through the application of transit pricing incentives such as fare reductions or fare payment innovations, the attractiveness of transit relative to auto can

51. In Minneapolis, for example, seven multi-employer sites are involved in the demonstration, and a private third-party broker leases out “seed vans” to get the vanpools started. In the Marin County demonstration, ridesharing promotion is handled by the Golden Gate Bridge and Transportation District, which has provided special incentives through differential pricing of bridge tolls.
be enhanced, thereby inducing auto users to travel by transit. Similarly, the application of auto pricing disincentives such as fees for using congested roadways and parking surcharges can reduce the attractiveness of auto relative to transit and may induce a shift to high occupancy modes. Consequently, the ability of the transportation system to accommodate traffic can be increased without capital investment.

Many of the Transportation System Management plans currently being proposed by cities do not include pricing strategies because local staffs, for the most part, lack technical familiarity with these concepts. Fare reductions have been implemented under local initiative in the past, and limited experimentation with fare elimination has occurred (i.e., free-ride days, free-fare downtown zones), but relatively little is known about the magnitude of impacts of these strategies. Moreover, in the case of pricing disincentives, the barriers to innovation include not only inadequate knowledge and experience, but also considerable skepticism as to the political feasibility of the strategies. Title II of the National Mass Transportation Assistance Act of 1974, provided for the "research and development, establishment and operation of demonstration projects to determine the feasibility of fare-free transit." UMTA incorporated this concept into a broader spectrum of pricing policies, and embarked on a major research and development program to advance the state of knowledge about these techniques and to disseminate the information widely to local officials and planners.

In recent years, it has been suggested that elimination of fares on urban transit systems, on either a restricted or unrestricted basis, could contribute to urban revitalization in a number of ways. The increased ridership resulting from free fare could reduce urban congestion and pollution and might enhance the public’s image of transit. In addition, a free transit system would improve the mobility of downtown residents, who tend to be more elderly, low-income, and auto-dependent than the general population. Finally, a free transit system would make downtown more accessible to area residents and workers and might therefore help strengthen the declining retail sector. Although interest had existed in the fare-free transit concept for many years, only limited locally-initiated experimentation has occurred. These projects were generally very restrictive in nature and/or of short duration. Without knowledge of the actual benefits of a free-fare sys-

tem (and the magnitude of potential disbenefits such as joy-riding and vandalism), operators were unwilling to accept the loss in revenue which would result. The SMD Program is currently sponsoring the operation and evaluation of four fare-free demonstrations.\textsuperscript{56} In Albany, New York, and Knoxville, Tennessee, fares are eliminated in off-peak periods in the downtown area. In Denver, Colorado, and Trenton, New Jersey, fares are eliminated on the entire transit system during non-commuting hours. These projects are being thoroughly evaluated by TSC, and will provide information on the operational aspects of fare-free transit and impacts on ridership, mobility, revenues, traffic congestion, and retail sales.

During the 1960's, when exact change requirements were instituted on most U.S. transit systems, many operators began to sell prepaid tickets, passes, and tokens to their riders. Although these prepayment programs were originally designed to mitigate the inconvenience to passengers of requiring exact change, in recent years operators have begun to consider them as marketing tools. In a recent TSC-sponsored study\textsuperscript{57} it was found that more than 80% of all U.S. transit operators offer one or more types of prepaid fare instruments. Operators allege that transit fare prepayment programs confer many benefits, including increased ridership and revenue, improved cash flow and heightened public awareness of the transit system. However, the study concluded that little quantitative evidence existed to validate these operator claims.

The impact of increased usage of prepaid instruments on transit ridership and operator economics is currently being evaluated in the SMD Program. Marketing promotions of transit passes and tickets are being conducted in four demonstration cities (Austin, Texas, Phoenix, Arizona, Sacramento, California, and Jacksonville, Florida).\textsuperscript{58} The findings from these projects will assist transit operators in designing well-balanced, rational prepayment programs for their areas.

The SMD Program is also studying the feasibility of instituting other fare payment innovations which can improve operating efficiency.\textsuperscript{59} One of these is credit card fare post-payment, which employs a machine readable credit card and automated recording equipment at the transit stop or in the vehicle which can read the card and store information about the trip. The system could be used to improve record-keeping and information management as well as to increase patronage, since deferred payment may induce increased usage of transit. Credit card post-payment has been used in several demonstrations designed for the elderly and handicapped; the SMD

\textsuperscript{56.} Service and Methods Report, supra note 19, at 106-122.
\textsuperscript{57.} Transportation Systems Center, U.S. Dept of Transportation, Transit Fare Prepayment (the Huron River Group, Inc. ed. 1976).
\textsuperscript{58.} Service and Methods Report, supra note 19, at 92-102.
\textsuperscript{59.} Id. at 102-106.
Program plans to implement the concept on a systemwide basis. Another fare payment concept which is being studied for implementation in the United States is self-service fare collection, which is common in Europe. The SMD Program has sponsored a study of the potential of these systems for application in the U.S. In the near future, system requirements will be specified, and candidate cities will be identified.

In recent years pricing disincentives have been considered a potentially effective approach for improving urban transportation in congested areas. The concepts are based on the philosophy that transit incentives by themselves may not be fully effective in obtaining significant mode shifts from the automobile to transit and other ridesharing arrangements. Only by the application of specific disincentives to the low occupancy automobile and the introduction of tangible and visible public transportation improvements can significant increases in transit ridership be obtained. Proposed auto pricing schemes can be divided into two categories: those affecting vehicles on the road and those affecting parking. Auto pricing schemes are particularly attractive policy instruments because, unlike transit fare elimination, no revenue loss is generated. In fact, the fees which are collected from auto drivers might be used to improve or subsidize transit service.

Despite widespread interest in the potential impacts of the concept, auto pricing disincentives have not yet been implemented in an American city because of formidable political and legal barriers. Any policy which exacts a user fee tends to be unpopular, and when the policy also infringes on citizens' freedom to operate their automobiles at will, implementation becomes very difficult. A variety of legal questions have yet to be resolved. For example, flexibility in introducing taxes or surcharges at municipal parking lots may be limited by the terms of the bonding agreements made when the lots were constructed. The SMD Program is interested in implementing and evaluating a variety of pricing disincentive demonstrations. To that end, a large-scale research effort was undertaken to refine the concepts and to establish procedural guidelines for implementing them. In addition, potential demonstration sites were actively solicited. As a result of these efforts, a parking pricing demonstration, the first of its kind, will be implemented in Madison, Wisconsin, this year. It is anticipated that the

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61. This research effort is being conducted by the Urban Institute. To date, a number of working papers have been produced, including K. Bhatt, J. Eigen & R. Higgins, Implementation Procedures for Pricing Urban Roads (1976); and K. Bhatt & M. Beesley, Planning and Implementing a Road Pricing and Transportation Improvement Package (1975).

project will demonstrate pricing disincentives to be politically feasible—thus interesting other cities in future application of the concepts.

E. **Special User Group Services**

The term special user groups generally refers to those persons who, because of age, income or physical disabilities do not have the use of an automobile and are therefore dependent on public transportation or special arrangements to meet their mobility needs. It is estimated that almost seven and a half million Americans have trouble with or cannot use regular public transit because of age or a handicap.63

Public transit’s inability to be responsive to all the travel needs of these market segments has promoted several Federal initiatives to improve transportation opportunities and services available to them. The Urban Mass Transportation Act of 1964 as amended in 1970 declares “the national policy that elderly and handicapped persons shall have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured.”64

More recently the Department of Transportation has been developing regulations to implement Section 504 of the Rehabilitation Act of 1973 which mandates that Federally funded programs be accessible to all handicapped persons.65 Complementing these legislative initiatives are a variety of UMTA-sponsored R&D activities (mostly within the SMD Program) which have the dual objective of improving understanding of the characteristics and travel requirements of the elderly and handicapped, and developing, demonstrating and evaluating various innovative service concepts. A major concern is to identify strategies which are effective in alleviating the physical and economic barriers to travel, and yet are compatible with the financial ability of local communities.

One area of SMD Program emphasis has been to improve the efficiency with which existing transportation resources are used to serve the needs of special user groups. The existing network of social service agency transportation is fragmented, duplicative, and often inefficient. Typically, each agency services its own clients with separate vehicles, staffs, facilities, and budgets. There is little coordination among agencies in a region to deliver service in an efficient manner. One agency may lack the

resources to provide any transportation for its clients while a neighboring agency has excess vehicle capacity. In most cases, client demand for service exceeds supply, and limitations on service must be imposed.

Coordination of these disparate agency resources has been viewed as a promising means of achieving more cost-effective services for special user groups. However, there are formidable institutional barriers to such coordination, the foremost being agency skepticism about the feasibility and benefits of entering into coordination schemes. The SMD Program has attempted to narrow the knowledge and experience gap in this area by sponsoring demonstrations involving a variety of approaches to service coordination. Projects in diverse locations such as Naugatuck Valley, Connecticut, Mercer County, New Jersey, and Pittsburgh, Pennsylvania, are providing a wealth of experience regarding institutional and operational issues, as well as quantitative data on the impacts of coordination on service quality, costs, and travel behavior.\textsuperscript{66}

Another concept designed to improve the quality and utilization of transportation services for special user groups is the user-side subsidy concept. Under this approach, eligible individuals are provided with transportation tickets or vouchers at reduced prices. Transportation providers accept these vouchers as payment for services and then redeem them at face value from the public agency. Since the decision of which provider to use rests with the passenger, the subsidy mechanism is expected to stimulate transportation providers to improve the quality of service offered these groups. Through a carefully designed set of demonstrations in four sites (Danville, Illinois, Montgomery, Alabama, Kinston, North Carolina, and Lawrence, Massachusetts), the SMD Program is obtaining an extensive body of information on the feasibility, costs, and impacts of this innovative technique in a variety of local contexts, involving fixed-route transit and shared ride taxi operations.\textsuperscript{67} With respect to service innovations, the SMD Program has sponsored demonstrations of two major types: specialized demand responsive services and wheelchair-accessible fixed-route bus service. Projects in Portland, Oregon, Baton Rouge, Louisiana, and the Lower East Side in New York City, as well as many of the agency transportation coordination and user-side subsidy projects, have provided useful information for planners and local decisionmakers regarding the operational characteristics, costs, and impacts of a wide range of specialized demand

\textsuperscript{66} Service and Methods Report, supra note 19, at 236-245.

\textsuperscript{67} D. Kendall, A Comparison of Findings from Projects Employing User-Side Subsidies for Taxi and Bus Travel (1979) [paper prepared for distribution at the UMTA Regional Seminars on Interim and Specialized Transportation for Handicapped and Elderly Persons, August 1979]. For a summary of findings presented in this paper, see Service and Methods Report, supra note 19 at 209-236.
responsive service options.\textsuperscript{68} In the case of wheelchair-accessible bus service, SMD Program efforts have focused on special evaluations of several locally initiated projects and two demonstrations in Palm Beach County, Florida, and Champaign-Urbana, Illinois.\textsuperscript{69} The projects collectively offer considerable variations in terms of their use of retrofitted vs. new buses, the deployment of lift-equipped buses, and local operating environments. Given the recent legislative initiatives regarding fully accessible services, the findings from TSC's evaluations of these projects will be particularly relevant to transit properties and local officials across the country.

The final area of Federal R&D emphasis with respect to special user group service improvements is basic research which both draws upon and guides the demonstration evaluation effort. A recent TSC study\textsuperscript{70} used data from a variety of SMD projects to examine the travel preferences, perceived barriers, and resultant travel choices made by elderly and handicapped persons. One of the more significant findings of the study was that while fully accessible public transportation would provide substantial benefits for a small subgroup of the target population, its overall impact on tripmaking and other dimensions of mobility is likely to be small.\textsuperscript{71} The SMD Program has also sponsored major research to determine the size and characteristics of the elderly and handicapped population.\textsuperscript{72} One particularly useful output for planners and operators is the extensive statistical information on trip frequencies, and geographic and temporal variations in travel patterns.

V. CONCLUSION

The number and diversity of innovative services and methods currently being demonstrated and evaluated in the United States reflects the commitment of the Federal government to improve public transportation through research and development. It is recognized, however, that no single set of transportation strategies will be universally applicable in all U.S. cities. Consequently, the Federal role has been to encourage local areas to decide for themselves which strategies would be most suitable for their needs. The multiplicity of service and methods demonstrations is designed to test each strategy in a variety of settings, thereby providing local transit operators, planners, and policymakers with the necessary information to select those strategies which best address their specific needs.

\textsuperscript{68} Service and Methods Report, supra note 19, at 195-209.
\textsuperscript{69} Id. at 246-262.
\textsuperscript{70} Transportation Systems Center, U.S. Dep't of Transportation, Recent Evidence from UMTA's Service and Methods Demonstration Program Concerning the Travel Behavior of the Elderly and the Handicapped 161 (B. Spear, E. Page, H. Slavin & C. Hendrickson ed. 1978).
\textsuperscript{71} Id. at 45-46.
\textsuperscript{72} Survey of Handicapped, supra note 63.
The discussion of particular services and methods presented in Section IV also illustrates the varied state of knowledge about specific strategies. In some areas, such as traffic management, it is possible to make some definitive statements regarding the feasibility of implementation and ranges of effectiveness for particular strategies. In other areas, such as transit operations, we are on the verge of major evaluation efforts which are likely to produce definitive results in the near future. In still other areas, such as auto pricing disincentives, we must currently rely on findings from other nations which have more experience in the implementation and operation of these strategies.

Clearly, the opportunity and need for international cooperation exists in urban transportation service and methods research. Urban transportation in the United States has already benefited considerably from the results of innovative projects in other nations. Conversely, findings from current and future service and methods implementations in the United States should be useful elsewhere in the world. This transfer of information should be encouraged through cooperative research efforts and more extensive dissemination of demonstration results.
Note

Proposed Regulatory Reform in the Area of Railroad Abandonment

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I. BACKGROUND

Railroads have played a major part in the growth of this nation. However, the last fifty years have seen the railroads’ prestige and strength fall dramatically. Though the demise of passenger service has been a highly visible development, the rail industry’s freight transporation has also faltered.

A 1979 analysis of the rail industry by the Association of American Railroads (AAR)\(^1\) portrayed the precipitous decline of the national rail industry and described its present precarious state. According to the AAR, the percentage of total intercity ton-miles hauled by the railroads dropped from 77% in 1929 to 36% in 1977. In the same period, the railroads’ share of total freight revenues decreased from 72% to 21%. The Interstate Commerce Commission (ICC) has set a target return on investment of 10.6% in order that the railroads might ensure investment sufficient for the maintenance of adequate service. However, on the whole, the industry has fallen far below this goal.\(^2\) The rate of return for the industry has been not more than 1.5% in the last four years and has not exceeded 4% in the last twenty years.\(^3\)

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2. Id. at 1-2.
3. In most profitable region of service, the group earnings are less than half of this target.
The Department of Transportation (DOT) has determined five factors which have caused the decline of the rail industry. First, a movement to a service-oriented, high technology economy from heavy industry and shifts in the location of industry have changed the traditional rail markets. Second, management has been stifled by extensive regulation which has limited innovative programs. Third, indirect government subsidy of rail’s competitors by the provision of rights-of-way has put the rail industry at a disadvantage. Fourth, the rail industry has fallen behind its competitors in making use of new technological developments. Finally, though there have been substantial wage and benefit increases, labor and management have failed to implement new methods of increasing productivity.

One primary problem for the railroads has been the maintenance of excessive trackage and facilities. Two-thirds of all the rail traffic today moves over only 20% of the rail system, while 10% of the total trackage accounts for only one-half of 1% of the traffic. There are various reasons for such inefficient use of track. Among these reasons is the fact that in the past, rail lines were often built on speculation in anticipation of traffic that failed to materialize. The railroads also frequently built alongside existing lines of other rail competitors in a particular area. Light traffic over a line would result from a cyclical process; less profitable lines were not maintained in good condition which in turn resulted in a reduction in demand for service. Redundant trackage has also resulted from frequent mergers within the industry.

Railroads have sought to divest themselves of these unprofitable or redundant lines through abandonment proceedings. The DOT followed certain abandonment applications and gave an overview of ICC actions in those applications. It found that from 1964 through 1972, the ICC approved 13,958 miles for abandonment of the 19,767 miles the railroads

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5. In 1976, railroad maintenance of right-of-way equaled 35.8% of the annual revenue, motor carrier right-of-way equaled only 3.7% of revenue, while water carriers paid no right-of-way maintenance costs. Association of American Railroads, Railroad Deregulation: A Matter of Necessity at 3 (May 23, 1979) [hereinafter cited as AAR, Deregulation: Necessity].

6. DOT, Prospectus for Change, supra note 4, at 39.

7. AAR, Economic Regulation, supra note 1, at 3.
sought to abandon. During that same period, the total route mileage declined slightly over 4% (a decrease of 8,603 miles). The move to abandon is continuing. In 1976, there were ninety-four applications filed with the ICC involving 1,635 route miles.\(^8\)

In another DOT study of twenty-five abandonments\(^9\) between the years of 1951 and 1969, the average savings to the railroads involved were $4,600 per mile (in 1973 dollars). If this figure were applied to lines abandoned from 1951 through 1972, the annual savings by 1973 would be $90 million.\(^10\) The aftereffect of abandonments on the shippers involved is difficult to assess because before an abandonment both the shippers and the railroads begin certain anticipatory actions. Service on the line begins to deteriorate because of declining revenues for the railroad and market requirements. Also, the volume of traffic tendered by shippers declines as service over the line deteriorates. Therefore, an abandonment may be but the culmination of economic changes, not necessarily their cause.

Past abandonments and ones proposed for the future are seen as creating a problem requiring a quick resolution. The DOT has projected that the nation's freight level will double by 1990, with the railroads showing the biggest increase in traffic of the major methods of freight transport. The DOT gives as reasons for rail's traffic increase the fact that the railroads have the excess capacity to absorb a large portion of the freight and that rail transport is fuel efficient.\(^11\) With the maintenance of a healthy rail system of utmost importance, prompt action is necessary. Therefore, DOT suggested that major reform is needed to avoid annual multi-billion dollar subsidies.\(^12\)

II. CURRENT ACT

To abandon a line under current law,\(^13\) a railroad has the burden of proving the "present or future public convenience and necessity" require or permit the abandonment or discontinuance.\(^14\) While the economic condition of the line is not a factor in this determination, the Commission is required to consider the "serious, adverse impact on rural and community development."\(^15\) The Commission presently uses a "weighing" or "balancing" approach to determine whether any particular abandonment would

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8. DOT, Prospectus for Change, supra note 4, at 84.
9. Id.
10. Id.
11. A railroad can move a ton of freight with one-fourth as much fuel as a large truck. AAR, Deregulation: Necessity, supra note 5, at 4.
12. AAR, Economic Regulation, supra note 1, at 2.
be consistent with the present or future public convenience and necessity. Using this method, the Commission will compare the burden to the carrier of continued service with the adverse effects on shippers and local communities.\(^{16}\) Some of the considerations in such a determination are "the population of the territory serviced, the use by the public of the service sought to be discontinued, other available transportation in the area, the general financial condition of the carrier involved, and the losses it suffers in providing the service."\(^{17}\)

In addition to proving public convenience and necessity, the petitioning railroad must fulfill a complex and lengthy set of procedural requirements. A carrier must submit its application at least sixty days in advance of the proposed abandonment effective date.\(^{18}\) However, if the application is opposed, a certificate can be issued only if the line was described on a diagram showing lines for which the carrier plans abandonment filed with the Commission at least four months prior to the date of the application.\(^{19}\)

After an application for abandonment is filed, the Commission may order an investigation and postpone the abandonment "for a reasonable period of time."\(^{20}\) Even if the Commission finds that a certificate should issue, it may postpone issuance for another six months if it finds that a "financially responsible person" has offered assistance equal to the difference between the revenues attributable to the line and the "avoidable cost"\(^{21}\) of providing service, plus a reasonable rate of return on the value of the line.\(^{22}\)

Experience under the current law has shown the procedure to be vague and cumbersome. The ICC has attempted to issue interpretative regulations, but substantial parts of these regulations have been found unlawful.\(^{23}\) Also, the existing abandonment procedures provide for no compensation to railroads for the losses incurred in operating the lines while the abandonment process is taking place. To those losses are added the high

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17. Atchison, T. & S.F. Ry. Co. Discontinuance of Trains, 334 I.C.C. 735, 745 (1969). Use of the service can include future use if that future use can be shown with specificity; Chicago and North Western Transp. Co.—Abandonment, 354 I.C.C. 114, 118 (1977). The general financial condition of the railroad, not just the condition of the line to be abandoned, may be a factor, depending on the circumstances of the case; Georgia Northern Ry. Co. Abandonment, 354 I.C.C. 436, 444 (1976). No standard has been set for what would constitute insurable losses on a line. Again, the losses sustained will be balanced against other considerations; Gulf, Mobile & Ohio R. Co. Abandonment, 354 I.C.C. 422, 430 (1973).
21. 49 U.S.C. § 10905(a)(1) (1979) defines "avoidable cost" as all expenses incurred over that line that would not be incurred if the line were abandoned.
costs of the administrative proceeding itself.\textsuperscript{24}

The most common complaints from the railroads themselves centered around "cost" considerations, lack of standards, and length of proceedings. The railroads complain that the Commission refuses to recognize return on investment in branchline assets and the expense of removing weight restrictions in order to permit heavier cars to use branchlines when computing "costs" of operations. Also, the Commission recognizes only "historical" maintenance costs which do not reflect the current economic problems of the industry. Another problem is that the Commission has developed no objective standards for determining what constitutes "serious, adverse impact on rural and community development" which is required to be considered in evaluating the proposed abandonment's consistency with the "public convenience and necessity."

Finally, the industry is unhappy with the length of time the Commission consumes in deciding abandonment cases. In the case of one railroad, reported in June of 1979, thirty-seven applications, concerning a total of 1,185 miles, have been filed since the current law went into effect on February 6, 1976. Of these applications, seventeen have been decided and twenty are still pending decision. The average time for the decided cases was 16.8 months with the average age of the pending applications being 28.4 months. The longest time taken to decide a case was thirty-one months, while the shortest time was two months (an application which involved 1.13 miles of line). The oldest pending application of those filed since February 6, 1976, was thirty-three months.\textsuperscript{25}

III. DOT STUDY

In October, 1978, pursuant to directives of the Railroad Revitalization and Regulatory Reform (4R) Act of 1976,\textsuperscript{26} the DOT published an exhaustive study of the rail industry's overall standing.\textsuperscript{27} In this publication, the DOT reported the decline of the rail industry and identified its major causes. The DOT then went on to evaluate the effectiveness of the 4R Act in alleviating the financial plight of the rail industry. In the area of abandonment proceedings, the DOT found the ICC's disposition of applications had advanced from the prior practice of having proceedings last from two to three years (with a few going beyond four years) to the present status of handing down most decisions within fifteen months, with uncontested applications

\textsuperscript{24} Id. at 44.
\textsuperscript{26} 49 U.S.C. §§ 504, 901 (1979).
\textsuperscript{27} DOT, Prospectus for Change, supra note 4.
being decided within two months.  

Though the actual time spent in the proceedings has decreased, there are still substantial legal and administrative costs associated with the abandonment process which can exceed $50,000 per application.  Though 97% of the applications filed between 1960 and 1969 were approved, some railroads chose to avoid the time and considerable expense of pursuing an abandonment by the continuation of services at a loss on some small branchlines. This practice, together with all the difficulties and costs involved in abandonments pursued, caused the DOT to state that “the primary test of the public convenience and necessity in abandonment proceedings should reflect the total benefits and costs—both public and private—of continued line operation in the context of other transportation alternatives.”

IV. DOT PROPOSALS

Finding the rail industry in such dire condition, the DOT developed three options for amending the current procedures for abandonment. These proposals reflect the idea of “maximum reliance on competitive market forces.” The DOT also recommended liberalizing entry and rate provisions for motor carriers so that these carriers could provide service to markets losing rail service. However, the Secretary of Transportation did stress the fact that rail legislation should take precedence in light of the present, desperate need of the nation’s railroads.

The three options for reform offer decreasing degrees of relaxation of the current abandonment procedures. “Option A” provides for a three-year transition period during which a railroad could abandon a line on 240-days notice to the public. During that three-year period, the rail carrier seeking an abandonment would be required to accept a subsidy offer which would cover the full costs of operation and maintenance of the line, including a rate of return sufficient to attract investment capital. The opportunity for ICC or commercial arbitration would be given to either party to determine the adequacy of the subsidy offer. Five years after its enactment, “Option A” would allow abandonment simply on 240-days notice. A carrier in this position could not be required to continue service even if a subsidy were available. However, the railroad would be required to offer

28. A major factor in the length of the abandonment proceedings is the requirement that an environmental impact statement be prepared and filed.
29. DOT, Prospectus for Change, supra note 4, at 51.
30. Id.
31. Id. at 128.
32. Department of Transportation, Transportation Regulatory Reform, Rail Regulatory Reform Options, Tab B, 1 [hereinafter cited as DOT Reform Options].
the line for sale (at the line’s net liquidation value) to any financially responsible person proposing to use the line for rail transportation.\textsuperscript{34}

The second possibility for reform, "Option B," contains substantially the same provisions of "Option A" with two exceptions. First, the current abandonment procedures would remain in effect for three years with "Option A" then going into effect. The other deviation from the pure "Option A" is that at the end of the "transition period" the railroad could sell the line for its net liquidation value or be required by the ICC to continue to operate if a full subsidy should be provided.\textsuperscript{35}

Under "Option C," the legislation would provide the basic structure of either "Option A" or "Option B" but would allow the provisions of either to be available only to rail lines that are not generating revenues sufficient to cover the "full cost" of providing the rail service.\textsuperscript{36}

The DOT based these proposals on the following four premises:

\begin{itemize}
\item There is a fundamental crisis in the rail industry that could paralyze the system by 1985;
\item This crisis can and should be solved in the private sector;
\item Absent changes in government and private sector policies, the Federal Government could be forced to spend at least $20 billion to perpetuate an inefficient system; and
\item Deregulation is the essential first step in a private sector solution.\textsuperscript{37}
\end{itemize}

The position of the DOT is that complex and extensive regulation of the rail industry has stifled the railroads' ability to keep up with modern developments of the market. By deregulating the industry and allowing risks to be taken and rewarded, better management will be attracted to the industry.\textsuperscript{38}

\section{V. Administration's Proposals}

On March 27, 1979, the Administration's proposals for regulatory reform of the rail industry were introduced in the United States Senate as S. 796.\textsuperscript{39} These proposals, with some minor changes, were then introduced in the United States House of Representatives on June 21, 1979, as H.R. 4570.\textsuperscript{40} Under H.R. 4570, several significant changes in the present abandonment procedures are proposed. First, the requirement that the ICC consider the "serious, adverse impact on rural and community development" in determining public convenience and necessity is repealed.\textsuperscript{41} Instead, the Commission is required to conclude that the proposed

\textsuperscript{34} DOT Reform Options, supra note 32, at 24.
\textsuperscript{35} Id. at 25 (though it is not said who will provide this subsidy).
\textsuperscript{36} Id. at 26.
\textsuperscript{37} Id. Tab A, at 1.
\textsuperscript{38} Id. at 3.
\textsuperscript{40} H.R. 4570, 96th Cong., 1st Sess. (1979).
\textsuperscript{41} Id. § 132(a)(1).
abandonment is consistent with the public convenience and necessity if:
(1) no objection is filed to the abandonment application; (2) the railroad
shows the revenues attributable to the line do not meet or exceed the "full
cost" of operation of that line; (3) the Commission finds the benefit to the
railroad (including the benefit of the ability to put that capital to other use)
exceeds the detriment to the objecting party.43

A new section is proposed that requires the railroad applying for aban-
donment to prove public convenience and necessity only if an objection is
filed. However, if the application is one approved by the DOT,44 that appli-
cation would be approved unless the objecting party could prove the detri-
ment exceeds the transportation benefits as determined by the Secretary of
Transportation.45 Strict time limits for issuing a decision on an abandon-
ment application are also suggested. If no objection is made within thirty
days after the filing of the application, the Commission would be required to
issue a certificate approving the abandonment immediately.46 If an ob-
jection is made, any investigation must be completed within 120 days from the
last date on which an objection could have been filed. If the investigation
were not to be completed in that time, the application would be ap-
proved.47

The current section pertaining to offers of financial assistance48 would
be significantly changed by those proposals. Any subsidy offer would have
to be equal to the difference between revenues attributable to the line and the
"full cost" of continuing service.49 Binding arbitration would be avail-
able to reach an agreement on the amount of the subsidy if either party
wished it.50 A provision for offers of purchase by a financially responsible
person or government entity is also included. The purchase price would
have to be equal to or greater than the lesser of the fair market value of the
line when providing transportation, or the fair market value of the line when
used for purposes other than transportation.51 Binding arbitration would
also be available upon request of either party to settle a dispute over
purchase price.52

42. "Full cost"—the avoidable cost of providing rail freight transportation on a line, plus an
adequate return on capital attributable to the line. id. § 132(c)(1).
43. Id. § 132(a)(2).
44. Such approved consolidated abandonment proposals are provided under 49 U.S.C.
§ 1654(a)-(d) (1979).
45. H.R. 4570, supra note 40, § 132(b)(2).
46. Id. § 132(b)(4).
47. Id.
49. H.R. 4570, supra note 40, § 132(c)(3).
50. Id.
51. Id.
52. Id.
The President’s message to Congress concerning the proposed amendments stresses the goal of promoting more competition in the nation’s entire transportation system. The President sees a major cause of the decline of the rail industry as being the restraint on better management and efficient pricing due to over-regulation by government. Other causes include the increase in the share of freight carried by unregulated trucks and barges, rail’s inability to adapt to changing freight patterns, and the insufficient increase in labor productivity as compared to the rest of the economy. The President seeks to set up, among other things, new guidelines for ICC approval of abandonment applications. These proposals would ensure that the railroads are not forced to continue to operate money-losing lines while allowing shippers, States, or communities to maintain service by subsidy or purchase.

VI. AAR PROPOSALS

The Association of American Railroads (AAR) takes the position that, if the rail industry is to continue as a viable business, it must be allowed to operate as a business. Therefore, the industry should be given the opportunity to abandon lines which carry little traffic and/or operate at a loss, much as one of its shippers has the freedom to eliminate an unprofitable product line. The AAR points to a 1976 DOT study which indicated that more than 25,000 miles of trackage (about 18% of trackage outside the Northeast) was "potentially light density line." The DOT estimated the losses on those lines at about $150 million per year. However, the AAR argues these estimated losses were low, claiming the DOT did not consider the opportunity costs associated with the investment in such lines as well as their potential rehabilitation. The AAR sees no sound public policy reason for forcing the railroads to incur these costs. Abandonment is considered an important method for reducing those losses and returning the rail industry to an economically viable position.

While conceding the Administration’s proposed amendments would greatly improve the current law, the AAR’s position is that they are inadequate to alleviate the current economic plight of the railroads. The railroads say the cost and time necessary to pursue an abandonment are far too high to justify the elimination of marginal or unprofitable business. Therefore, the AAR has its own reform proposals.

The AAR would have Congress eliminate prior Commission approval if

54. Id. at 2.
55. AAR, Deregulation: Necessity, supra note 5, at 18.
57. Id.
58. Id. at 19.
120-days public notice were given on any proposed abandonment. The effective date of the abandonment could be delayed an additional three months if a public body determined the public interest required continuation of service. This delay would allow for negotiation of a subsidy. Also, the AAR wants the legislation to provide that the railroads be reimbursed for all losses incurred by operations continued beyond the end of the 120-day notice period. These proposals would allow railroads to eliminate many of the lines that are causing a large part of the current deficit.

VII. LABOR'S REACTION

The labor unions in the rail industry say the Administration's proposed amendments are "contrary to the future transportation needs of the nation and hostile to the interests of shippers, railroad employees, and the railroad industry itself." Labor sees the public convenience and necessity as being replaced by profitability of a rail line as the new standard for abandonment proceedings. Under the proposed reforms, the ICC would approve an abandonment if the line in question were losing money. Labor points out that, as yet, there are no adequate guidelines to indicate how much revenue and expense can be attributed to any given line. The various proposals for reform are seen to have the effect of abolishing jobs at a time when the Federal Government is spending large sums of money to try to create jobs in the private sector. If freer abandonments were available, railroads might abandon all of their branchlines, turning large shares of business over to the motor carriers. Such actions would result in only a few major, high-density lines throughout the nation and would result in a tremendous loss of jobs. Therefore, any savings to the rail industry would be at the expense of labor.

Labor would like to see a more cautious approach to deregulation, claiming the current act is still too new to be able to discern its effectiveness in the industry. It also believes any abandonment would have a high impact on shippers and communities and that little attention has been paid to the five to ten year impact of an abandonment on such interests. Railroads,

59. AAR, Deregulation: Necessity, supra note 5, at 12.
61. Id. at 8.
62. Remarks of J.J. Otero, Vice President of the Brotherhood of Railway and Airline Clerks (BRAC) at 6.
because of their role in the development of this nation, have been—and still are—charged with the public interest. One spokesman for labor, in appealing for caution, said "[w]hen a railroad line is abandoned and the right-of-way sold, that line is gone forever."64 Labor sees the rail industry as too important to the continued growth of this nation to allow large sections of the system to disappear.

VIII. SENATE PROPOSALS

After the Administration's proposals were submitted to the Senate as S. 796,65 committee hearings gave interested parties a chance to voice their views on the matter of rail regulatory reform. Testimony in these hearings convinced the Senate Committee on Commerce, Science and Transportation that the proposed legislation was not the best means of reform.66 The Committee drafted S. 1946,67 its own proposal for reform. Senator Cannon introduced S. 1946 to the Senate on October 29, 1979, with the statement that the bill "is to provide the railroads with more pricing flexibility while protecting captive shippers."68

The proposed legislation now before the Senate contains a Railroad Transportation Policy which removes rail carriers from the National Transportation Policy provisions.69 The new policy provides that the ICC, in regulating rail carriers, shall consider the following as being in the public interest:

(1) development and maintenance of a healthy, efficient freight transportation system, in the private sector, in which various modes of transportation are subject to impartial regulation;

(2) maximum reliance on competitive market forces and on actual and potential competition among all transportation services at fair prices and to enable efficient and well-managed carriers to earn adequate profits and to attract capital;

(3) avoidance of undue concentrations of market power;

(4) reduction of regulatory barriers to entry into and exit from the industry;

(5) maintenance of fair wages and working conditions;

(6) operation of transportation facilities and equipment without detriment to the public health and safety;

(7) development and maintenance of a transportation system responsive

64. Mahoney, supra note 60, at 8.
65. S. 796, supra note 39.
67. Id.
68. Id.
to the needs of the public, in which regulatory decisions are reached fairly and expeditiously;

(8) encouragement of the establishment and maintenance of reasonable rates for transportation without undue discrimination or unfair or destructive competitive practices;

(9) cooperation with each State and the officials of each State on transportation matters;

(10) elimination of noncompensatory rates for rail transportation; and

(11) encouragement and promotion of energy conservation.\textsuperscript{70}

In the areas of abandonments, S. 1946 does not change the standards by which the ICC would decide whether or not to grant an abandonment. S. 1946 rejects the administration's proposal to repeal the consideration of "serious, adverse impact on rural and community development"\textsuperscript{71} in finding public convenience and necessity. The burden of proving that the present or future public convenience and necessity require or permit abandonment remains with the one applying for the abandonment.\textsuperscript{72}

The reforms are designed to reduce the time spent processing such cases and to extend the Bankruptcy Act of 1978\textsuperscript{73} to bankrupt railroads.

The efforts to streamline the current system reach all stages of an abandonment proceeding. The current Act requires the applicant to file and give notice to the Commission at least sixty days prior to the effective date of the proposed abandonment.\textsuperscript{74} S. 1946 repeals that sixty-day period.\textsuperscript{75} However, the applicant would be required to satisfy the notice requirements "within the most recent 30 days prior to the date the application is filed."\textsuperscript{76} If no protest to the abandonment is filed within forty-five days after the application is filed, the abandonment shall be found to be consistent with the public convenience and necessity and will occur within seventy-five days from the date of the application.\textsuperscript{77}

If a protest should be filed within the thirty-day period, the Commission must decide within forty-five days from the application filing date whether to conduct an investigation.\textsuperscript{78} If no investigation is held, the Commission will decide whether the abandonment is consistent with the public convenience and necessity within seventy-five days from the date of filing, using the materials initially submitted by the parties.\textsuperscript{79} If the Commission decides to

\textsuperscript{70} S. 1946, supra note 66, § 2.


\textsuperscript{72} S. 1946, supra note 66, § 202(b)(4).


\textsuperscript{75} S. 1946, supra note 66, § 202(b)(1)(E).

\textsuperscript{76} Id., § 202(b)(1)(A).

\textsuperscript{77} Id.

\textsuperscript{78} Id., § 202(b)(3).

\textsuperscript{79} Id.
issue a certificate of public convenience and necessity, the abandonment will occur within 120 days from the date of the application.\textsuperscript{80}

Should the Commission decide to hold an investigation, that investigation must be completed within 135 days and the initial decision must be made within 165 days from the date of the application. If an appeal is taken, a final decision must be issued within 255 days of the date of the application.\textsuperscript{81}

The proposed legislation provides for the purchase or subsidy of a line, but where the Administration’s proposals suggested binding arbitration to settle disputes as to purchase price or subsidy offer, S. 1946 provides that if a disagreement arises either party may request that the Commission establish the conditions and amount of compensation. The decision of the Commission is binding on both parties but the offeror may withdraw his offer within ten days of the decision. The railroad, however, is bound by the Commission’s decision.\textsuperscript{82}

Under this legislation, the Bankruptcy Act of 1978\textsuperscript{83} will apply to any carrier in bankruptcy, whether the railroad was in bankruptcy when the Act was passed or not.\textsuperscript{84} Therefore, if an abandonment has been approved by a bankruptcy court, the Commission is not required to hold a separate hearing of its own but may participate in the deliberations of the bankruptcy court.\textsuperscript{85} Also, if a railroad is in bankruptcy or an application for abandonment is one approved by the Secretary of Transportation, the Commission may waive the requirement of having a system diagram on file at least four months prior to the abandonment application.\textsuperscript{86}

These proposals, while falling short of what the Administration requested, do significantly curtail the length of abandonment proceedings and provide some relief for railroads in bankruptcy.

\section*{IX. Conclusion}

It has become increasingly clear that the rail industry is in a less than desirable economic position. The rail industry, the Department of Transportation, and the present Administration all agree that significant regulatory reform is necessary to put railroads back on their feet financially. Such reforms must be brought about in the near future to avoid a crisis situation in which massive subsidies by the Federal Government will be necessary to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id., § 202(c).
\item \textsuperscript{83} Supra note 73.
\item \textsuperscript{84} S. 1946, supra note 66, § 202(a)(2).
\item \textsuperscript{85} \textsl{Section-by-section Analysis, Railroad Transportation Policy Act of 1979}, 125 \textsc{Cong. Rec. S} 15314, \textsc{S} 15318 (1979).
\item \textsuperscript{86} S. 1946, supra note 66, § 202(b)(5).
\end{enumerate}
\end{footnotesize}
maintain a rail system adequate to meet this nation's transportation needs. While fears of the adverse effects of abandonment are valid, there is little evidence available to show what the exact consequences would be.

In trying to determine the post-abandonment community impacts, several studies have been made on the subject. However, for the most part, no serious adverse consequences were found. In many of the communities observed, no discernible effect of abandonment of rail service was found and a few positive developments were discernible. In its analysis of the Administration's proposed amendments, the DOT did not consider a serious, adverse impact to be either very probable or particularly determinative. It pointed out that abandonment of rail service is usually the effect of declining traffic and decrease in demand for service rather than the cause of that decline. The major concern of the DOT was that the railroads no longer be required to "carry the burden of subsidizing uneconomic service ...". Shippers and communities most likely to be affected by an abandonment are usually served by an extensive highway network so that motor carriage could either replace the lost rail service or could serve to transport freight to consolidated rail terminals. If the need for rail service is seen as essential to the area, the shipper or a local government entity could offer a subsidy or purchase which, if found reasonable, the carrier would be required to accept.

Any effect on labor would presumably be the same under the proposed amendments as under current law. The proposals before Congress continue the present statutory employee protections. An employee adversely affected by an abandonment is presently provided with up to six years of protection. If the employee loses his job, he is given a separation allowance in an amount up to twelve months' pay. If he is reassigned to a position at a lesser pay, he is given a displacement allowance based on his average earnings for the twelve-month period immediately prior to his reassignment.

The DOT has stated the rail industry is in such poor shape that, absent significant regulatory reform, maintenance of an adequate rail system in the future will only be accomplished through massive government subsidy or through nationalization of the rail system. Both of these alternatives would be costly to the taxpayer. The DOT summarized its views on regulatory reform when it stated that "deregulation would represent an important step toward the ultimate goal of permitting railroads to function in a competitive

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87. Dempsey, supra note 25, Appendix (discussion of several post-abandonment studies).
89. Id.
90. Id.
91. Id. at S 3516.
environment where success—or failure—is based on performance, rather than circumstances beyond the control of management."92 Unless this nation’s taxpayers are willing to spend large amounts of tax dollars to perpetuate a deteriorating system, some reform in regulatory policies is necessary. While it would be unrealistic to expect any proposal to completely satisfy all interested parties, the Administration’s proposals seem to fall into a middle ground between the stifling over-regulation of the past and the possibility of the destructive results of a total absence of regulation in an essential component of our national transportation system.

The Senate’s proposals fall short of the major reforms requested by the Administration. The burden of proving an abandonment is consistent with the public convenience and necessity remains with the rail carrier. The Commission will have to continue on a case-by-case determination of the merits of abandonment of lines relying on past decisions and the guidelines of the new Railroad Transportation Policy.

However, while failing to ease or better define the burden of proof of the railroads, S. 1946 does statutorily restrict the amount of time that can be consumed in abandonment proceedings. Under the proposed bill, all decisions will be handed down in less than one year’s time. This change may well encourage railroads with marginal or unprofitable lines to pursue an abandonment where under current law a carrier might prefer to absorb the loss rather than face a rather lengthy and expensive process.

Linda B. Burlington

92. AAR, Deregulation: Necessity, supra note 5, at 20.
Recent Decision

*Raymond Motor Transportation, Inc. v. Rice:* Death Knell For the Reasonableness Test in Interstate Commerce

I. INTRODUCTION

Since the United States Supreme Court’s landmark decision of *Gibbons v. Ogden* in 1824,\(^1\) debate has persisted as to the states’ right to legislate in interstate commerce. *Gibbons* and the balancing test developed by Justice Stone’s dissent in *Di Santo v. Pennsylvania*\(^2\) provide guidelines to determine when state legislation is permissible. In *Raymond Motor Transportation, Inc. v. Rice,*\(^3\) (hereinafter *Raymond*), the Supreme Court of the United States discussed once again the states’ right to legislate in interstate commerce. The holding of the case indicates that a mere speculative contribution to state and local interests, highway safety, will not outweigh a substantial burden on interstate commerce. This note will examine the history of cases concerning the test to be applied in determining the proper level and the allowable extent of state government legislation in interstate commerce.

II. THE CASE

Appellants are common carriers of general commodities by motor vehicle. Raymond Motor Transportation, Inc. (hereinafter RMT), provides service in eastern North Dakota, Minnesota, northern Illinois, and northwestern Indiana. Its primary interstate route is between Chicago and Minneapolis. Consolidated Freightways Corporation of Delaware (Consolidated) operates nationwide, including routes between Chicago, Detroit and points east, and Minneapolis and points west to Seattle. RMT and Consolidated use two different kinds of trucks: a 55-foot semitrailer truck (one trailer), and a 65-foot twin trailer truck (two trailers).

Michigan, Illinois, Minnesota, and states west of Minnesota to Washington allow 65-foot doubles to be operated on their highways and inter-

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2. 273 U.S. 34, 44 (1927).

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states. Wisconsin law generally does not allow operation of trucks longer than 55 feet upon its highways within the state.\textsuperscript{4} Exceptions to this prohibition include vehicles transporting milk or involved in interplant operations.

RMT and Consolidated applied for annual permits to operate 65-foot twin trailers on Interstate Highways 90 and 94, and short stretches of four-lane divided highways in Milwaukee and Madison. The permits were denied since appellants' operations were not covered by the administrative regulations that specify when trailer-train permits are allowed.\textsuperscript{5} Declaratory and injunctive relief were sought in Federal District Court for the Western District of Wisconsin on the grounds that the administrative regulations burden and discriminate against interstate commerce in violation of the Commerce Clause.\textsuperscript{6} A three-judge district court was convened pursuant to 28 U.S.C. § 2281.\textsuperscript{7}

The state's Amended Answer sets forth highway safety as its sole justification for denying the permits.\textsuperscript{8} At trial the appellants presented substantial evidence supporting their allegations that the 65-foot twin trailers are as safe as, if not safer than, the 55-foot semis.

The evidence tended to prove that the twin trailer is safer in terms of accidents, injuries, and fatalities per 100,000 miles; has greater mobility upon city streets when the trailers are detached; and provides greater maneuverability because the rear wheels can follow the path of the front wheels better than a semi, therefore requiring less distance for turning purposes. Furthermore, the twin trailer has a better braking system in that

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\textsuperscript{4} Wis. Stat. § 348.07(1) (1975), sets a 55-foot limit on the overall length of a vehicle pulling one trailer. Any person obtaining a single trailer unit exceeding 55 feet in length must obtain a permit from the state highway commission. Section 348.08(1) provides that no vehicle pulling more than one other vehicle shall be operated on a highway without a permit.

The highways commission has authority to issue various annual permits for vehicles that do not conform to the state statute, and to adopt reasonable rules deemed necessary for safety of travel including specifications of routes to be used by permitees pursuant to Wis. Stat. § 348.25(3).

Trailer train permits may be issued for combinations of two or more vehicles which do not exceed 100 feet in total length. Id. § 348.27(6). Furthermore oversize vehicles with interplant, and plant to state line operations may receive annual permits pursuant to Section 348.27(4).

Administrative regulations restrict trailer train permits under Section 348.27(6) to vehicles transporting refuse or waste or operation without load of vehicles in transit from manufacturer to dealer to purchaser or dealer, or for the purpose of repair. Wis. Admin. Code § Hy 30.14(3)(a) authorizes issuance of permits for operation of three vehicles used for transporting milk from production points to the point of first processing.

\textsuperscript{5} Id.

\textsuperscript{6} U.S. Const. art. I, § 8, cl. 3.

\textsuperscript{7} 28 U.S.C. § 2281 (1948), provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a state statute on grounds of unconstitutionality should not be granted unless the application has been heard and determined by a three-justice district court. This section was repealed by Pub. L. 94-381, 90 Stat. 1119 and is not applicable to any action commenced on or before August 12, 1976.

each trailer has its own brakes, is less susceptible to jackknifing, and is more economical since fewer trips need to be made, making it less expensive than the more frequent but lighter loads of semis. The twin trailers also emit less spray and splash upon passing vehicles, and are easier to load and unload due to the shorter depth of the trailers. Due to these advantages RMT and Consolidated would prefer to use twin trailers on their routes over Interstate Highways 90 and 94 in Wisconsin. (The State presented no evidence that the extra length of twin trailers make them less safe than the semis.)

Appellants also produced uncontradicted evidence that the regulations disrupt their operations, raise their costs, and slow their service. Both Consolidated and RMT found it faster and less expensive to operate the 65-foot twin trailers on their routes. For instance, when carrying interstate freight to or from Wisconsin, Consolidated’s drivers must stop, detach the twin trailers, and pull them separately within Wisconsin to comply with its laws. As a result, Consolidated must maintain drivers to shuttle second trailers to and from the state line. It is estimated that this detaching of the doubles costs Consolidated $389,898 a year. On routes through Wisconsin, the appellants used 55-foot singles as opposed to the 65-foot twins to avoid the use of the extra tractors and drivers. On longer routes, for example Consolidated’s Detroit and Chicago to Seattle routes, twin trailers were diverted through Nebraska and Missouri to avoid the Wisconsin ban. Savings of time, distance, and money would be involved if RMT and Consolidated could use doubles in Wisconsin.

Wisconsin’s regulations do allow vehicles over 55 feet in length to be operated on its highways which transfer refuse or milk, or which concern interplant operations within state lines. These provisions supported appellants’ claim that the administrative regulations were discriminatory in favor of local Wisconsin businesses.

The three-judge court found that the burden imposed upon interstate commerce was outweighed by the benefits to the local populace. The Court thought that appellants had not refuted Wisconsin’s claim that refusal to issue permits for their 65-foot doubles was supported by highway safety, pointing out that, other things being equal, it takes longer for a motorist to pass a 65-foot trailer than a 55-foot trailer. The Court also considered

9. See id.
10. Id. at 294. This estimate was for the year ending June 30, 1975.
11. Id. The estimated cost of this adjustment of operations was $81,440 annually.
12. Id. at 297. This estimated cost burden of adjustment was $1,334,876 annually.
13. See Wis. STAT., supra note 4.
14. Id.
16. Id. at 1359. It seems odd this should be any consideration at all since appellants’ applica-
III. THE ARGUMENTS

The controversy which gave rise to Raymond is that ever-present conflict between local and federal governing bodies—federalism. On the one hand, the appellants contended that the burden imposed upon interstate commerce by Wisconsin’s regulations was clearly excessive in relation to the putative local benefits, and that the regulations did not contribute to local highway safety. On the other hand Wisconsin relied on states’ rights to support its regulations.

The State’s first premise was that the regulation of highways is a matter of local concern, since they are built, owned, and maintained by the state. Second, the State argued that matters of size and weight limitations, as well as safety, are subjects to be determined by the legislatures and not by the judiciary. Finally, the State argued that the appropriate test to be applied is whether the statute bears a reasonable relationship to highway safety. For this last argument the State relied on South Carolina State Highway Department v. Barnwell Bros., Inc., where the Court stated that the scope of its inquiry stopped after determining whether the state legislature in adopting regulations has acted within its province, and whether the means of regulation are reasonably adopted in view of the end sought.

The appellants attacked appellee’s argument of states’ rights by compiling massive evidence that the 65-foot twin trailers are as safe as, or safer than concerned traffic over interstate and four lane highways only. See text after footnote 4, supra.

17. Id. at 1361. In Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), the Supreme Court held cost to be a relevant factor in determining the burden on interstate commerce.


19. Appendix, supra note 8, at 278. This information is as of November 1975. But, different facts as to the burden created could exist for many of these states, since most of the southeastern states have this limitation as opposed to one isolated state in the Northeast, as in Raymond.


21. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523 (1959); Southern Pacific v. Arizona, 325 U.S. 761, 783 (1945); Mauer v. Hamilton, 309 U.S. 598, 604-05 (1940); Sproles v. Binford, 286 U.S. 374, 388-89 (1932); Morris v. Duby, 274 U.S. 135, 143 (1927). (When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome.)

22. 303 U.S. 177, 190 (1938).
than, the 55-foot semi. Furthermore, it was shown that operating costs were substantially increased, and that the regulations have the effect of slowing the movement of goods in interstate commerce. Since the State failed to rebut the evidence compiled by the appellants, the Supreme Court held that there was no showing that the regulations actually do promote highway safety, and therefore the local interest substantially burdens interstate commerce.

IV. Tests Used in Interstate Commerce Cases

Judicial attempts to define the dichotomy between federal and state power to regulate interstate commerce began with Chief Justice Marshall’s opinion in Gibbons v. Ogden. The great Chief Justice gave commerce a broad definition, and found that commerce included navigation and for-hire transportation of passengers. But Marshall’s compromise between federal and state interests dodged the issue of whether federal commerce power is exclusive or concurrent. In the License Cases, Marshall’s successor, Roger Taney, advanced the view that the Commerce Clause left states free to regulate as they wished as long as their actions did not conflict with validly enacted federal legislation.

The Supreme Court, in the years after Gibbons v. Ogden and the License Cases, developed numerous tests to distinguish permissible and impermissible impacts upon interstate commerce. Cooley v. Board of Wardens, which concerned a money forfeiture for nonpiloted vessels, determined that matters requiring uniform regulation throughout the country were national in nature, and therefore were not subject to local legislation, whereas matters allowing for diversity of treatment were local in nature, though still part of interstate commerce. In that case, the state’s power over commerce was concurrent, and could be exercised only when Congress had not yet acted. Smith v. Alabama, which involved legislation requiring licensing of locomotive engineers, distinguished between direct and indirect effects on interstate commerce by state legislatures, and between regulations that are an exercise of the states’ “police powers” and those that are “regulations of commerce.”

23. Appendix, supra notes 8, 11, and 12.
27. 46 U.S. 504, 573 (1847); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 322 (1978) [hereinafter cited as AMERICAN CONSTITUTIONAL LAW].
29. 124 U.S. 465, 482 (1888).
Justice Stone, writing in dissent in *Di Santo v. Pennsylvania*,30 abandoned the mechanical direct-indirect and national-local tests. He developed the balancing test in which the court would carefully consider the pertinent facts of each case. Justice Stone voted to uphold a Pennsylvania statute requiring one engaged in the business of selling steamship tickets to obtain first a license from the Commissioner of Banking. He held that the purpose of the legislation was to further the states' police power in protecting its citizens from fraud and sharp practice, in particular those citizens of small means who might be unfamiliar with the English language and institutions. He went on to say that:

The state regulations should be upheld not because they are nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved, and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.31

In *United States v. Darby*,32 the balancing test became the majority rule. In determining that Congress could regulate directly the conditions of local production, Justice Stone cited *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819):

The power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power. . . .33

The next issue addressed by Justice Stone was that the Tenth Amendment had no effect upon the powers delegated to the national government since the amendment is merely a declaration of a truism which states that all which is not delegated is reserved.34 Finally, Stone stated that the plenary power of Congress over commerce requires the courts to defer to this legislative judgment.35

Another case applying the balancing test was *Bibb v. Navajo Freight Lines, Inc.*36 The issue presented was: could one state prescribe standards for interstate carriers that would conflict with the standards of another state making it necessary for an interstate carrier to shift its cargo to differently designed vehicles once another state line is reached? The Court

30. 273 U.S. 34, 44 (1927).
31. Id.
32. 312 U.S. 100 (1941).
33. Id. at 118.
34. Id. at 114.
35. Id. at 115. The determination of this issue called for deference to the Federal Legislature, Congress, but not to the State Legislature. See Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), where Justice Stone said that it is for the Supreme Court and not the State Legislature to determine the competing demands of state and national interests.
noted that interchanging mudguards on trucks and trailers at the Illinois border and the necessity of welding might mean some trucks or trailers would have to be unloaded and loaded again. This regulation limiting the trucks and trailers to the particular states they could operate in, as a matter of design, was too serious a burden on interstate commerce. Therefore, Raymond and Bibb are factually distinguishable. In Bibb the burden extended to the necessity to weld or load and unload the trucks or trailers at the state border, whereas Raymond concerned the far lesser burden of separating the doubles or using semis on Wisconsin highways.\footnote{37}

In the more recent case of Pike v. Bruce Church, Inc., the Court continued to apply the balancing test developed by Justice Stone. The case states:

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows:

Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.\footnote{38}

In Pike, Arizona asserted that its statute requiring all canteloupes, with certain exceptions, grown in Arizona and offered for sale to be packaged and identified as originating in Arizona did not burden interstate commerce. The grower was shipping the canteloupes 31 miles to a California plant where the canteloupes were packaged pursuant to California requirements. To meet Arizona's requirement, it would cost the grower $200,000 to build a packaging plant. In striking down Arizona's interest of enhancing the reputation of producers within Arizona borders the Court indicated that it is virtually per se illegal for a statute to require business operations in the home state that are more efficiently performed elsewhere, even in the absence of a purpose to secure employment for the home state.\footnote{39}

Basically, Pike stated that the interest of enhancing local canteloupe growers' reputations is not a sufficient local interest that will be allowed to burden interstate commerce. Therefore, Pike is distinguished from Raymond since the interest is not one normally left to the states, such as Wisconsin's concern for safety in Raymond.\footnote{37} The state's failure to present any evidence to rebut appellant's showing in itself sets this case apart from Barnwell Bros., see 303 U.S. 177, at 196, and even from Bibb, see 359 U.S. 520, at 525.''}34 U.S. 429, 445 n.20.

\footnote{38} 397 U.S. 137, 142 (1970).

\footnote{39} Id. at 145.
Historically speaking, the rational relations test, standing alone, was inadequate. It would determine if the regulations were rationally related to a legitimate interest without determining the burden resulting on interstate commerce. The language of Bibb, which applied a principle similar to Pike, makes this clear:

Unless we can conclude on the whole record that the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it . . . we must uphold the statute.40

Therefore, the main flaw in Wisconsin's argument is that the balancing test is the proper test to apply in determining the states' right to legislate in interstate commerce. Now the Court in Raymond makes it clear that the reasonableness test has no place in interstate commerce. The Court states: "There is language in Barnwell Brothers which, read in isolation from later decisions, would suggest that no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in the absence of some element of discrimination against interstate commerce.‖41 Query: Did the Barnwell Brothers case, central to appellees argument, actually apply a test of reasonableness? Upon a close reading it can be determined that the justices were engaging in a hard factual analysis while weighing competing demands.42 That approach to interstate commerce is the balancing test. So even the Barnwell Brothers case supports the application of a balancing test, and not one of reasonableness.

It is argued that by applying a balancing test to determine the burden on interstate commerce, the state's right to control local matters is being usurped by the federal government. In response, it should be noted that the purpose behind the Commerce Clause is to insure the free flow of goods which form the very basis of our industrialized society. Therefore, the Commerce Clause is invoked to maintain uniformity of laws to further the free flow of goods and the increased development of our technological society. Furthermore, the Commerce Clause is invoked to overcome a spurious claim of local interest to uphold this national interest of increased economic, industrial, technological, etc., development.43

42. P. Benson, The Supreme Court and the Commerce Clause, 240 (1970) [hereinafter cited as P. Benson]. In Barnwell the test of reasonableness was expounded, but it can be seen that the analysis centered upon finding facts to be weighed against each other to determine the national or local nature of the South Carolina legislation.
43. Appendix, supra note 8. The evidence compiled in Raymond suggests Wisconsin's highway safety interest was indeed spurious. Furthermore, in Bibb, Illinois sought to force truckers to adopt a mudguard of questionable value which is different from that required by any other state. In Pike, Arizona sought to protect the prestige of local canteloupe growers at a $200,000 expense to the shipper who was shipping and packaging his goods in California just 31 miles away. P. Ben-
Those scholars asserting a states' rights argument in an effort to limit this federal power are deeply concerned with the possibility that the Commerce Clause will be invoked to further a spurious federal interest. And indeed, since the federal interest must prevail when it is determined that it outweighs the local interest, what safeguards are there to protect the states from an abuse of federal power through the Commerce Clause? For one, the Commerce Clause is limited by the Bill of Rights. Any exercise of federal power conflicting with the Constitution must yield. The Commerce Clause is also limited by internal political constraints. In the field of conflicting interests, the legislative process can operate only by compromise of various political groups to secure passage of a particular piece of legislation. In this manner, the values interest groups are willing to compromise, and those values they are not willing to compromise, will determine if legislation will pass that might usurp State Power. The government structure defined by the Constitution also checks the abuse of federal power. Here the fact that the federal legislators are state citizens as well as federal gives the states formal representation in Congress. This formal state representation coupled with the interstitial nature of federal law making, checks the Commerce Clause from federal abuse.

V. SUMMARY

Other views besides the balancing test have existed within the Supreme Court, in particular those of Justice Black and those of Justice Jackson. But through the years, the balancing test and its hard factual analysis has been preferred. In Raymond, the Court decided that the Commerce Clause allows the courts to look beyond the statement of legitimate local interest raised by the state by weighing such interest against the burden imposed on interstate commerce. Since the facts in Raymond

44. 312 U.S. 100, 116 (1941).
47. But see American Constitutional Law, supra note 27, at 242.
48. See P. Benson, supra note 42, at 246-49 (for a succinct discussion of Justice Black's position on a state power in interstate commerce).
49. See id. at 249-54 (for a succinct discussion of Justice Jackson's position on state power in interstate commerce).
show that the regulations did not contribute to legitimate local interests, the burden as to costs and time outweighed the local concern.

The Court has made it apparent that the reasonableness test has no place in determining when the states can legislate in interstate commerce. Furthermore, a hard factual analysis weighing the competing burden on interstate commerce against the putative local concern will be undertaken. Therefore, to legislate in interstate commerce, the states must present some evidence to rebut the cost and convenience burdens on interstate commerce and/or present evidence, as in Barnwell Brothers, showing a legitimate local concern for safety.\(^{51}\) Such evidence might have changed the Raymond result.

*Neal Dunning*

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\(^{51}\) *Supra* note 37.
Book Review

Freight Claims in Plain English, William J. Augello, Shipper's National Freight Claim Council, Inc., 120 Main St., Huntington, N.Y. 11743, October 1979, pp. 744, $39.50

This long-awaited volume is a welcome addition to the sparse legal and technical literature on carrier liability law and freight claims management. The existing works in the field, to which Augello's hefty book will inevitably be compared, are Miller's Law of Freight Loss and Damage Claims, now in its Fourth Edition, revised by the late Richard R. Sigmon, and How to Recover for Loss and Damage to Goods in Transit by Saul Sorkin. Freight Claims in Plain English is distinguished from the other texts by its inclusion of the latest available material and its innovative departure from traditional legal language to break new ground in the use of direct, readily understood English.

Prior to analyzing the merits of Augello's treatise, however, it seems appropriate to look at the author's background and the activities which led to the book's publication by the Shipper's National Freight Claim Council [SNFCC]. A psychology major at Dartmouth, Augello obtained an LL.B. at Fordham, and then studied traffic management at the Academy of Advanced Traffic. He has practiced transportation law for twenty-seven years and is the senior member of the Huntington, N.Y., firm of Augello, Pezold and Hirschmann. He is a well-known member of the Motor Carrier Lawyers Association, a member of the National Industrial Traffic League and the New York Bar Association. His legal dossier includes serving as counsel for several shipper associations, and for the past five years representing the newly-formed SNFCC.

SNFCC was founded in late 1973 by a group of shippers and receivers who decided the time was overdue for a shippers' group to tackle the increasingly frustrating field of freight loss and damage claims. Augello was retained in the dual role of Executive Director and General Counsel. The centerpiece of the Council's education program was a series of some eighty-six seminars attended by more than 4,300 people interested in the freight claims field. Augello personally conducted all but a few of the seminars, and the material developed for the seminar lectures provided the basis for the book, and shaped its two-part format.

Part I—"The Legal Principles of Freight Claims, From a Claimant's Standpoint"—contains Augello's substantive analysis of claims law. It is divided into decimally-numbered sections covering the different transport...
modes, and then delves into various sub-topics including: 1) Burdens of Proof; 2) Bill of Lading Exceptions to Liability; 3) Measure of Damages, Including Special Damages; 4) Time Limits; 5) Procedural Considerations; 6) Specific Claim Problems, Including Concealed Damage; and 7) Aids to Claim Recovery.

Augello is content to leave the history of carrier liability law and its musty origins in English common law to other writers. The classic decision of Lord Holt in Coggs v. Barnard, 1 decided in 1704, is not even listed in the Table of Cases, but 491 other modern and current cases are cataloged. Other areas of the subject already covered in depth by other writers are likewise not treated extensively in this text. An example of a subject the author chose not to duplicate is the terms and conditions of the uniform bill of lading contract, which is analyzed in depth in Miller's. Complete texts of the conditions of both rail and motor bills, a sample household goods bill, and a suggested form for an exempt commodities motor bill of lading, however, are included as Appendices. Ocean carrier liability is not covered as extensively as in Sorkin, 2 but both air and ocean carrier liability is discussed, and the Carriage of Goods by Sea Act 3 and the recently developed but as yet unratified Hamburg Rules 4 are reproduced in the extensive appendices.

Part I is made more understandable and more valuable to the reader by the frequent use of questions and answers, as well as a liberal sprinkling of claim tips of practical counsel on how common problems can be avoided or mitigated. Section captions and generous use of blank space complement the clear language of the text. Augello uses two recent cases to focus attention on seemingly basic but still controversial legal issues, and reproduces the complete reports on the decisions as Appendices. The first of these cases is the oft-cited Missouri Pacific Railroad Co. v. Elmore & Stahl, 5 a decision of the United States Supreme Court in which the author was counsel of record. This landmark decision is treated extensively in both Parts I and II, and deals with significant issues of burdens of proof. A proper understanding of Elmore & Stahl is regarded by the author as a requisite foundation for any in-depth comprehension of the remainder of the statutory and case law covered.

The other recent decision discussed at some length is the 1976 decision of the California Court of Appeals in Vacco Industries v. Navajo Freight

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1. 2 Lid. Raymond 909 (1704).
2. S. SORKIN, HOW TO RECOVER FOR LOSS AND DAMAGE TO GOODS IN TRANSIT (1976).
which involved a number of substantive issues (e.g., "shippers load and count" notations, inherent vice defense, replacement costs including profit as a measure of damages, and the procedural matter of the use of expert witnesses in a sophisticated carrier defense).

Part II of the book is titled "'Fifty Carrier Declinations--And What To Do About Them'". Augello suggests that readers should use Part II with its sample declination letters (actual letters edited for publication) as a test to check comprehension of the legal principles covered in Part I. The declination statements are divided into three sections: 1) Disallowances in General; 2) When Liability is Denied; and 3) When Liability is Admitted, but Claim is Disallowed as Filed. The author strongly recommends in a welcome explanatory introduction that claims personnel should read the text thoroughly before attempting to use it as a research tool. He also urges use of Part II to help analyze each factual claim situation to determine its significant characteristics, to properly "pigeonhole" each claim, and to properly apply the pertinent legal principles presented in Part I. Part II provides a series of questions and commentaries on each declination to direct the user in his own inquiry, and to help him determine what are proper as opposed to improper grounds for disallowance. Part II is copiously cross-referenced to both the legal provisions in Part I, and extensive reference material in the Appendices.

The introductory chapter includes a special section on how to read and evaluate legal decisions. This section is especially helpful to the lay reader in understanding the precedential value of court decisions, and deciding if cases cited in a claims dispute are "on point" with the facts of the case. Augello urges claims personnel to become the paralegals of their companies knowing when to seek professional counsel and how to assist attorneys in technical claims matters.

A section is included on two available procedures for the arbitration of claims disputes. One is a program developed by the Association of American Railroads in conjunction with the American Arbitration Association, and the other is the Transportation Arbitration Board [T.A.B.] developed jointly by SNFCC and the National Freight Claim Council of the American Trucking Association. Augello is a founder, director and officer of T.A.B. Included in the Appendices are rules for both arbitration plans, arbitration agreement forms for T.A.B., and printed decisions in seven noteworthy T.A.B. cases. The book also includes in the Appendices a conversion table of the Interstate Commerce Act prior and subsequent to the 1978 Recodification, the Commission's regulations on freight claims, and the Warsaw Convention.

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plus an extensive list of federal regulations and rulings, tariff provisions, legal forms and claim charts. Finally, the work is made infinitely more valuable to the researcher by an exhaustive index requiring sixty one pages.

In the book's strength may also lie its greatest weakness. The author's accomplishment in simplifying material of inherent complexity may mislead the inexpert reader to conclude that the law is more clear and less ambiguous than is warranted by reality. This criticism of the tendency towards generalization, however, is one that can be lodged against virtually all textbooks, and not just this one which bears the author's enormous talent in translating legalese into plain English.

Legal scholars will undoubtedly wish that Augello had utilized his special experience and legal knowledge to address additional substantive areas of claims law. Claims experts using the book as a research tool may also be disappointed, as was this reviewer, when they find that a specific topic has been omitted. (The specific instance was a search for the case law on when carrier liability commences; happily the subject is covered in other sources.) Carriers may prefer Miller's carrier viewpoint, and attorneys are likely to feel more comfortable with Sorkin's copious citations. Claimants will, however, predictably find Freight Claims in Plain English just what they have been waiting for—an invaluable reference work and working tool. Its value as a textbook for study will be obvious to anyone interested in teaching the subject. In this reviewer's opinion, Freight Claims in Plain English will prove a good investment for anyone (carrier, claimant or lawyer) who wants to have the latest and most understandable text in the freight claims field.

John Betz
Director of Transportation
Adolph Coors Company
Sohio Crude Oil Pipeline: A Case History of Conflict

DONALD B. BRIGHT*

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I. INTRODUCTION

On March 13, 1978, the Standard Oil Company, Ohio (SOHIO), after five years of confusing and frustrating efforts to obtain 703 permits and an expenditure of over $50 million, decided to abandon their proposed west-to-east crude oil pipeline system for delivering Alaskan oil to the Gulf Coast and Midwest areas.\textsuperscript{1} SOHIO gave as their official reasons the "endless government permit procedures . . . [and] pending and threatened litigation,"\textsuperscript{2} what they called a "quagmire of Regulations."\textsuperscript{3}

The reactions to SOHIO's announcement were immediate and divergent. The Governor of California referred to them as an "outlaw corporation" that "didn't want to clean up its garbage,"\textsuperscript{4} senators and congressmen demanded an immediate investigation on why California had failed to approve the project;\textsuperscript{5} and key regulatory agencies—still to approve the project—displayed dismay because final permits were to be is-

\begin{itemize}
\item[1.] During the various phases of regulatory review this project had several other names, e.g., West Coast to Mid-Continent Pipeline Project, SOHIO Transportation Company Project, and PACTEX.
\item[3.] SOHIO Press Release containing the statement of the Chairman, The Standard Oil Company of Ohio, announcing abandonment of the project (March 13, 1979).
\item[4.] "Last-Ditch Stabs Made at Reviving SOHIO Project," IPT, Mar. 16, 1979.
\item[5.] \textit{Hearings on SOHIO Crude Oil Pipeline Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 1st Sess. (1979)}; \textit{Hearings on Transportation of Oil by Pipeline from Long Beach, Cal., to Midland, Tex., Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, and Before the Subcomm. on Oversight and Investigations of the House Comm. on Interior and Insular Affairs, 96th Cong., 2d Sess. (1979).}
\end{itemize}
sued "in a matter of days." 6

After extensive meetings and hearings and a reassessment by SOHIO management and board directors, the project was "killed" for good on May 24, 1979. 7

The abandonment of this project gives tragic testimony to the increasingly conflicting maze of regulations which controls our everyday lives and which can be so extensive and quixotic as to preclude timely development of energy projects. Since this project was of national importance, why did it take more than four years to obtain regulatory approvals? Was the project subject to unusual political and regulatory problems? Did SOHIO fail to recognize the importance of the regulatory process in California? The events indicate that although the state of California, through the California Air Resources Board, was the major negative influence, no single factor contributed to this "quagmire." Rather, it was largely the burden of "regulatory culture": the concept that completing the process in a step-by-step fashion is more important than making appropriate, reasonable and timely decisions.

II. BACKGROUND

When oil was discovered on the North Slope of Alaska, it was heralded as one of the greatest discoveries of energy in American history. The production and pipeline facilities for the Alaskan oil delivery system were approved before it was clearly determined where the oil would be used and how it would be transported to those areas with the greatest need. Final approval of the Trans Alaskan Pipeline System (TAPS), however, was based on the assumption that all the Prudhoe Bay/North Slope oil could be used in the three major refinery centers along the West Coast: Puget Sound, San Francisco, and Southern California. Today, however, there is an excess of this oil on the West Coast.

With all the accolades about how this oil would ease our energy problems, we should have been suspicious, because in today's world, no new large industrial processes or systems can evolve without full exposure in a crucible composed of economic, regulatory, political, and public review.

Until 1960-1964, the United States was essentially independent of foreign oil supplies, producing and consuming more oil than any other country. 8 In 1970, as production of older fields peaked and new explorations

and developments diminished, total domestic production declined. This declining supply, combined with an average four percent annual growth in consumption,\(^9\) resulted in an increasing dependence on foreign oil. Import dependency grew from eighteen percent in 1960 to almost fifty percent in 1978.\(^10\) Aside from the oil supply issues, the increase in the price of oil placed severe burdens upon our balance of payments for energy. In 1970, we paid about three billion dollars for foreign oil as compared to about forty billion dollars in 1978.\(^11\)

During the extensive congressional hearings and debates in the early 1970’s on the construction of TAPS, the concern was expressed that Alaskan oil would be sold to Japan. Oil-industry and federal government spokesmen gave extensive assurances that this would not occur and that all the Alaskan oil would be needed on the West Coast. Congress, based on these assurances, essentially barred the export of North Slope oil.

In 1974, SOHIO, a major participant in the TAPS project, recognized that all the North Slope oil could not be used on the West Coast. Utilizing a series of studies conducted by private consultants, it tried to convince others that a west-to-east pipeline system was needed to deliver Alaskan crude oil to energy-deficient areas in the Gulf Coast and Midwest.\(^12\) Hardly anyone agreed with SOHIO, and its initial efforts were not taken seriously.

In 1974, the foreign oil embargo resulted in extensive revisions to various energy supply and demand forecasts; gradually it was recognized that there could be a surplus supply of crude oil on the West Coast when Alaskan oil entered the market. Additionally, several environmental regulations, such as those requiring the use of low-sulfur fuel to reduce air emissions, and changes in consumer use patterns, reduced the demand on the West Coast for crude oil.\(^13\) In 1974, in spite of these events, no real plan existed to deal with the distribution of Alaskan oil. Also, although the increasing dependency on foreign oil and the change in consumer use patterns focused a need for state and federal energy plans, bureaucratic and political units at all levels of government responded very slowly, if at all. It was not until November, 1978, that a federal energy policy was approved by Congress,\(^14\) four years after SOHIO initiated efforts to obtain approval for its west-to-east pipeline system.

SOHIO personnel continued to push for consideration of their proposal.

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9. Id. at III-1.
13. SOHIO DRAFT EIR, supra note 8, at Vol. 3, Part 1, I-3 to I-16.
to build a west-to-east pipeline system. During most of 1974, SOHIO had a traveling team on the West Coast urging the need for the pipeline. Most people believed if the oil was really needed in the Gulf and Midwest areas, that Congress would not have approved the TAPS project only for delivery to the West Coast. Alas, a blind faith in political, bureaucratic processes! It was this blind faith, coupled with the absence of timely, coherent and decisive action, that brought about the abandonment of the proposed project.

Because of the national significance of the abandonment of this project, and because of the multitude of public institutions which participated in the analysis of the project, and because, hopefully, there are some lessons to be learned for reviewing future projects, it is appropriate to analyze certain of the key events in the SOHIO drama.

III. SOHIO SEeks Approval

By 1974, most West Coast and federal government entities began to take SOHIO seriously; that is, they recognized there would be Alaskan oil in excess of West Coast needs. Aside from the basic problem of the extent of the West Coast surplus, SOHIO also had two other immediate problems. First, it did not own any existing oil facilities on the West Coast,15 and second, it owned about fifty-two percent of the TAPS oil.16 Economically, and from a sheer marketing position, SOHIO was at a tremendous disadvantage and its best option was to build a west-to-east pipeline system. It appeared that this option was very much in the national interest since there were no major existing west-to-east crude oil pipeline systems.

After extensive marketing, preliminary engineering and designs analyses, SOHIO determined that it would require a transportation system consisting of marine transport from Valdez, Alaska, to a terminal on the West Coast, and from that site, a pipeline system leading to Midland, Texas.17

In 1974, SOHIO conducted discussions with El Paso Natural Gas Company (El Paso) about the possibility of obtaining long-term use of two existing thirty inch diameter natural gas lines. These pipelines extended from Ehrenberg, Arizona, to Jal, New Mexico. Subsequently, SOHIO began discussions with the Southern California Gas Company (So-Cal) about the use of two, thirty inch diameter pipelines extending from Beaumont, California, to the Colorado River. Ultimately, both El Paso and So-Cal agreed to provide these gas lines for use by SOHIO.

SOHIO conducted a study of about fifty possible terminal sites and re-

15. Historically, SOHIO was a midwest and East Coast refining and marketing company. They were "newcomers" on the West Coast whose principal stockholder would be The British Petroleum Company, Ltd.
16. Part of the agreement with The British Petroleum Company, Ltd.
17. West Coast to Mid-Continent Pipeline Project Description, The Standard Oil Company (SOHIO) (Jan., 1975).
lated pipeline systems, and concluded that the "best" site, using an off-shore unloading facility, was near Camp Pendleton, in the northernmost portion of San Diego County, California.\textsuperscript{18} However, it appeared almost impossible to obtain approvals from the California Coastal Commission for such a facility, to say nothing of the attendant problems of obtaining approvals for constructing a pipeline through military, residential, and open space areas. Consequently, SOHIO picked San Pedro Bay because it contained existing ports, and provided reasonable ways of constructing a pipeline leading toward the Colorado River.

In 1975, SOHIO concluded agreements with both ports in San Pedro Bay (Port of Long Beach and Port of Los Angeles) whereby each would initiate the preparation of an Environmental Impact Report (EIR) to meet the requirements of the California Environmental Quality Act (CEQA).\textsuperscript{19} In December, 1975, SOHIO determined that the Port of Long Beach (Port) represented the most appropriate location for their marine terminal, and negotiations with the Port of Los Angeles were terminated.

At this point, SOHIO established the basic character of its proposed system: a transportation system consisting of marine transport from Valdez, Alaska, to Long Beach, California, using eleven "dedicated" tankers,\textsuperscript{20} a 700,000 barrel per day capacity marine terminal,\textsuperscript{21} and a pipeline system from Long Beach, California, to Midland, Texas. This pipeline was to be 1,027 miles long with almost 800 miles of pipeline already in place as part of the existing El Paso and So-Cal systems\textsuperscript{22} (see Figure 1).

After this long period of study and consultation, SOHIO was pleased, for at last it had acceptance of its view on the West Coast surplus problem and, in turn, had established public awareness of its proposal to build a west-to-east pipeline system utilizing a new modern marine terminal in the Port of Long Beach.

SOHIO, although it was a small company, put together a strong team of management and engineering personnel to participate in the TAPS project. However, that effort drained it of personnel to orchestrate the west-to-east pipeline system. Accordingly, they hired Williams Brothers Engineer-

\textsuperscript{18} Williams Brothers Environmental Services, Environmental Impact Assessment [hereinafter cited as SOHIO EIA]: West Coast to Mid-Continent Pipeline Project, Vol. 4, § 9, 9-164 (1976).
\textsuperscript{20} Tankers under continual charter to SOHIO moving oil from Alaska to California.
\textsuperscript{21} This was later reduced to 500,000 barrels per day when SOHIO was not given air quality credit for delivery of oil which replaced oil delivered on older vessels to existing terminals. The premise was that 200,000 barrels per day of Alaskan oil could be received at existing terminals without construction of the SOHIO terminal. Since such oil would be delivered on modern tankers to its modern terminal, SOHIO felt it should receive credit for the emission reductions associated with the reduced delivery of oil by others.
\textsuperscript{22} Supra note 17.
ing Company, Tulsa, Oklahoma, to do the preliminary engineering and to complete the preparation of the federal Environmental Impact Assessment. SOHIO established an affiliate company on the West Coast, SOHIO Transportation Company, and provided certain individuals to coordinate permit activities. They did not establish a management organization on the West Coast, and major decisions were made by a corporate management team in Cleveland. Consequently, SOHIO did not have consistent management ‘‘ears’’ on the West Coast to help interpret the intricacies of the California regulatory process. The initial absence of resident decision-level management on the West Coast contributed to project problems.

During the regulatory review process, the issues originally perceived as major—dredging and disposal of dredged material—were replaced by concerns about earthquakes, oil spills, and air quality. SOHIO demonstrated an unparalleled willingness to provide technical information. However, as the air quality issue emerged as the key concern at the state level, SOHIO increasingly encountered difficulty in finding regulatory staff who both understood oil operations and had rapport with their decision-makers. Because of this, SOHIO’s efforts were split into a series of technical discussions, preparation of related documents and guidelines, and a series of top level discussions on how to work through the decision-making portion of the regulatory process. It was this splitting of effort that initiated major difficulties in the approval of the SOHIO project.

Thereafter, regulatory, political, and public processes got into full swing and almost immediately, a series of issues evolved which indicated the potential for delay, extensive modification, or ultimate denial of the project. These same problems continued for four years, 1975-1979, during the federal, state, and local review of the permits required for the project (see Tables 1 and 2). There were 703 permits required for project approval, of which eighty-nine were critical.

IV. ISSUES

After SOHIO established the character and quality of the proposed west-to-east pipeline system, it initiated the processes necessary to accomplish the project. During the federal, state, and local review of the 703 permits required for the project, certain issues were resolved, but in almost every instance, new issues emerged which jeopardized project approval.

Certain issues which were widely debated during the approval process

23. SOHIO EIA, Vol. 1, i.
24. Fifty-nine were environmental permits and 30 were construction permits.
25. Critical in the sense that the related decisions were discretionary as opposed to ministerial.
controlled the destiny of the SOHIO project. Generalized discussions on key issues follow.

A. NATIONAL AND STATE ENERGY POLICIES

Although U.S. oil and gas production increased modestly after 1977, the position of the United States regarding oil still is precarious. The U.S., with six percent of the world's population, consumes more than thirty-three percent of the energy consumed worldwide and about the same percentage of the world's oil. About three-fourths of the energy con-

suumed in the United States is in the form of oil and gas—the energy resources that are in short supply. Because of America’s increasing energy appetite and declining U.S. production of crude oil and gas, we face a substantial social and political dilemma.

Why didn’t the federal or state government provide solutions? The state of California still does not have a clearly stated energy policy, although the often-criticized California Energy Commission has attempted to establish a number of procedures and rules governing future development of energy projects.\textsuperscript{28} The federal government grappled with the character and quality of a federal energy policy for many years. The version approved in 1978 can not be considered totally responsive.\textsuperscript{29} Why have national and state policies been so slow in evolving and why have they failed to provide effective, efficient solutions? The answer is simple: the energy shortage has not reached the point where energy sources are so scarce as to threaten our very existence, and the public is not accustomed to pinching and saving to protect the future. Thus, to solely criticize the government for its failure to respond would be remiss; yet, preparing to meet future energy crises will take a concerted government-business effort to decrease energy use and provide realistic alternative energy sources. For the immediate future, the next thirty to forty years, oil is and will continue to be the major energy source.

The average citizen subscribes to dichotomous energy goals: a strong interest in conservation and enhancement/restoration of environmental quality versus a strong unwillingness to change to less energy-demanding lifestyles. Our lifestyles support energy waste.\textsuperscript{30}

Where does SOHIO fit into this picture of confused governmental and public goals? With no consistent, realistic state or federal energy policy, it was impossible for the SOHIO project to be viewed as a significant component in achieving equitable distribution of domestic oil throughout the country. In essence, the neophytic condition of state and national energy policies precluded the project from being considered as significant or appropriate in achieving, even in a small way, energy independence.

\section*{B. Alternatives}

A number of pipeline projects have been proposed for the movement of surplus oil from the West Coast to the central United States (Figure 2). At one time, in addition to SOHIO’s, there were eight other proposed projects.\textsuperscript{31} In addition to these eight pipeline projects, three additional

\begin{itemize}
\item \textsuperscript{29} \textit{Supra} note 14.
\item \textsuperscript{30} Each step, from the production of crude oil to moving a car, loses energy, that is, only a small portion of the potential energy, about six percent, is converted into a useful form of energy.
\item \textsuperscript{31} (1) Kitimat Pipeline from Kitimat, British Columbia to Edmonton, Alberta: this project was
\end{itemize}
transportation routes were proposed and rejected because of a combination of engineering, environmental, and economic problems.\footnote{32}

Exchange of Alaskan oil for foreign oil also has been proposed. Alaskan oil could be sent to Japan in exchange for other oil being redirected to the Gulf Coast, or Alaskan oil could be sold to Mexico in exchange for delivery of Mexican oil to Gulf Coast ports. Sending oil to Japan requires sensitive federal approvals; and exchanging oil with Mexico, although allowed by the Trans-Alaska Pipeline Authorization Act,\footnote{33} appears unlikely because of strained relations.

C. ENERGY WINDOW

California has traditionally been isolated from the rest of the country with respect to receipt and distribution of crude oil. That is, California has traditionally been able to produce almost all the oil needed to maintain petroleum product availability. The major exception has been the importation of low-sulphur crude oil to meet regulatory requirements for minimizing air quality impacts. Because California has not played a role in the receipt and distribution of crude oil to other parts of the U.S., there was no initial interest in receipt of Alaskan oil beyond West Coast needs. This somewhat parochial view persists, in spite of the fact that California traditionally depends upon a large supply of natural gas from Texas, Oklahoma, Colorado, Utah, Arizona, and New Mexico.\footnote{34} From 1974 to 1978, SOHIO repeatedly was told that California was not interested in serving as an energy window for the rest of the nation.\footnote{35}

\footnote{32} These routes are (1) moving North Slope oil by rail in the Northern Tier area (Washington, Idaho, Montana, North Dakota and Minnesota) and the Southern Tier area (across Southern California, Arizona, and into Texas); (2) combined movement by ship and use of existing small diameter pipelines in the Panama Canal; and (3) the movement of oil around Cape Horn on Very Large Crude Carriers (VLCC’s) for delivery into the Gulf of Mexico.


\footnote{34} SOHIO EIA, supra note 18, Vol. 1, III-27 to III-88.

\footnote{35} Discussions between staffs of SOHIO, California Air Resources Board (CARB), California
Figure 2. Proposed Routes for Distribution of Alaskan Crude Oil.

D. DISTRIBUTION OF ALASKAN OIL

Major crude oil transmission systems exist in the Gulf Coast region and in the Midwest (Figure 3), while the West Coast—in particular California—is isolated from these systems. Therefore the SOHIO project would have established the ability to move oil from the West Coast to those areas in the Gulf Coast and Midwest which now are deficient in indigenous crude oil supply and are increasingly dependent upon foreign oil.

Public Utilities Commission (CPUC) and Port of Long Beach (Port) and "Overview: SOHIO—West Coast to Mid-Continent Pipeline Project," Port of Long Beach (1977).
Figure 3. Existing Major Crude Oil Pipelines in the Central United States

If another oil embargo were to occur, many areas dependent upon foreign oil to maintain daily energy requirements would be heavily impacted. Interestingly, because of the availability of North Slope crude oil, the West Coast area might not suffer. For example, if all foreign oil imports on the West Coast were withdrawn, and certain refinery modifications achieved, the present production of Alaskan crude oil would replace all but 100,000 barrels of the daily requirement.\(^{36}\)

At the present, North Slope oil surplus to West Coast needs is being transported by tanker to Gulf Coast areas. Large tankers leave from the

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\(^{36}\) SOHIO Draft EIR, supra note 8 at Vol. 3, Part 1, III-6.
TAPS terminal at Valdez and proceed to Panama. There, after transfer to a mother ship, the crude oil is retransferred to smaller tankers—tankers which can pass through the Panama Canal—and delivered to the Gulf Coast. This transfer of oil is time-consuming and costly. In general terms, it would cost $1.00 to $1.75 per barrel less to ship oil from Valdez, Alaska to Midland, Texas via the Port of Long Beach, as compared with shipping by tanker from Valdez, Alaska, through the Panama Canal to a Gulf Coast port. These additional transportation costs and the absence of workable energy-regulatory goals have depressed aggressive development of other North slope petroleum areas.

E. Oil Spills

SOHIO entered the regulatory arena when awareness of oil spill problems was on the upswing. In the middle of preparation of the Environmental Impact Report, the SANSINENA exploded in Los Angeles Harbor, and focused local and state concerns on oil spills and tanker explosions.

During the public hearings on the adequacy of the EIR for the SOHIO Project, repetitive concern was expressed about increased tanker traffic and the potential for oil spills due to collisions, rammings, and groundings of tankers, and the potential for rupture of SOHIO’s storage tanks during an earthquake.

Actually, the SOHIO Project only represented an increase of one tanker every 1.5 days, and the tankers to be used would have been new, of the 165,000 deadweight ton (DWT) class, all outfitted with inert gas systems to minimize the potential for explosion, in addition to the latest navigational safety devices. Concern also was expressed that the increase in tanker traffic would impinge upon existing vessel traffic at a number of points along the West Coast so that the potential for accidents would increase as the dedicated tankers traveled from Alaska to Long Beach and back. Yet, studies indicated that the increased traffic would be minimal and that the newly established traffic separation patterns between north and southbound traffic more than compensated for the slight increase in traffic due to the SOHIO project. Also, review of historical data showed that the potential for oil spills caused by tanker accidents within the coastal area (fifty miles seaward from the coastline) along the West Coast was very, very low.

The storage of millions of barrels of oil at the marine terminal also

39. Port of Long Beach and California Public Utilities Commission, Supplement to Final Envi-
caused concern. Long Beach, with a history of earthquakes, is located adjacent to three known earthquake faults. One of those faults, the Palos Verdes Fault, runs within three miles of the SOHIO terminal site. Although there has been no recent activity along the Palos Verdes Fault, geologists and seismologists do not agree on the potential for activity. Opponents of the SOHIO project continually argued that an earthquake could cause liquefaction of the soil beneath the tank farm so that the tanks would rupture and release millions of barrels of oil into the waters of the Port of Long Beach. Yet, SOHIO planned to densify (compact) the soil beneath the tank farm, and utilize an engineering design that would withstand the projected maximum credible earthquake.

None of the safety measures seemed to satisfy the local citizens, in spite of the fact that Long Beach is an oil town with a series of oil islands directly offshore which have been supporting citizen activities over the past thirty years. This is an issue which never could be solved to the satisfaction of all, because scientific data are not trusted and the concerns are often emotional.

F. USE OF NATURAL GAS PIPELINES

After completing an engineering feasibility study on overland pipeline alternatives, SOHIO chose a southwestern route. In 1974, SOHIO and El Paso Natural Gas Company (El Paso) began negotiations to achieve an agreement authorizing SOHIO to use one of five existing El Paso natural gas lines which was projected to be unnecessary for El Paso's natural gas transportation obligation. El Paso was to carry out the necessary regulatory requirements to achieve abandonment of the pipeline from natural gas service, and the subsequent conversion for crude oil use.40

Shortly after an interim agreement was reached with El Paso, SOHIO began negotiations with So-Cal to utilize one of its existing natural gas pipelines within California. SOHIO planned to use about 800 miles of existing natural gas pipeline, with approximately 130 miles owned and operated by So-Cal within the state of California, and the remainder owned and operated by El Paso, stretching across the southwestern United States from the

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40. El Paso obtains natural gas from the Permian Basin supply area which consists of the Permian Basin, the Anadarko Basin, the Panhandle areas of Texas and Oklahoma, and the San Juan Basin in northern New Mexico, southwest Colorado, Arizona, and Utah. Since about 1970, almost 52 percent of California's gas supply has been delivered utilizing El Paso pipelines. In addition to El Paso, Transwestern Pipeline Company (Transwestern) also transmits gas to the California border from southwestern production areas. Among others, Southern California gas Company (So-Cal) receives El Paso and Transwestern gas for distribution in Southern California. Both El Paso and Transwestern plan to supplement production from present sources by additions to supplies from supplemental sources.
California-Arizona boundary to southwestern New Mexico. By utilizing these existing natural gas pipelines, SOHIO only would have to construct a new pipeline leading from the marine terminal in Long Beach to the beginning of the So-Cal line, from the end of the So-Cal line across the Colorado River to Ehrenberg, Arizona, and from Jal, New Mexico, to Midland, Texas.

In mid-1975, El Paso initiated a study to assess the impact of the proposed gas service abandonment of one of five main transmission lines.\(^{41}\) El Paso compared its pipeline capacity after abandonment with possible future average and peak-day gas availability, considering its connected sources and projections of future reserve additions, potential for gas produced through coal gasification, gas received from foreign sources such as LNG, and the receipt of Alaskan gas. Based upon these comparisons, it was concluded that use of the pipeline by SOHIO could result in substantial economies for its gas customers and that the one pipeline to be used by SOHIO would not be required for future gas service (even if the wellhead price of gas was deregulated) and that the SOHIO project would benefit the entire nation by expeditiously providing secure, economic transportation of Alaskan oil from the West Coast to distribution networks connecting refining centers throughout the middle and eastern portions of the United States. El Paso filed an application with the Federal Power Commission in June, 1975, requesting approval to abandon the natural gas pipeline.\(^{42}\)

So-Cal, after making comparable studies, determined that the loss of a delivery line in its system, assuming availability of El Paso gas lines, did not represent a major problem; in other words, there would be no loss in So-Cal ability to receive and distribute the maximum amount of natural gas available for use in California up through the year 1985.\(^{43}\) Negotiations between So-Cal and SOHIO continued for several years before a final agreement was reached in the summer of 1977.

The agreements between SOHIO and El Paso and SOHIO and So-Cal also included the potential use of a second set of natural gas pipelines. These pipelines were not part of the proposed SOHIO project as reviewed in the EIR, but represented a point of continual concern during hearings in California.\(^{44}\)

As the Draft EIR was being circulated, certain agencies in the state of California began to question the validity of statements that abandonment would not adversely impact the capability for receipt of natural gas in California. The Chairman of the California Air Resources Board (CARB) noted


\(^{43}\) Southern California Gas Company Application No. 57695 before the CPUC (1977).

\(^{44}\) "SOHIO-Phase II," an alternative which provided for the ability to transport an additional 500,000 barrels per day of crude oil using a second set of existing natural gas pipelines.
that, "If this happens, we could lose substantial quantities of natural gas (and) customers will find themselves without gas to use in necessary industrial operations."\textsuperscript{45} This pronouncement was the initial volley in a lengthy series of studies and analyses which yielded divergent conclusions. The Draft Environmental Impact Report completed by the Port and CPUC, based on the assumptions used by El Paso and So-Cal, indicated that the abandonment of the existing natural gas pipelines still would allow effective service to California customers.\textsuperscript{46} In contrast, the CPUC, in presenting California's position on the abandonment issue before the Federal Power Commission, indicated that loss of the El Paso line would leave insufficient capacity to supply California during the mid-1980's.\textsuperscript{47}

The CARB authorized the Rand Corporation to prepare a Working Note\textsuperscript{48} examining the problems resulting from the abandonment of one El Paso pipeline and whether or not there was a "realistic probability of limiting the amount of gas available to California during the next ten to twenty years."\textsuperscript{49} Several sources of new gas supply were examined. It was determined that adequate delivery capacity would be lacking during the 1980's if additional gas came from El Paso sources in lieu of North Slope gas, and if California also obtained gas through the same system from LNG, coal gasification, and so forth; and that the loss of capacity could be a problem if California receives southwestern gas as a substitute for North Slope gas, and that "the problem can be avoided if California is guaranteed the means of obtaining North Slope gas other than displacements from the Southwest."\textsuperscript{50} The report also indicated that California could bargain by requiring El Paso or SOHIO to provide "insurance to cover the cost of building new capacity"\textsuperscript{51} if and when the existing capacity was determined insufficient.

Forecasting the availability of any energy source, together with the projected demand for products obtained therefrom, is an exercise in speculation. Therefore, the projections by El Paso, So-Cal, CPUC and others were subjected to intense scrutiny. Having assessed this debate in extensive hearings, a Federal Power Commission Law Judge issued an Initial Decision approving the abandonment in August, 1977.\textsuperscript{52} The Initial Decision

\textsuperscript{45} Press release of speech by Chairman, California Air Resources Board, before the League of Women Voters of California (July, 1976).
\textsuperscript{46} SOHIO DRAFT EIR, supra note 8, at Vol. 3, Part 1, V-28.
\textsuperscript{47} Assuming receipt of natural gas from all the following sources: LNG from Algeria; coal gas from New Mexico; Canadian, Mexican and Alaska gas; and traditional sources of domestic gas.
\textsuperscript{49} \textit{id. at 1.}
\textsuperscript{50} \textit{id. at 20.}
\textsuperscript{51} \textit{id. at 31.}
\textsuperscript{52} Federal Power Commission Initial Decision on the non-environmental phases of the pro-
was just that, since several additional studies were necessary.

In November, 1977, So-Cal submitted an application to the CPUC requesting abandonment of its line in California. At the same time, the Draft Supplement to the Final Environmental Impact Report was issued with responses to questions on the loss of natural gas pipeline capacity, the use (albeit loss for customer use) of natural gas as compressor fuel in order to achieve increased delivery in the remaining El Paso pipelines, and a detailed analysis of the impacts should SOHIO-Phase II be implemented.

The issue of natural gas pipeline capacity for delivery to California was resolved by a Presidential decision that "construction of a western leg be authorized for direct delivery of Alaskan gas to the West Coast." With respect to the compressor issue, the information provided by FERC showed that only eleven billion cubic feet of natural gas would be required to meet increased compressor requirements during the first year after abandonment of the El Paso line. Further, that loss in later years would be substantially less because gas supplies to the whole El Paso system would be continually decreasing. With respect to the Phase II issue, it was clearly determined that use of other existing natural gas pipelines would require additional regulatory approvals.

The final decision by FERC stated that the "abandonment of the proposed facilities is in the public convenience and necessity, if properly conditioned, and accordingly, we grant authorization for this abandonment . . . ." Similarly, the CPUC approved the abandonment of the So-Cal pipeline in October, 1978. However, the CPUC identified several areas of ambiguity or incompleteness in its final decision of October, 1978, and changes were completed which became effective March, 1979. The CPUC also indicated that because of a pending court case on the adequacy of the EIR, the authority to proceed with the withdrawal of So-Cal's pipeline from natural gas service could only occur after the EIR was found by the court to be in compliance with CEQA.

31. Proceedings on permission to abandon certain of the natural gas pipeline facilities of El Paso Natural Gas Company pursuant to Section 7(b) of the Natural Gas Act (May, 1977).


56. Id. at 2.

57. CPUC Decision No. 89517.

58. Id., Decision No. 90049.
Early in 1975, SOHIO officials met with representatives of the California Energy Commission and the California Air Resources Board (CARB). At that time the significance of the SOHIO project both as a political and as a regulatory entity was not recognized. Shortly thereafter, however, with submittal of permit applications and the preparation of the Environmental Impact Report, the project moved to a position of eminence. Initially there were three concerns: (1) the impact on air quality from the emissions generated at the marine facility in the Port of Long Beach;\textsuperscript{59} (2) the loss of existing pipeline capacity for delivery of natural gas to the West Coast;\textsuperscript{60} and (3) the potential for environmental catastrophes because of inadequate enforcement of maritime rules controlling oil tanker operations.\textsuperscript{61}

During all of these pronouncements about the proposed impacts of the SOHIO project, three other significant activities were taking place: (1) the Environmental Impact Report was being prepared; (2) a State Agency Task Force was being organized to provide an efficient mechanism for communication and an exchange of information; and (3) SOHIO was refining their proposal to include, to the maximum extent feasible, best available control technology to minimize air quality impacts.

During all of these activities, CARB indicated its frustration because of

\textsuperscript{59} The quantities of emissions are extremely large. To put them in perspective, it might be useful to compare them with the exhaust emissions of new cars meeting 1977 California emission standards. The 'worst case' analysis yields emissions equivalent to those from 6 million automobiles. Emissions under the 'most realistic' scenario are equivalent to the exhaust emission from more than 3.9 million new cars. The emissions of sulfur dioxide in the 'worst case' are the equivalent of emissions from an electric power plant of approximately 170 megawatts. In the 'most realistic' analysis, sulfur dioxide are the equivalent of those produced while generating 140 megawatts of electricity. The air quality impacts of these emissions is staggering.

\textsuperscript{60} The result will be additional unemployment as businesses which need the natural gas are forced to curtail operation. The pipeline owned by the El Paso Natural Gas Company is part of a system which delivers natural gas to 12 million Southern Californians, including 6,200 medium and large companies. If the oil companies are allowed to take over the natural gas pipeline, it is likely that some of these customers will find themselves without gas to use in necessary industrial operations. It is obvious that the Alaskan oil scheme as laid out by the oil companies will cause more smog and more unemployment in Southern California; in return we'll get absolutely nothing. Only people in other parts of the country will benefit.

\textsuperscript{61} The Air Resources Board is attempting to begin a study of relevant new rules and regulations with responsible officials of the Coast Guard, EPA, and other agencies with jurisdiction over the subject matter. However, the ARB will not reduce its estimate of emissions associated with the SOHIO project on the basis of a promise by a federal agency to adopt a regulation at some time in the future. Emissions estimates can only be reduced if such a reduction is inferable from an existing and enforceable regulation of an agency with appropriate jurisdiction.

\textsuperscript{Supra note 45.}

\textsuperscript{Supra note 59.}
SOHIO’s “lack of cooperation,” and SOHIO indicated its frustration because CARB and other agencies in California would not provide specific, detailed regulatory requirements. This frustration reached a peak in March, 1977, when CARB informed the federal government that review of the controversial Alaskan oil terminal in Long Beach would be suspended April, 1977, because SOHIO had refused to complete an application for the facility. In an eleven page letter to the President of SOHIO Transportation Company, the SOHIO subsidiary responsible for the west-to-east pipeline project, CARB pointed out that they had expected SOHIO to quickly apply for the necessary air quality permits some ten months earlier. Further, SOHIO was advised that their application was incomplete and failed to meet the requirements of both state and federal laws, and that SOHIO’s failure to complete the application, coupled with the delay in answering questions regarding the project, made it impossible for any meaningful analysis of their proposal. SOHIO countered with another plea for specific, detailed regulatory requirements.

Shortly after this impasse between CARB and SOHIO, representatives of the Port of Long Beach and the Federal Energy Administration met with SOHIO corporate executives and developed a proposed plan of action. The goals of this plan were to develop a final project description, determine how the project would be evaluated under existing regulations (local, state and federal), and establish what type of air quality trade-offs would be acceptable. Most of the differences were resolved, but the trade-off issue continued to be disruptive.

H. FEDERAL AND STATE GAMESMASHIP

From the outset, SOHIO was in trouble: their proposal was in direct opposition to the concept that all of the Alaskan oil could be used on the West Coast; California had to agree to be an energy window for the rest of the nation; and there was extensive political maneuvering between federal and state personalities. In spite of all the actors in this drama, there were two significant aspects: (1) the unwillingness of the federal government to publicly support the SOHIO project as being in the national interest and thus deserving expedited processing; and (2) the maneuvering in California to stop the project or obtain unprecedented concessions.

Since 1974, the federal government had an active interest in the development of one or more west-to-east crude oil pipeline systems. The Senate and the House of Representatives held a number of hearings, spent

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63. Letter from California Air Resources Board to President, SOHIO Transportation Company (Mar., 1977).
countless hours of staff time, and contracted for special studies. But Congress was hard-pressed to initiate aggressive federal action to approve the project. The key question was: If we need to reduce reliance on foreign crude oil in the Gulf Coast and Midwest areas, why isn’t the federal government taking strong steps to get the SOHIO west-to-east pipeline project approved with appropriate stipulations, and in a timely manner?

The flux in federal posture is illustrated in two letters to the California Coastal Commission in support of the application to construct the marine terminal. In August, 1977, the Federal Energy Administration (FEA) indicated that,

the federal government has no current legislative authorization to select crude pipeline and oil terminal locations. For this reason, as well as our desire not to exert undue pressure on state agencies that must approve the siting, construction and operation of particular projects, we have refrained from endorsing any of the four proposed pipeline projects—of which the SOHIO project is one—for moving Alaskan and other crude oil from the West Coast to points east of the Rocky mountains. The federal government does, however, believe that the expeditious authorization and construction of at least one, and perhaps two, such pipelines is in the national interest.\(^{64}\)

In August, 1978, the Federal Department of Energy indicated that since last August, the conditions on the West Coast . . . have worsened. In particular, two of the four possible projects for the transportation of Alaskan crude oil from the West Coast to inland regions by pipeline have not progressed. Even more serious are the changes that have occurred in the crude oil supply situation in California . . . [this] has caused prices for California crude oil production to be depressed to the point where as much as 30,000 barrels per day has been shut in. In light of these developments, we have come to the conclusion that the SOHIO pipeline is a critical element in the long-term solution of the West Coast crude oil production problem. The Department of Energy urges that the Coastal Commission act expeditiously in its deliberations on this matter and that it make every possible effort to resolve the remaining issues in a way that will best accommodate the nations energy needs.\(^{65}\)

Public announcement of strong federal support came four years after SOHIO started applying for permits! California’s efforts during the same time period were divided between initial efforts to deny the project and subsequent efforts to conditionally approve the project. In 1976, the California Air Resources Board (CARB) adopted New Source Review Rules\(^{66}\) whereby new projects would be required to mini-

\(^{64}\) Letter from Federal Energy Administration to Executive Director, California Coastal Commission (Aug., 1978).

\(^{65}\) Letter from Department of Energy to Executive Director, California Coastal Commission (Aug., 1978).

\(^{66}\) These rules establish the standards for issuance of Permits to Construct for new facilities or modernization of existing facilities when the emissions inventory for the project exceeds 15 pounds per hour or more than 150 pounds per day for nitrogen oxides, organic gases or any
mimize air emissions through the use of Best Available Control Technology (BACT) or provide trade-off emissions (reduction in emissions at existing facilities or by retrofitting facilities owned by individuals other than the applicant) to offset the new emissions produced by a project. Some believe that this rule was developed solely to stop SOHIO; however, a review of the history of the development of the model rule indicates that was not totally the case.

In November, 1976, CARB, based on an Environmental Protection Agency study, indicated that air emissions from the SOHIO project would be catastrophic. This study was the basis of a media blitz in which SOHIO project emissions were equated to the emissions from six million cars. At the same time, other state agencies argued that abandonment of the El Paso Natural Gas Company and the Southern California Gas Company pipelines would severely jeopardize California’s ability to receive future allocations of natural gas. Throughout these events, the behind-the-scenes discussions indicated that California could approve the project if SOHIO became a “good citizen” and if the federal government would guarantee California additional allocations of natural gas. When additional natural gas allocations were not authorized, it was then agreed that if the President approved the western leg of the Alcan gas project, California would work with SOHIO to develop suitable project mitigations meeting California laws.

With the Chairman of CARB serving as the catalyst, Southern California Edison Company and SOHIO entered into a working agreement to determine the feasibility of utilizing a sulfur dioxide scrubber and ammonia injection equipment to remove sulfur dioxide and nitrous oxides from the stack gases at an existing electric generating facility. These efforts were culminated in August, 1978, when SOHIO and the Southern California Edison Company

contaminant for which there is a state or national ambient air quality standard except for carbon monoxide where the limits are 150 pounds per hour and 1500 pounds per day. These rules were adopted for the South Coast Air Quality Management District by the California Air Resources Board under the authority of California Health and Safety Code, § 40400 (1976) et seq.

67. “Final Report: Air Quality Analysis of the Unloading of Alaskan Crude Oil at California Ports,” prepared by Pacific Environmental Services under contract to the Environmental Protection Agency (1976). This study was undertaken to provide technical assistance to CARB in their study of the implications of introducing Alaskan oil to the lower 48 states through California ports. The CARB provided technical direction and air quality data on port sites, types and sizes of tankers, oil delivery volumes and frequencies, and oil characteristics.

68. Becoming a good citizen meant, at least: (1) providing air quality trade-offs for the maximum amounts of air emissions attributed to the project; (2) adding monitoring devices to the oil tankers to insure that cargo compartments were not opened (purged), releasing hydrocarbon vapors into the atmosphere, and that a low-percent sulphur fuel oil was used to minimize the release of oxides of sulphur and nitrogen into the atmosphere; (3) agreeing not to exercise the option for use of additional existing natural gas lines; and (4) helping California obtain additional supplies of natural gas.

Edison Company signed an agreement which allowed SOHIO to install an anti-pollution package on one of their power plants. The contract, according to the Governor of California, guarantees an improvement in Southern California air quality and it also will help reduce America's dependence on foreign oil. Often before, new industrial growth has meant a growth in air pollution, but under a new procedure developed by CARB, this Alaskan oil terminal will be built without increasing smog levels. In fact, some improvement in air quality will almost certainly come about. 70

For the casual observer, this announcement indicated that California was on the verge of approving the SOHIO project. However, to those who had followed the evolution of the project step by step, it only indicated that two new issues would rise to the surface; namely, that the South Coast Air Quality Management District (Local District) would have to be persuaded that the scrubber was adequate—and their protestations to that point indicated they did not deem it so—and the initial, totally negative, media blitz conducted by the state of California would have to be reversed.

I. ABSENCE OF COORDINATED REGULATORY PROCEDURES

The SOHIO project falls under the jurisdiction of four states and the federal government, to say nothing of the numerous special districts and local governments (see Table 2). 71 Therefore, questions concerning jurisdiction, territorial imperative with respect to regulatory controls and determination of who made the first decision, were never-ending and complex. For example, early in the discussions, the issue of jurisdiction with respect to coastal waters became a crucial issue. At the heart of the matter was the question: Can an individual coastal state require that all oil tankers moving along its coast install air monitoring/control equipment? Inherent in that question was a second one, namely, what technology is "best" to control the significant impacts? 72

The California Air Resources Board determined that they had jurisdiction over air emissions within a broad corridor along the coast of California extending seaward sixty miles from the mean high tide line. 73 The Department of Transportation, particularly the Coast Guard, disagreed with this interpretation, and indicated that the Ports and Waterways Safety Act left

72. These questions were considered at a number of meetings between CARB, Port, Local District, League of Women Voters, Los Angeles City Attorney, SOHIO, Federal Energy Administration, and others. Certain aspects of these questions also were considered by SOHIO in "Supporting Information for the SOHIO Permit Application" submitted to SCQAMD, II-2 (1977). Also supra note 67.
73. Supra note 67.
such matters to federal control.\textsuperscript{74}

In the midst of this conflict, the federal Supreme Court rendered a decision on the \textit{ARCO v. Evans} case (subsequently changed to \textit{ARCO v. Ray}) concerning special rules promulgated by the state of Washington to control shipping in Puget Sound. Simply stated, the federal Supreme Court held that the state could not impose absolute control over ship traffic within state waters because the field was preempted by existing federal laws, rules and procedures.\textsuperscript{75} In spite of this decision, the state of California persisted in its demands for control over air emissions, based on the concept of police power, and indicated that unless the state was provided with adequate assurance that SOHIO tanker operations would be regulated by appropriate federal agencies, it would have to use maximum air emissions values in evaluating the project.\textsuperscript{76} Inclusion of all such emissions as part of the trade-off package clearly was not economically viable for SOHIO, to say nothing of the startling precedent it established.

As a genuine effort to provide adequate, but reasonable controls over SOHIO tanker operations, the Port of Long Beach (Port) developed preliminary lease conditions stipulating that the SOHIO marine terminal only could be used by tankers with a specific amount of segregated ballast (no mixing of oil and water), an inert gas system (to reduce the potential for explosions) and certain air quality monitoring devices (to insure operations which minimized air emissions).\textsuperscript{77} The Port also planned to establish basic operational safety and oil spill prevention criteria.\textsuperscript{78} CARB was not comfortable with the enforcement of such conditions under a simple lease agreement between the Port and SOHIO, and continued to press for a clear understanding that the federal government would enforce such conditions and also be liable (in a general sense) for failure to do so.\textsuperscript{79} Finally, using the Port’s suggestion as a platform of departure, and with a push from the federal energy agencies, a coordinated effort between the Department of Transportation, Department of Justice, and CARB produced a list of “workable” conditions suitable to the state and concerned federal agencies.\textsuperscript{80}

The most complex and controversial procedural problem centered


\textsuperscript{75} 435 U.S. 151 (1978).

\textsuperscript{76} \textit{Supra} note 59.

\textsuperscript{77} “OVERVIEW: SOHIO-West Coast to Mid-Continent Pipeline Project,” Port of Long Beach, 19 (Dec., 1976).

\textsuperscript{78} \textit{Id.} at 22.

\textsuperscript{79} Letter from California Air Resources Board to California Coastal Commission (Oct., 1977) and discussions between staffs of CARB, FEA, Port of Long Beach, and SOHIO.

\textsuperscript{80} SOHIO \textit{SUPPLEMENTAL EIR}, \textit{supra} note 39, at Vol. 5, Part 1, Appendices F and G (Nov., 1977).
around the efforts of CARB to develop precise strategy for controlling the air emissions associated with the SOHIO project. Although their effort was considered to be in conflict with both law and tradition, since the regulation of industrial polluters is in the province of the local air quality board (Local District), CARB assumed leadership based on their responsibility for implementing the Federal Clean Air Act. At the outset, there were few data on the air emission problems associated with crude oil tanker operations and a strong effort was made to obtain information from all sources.

SOHIO initially proposed development of a 700,000 barrel per day facility with 200,000 barrels per day of that total for local use. SOHIO strongly believed that they should receive full "air quality credit" for emissions reduction associated with the delivery of 200,000 barrels a day via modern tankers to a modern facility in lieu of the present system using older tankers and terminals. CARB disagreed and ultimately so did the Local District. SOHIO corporate officials, who never understood why this was not acceptable, commented on several occasions that "there was nothing we could do—they had us over a barrel—it wasn't a question of air quality, it was a question of how much we were going to have to pay to California in order to build a terminal."

Initially, it was thought that the hydrocarbon emissions generated by tanker unloading and the storage of 3.5 million barrels of oil at the marine terminal would be the most problematic. Subsequent analyses indicated, however, that the hydrocarbons were not the key emissions problem. As a consequence of extensive research conducted by Chicago Bridge and Iron Company, on behalf of SOHIO, hydrocarbon emission losses from storage tanks were determined to be no more than ten percent of the value normally considered by regulatory agencies. Opening of cargo compartments after the oil had been pumped ashore was not a requisite safety requirement. Consequently, the hydrocarbon issue dissipated.

Shortly after the resolution of the hydrocarbon issue, however, two other emissions factors emerged as problematic: the nitrous oxides and sulfur dioxides produced as a consequence of the operation of the ship boilers (engines) to provide the energy for pumping the oil from the ship to the onshore storage facility. Because on certain occasions the air basin

81. CAL. HEALTH AND SAFETY CODE § 41500 (1975) et. seq.
82. Supra note 67.
83. Supra note 17.
84. Supra notes 21 and 72.
85. SOHIO FINAL EIR, supra note 37, at Vol. 4, Part 2, 182-246.
86. Comment of Frank Mosier, Senior Vice President, SOHIO, at an Academy Forum, National Academy of Sciences (Nov., 1978).
in which the marine terminal was to be located exceeded allowable air quality standards, the introduction of even one additional part per million of nitrous oxides or sulfur dioxide was problematic. The only proven technology for directly reducing either of these emissions was the use of an inert gas scrubber (IGS) system on the tankers whereby about seventeen percent of the gases going up the stack of the ship were scrubbed of their sulfur dioxide content. Since this was inadequate, additional trade-offs were required.\textsuperscript{90}

Next, CARB actively supported the use of a stack-gas scrubber and ammonia injection equipment at an existing electric generating plant to trade-off SOHIO's emissions. They believed this was an extremely effective way of reducing air emissions as well as initiating emission control strategy that was sorely needed if the Southern California area was to make significant progress towards reducing problematic air emissions. The Local District effectively was excluded from this effort.\textsuperscript{91}

The discussions between CARB, SOHIO, and Edison excluded the Local District, which, by law, was the primary regulatory agency designated to evaluate stationary source emissions. The Local District was not pleased at being left out of these discussions and indicated in a letter to the Secretary of Energy its position that "under state law, [the] District is the primary agent in the air quality permit approval process. . . . If the District disapproves the project as a whole, or any portion of the proposed trade-offs offered by SOHIO, our disapproval can not be overturned by the CARB."\textsuperscript{92} After a careful review of the documents, the Local District indicated that the proposed equipment would not be as reliable as had been determined in the CARB documents,\textsuperscript{93} therefore the equipment would not fully meet the Local District requirements established for the project.\textsuperscript{94} The Local District proposed an alternative course of action which would require SOHIO to provide ultra-low-sulfur fuel as an interim "back-up" trade-off for those times when the new equipment at the Edison plant was not operational. Additionally, they suggested that the most expeditious process was for SOHIO to exclusively provide ultra-low-sulfur fuel for use at the electric generating facility.\textsuperscript{95} The ultra-low-sulfur fuel option, however, in the opinion of CARB, produced a series of potential problems, in particular, increased reliance upon foreign oil.\textsuperscript{96}

\textsuperscript{90} Id. at VIII-17.
\textsuperscript{91} Discussions between staffs of Local District, CARB, and Port of Long Beach.
\textsuperscript{92} Letter from Local District to Secretary of Energy (Mar., 1978).
\textsuperscript{93} "Construction Permit for New Stationary Source issued to PACTEX Pipeline Company" and "Authority to Construct Conditions for Southern California Edison's Alamitos Unit 6" (June, 1978).
\textsuperscript{94} Letter from Local District to CARB (July, 1978).
\textsuperscript{95} Id.
\textsuperscript{96} Letter from CARB to Local District (July, 1978).
The "jousting" between the two air agencies continued until the hearing on the acceptability of the proposed trade-offs, when the frustration of the Local District was clearly expressed in the statement "that at issue is whether air quality decisions are to be made by the people's elected representatives in open hearings with full participation of the people being affected or whether such decisions are to be made [in] smoke-filled rooms without meaningful involvement of the citizens whose welfare is at issue."97 The confrontation between these two agencies still exists.98

On April 20, 1979, twenty-one months after the first hearing and at a cost to the state estimated to exceed two million dollars, the Local District approved the stack-gas scrubber and other air quality trade-offs for the SOHIO project. They also recommended that SOHIO use the ultra-low-sulfur fuel option rather than the scrubber. In addition, the Local District made a separate determination that the trade-offs had to be for the "life" of the SOHIO project, that is, that SOHIO was responsible for the effectiveness of the trade-offs.99 Subsequent action by CARB approved the use of the scrubber and other air quality tradeoffs.100

The process of obtaining approval from the California Coastal Commission for the SOHIO project also was complex and confused. An initial application was filed with the State Coastal Commission in May, 1977. Numerous documents were prepared and submitted in support of the application for a breakwater, wharf, trestle, surge/storage tankage and associated piping and operational facilities.101 After considerable deliberation and analysis, the Coastal Commission approved the project with the exception of the storage tanks. The tanks were omitted because the Commissioners felt they were not coastal-dependent, i.e., they could be located inland, beyond the coastal zone boundary.102 This finding was made without a clear understanding of the methodology associated with unloading and transporting crude oil in a forty-eight inch diameter pipeline. It is important to recognize that the only forty-eight inch diameter crude oil pipeline in operation in the United States is the TAPS pipeline.103 The Coastal Commission did leave only one option, namely, that if after additional analyses the

97. Statement of the Local District Vice Chairman during the final hearing on the SOHIO request for Permits to Construct (Mar., 1979).
98. The CARB has continued to develop New Source Review rules and procedures for implementation by the Local District. The latest changes were approved in November, 1979.
99. Findings, Decision, and Order of the South Coast Air Quality Management District Board in the Matter of the South Coast Air Quality Management District Board in the Matter of the SOHIO Transportation Company Application for Permits to Construct (May, 1979).
100. CARB approved the Local District action on May 24, 1979, the same day that the Local District decision was final (see supra note 99).
101. Application 185-77 before the California Coastal Commission and Responses to Comments received during the Hearing on Application 185-77 (Aug., 1977).
103. Supra note 33.
tank farm still was deemed essential, the Port could apply for an amendment to the permit requesting authorization to construct the tanks.\textsuperscript{104}

After extensive review of engineering, air quality, and suitable alternative locations, an amendment was filed requesting permission to construct the tanks.\textsuperscript{105} Almost immediately a concern was expressed that the key issue was the air quality impacts associated with locating the tanks other than adjacent to the marine terminal.\textsuperscript{106} A detailed analysis indicated that locating the tanks elsewhere would increase the related air emissions, principally due to the fact that tankers would be in port longer while they pumped the crude oil several miles inland.\textsuperscript{107} At this point, CARB had not gotten a firm commitment from SOHIO to use the trade-off equipment at the Edison plant, and their interest in supporting this amendment was not strong.\textsuperscript{108} Accordingly, the Coastal Commission denied the amendment.\textsuperscript{109} Subsequent to this denial, SOHIO and the Port requested approval for two tanks, indicating that if no tanks were authorized, SOHIO could not proceed with the project.\textsuperscript{110} This amendment was considered in March, 1979, just after SOHIO’s announcement that they were abandoning the project. The timing was perfect. The Coastal Commission, because the project was in the national interest, and perhaps because they did not wish to be the “whipping boy,” accused of denying the SOHIO project, approved the amendment six days after SOHIO first announced it was abandoning the project.\textsuperscript{111}

Another illustration of the absence of regulatory coordination is associated with the “surge” of special studies on the SOHIO project prepared by a variety of federal and state agencies to support their own particular interests and temporal concerns. These studies included the Federal Energy Administration study on “North Slope Crude, Where To? How?”;\textsuperscript{112} a report on “Air Quality Analysis of the Unloading of Alaskan Crude Oil at California Ports” prepared by CARB and the Environmental Protection Agency;\textsuperscript{113} and the California Energy Resources Conservation Development Commission Biennial Report on “Energy Trends and Choices.”\textsuperscript{114}

\begin{footnotesize}
\begin{itemize}
  \item[104.] Supra note 101.
  \item[105.] Application to Amend Coastal Development Permit A-185-77 to add three crude oil storage tanks on Pier J, Port of Long Beach (Dec., 1977).
  \item[106.] Public Hearing before the California Coastal Commission (Jan., 1977).
  \item[107.] Letter from Fluor Engineers and Contractors, Inc. to Port of Long Beach (Aug., 1978).
  \item[108.] Letter to California Coastal Commission from CARB (Aug., 1978).
  \item[109.] Decision of California Coastal Commission (Oct., 1978).
  \item[110.] Application 185-77 (Amendment II) before the California Coastal Commission (Feb., 1979).
  \item[111.] Decision of California Coastal Commission (Mar., 1979).
  \item[112.] Federal Energy Administration, Region 9 (1976).
  \item[113.] Supra note 67.
\end{itemize}
\end{footnotesize}
These documents were intended to show that the SOHIO project was not needed or that it would cause cataclysmic events if located in Long Beach. It is interesting to note, however, that much of the data in these studies are no longer applicable. For example, the "North Slope Crude, Where To? How?" report prepared by Region IX of the Federal Energy Administration in 1976 was extensively reviewed and revised, but a final report was not published because certain assumptions could not be substantiated.\textsuperscript{115} This report and others are a testimony to the "individuality" of the various regulatory agencies as well as the absence of coordinated review by agencies with overlapping jurisdiction.

\section*{J. Public Participation}

To an "outsider," California appears unnecessarily concerned about the environment. However, California became a leader in the environmental movement when the California Environmental Quality Act (CEQA) of 1970 was enacted,\textsuperscript{116} thereby implementing the National Environmental Policy Act (NEPA) in California.\textsuperscript{117} In addition to CEQA, the California Coastal Zone Conservation Act of 1972 (also called Proposition 20) established a state and six Regional Coastal Zone Conservation Commissions,\textsuperscript{118} which were institutionalized by enactment of the Coastal Act of 1976.\textsuperscript{119} One of the primary goals of the Coastal Act is to guarantee public participation in land use decisions within the Coastal Zone area.\textsuperscript{120} Although this process of coastal control has been continually criticized, and changes repeatedly proposed to disarm the Commissions, the fact remains that development of the Coastal Zone in California has been rigorously controlled since 1973.\textsuperscript{121}

All of these regulatory efforts in California have insured that environmental impacts will be carefully reviewed and mitigated and that the public can effectively participate in the decision process.

The public participation process is not refined, and it allows an opportunity for all to express their concerns whether reasonable, emotional, confused, parochial, or based on a partial extrapolation of technical information. Consequently, decision-making bodies must be willing to review, evaluate, and make decisions within a forum of conflicting information and views. The process is young, but the public expects its business to be

\textsuperscript{115} Discussions with Federal Energy Administration/Department of Energy staff.
\textsuperscript{116} Supra note 19.
\textsuperscript{117} 42 U.S.C. § 4321 (1970) et. seq.
\textsuperscript{119} Id. § 30000 (1976) et. seq.
\textsuperscript{120} 14 Cal. Admin. Code § 13001 et. seq.
\textsuperscript{121} Based on participation in permit applications before the State and Regional Commissions since 1975.
done in public, and the decisions therefrom to benefit as many concerned constituencies as possible.

Most business interests have failed to understand the public participation process in California, and as a consequence, there have been numerous head-on confrontations resulting in expensive delays in approval or ultimate denial of projects.\textsuperscript{122} Many in the business sector hoped that the so-called costly environmental concerns (or at least the permit "maze") would disappear in the face of an energy crisis, impatience with government regulation, tax revolt, inflation, and so forth. That has not been the case.\textsuperscript{123}

In a 1978 survey conducted by Resources for the Future, sixty-seven percent of the public expressed agreement that the environment should be protected at the expense of commercial activities, and sixty-two percent were in favor of paying higher prices to protect the environment. As that survey concludes, "the environmental issue has made the transition from a fad to an endearing public concern."\textsuperscript{124} Also of significance is the fact that the public in California exhibits a very high concern for the environment and, accordingly, serves to transmit that concern to other parts of the country.\textsuperscript{125}

SOHIO, as a midwestern oil company primarily engaged in refining and marketing operations until their participation in the Alaskan oil project, was startled by the scope of public participation in California. They assumed, because their project was in the national interest, economically feasible, and timely, that approvals would not be inordinately difficult.\textsuperscript{126} Accordingly, they were pushed to the limit in dealing with an expanding list of detailed questions on natural gas delivery to California, oil spill potential from tanker collisions, air quality impacts on specific and general geographic areas, and so forth.\textsuperscript{127} SOHIO, as it participated in the multiplegency reviews of the project, prepared a tremendous number of technical documents. Because certain of the regulatory agencies were not sure what they needed to make appropriate decisions, SOHIO often ended up being


\textsuperscript{123} Based on the increasing number of regulatory controls which affect almost every aspect of daily life. For example, the federal government has 90 regulatory offices. These offices issue a total of 7,000 rules each year. There is no indication that regulatory controls will diminish, rather, there is an increasing tendency to add new controls while consolidating existing processes.

\textsuperscript{124} Results of a Resources for the Future Survey of 1,076 randomly selected respondents in a phone survey conducted in July, 1979. Data available from Resources for the Future.

\textsuperscript{125} Based on implementation of the California Environmental Quality Act, the California Coastal Zone Conservation Act of 1972, and the Coastal Act of 1976. Supra notes 19, 119, and 120.

\textsuperscript{126} Supra note 17.

the middle-man between the various local and state agencies. 128

The public had a wide range of opportunities to participate in the review of the SOHIO project. The degree of participation is unparalleled in California. 129 Although opponents of the project may say that their concerns were never considered by the decision-makers, they cannot argue that they were not provided repeated opportunities to make their concerns known. 130 Clearly, if the key ‘actors’ in the SOHIO project had used a reduced but comprehensive public participation process as an effective means of educating themselves and the various constituencies of concerned individuals on the major issues, many of the roadblocks preventing timely approval would have been substantially reduced. 131 Further, had the state used a positive approach, that is, suggesting that the project could be approved with appropriate conditions rather than equating the project to catastrophic events, public understanding of the project would have been enhanced and there would have been less emotionalism clouding the complex technical analyses. 132

K. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

In 1970, California approved the California Environmental Quality Act (CEQA), 133 whereby projects having significant environmental impacts must be evaluated through the preparation of an Environmental Impact Report (EIR) which describes the project, the ambient environmental conditions at the project site, the project impacts, irreversible impacts, growth inducements, irreversible commitment of resources and necessary mitigations. CEQA also established a process for determining the lead agency which has the responsibility for preparation of the EIR, i.e., that agency which has the principal responsibility for approving or carrying out the project.

After SOHIO had determined that the marine terminal was to be located in the Port of Long Beach (Port), the Port commenced the preparation of the EIR on the assumption that it was the lead agency. Shortly thereafter, two state agencies, the State Lands Commission and the California Public Utilities Commission (CPUC), challenged that determination, utilizing a mechanism in CEQA whereby lead agency disputes are directed to the

128. Based on participation in various regulatory agency review/discussions, e.g., with CARB, Local District, Coastal Commission, and so forth.
129. Based on a review of the regulatory record associated with the SOHIO project.
130. There were 53 hearings. At the majority of these hearings, there was an opportunity for any and all to offer comments, opinions, and proposed revisions to the project.
131. Based on the numerous regulatory conflicts that evolved during review of the project.
132. Supra notes 45, 59, 62 and 63.
133. Supra note 19.
Governor’s Office of Planning and Research. After considerable, and often spirited, discussion and analysis of the related problems, a mutual agreement was achieved between the Port and the CPUC, whereby they would function as co-lead agencies with equal responsibility for preparing the EIR.

Immediately after resolution of the lead agency issue, a State Agency Task Force was organized, consisting of representatives from those agencies which had jurisdictional concern, permit authority, and oversight responsibility for the project. Most of the state agencies had no prior experience in evaluating projects comparable to SOHIO. Therefore, it was necessary to develop an understanding of how modern crude oil tankers operate, the characteristics of crude oil marine terminal operations, the use of an inert gas system, the movement of oil through a forty-eight inch diameter pipeline, oil spill monitoring procedures, and so forth. The principal purpose for establishing the State Agency Task Force was to provide a mechanism for exchange of information and development of a mutual understanding of the problems and processes related to the project.

The initial preparation of the EIR centered around a traditional approach, e.g., description of the project, analysis of the ambient conditions at the proposed project site, determination of project impacts and related mitigations, etc. However, it soon became apparent, because of an informal legal opinion, that a greatly expanded environmental evaluation would be necessary. The opinion, prepared by the Attorney General of the state of California, on a proposed electric generating facility outside of the state of California, but from which electric power would be delivered to various parts of California, indicated that regardless of geographical/political boundaries, the "spirit" of CEQA dictated that all key aspects of a project must be evaluated.

The Draft EIR, completed in September, 1976, consisted of four volumes in nine parts. In addition to the standard analyses, separate, detailed discussions were provided on: 1) energy supply and demand—an analysis of crude oil and natural gas use and distribution patterns in the United States; 2) tanker traffic and oil spill potential on the West Coast; and 3) analysis of alternative locations along the entire West Coast area—for an Alaskan oil terminal and related pipeline systems.

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134. 14 CAL. ADMIN. CODE § 15065.
136. Developed from discussions between the Port of Long Beach and the Office of Planning and Research.
137. Informal agreement between the CPUC and the Port.
139. SOHIO DRAFT EIR, supra note 8, at Vol. 1, Part 1, 1-i (Sept., 1976).
After issuance of the Draft EIR, three public hearings were held. During those hearings, several issues/concerns were noted. Among these, the key ones included tanker safety, earthquake hazards, oil spills, impact on the expansion of tourism in the city of Long Beach, and the air quality problems induced by the project.\footnote{Joint hearings of the CPUC and the Port.}

In May of 1977, the Final EIR was published and certified by the Board of Harbor Commissioners of the Port. The Final EIR contained responses to all the comments raised during the public hearings and during the formal review period.\footnote{SOHO Final EIR, supra note 37, at Vol. 4, Parts 1-5 (Apr., 1977).} However, the local citizen groups and others in Southern California did not believe that their concerns were adequately addressed in the Final EIR, or given proper consideration by the Board of Harbor Commissioners or the CPUC.\footnote{Minutes of the Board of Harbor Commissions (May, 1977).}

After certification of the Final EIR, there was considerable public debate about whether or not the air quality impacts and the related mitigations, \textit{i.e.}, trade-offs, had been adequately considered. The South Coast Air Quality Management District (Local District) received a petition from several interested parties requesting that review of the SOHIO project be conducted utilizing evidentiary hearings. It was the first request for such a hearing before the newly created Local District; the petition was granted.\footnote{On June 16, 1977, a number of petitioners filed a petition pursuant to California Health and Safety Code § 40509 requesting that the Local District Board hold a public hearing on the SOHIO permit applications. The Board concurred and set an initial public hearing for July 22, 1977.}

After initiation of the hearings, and as a consequence of the concerns expressed by the petitioners, it was deemed appropriate to prepare a Supplement to the Final EIR in order to specifically consider certain of the issues raised by petitioners.\footnote{Decision No. 88311 of the CPUC (Jan., 1978).} Among the several issues, the most significant concerned the abandonment of the El Paso Natural Gas Company natural gas line and the resultant impact on natural gas delivery capabilities to the state of California; and the specific nature, character, and significance of the tradeoffs to be provided by SOHIO.\footnote{SOHIO Supplemental EIR, supra note 39, at Vol. 5, Part 1, I-1 to I-3 (Nov., 1977).} Accordingly, in September, 1977, preparation of a Supplement to the Final EIR was initiated by the co-lead agencies. The Supplement was completed in November of 1977, and after appropriate review by responsible agencies and two public hearings, the Supplement to the Final EIR was certified as final.\footnote{Minutes of the Board of Harbor Commissioners (Dec. 19, 1977).}

The petitioners before the Local District and others representing various components of the public sector still did not believe that adequate answers were available on the natural gas delivery and air quality impact.
trade-off issues. Soon thereafter a petition for Writ of Mandate was filed to compel compliance with CEQA.\footnote{147}

L. LEGAL ACTION

The Citizens Task Force on SOHO, a loose coalition of several citizens' groups in Long Beach, California, and others, brought an action for Writ of Mandate in Superior Court to compel the Board of Harbor Commissioners of the Port of Long Beach to rescind the certified EIR so that additional discussion could occur on those issues they deemed significant. The petition listed a number of concerns dealing with: air quality impacts due to decreased natural gas supply, that is, use of natural gas as a compressor fuel to move higher volumes of gas through the remaining El Paso Natural Gas Company pipeline system; air quality impacts during construction and operation of the SOHO project; movement of Alaskan oil through the existing Four Corners Pipeline System; movement of oil through the proposed Elk Hills system; detailed analysis of alternative northern pipeline systems; analysis of the potential for and character of Phase II of the SOHO project, that is, adding an additional 500,000 barrels per day of capacity; specific identification of the steps for determining trade-off acceptability; the impact of the importation of Alaskan crude oil on California production; construction of a totally new crude oil pipeline as an alternative to abandoning the natural gas pipelines; and further identification of the earthquake hazards associated with crude oil storage in the Port.\footnote{148} It is interesting to note that almost all of these issues were discussed in the Final EIR or in the Supplement to the Final EIR. For example, the Elk Hills oil project was still in the proposal stage and specific details on right-of-way alignment, location of pumps, etc., could not be included.\footnote{149} The issue of earthquake hazards associated with the placement of oil tanks in the Port already had been debated extensively and mitigated by construction/operation conditions.\footnote{150} The real issue was not the adequacy of the EIR, but whether or not the "right" view on a given subject had been included in the EIR. There also was concern that the EIR did not provide specific information on the air quality trade-offs.\footnote{151} Yet, there was no way that definitive information could have been included in the EIR, since by law, the local District determines the acceptability of trade-offs after an EIR has been certified as Final.\footnote{152} A real Catch 22!

\footnote{147} Petition for Writ of Mandate, Superior Court of the State of California for the County of Los Angeles, No. SO C 50044 (Feb., 1978).
\footnote{148} Id., Petitioners' Points and Authorities in Support of Petition for Writ of Mandate.
\footnote{150} Id. at X-23.
\footnote{151} Id. at VIII-1 to VIII-16.
\footnote{152} Id. at VIII-3.
Although the petitioners recognized that the EIR had been prepared jointly by the Port and the California Public Utilities Commission (CPUC), they declined to name the CPUC as a party. Consequently, the Port, CPUC, and SOHIO requested that the matter be transferred to the Supreme Court in California in accordance with State Codes.\footnote{Port of Long Beach Memorandum of Points and Authorities in Support of Motion of Respondent for Order to Join California PUC and to Transfer this Action to the California Supreme Court, Case No. SO C 50044 (Feb., 1978).} In March, 1978, the trial court granted that motion and ordered the CPUC joined as a proper party and the proceeding transferred to the Supreme Court.\footnote{Court of Appeal of the State of California, Second Appellate District, Decision No. 53277.} Almost simultaneously, the petitioners filed an appeal seeking to have the trial court’s orders vacated. Shortly thereafter, the Court of Appeals denied the appeal.\footnote{Denied in the Court of Appeal on April 4, 1978, based on 2 Cal. Civ. Code § 53277 et. seq.}

The Supreme Court, “‘because of the extensive research involved,’” delayed taking action until one year later (March, 1979).\footnote{Statement of the Clerk of the California Supreme Court (Mar. 22, 1979).} The Court said in part, “‘The granting of the Court’s motion to join the CPUC as an indispensable party, together with the Court’s transfer of the matter to the Supreme Court on the ground that it lacked authority to compel the CPUC to comply with CEQA’” was improper.\footnote{Id.} Further, the Court found that “‘The Port of Long Beach was the first to act on the SOHIO project, thus it became the lead agency and hence was required to defend the adequacy of the entire EIR under appropriate sections of California’s Public Resources Code, and that consequently, the CPUC thereby became a responsible agency.”\footnote{Id.} This determination was based upon a review of the appropriate section of the California Administrative Code, that is, when two or more public agencies equally qualify as the lead agency for the purpose of preparing an EIR, the agency which is to act first on the project shall be the lead agency (following the principle that the environmental impact should be assessed as early as possible in the planning process).\footnote{Id.} The Supreme Court ordered that the matter be transferred back to the Superior Court of Los Angeles County.\footnote{Id.}

The issuance of the decision by the Supreme Court came nine days after the March 13, 1979, announcement by SOHIO that it was abandoning the proposed project. Significantly, the Supreme Court’s remand of the case to the Superior Court highlighted one of SOHIO’s major “fears”,
the potential for lengthy litigation. 161

M. MARINE TERMINAL AT LONG BEACH

The Port of Long Beach (Port) has been a major commercial center since about 1935. It had a steady growth until about 1970. 162 In 1970, the Port gambled on the success of containerized cargo, and developed an extensive amount of new land. 163 The gamble paid off, and tonnage increased until 1975, when productivity began to stabilize due to the maze of regulatory requirements associated with the construction of modernized or new maritime facilities. 164

In 1973, the California Coastal Initiative for Coastal Zone Management was approved, creating a Coastal Commission and five regional Commissions. 165 These Commissions had life and death control over all development extending 1,000 yards inland from the mean high tide line and three miles to sea. 166 The Port found it difficult to proceed with new projects because of uncertain requirements and lengthy delays in obtaining approvals. 167

In the summer of 1974, when SOHIO approached the Port about building a marine terminal to handle Alaskan oil, the Port did not have any staff dedicated to working with the regulatory process. They decided to organize a staff to prepare environmental documents and permit applications, and develop a rapport with appropriate regulatory agencies. 168 SOHIO was in agreement with this, and the Port organized a Division of Environmental Affairs. 169

Between September, 1975, and March, 1979, the Port diligently pursued completion of necessary environmental documents and obtaining of certain permits required for the SOHIO project. 170 The key efforts centered around completion of the Environmental Impact Report (EIR), obtaining California Regional Water Quality Control and Coastal Commission permits for construction of the marine terminal and adjacent storage facilities, and applying for the Army Corps of Engineers approvals. 171

165. Supra note 118.
166. Supra note 120.
167. Based on a review of the approval and denial of Port projects before the South Coast Regional Coastal Commission during the period 1973-1975.
169. Minutes of the Board of Harbor Commissioners, (July 1, 1976).
170. Based on a review of Port records.
171. Supra note 77.
In January, 1978, the Board of Harbor Commissioners adopted an extremely complex resolution which conditionally approved the SOHIO project.\textsuperscript{172} Because of the continuing concern regarding air quality, the resolution contained a statement that, "If the mitigations of air impacts imposed by other agencies, in the opinion of said Board of Harbor Commissioners, are inadequate, the Board will require by contractual agreement, to the extent legally permissible, such additional conditions as result in adequate mitigations of such air impacts."\textsuperscript{173} The inclusion of this statement was intended to clearly demonstrate to all interested parties that the Board of Harbor Commissioners would not be tolerant of approvals which clearly did not protect the citizens of Long Beach.\textsuperscript{174} In no way, however, was the Board of Harbor Commissioners attempting to preempt the jurisdiction of the South Coast Air Quality Management District (Local District); rather, because the Local District has a broad geographical responsibility,\textsuperscript{175} the Board deemed it appropriate to stress their concern for assuring air quality improvement within the confines of the city of Long Beach.

Within thirty days after this resolution, the Citizens Task Force on SOHIO and two named individuals filed a petition in Superior Court challenging the adequacy of the EIR and requested that a Writ be issued requiring the Port to set aside its certification of the Final EIR and Final Supplement to the EIR.\textsuperscript{176} The filing of this petition inhibited California agencies from authorizing construction of the project, since California law provides that agencies may only grant "conditional" approvals until the EIR has been deemed adequate.\textsuperscript{177}

This EIR lawsuit initiated a number of concerns and problems. SOHIO estimated that for each month of delay in start of construction, the project costs would increase $3.5 million, and that if SOHIO could not proceed to construct the proposed crude oil system in a timely manner, it could well result in their abandoning the project.\textsuperscript{178} Also, this continued to frustrate the Port management and Board of Harbor Commissioners.\textsuperscript{179}

About the same time, the Local District concluded the hearings which established project emissions, generally approved the project, and established the trade-off requirements.\textsuperscript{180} As an outgrowth of that decision, the

\textsuperscript{172} Board of Harbor Commissioners Resolution No. HD-1173.
\textsuperscript{173} Id. at 13.
\textsuperscript{174} Minutes of the Board of Harbor Commissioners (Jan. 16, 1978).
\textsuperscript{175} CAL. HEALTH AND SAFETY CODE, § 40410 et. seq.
\textsuperscript{176} Supra note 147.
\textsuperscript{177} CAL. PUB. RES. CODE § 21167.3 (1977).
\textsuperscript{178} Affidavit of R.A. Panek, see, supra note 153.
\textsuperscript{179} After three years of preparing EIR's and working with the various regulatory agencies, they believed it was time to force a decision.
\textsuperscript{180} Local District "Review of Phase I Findings and Staff Recommendations on Phase II of SOHIO Permit Applications" (Jul. 1978).
question arose whether or not a separate EIR was needed on one of the proposed trade-offs, the scrubber.\textsuperscript{181} There was no precedent for this, since SOHIO was the first party to retrofit facilities owned by others, so-called third-party trade-offs.\textsuperscript{182} Several interpretations evolved: For example, that the CEQA process required consideration of all components of the project; therefore, the EIR for the SOHIO project would be incomplete until detailed environmental information on the scrubber was incorporated into the certified Final and Subsequent EIR.\textsuperscript{183} On the other hand, it was argued that the approval of specific trade-offs was within the jurisdiction of the Local District and not that of the lead agency, and that trade-off facilities should not be part of the EIR for the basic project, but should be the subject of separate environmental evaluation.\textsuperscript{184}

By June, 1978, Port management decided that delay in executing a lease between SOHIO and the Port was only playing into the hands of the ever-increasing regulatory maze.\textsuperscript{185} This was not an unexpected conclusion, since SOHIO also was becoming extremely frustrated, and the Port, in its role as a utility, wanted to support the SOHIO project for several reasons.\textsuperscript{186} Foremost among these reasons was the fact that SOHIO represented an additional two million dollars in annual revenue; and if the project were constructed, it would serve as the nucleus for providing increased recreational access within the Port and for relocating and improving other petroleum operations.\textsuperscript{187} Also, the dredged material the SOHIO project produced could be used to expand sorely overcrowded container operations.\textsuperscript{188} Thus, implementation of the SOHIO project, based on appropriate environmental constraints, was considered to be extremely important in achieving certain master planning goals within the Port.\textsuperscript{189}

On June 23, 1978, the Board of Harbor Commissioners considered, at a first reading, an ordinance directing the General Manager of the Port to execute a lease agreement with SOHIO.\textsuperscript{190} Draft copies of that lease agreement, provided to interested parties, contained a section entitled "Cessation of Terminal Operations" which indicated that one or two air

\begin{footnotes}
\item[181] Under the provisions of the CEQA Guidelines, the EIR process is intended to evaluate whether a project may have a significant effect on the environment [\textsc{14 cal. admin. code} § 15011.6(f)]. Since the proposed trade-offs were for substantial volumes of air emissions, it was considered that the impacts would be significant.
\item[182] Supra note 66.
\item[183] \textsc{14 cal. admin. code} § 15069.
\item[184] Id. §§ 15065 and 15065.3.
\item[185] Supra note 179.
\item[186] Based on discussions between SOHIO and Port management staffs.
\item[187] SOHIO Draft EIR, supra note 8, at Vol. 1, Part 1, II-21 to II-25.
\item[188] Supra note 163.
\item[189] Supra note 164.
\item[190] Minutes of the Board of Harbor Commissioners (June 23, 1978).
\end{footnotes}
quality monitoring stations would be established within the coastal area of the City of Long Beach, and that whenever the sulfur dioxide and sulfate levels in the coastal areas of the City of Long Beach exceeded the value defined by Local District rules, SOHIO would cease all terminal operations; or alternatively, if sulfur dioxide and sulfate episode levels would be exceeded during the coming twenty-four hour period, all terminal operations requiring use of shipboard pumps would cease. 191 Just prior to consideration by the Board, SOHIO indicated it was not in agreement with that language and, after strenuous negotiation, the language was changed. 192 The language, in essence, changed the precise requirement for cessation of activities to a process whereby SOHIO would file a cessation plan with the Local District and, in turn, abide by the terms of that plan as directed by the Local District. 193 The basic difference between the two versions was that the final language was permissive. SOHIO argued that it was not appropriate for the Port, in essence, to preempt the authority clearly provided the Local District. After a lengthy and somewhat uncomfortable discussion, the Board of Harbor Commissioners approved the ordinance. 194

On July 6, 1978, when the Board of Harbor Commissioners again considered the ordinance, for the required second reading, citizen representatives expressed their disagreement with the changes in the lease language dealing with cessation of terminal operations. 195 A policy statement, which explained the Board’s intent and interpretation of the lease language, also was considered. SOHIO representatives agreed to this interpretation, and the Board of Harbor Commissioners adopted the ordinance approving the lease arrangements. 196 In a following agenda item the Board adopted the policy statement on implementation of the cessation of operations clause in the lease. 197 The City Attorney indicated, however, that the policy statement was just that, and that it did not amend the lease agreement approved by the ordinance, and that it only would be helpful in clarifying ambiguities at a later time. 198 Shortly thereafter, and not unexpectedly, the Citizens Task Force on SOHIO, and others, indicated that they would challenge the ordinance through a referendum. 199

192. Discussions between SOHIO and Port staffs.
193. Supra note 191, Revised Exhibit "F", 62-63.
194. Supra note 190.
195. Minutes of the Board of Harbor Commissioners (July 6, 1978).
196. Id.
197. Id.
198. Id.
199. LONG BEACH, CAL., CITY CHARTER art. XXVII.
N. REFERENDUM

When the Citizens Task Force on SOHIO and others made known their intention to use a section of the Long Beach City Charter to place a referendum measure on the ballot regarding the SOHIO project, it caught the Port, Long Beach City Council, SOHIO, and many others unprepared. In all the history of the Port, no ordinance had ever been challenged by use of this process. The City Charter stipulates that no ordinance shall become effective until the expiration of thirty days from the time of final passage, with exception for certain emergency provisions, and, if during that thirty day period a petition, signed by twenty-five percent of the qualified voters participating in the preceding general election, protesting the passage of such an ordinance, is presented to the City Council, then the ordinance shall not become operative until a majority of the qualified voters vote favorably.

When the Board of Harbor Commissioners approved the execution of an agreement with SOHIO in the form of an ordinance, the thirty-day referendum waiting period began. Those who opposed the ordinance and, in essence, the project, worked diligently to gather the necessary 4,700 signatures in order to qualify the referendum measure for the November, 1978, ballot. The small number of signatures required was generally considered to be the result of a "fluke" when the City failed to change the initiative and referendum procedure after voter approval in 1976 of district elections as opposed to city-wide elections. 7,322 signatures were obtained, and the Board of Harbor Commissioners was advised by the City Clerk that the signatures were valid and thus the petition was in order. The Commissioners then moved to reconsider the ordinance approving the lease with SOHIO and after due deliberation, the Board determined not to rescind or repeal the ordinance, and requested the City Council to submit the ordinance for voter consideration. The City Council concurred, and ordered the matter on the November general election ballot, thus setting the stage for a complex and controversial campaign.

The key issues offered by the referendum supporters were not new, but a reiteration of past concerns on: air pollution and related health hazards, particularly the fact that there were no mitigations to specifically protect Long Beach residents from hazardous air pollutants; the potential for massive oil spills which would result in miles of tarred beaches and oil-

200. Based on a review of Port records.
201. Long Beach, Cal., City Charter §§ 227-b, -c, and 307.
202. Supra note 195.
203. Supra note 199.
204. Long Beach, Cal., City Charter art. IV.
fouled boats; the potential for fire hazard resulting from explosions and fires aboard supertankers; the peril from earthquakes because the tank farm soils would "liquefy"—move like jelly; the economic disaster for the City because it would reduce the potential for tourism, conventions, and in particular, stifle the revitalization of the downtown area of Long Beach; and the "visual blight" of the tall storage tanks to be located in the Port. 207 By now, the issues were worn and polished so that debaters knew their opponents' rebuttal as well as their own arguments.

As the referendum issue gathered momentum, the Long Beach branch of the League of Women Voters strongly urged SOHIO to agree to modifications of its lease with the Port to insure: cessation of tanker operations at first stage sulfur dioxide levels; assessing of penalties if operations were not conducted to insure minimum air quality impact; that air monitoring would be continuous; and that monthly monitoring data would be available to the public. 208 This discourse continued until finally, in October, 1978, the Executive Committee of the Long Beach League of Women Voters voted unanimously to oppose the tanker terminal. 209 This action dismayed SOHIO and the Port. 210

SOHIO recognized that the issues being raised by their opponents were significant. In order to conduct an effective campaign, SOHIO hired a professional campaign management firm to organize the referendum fight, and they also organized a citizens' group to work closely with the campaign firm in carrying out the election strategy. 211 SOHIO was able to respond, often quite effectively, to the concerns raised by their opponents. 212 They indicated that the air pollution associated with their project was not really a problem; but rather, because of the equipment that SOHIO would provide as part of the third-party trade-offs there would be an improvement in the air in Long Beach, that they had modern tankers equipped with the latest safety equipment so that transporting the oil would be done with minimum potential for oil spills; that the potential for explosions and fires would not be high because of the local, state, and federal requirements they would fulfill when constructing and operating their facilities; that the economic disaster to the city would not occur because the City of Long Beach traditionally was an oil town; that the earthquake peril indicated by the opponents was not a reality, since SOHIO would carry out an expensive multi-million dollar den-

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208. Correspondence and discussions between the Long Beach League of Women Voters and Port.
210. Discussions between the staffs of SOHIO and the Port.
sification project to make sure the soils where the tanks would be constructed would not move like "jelly" in the event of a maximum credible earthquake.213

As the issues were refined and the debates repetitive, it was clear that neither side had an absolute winning position. This view was substantiated by the fact that the Long Beach City Council took no official position on the SOHIO project, an effort which thwarted SOHIO's hope to gain City Hall support.214 The "no position" posture stemmed primarily from the fact that the project would provide only marginal financial benefits to the City, as opposed to the Port, because the property tax limitation, popularly called Proposition 13, would reduce SOHIO's taxes from about $1.4 million per year to just slightly over $110,000 per year.215 Although during the final days of the campaign individual councilmembers came out both in favor of and opposed to the project, there was no strong City Hall support.216 City Hall was not alone, for various individuals within the city first supported and then urged a "no" vote, or pointed out the extreme problems associated with the project only to ultimately support it.217 Although the concerns were clear, the information was not.

SOHIO recognized their peril if the referendum was defeated. It would be at least twelve months before a new ordinance could be considered by the Board of Harbor Commissioners, and the potential for another referendum still would exist.218 Thus, SOHIO moved with tremendous effort to insure a victory at the polls. SOHIO committed about $700,000 to the campaign while the opponents worked diligently to raise a "war chest" of just a little over $10,000.219

At the same time as the referendum story unfolded, other significant activities occurred which were noted in the press and thus available to the electorate. Among those events, key ones included the eruption of a disagreement between CARB and the Local District on the type of trade-offs which would be appropriate for the SOHIO project; the setting of a hearing on the acceptability of third-party trade-offs plus a postponement until early 1979; the denial by the Coastal Commission to add three tanks to the already approved project at the Port; the signing of an agreement between Southern California Edison and SOHIO to construct a scrubber at the Alamos Bay electric generating plant; and the final decision of the Public Utilities Commission authorizing the abandonment of the natural gas line owned

218. Supra note 199.
and operated by the Southern California Gas Company.\footnote{220}

The day before the election, many considered that SOHIO only had a fifty-fifty chance of getting voter approval. Extensive precinct-walking by local labor union members may have turned the tide.\footnote{221} SOHIO obtained a sixty-two percent approval vote, a victory that cleared away a dangerous obstacle in SOHIO's long march to obtain approval to build their project.\footnote{222}

\section*{0. Post Abandonment Flurry}

When SOHIO announced on March 13, 1979, its decision to abandon the $700 million project, which had been in planning and permitting stages for nearly five years, the decision was said to be irrevocable.\footnote{223} The Chief Executive Officer of SOHIO said, "I don't see any reasonable prospect" of reviving the project.\footnote{224} This announcement created concern across the country. Port officials were stunned, but soon indicated that they would do their best to "scrounge the world" for a replacement.\footnote{225} Members of Congress immediately blamed California, in particular the Governor, for the "dragging of feet."\footnote{226} California countered by requesting a full-scale federal investigation into the decision, and the Governor indicated that the "cancellation may be a carefully crafted publicity circuit" designed to "railroad Congress into allowing them to sell oil to Japan."\footnote{227} Locally, supporters were saddened and opponents were jubilant.

Almost immediately, the senior Senator from California attempted to revive the project by orchestrating a "Save the SOHIO Project" meeting.\footnote{228} More than 20 representatives from various state and federal agencies attended a meeting in Los Angeles and it was concluded that the "door was not absolutely closed on proceeding with the project."\footnote{229} On Tuesday, March 28, 1979, the scene shifted to Washington, where the Chief Executive Officer of SOHIO indicated that SOHIO would require changes in its agreement to spend eighty million dollars for a scrubber device.\footnote{230} The Governor of California responded that such a request indicated that SOHIO "wants to welsh on a written contract" and that such a modification of the project would not be fair to the citizens of Long Beach since SOHIO prom-

\begin{itemize}
\item \footnote{220} Supra notes 58, 70, 93, 94 and 109.
\item \footnote{221} Based on comments from a number of individuals who walked the precincts.
\item \footnote{222} "SOHIO Oil Terminal Approved," IPT, Nov. 8, 1978.
\item \footnote{224} Id.
\item \footnote{225} "Port Officials to Seek New Terminal Backers," IPT, Mar. 20, 1979.
\item \footnote{226} "Brown is Called 'Irresponsible' in SOHIO Actions," IPT, Mar. 15, 1979.
\item \footnote{227} "Brown Asks U.S. Probe of SOHIO Pullout," IPT, Mar. 15, 1979.
\item \footnote{228} "SOHIO Will Listen, Anyway," IPT, Mar. 18, 1979.
\item \footnote{229} Id.
\item \footnote{230} "SOHIO Terminal Appears Dead Once More," IPT, Mar. 28, 1979.
\end{itemize}
ised that "Long Beach voters would get cleaner air."231 Later, SOHIO indicated that it would take a "miracle" to get the terminal built.232 The most often repeated reason, however, was the unprecedented regulatory review and the potential for lengthy litigation.233

On May 24, 1979, the Board of Directors of SOHIO made a final determination that the project was no longer viable because there was an increasing demand on the West Coast for Alaskan oil, and the regulatory quagmire and potential for lengthy litigation could not be resolved by proposed legislation until February, 1980. Ironically, this announcement came on the same day that the Local District approved the project and CARB ratified the Local Districts' decision.234

Clearly, the SOHIO announcement was tragic evidence of the inability of our regulatory and legislative processes to achieve a timely decision—particularly when that decision is produced by an extensive and diverse series of regulatory constituencies.

V. LESSONS LEARNED

The institutions of American business are creaking from the overburden of a regulatory culture so enormous that in many instances it is virtually impossible to be responsive. It is a situation where the process has become supreme, and the product—a safe, efficient, economical, and environmentally-sound project—almost forgotten. Yet, our regulatory culture has been accepted by the public as an essential safeguard mechanism. Recent events, however, indicate that there is an increasing recognition of the inconsistencies, the frailty, and the demagoguery of the regulatory process. Thus, our regulatory culture still must be both fostered and reformed, because it is the only mechanism available to balance progress with planning and effective environmental preservation with efficiency. The challenge is to refine the process to achieve an appropriate balance between preservation and essential development. There is no longer room for confusion, conflict, hastily imposed rules and regulations, and development strategies aimed at vast profits or absolute conservation at any cost.

The review, analysis and related decisions associated with the SOHIO project clearly indicate that the present regulatory structure is overly complex, redundant, often inconsistent, mosaic, and accordingly, much less productive than desirable. Although the project is no longer viable, there are several lessons which illustrate the need for change in the regulatory

231. Id.
232. Id.
233. Supra notes 2, 3, 4, and 6.
234. Supra note 7.
process so that other important projects can be evaluated more effectively and appropriately. Some of the lessons learned include:

A. **OVERLAPPING JURISDICTION MUST BE DELETED**

Overlapping jurisdictions, where two or more agencies have similar responsibilities, must be deleted so that decisions are compatible. The initial denial of storage tanks near the SOHIO marine terminal is an excellent example, since locating the tanks elsewhere would have caused less coastal impacts but much greater air quality impacts. Since the regulatory process is like a mosaic—each agency only considering the project within the limits of its responsibilities—requirements must be established for integrated review by all concerned agencies as well as the evolution of a compatible decision process.

Where more than one state and the federal government are involved, the federal government should be the lead agency, with responsibility for coordinating all project review and complying with applicable federal and state laws; concerned state agencies should participate as responsible agencies. Where only one state and the federal government are involved, the state should be the lead agency with concerned federal agencies participating as responsible agencies. These processes would provide responsive review and still insure adequate opportunity to assess project impacts and related solutions.

In the case of SOHIO, a federal Environmental Impact Statement and a California Environmental Impact Report were prepared. The information in these two documents has a very high correlation, and preparation of both documents was an unnecessary expenditure of resources.

Where two agencies, with established or assumed powers, achieve alternative solutions to the same issue, the project proponent should not become the middle-man in the process. Government owes the public a fair decision based on clearly established legal and administrative processes. When such disputes arise, top governmental officials should be required to intervene immediately to achieve timely accommodation, or alternatively, if necessary, a short-term legal review process should be available (established).

B. **REGULATORY REQUIREMENTS MUST BE ESTABLISHED AT THE OUTSET**

The requirements for approval must be available for project proponents to review and understand at the initiation of a project. Such requirements must include the general and specific criteria to be used in making decisions. All agencies should have printed guidelines which stipulate project review criteria and processes. If this requirement is not established, agencies can continue to request information which, after review, serves as the
stimulus to request more information which, after review, serves as the stimulus to request more information, etc. The maze of reports and analyses regarding the air quality trade-offs for the SOHIO project is an excellent illustration of how agencies can prolong decisions using a "we need more information" approach.

Both the project proponent and the regulatory agency must have essential information available early in the review process. Regulatory staffs cannot be experts on the specific methodology or operational processes associated with all types of projects. Special studies prepared by the project proponent or regulatory agencies and their consultants must be made available at the start of the review process. An open approach between project proponent and the regulatory agency is a must for good decisions because it serves to educate all involved. The development of a State Agency Task Force for the SOHIO project is a good example of how this can work.

C. **Decision-Makers Must Be Involved at the Outset**

When the decisions are discretionary, as opposed to ministerial, working only with the regulatory staff can be problematic. For complex projects, decision-makers must be involved very early in the review process. Otherwise, agreements with staff can be rejected during the final phases of review, causing frustration, delays, and additional opportunities for political maneuvering.

D. **Benefits and Costs Must Be Balanced**

Denial of a project simply because it does not conform to the expectations of a given group of regulators is not in the best interest of the public. Approval or denial of a project should be based on appropriate regulations plus a review of the benefits versus the costs of obtaining the benefits. Determining reasonable benefits is very complex. Regulatory efforts must be expanded so that effective guidelines for quantifying benefits versus costs are available. In the case of SOHIO, for example, it still is questionable that the air quality impacts from the project warranted spending eighty million dollars for third-party trade-offs.

Trade-offs, as a type of mitigation, are relatively new, and determining requirements and acceptability of specific trade-offs has been a game of: How much can we get? as opposed to: How much is necessary?—to mitigate the impact. Agencies which use trade-offs as mitigations must be required to establish guidelines and evaluation criteria so that project proponents know what is expected before initiating regulatory review. Such guidelines must be cross-checked between local, state and federal agencies to eliminate redundancy and the opportunity for conflicting criteria.
E. The Time Limit and Mode for Completing Regulatory Review Should Be Established by Law

Most states and many federal agencies now must approve or deny a project within a specific time limit. However, there is no companion requirement that if denial is due to the expiration of a time limit that a factual finding providing the rationale for denial is entered into the public record. Agencies can delay a factual decision by getting the project proponent, on the threat of denial, to grant an extension of time. No agency should be able to deny a project just to comply with a stipulated time limit. There is no reason why appropriate information cannot be assembled in a manner allowing for timely, responsible review and decision. The procedures of the California Coastal Commission in this regard are good and should be emulated.

F. Regulatory Agencies Should Be Reviewed for Effectiveness

Some regulatory agencies have functions which no longer are necessary or which, more appropriately, should be assumed by other agencies. There must be an effective process for eliminating unnecessary agencies and consolidating responsibilities to achieve effectiveness. Such a review must be accomplished with the assistance of both the private and public sectors. Corrective legislation at both the state and federal levels should be aggressively implemented.

G. Public Participation Cannot be Limitless

Public participation must continue, it must be available to all who are concerned; but it must not be open to vicarious efforts. Public participation can be destructive if unbridled. In the case of SOHIO, public participation was excessive because the regulatory process was grossly disorganized. In the future, the option for public participation must remain open, but unlimited participation must be reduced by new local, state and federal rules and procedures to only essential opportunities.

H. Excessive Politics and Regulatory Processing Don't Mix

The intent of the regulatory process is to regulate, not intimate. Regulators should be allowed to achieve their responsibilities, in accordance with a reasonable exercise of their jurisdictional power, without undue influence from political circles. Political processes should receive no more or no less opportunities than those afforded the public. The conflict between the California Air Resources Board and the Local District over what trade-offs would be best for the SOHIO project illustrates the kind of problem generated when political pressure is overbearing.
I. *No Risk is the Greatest Risk of All*

We cannot cease to function—culturally and economically—because there is an associated risk. Lifestyle continues to be a very significant ingredient to all Americans and we cannot have a continual supply of affluent goods without taking some risks. Risk is commonplace on the highway, and when smoking, flying, eating and breathing. Procedures should be evolved so that risks are balanced, that is, when they outweigh the benefits, they are used to reject the project, and when they are less important than the benefits, the project is approved. Perhaps, the greatest risk to future generations is our propensity for no risk at all!
Collective Ratemaking Reconsidered: A Rebuttal

JAMES C. MILLER III

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I. INTRODUCTION

In a recent issue of this Journal, Jesse J. Friedman set forth a number

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* This article was submitted by the author as a partial response to the analysis contained in Friedman, Collective Ratemaking by Motor Common Carriers: Economic and Public Policy Considerations, 10 Transp. L.J. 33 (1978). This rebuttal is based upon testimony the author presented on behalf of the Federal Trade Commission before the Interstate Commerce Commission in Ex Parte No. 297 (Sub-No. 4), 43 Fed. Reg. 1666 (1978). It represents the author's own views and does not necessarily reflect the views of the American Enterprise for Public Policy Research, with which he is associated.

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of considerations in defense of collective ratemaking by motor common carriers. Whether the limited antitrust immunity afforded under section 5a of the Interstate Commerce Act will continue, and if so in what form, is of course an issue of current debate, both within the Interstate Commerce Commission (ICC or Commission) and in the halls of Congress. In a belief that an airing of both sides of a policy issue is desirable, the following rebuttal is presented to Friedman’s position in favor of collective ratemaking. While this material is based on the author’s rebuttal to Friedman’s statement in a case pending before the Commission, it also responds to many of the points raised in Friedman’s original article.

II. JUSTIFICATIONS FOR COLLECTIVE ACTION

In his recent article, Friedman argues that collective action is needed to maintain equitable, nondiscriminatory rates, to assure rate stability, to preserve the "national trucking network," and to make regulation and enforcement manageable. These issues are addressed below.

A. MAINTAIN EQUITABLE, NONDISCRIMINATORY RATES

The first justification of collective action is that it aids the Commission in maintaining equitable, nondiscriminatory rates. Economists usually define the term discrimination to mean rate relationships that are at variance with relevant measures of cost. Realizing, of course, that the definition of discrimination often used in regulatory proceedings, especially at the Commission, is not quite the same, two points should be kept in mind: (a) a competitive market would not be characterized by discrimination as economists define it, and (b) the achievement of nondiscriminatory rate relationships at variance with the economist’s definition of discrimination is costly in terms of resource allocation.

If markets are competitive, discrimination (as economists define it) simply cannot obtain. If one carrier is providing service at a higher rate than another, the shipper discriminated against will simply choose another carrier. Thus, in a competitive market, carriers would have to meet the "market test," and discrimination would be eliminated.

If rate relationships are artificially maintained at variance with appropriate measures of cost, then resources are misallocated. Those favored by rates below cost value this service at the margin less than the value of the

1. National Classification Committee, Opening Statements of Facts and Argument (Sept. 18, 1978), Vol. I, Section J, in Ex Parte No. 297 (Sub-No. 4), Reopening of Section 5a Application Proceedings to Take Additional Evidence; Section 5a Application No. 61, National Motor Freight Classification-Agreement.
3. Id. at 42.
resources used in producing the service. Those who pay rates in excess of costs value the service at the margin more than the opportunity costs of the resources. The result is that transportation costs, overall, are higher than need be. Of course, how equitable rates are depends on one’s point of view. Obviously, those receiving below-cost rates tend to think they are equitable, whereas those paying more than necessary tend to think they are not.

In his article Friedman identifies a number of ways in which collective action allegedly brings about rate equity. He notes, for example, that because of collective action, all shipments of the same size transported the same distance are charged the same rate. But it is likely that costs will vary for a given distance because of differences in carrier efficiency or because of certain characteristics of the service, such as congestion, factor prices, and loading. In such a case, one shipper may be truly favored over another, even though for the given distance the rate is the same. Thus, to the extent that collective ratemaking encourages uniform rates, it may well foster price discrimination.

Friedman reserves his strongest remarks for the allegation that without collective ratemaking, economically powerful shippers would be in a position to gain more favorable rates than less powerful shippers. In theory, there is no reason to expect "more powerful" shippers will receive favored treatment. No carrier would be willing to transport any shipper's freight below cost, and could not do so in the long run and stay in business. The argument that collective ratemaking now assures that small shippers (arguably "less powerful") get equal treatment with large shippers (arguably "more powerful") does not seem persuasive. For example, it is my understanding that at present what shipper "participation" now occurs in rate bureau proceedings tends to be from large shipper interests, not small shippers. Thus, if shippers have any effect on rate bureaus, it must be the large shippers who get the favored treatment.

B. ASSURE RATE STABILITY

Friedman states that:

[S]hippers must be able to rely on a fair amount of stability in the transportation charges they pay. . . . [T]here is no doubt that in many commercial activities, including transportation, the purchaser regards the need for a reasonable degree of price stability as inseparable from the need for a reasonable price itself.

. . . A system of individually-established rates would be at the opposite pole in this respect in important ways such as lack of ready ascertainability of prevailing charges and tariff conditions under the welter of alternative rates and

4. Id. at 43.
5. Id. at 42.
It appears certain that rate regulation (though not necessarily collective ratemaking) causes rates to be more stable than they would be in an unregulated environment. All else being equal, shippers value this rate stability. However, shippers also value lower overall rate levels. Economic efficiency requires that rates be adjusted to changes in demand, and it is important to note that rates vary over seasonal cycles and often by direction of movement. This increases utilization and lowers average costs. If any institutional arrangement restrains such variations (or "rate instability"), then the result is higher costs of transportation.

Shipping firms realize, of course, that rate stability is of value to consumers and make a trade-off between stability and straightforward cost minimization. Thus, we find that in unregulated markets such as commuter airlines, restaurants, and professional services, rates have a certain stability even though there are wide, sometimes unexpected, variations in demand and even cost. The important point is, that from the standpoint of the consumer of the service, there is an optimum combination of lower rates and rate stability. On the basis of economic theory, it is quite clear that a competitive market will approximate that optimal combination. There is, however, no reason to assume carriers will choose this optimal combination through collective action.

C. PRESERVE "NATIONAL TRUCKING NETWORK"

Friedman argues that collective action is necessary to preserve our national trucking network. He states that "total interlacing of trucking service across the nation is inconceivable without the machinery of collective rate action by all the carriers concerned and the antitrust immunity which makes it possible." This argument is not persuasive for two reasons.

First, would carriers have an incentive to interline where this would be in the interest of shippers? The answer, of course, is yes. Without doubt, some traffic is interlined today because of regulatory restraints on service. In an unregulated environment we must expect slightly less interlining because carriers would provide direct service in many cases. But in other cases, it would be more economical for a carrier simply to interline a shipment tendered to it. The incentive to provide such service would exist since rates would be charged to cover costs. Why does interlined through service now exist? The Commission has no authority to force interlining of traffic, so the willingness of carriers to interline is a function of other

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6. Id. at 45.
7. Id. at 44.
8. Such poor service is one of the costs of regulation.
incentives. It is difficult to see how collective ratemaking provides further incentive, except to raise prices above costs in certain instances.

The second issue is whether truckers need antitrust immunity to interline traffic. The Justice Department has often given its judgment that such arrangements pose no problem under the antitrust laws. The important point, it seems, is that individual carriers contract with individual carriers, rather than contracting on a collective basis. To the degree that scarcity of information creates the need for a "clearinghouse" type of institution, a form of a brokerage market would evolve such as exists (for a different function) in the exempt agricultural trucking market.

In the same vein, there appears to be no difficulty in having a system of motor carrier freight interlining in the absence of collective action on classifications. The reason is, that parallel to the incentive for rate stability, there is an incentive for standardization in any industry. As in many other industries, informal classification standards would develop as carriers adopted reasonable standards proposed by other carriers. That is, the market itself would determine what constituted the most efficient standards for producers to follow. Information on rates and classification would be communicated among carriers which interlined freight either directly or through brokers lacking antitrust immunity. In either case, the type and amounts of interlining would be more efficient than under today's regime of collective action.

D. MAKE REGULATIONS AND ENFORCEMENT "MANAGEABLE."

Friedman argues that "[i]n the absence of collective ratemaking, effective regulation would literally be impossible." He also argues that without collective ratemaking there would be "gigantic problems of enforcement." Basically, the argument is that if carriers set rates and classifications individually, the temptations for rate inequities would be more than the Commission could control. Several considerations are involved.

First, as discussed above, there is reason to believe that even without collective action there would be a good deal of standardization on rates and classifications. One does not, for example, observe a great deal of variation in prices for homogeneous products and services in unregulated markets. Carriers could set rates through rate publishing agents rather than through rate bureaus, and one would anticipate a great deal of uniformity with respect to rates and classifications in the absence of collective action.

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9. We observe vertical production processes in many areas of the economy. The farmer produces wheat and sells it to the grain elevator operator, who sells it to the bread manufacturer, who sells it to the wholesaler or retailer, who then sells it to the consumer. The reason this system continues to function is the set of incentives. We would expect no less under a deregulated trucking environment.

10. Friedman, supra note 2, at 41.
Second, as is well known, monopolistic firms have a much greater ability to price-discriminate than competitive firms. Competitive ratemaking would thus, on this account, be expected to result in fewer classes and rates. Third, the existence of independent action results in limited variations from the bureau-proposed rates and classifications.

Finally, and perhaps most importantly, the rate control and enforcement burdens on the Commission depend very much on the Commission’s policies. If the Commission deems it appropriate to scrutinize rate reductions in great detail and to entertain protests from competing carriers, then the burden may actually increase and enforcement problems proliferate. But if it chooses, the Commission can reduce its burden quite substantially by changing its policy. As economists have noted for many years, the Commission’s policy of maintaining minimum rate control has had substantial anticompetitive effects. The fact that elimination of collective ratemaking might increase the regulatory burden on the Commission is just another reason for a change in its policy toward minimum rates. There would be less need for Commission supervision if rates were competitively determined because competition would assure that rates were reasonable and nondiscriminatory.

III. SAFEGUARDS TO RATE BUREAU ABUSES

Friedman argues that while collective ratemaking restrains competition, the system contains sufficient safeguards to limit abuse. These include ultimate Commission supervision, the right of independent action, and the opportunity of shippers and other interested parties to have their views heard. Each of these purported safeguards is addressed below.

A. COMMISSION HAS FINAL WORD

Friedman notes that “the ultimate protection of the public interest lies in the all-embracing array of powers with which Congress has equipped the Interstate Commerce Commission for the purpose of regulating rates.”11 The problem with this line of reasoning is that it assumes that the Commission has the resources necessary to regulate each rate proposal and to assure that rates established under collective action are not excessive or discriminatory. Because of the size of the job in relation to the resources of the ICC, rate bureaus do in essence set trucking rates. Because of the hundreds of thousands of rates that are proposed each year, the Commission can do little more than apply its rubber stamp of approval. According to the latest ICC annual report, during fiscal year 1977, of the 221,874 trucking rates proposed, only 5,246 were suspended (2.4%) and only

11. Id. at 47.
1,827 were rejected (0.8%).\textsuperscript{12}

Moreover, there is considerable evidence that rates of return in the trucking industry exceed competitive levels. Perhaps the most notable piece of evidence is that operating certificates command high prices. While a portion of this value stems from regulation-induced inefficiencies in routes, commodities, and services, a great deal of the value reflects monopoly profits that are being earned in certain markets.\textsuperscript{13} In short, it is simply not feasible for the Commission to adequately police the abuses of collective ratemaking.

B. INDEPENDENT ACTION

Friedman emphasizes the role of independent action in policing any potential abuses of collective action.\textsuperscript{14} The existence of independent action may somewhat constrain the ability of rate bureaus to set prices above competitive levels. The question is, how effective is this safeguard, given the coercive nature of the bureaus.

Some indication of the role of independent action in restraining rate bureau abuses can be gleaned from the Commission’s responses to the eighty-six questions put to it by the Senate Subcommittee on Antitrust and Monopoly.\textsuperscript{15} First, it should be noted that after the Commission’s initial decision in \textit{Ex Parte No. 297},\textsuperscript{16} which forbid rate bureaus from protesting independent actions by their members, the percent of protests by motor carrier rate bureaus fell precipitously from 27.6% to 13.3%.\textsuperscript{17} Protests by individual motor carriers, on the other hand, rose from 13.3% to 38.2%.\textsuperscript{18} During the subsequent year, the proportion of protests accounted for by individual motor carriers fell precipitously and the share of motor carrier rate bureau protests more than doubled.\textsuperscript{19} This suggests that rate bureau members objecting to an independent action may have been able to get another rate bureau to protest the action.\textsuperscript{20}

\textsuperscript{13} See The Value of Motor Carrier Operating Authorities, Council on Wage and Price Stability (CWPS-247) 27 (June 9, 1977). Of course, excessive returns are a function of the Commission’s entry and rate policies as well as of its policy of granting antitrust immunity for collective action.\textsuperscript{14} Friedman, supra note 2, at 37.
\textsuperscript{15} The subcommittee, during the course of its hearings, put eighty-six questions to the Interstate Commerce Commission. Neither these questions nor the ICC’s answers [hereinafter cited as Hearing Questions and Answers] are yet generally available to the public. Oversight of Freight Rate Competition in the Trucking Industry (1978).
\textsuperscript{16} Ex Parte No. 297, Rate Bureau Investigation, 349 I.C.C. 811 (1975).
\textsuperscript{17} See Hearing Questions and Answers, supra note 15, ICC’s answer to Question No. 32.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Curiously, the number of total independent actions fell after the prohibition against rate bureau protest of member initiatives. Id. Crosscurrents were at work here. On the one hand, with
Between one-third and one-half of motor carrier independent actions are suspended following protest,\textsuperscript{21} and nearly three-quarters of the motor carrier rate proposals suspended were established by independent action.\textsuperscript{22} Only a minor proportion of motor carrier rate proposals that were suspended were ultimately approved.\textsuperscript{23} Finally, the vast majority of independent actions were for rate decreases rather than rate increases.\textsuperscript{24} Where the vast majority of independent actions are for rate decreases rather than rate increases, where these actions are much more likely to be protested than rate proposals issued by bureaus, and where if protested, they are extremely likely to be suspended and not allowed to go into effect, it is farfetched to believe that independent action constitutes a truly significant restraint on the abuses of collective action.

C. \textit{Interest Group "Participation"}

Friedman and others have argued that another check on rate bureau abuses, in fact, a specific advantage of rate bureaus, is that they offer a forum where various interested parties may reason together. It should be noted, however, that competition provides an incentive for carriers to develop new services and lower prices, and for shippers to propose new services and to insist on lower prices. The distinguishing characteristic of rate bureaus\textsuperscript{25} is that while the various interest groups may present their cases, the decisions are made by the carriers in secret vote. An analogy is relevant here: suppose that instead of our having the opportunity to shop for clothes at any of the local department stores or from mail order houses, we were forced to make application for a new suit at a proposed price before a "Board of Tailors" representing all retail outlets. Who would argue that we would have more consumer sovereignty and more voice in our selection of clothes and the prices we pay under such an arrangement?

While the access of shippers to rate bureau proceedings may in some sense reduce the abuses of collective action, the effect cannot be very significant. Moreover, it cannot be seriously argued that a direct discussion between a shipper and a carrier is somehow inferior to having a rate bureau pass on a specific proposal.

\textsuperscript{21} See Hearing Questions and Answers, supra note 15. ICC's answer to Question No. 33.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id., ICC's answer to Question No. 30.
\textsuperscript{25} See, e.g., Friedman, supra note 2, at 46.
IV. CONCLUSION

The discussion above, the extensive writings of economists, the findings of the Senate Antitrust and Monopoly Subcommittee,\textsuperscript{26} and the hearings of the National Commission for the Review of Antitrust Laws and Procedures,\textsuperscript{27} show collective ratemaking in trucking to be contrary to the public interest. Rate bureaus set rates at higher-than-competitive levels and they provide a mechanism to police deviations. Clearly, the alleged benefits of rate bureaus are either vacuous or can be achieved by substantially less anticompetitive means.

Of course, advocates of the existing regime will continue to say that without collective action dire consequences will result—that the national trucking system will break down, and so on. As one who has spent a great deal of time and research in another area of transportation—the domestic airlines—this writer is struck by the similarities in the arguments. At present the nation is experiencing a transition in airline regulation from an environment in which prices have been very inflexible, entry has been very difficult, and competition has been channeled into service dimensions, to an environment in which there will be price as well as service competition and entry will be reasonably free. When this experiment in regulatory reform was first proposed, the opponents made many of the same arguments now being leveled at the proposals to reform trucking regulations. Yet, policy makers rejected these arguments as insufficient to outweigh the benefits of reform. The results so far have confirmed this view, and it is reasonable to expect the same will hold true in the motor common carrier industry.

\textsuperscript{26} Findings of the subcommittee are not yet available to the public.

\textsuperscript{27} National Comm'n for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 197 (1979).
What's Wrong With the Case Against Collective Ratemaking: Rejoinder to James C. Miller III

JESSE J. FRIEDMAN*

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I. INTRODUCTION

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

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

II. RATE DISCRIMINATION

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

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

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1. Although Congress has acted on deregulation legislation since this rejoinder was written it is likely that the controversy will continue and quite possible that further legislation will be before Congress in its next session.
4. Friedman, supra note 2, at 42-43.
that rate discriminations that reflect cost differences can be economically desirable, and goes on to assume the entire problem away by asserting, as if it were indisputable, the premise that under conditions of competition discriminatory prices not reflecting cost differences "simply cannot obtain."5

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

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

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

5. Miller, supra note 3, at 292.
6. Id.
7. Id. In his explanation of how resource misallocation occurs, Miller states (p. 293) that transportation "costs" are higher than they need be. I believe the intended reference here is to carrier rates rather than to carrier costs.
son for the provision in the antitrust laws that prohibits any price discrimination in the sale of goods of like grade and quality except to reflect cost savings or to meet competition. If the mere absence of collective pricing would be sufficient to foreclose the possibility of price discrimination that victimizes weaker firms, why is it that the law prohibiting price discrimination in the unregulated economy, where collective pricing is forbidden, has such an extensive constituency among small businesses in practically every line of manufacturing and distribution?

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

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

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

9. Miller, supra note 3, at 292.
10. Id. at 292-93.
power of persuasion possessed by the large shipper arises naturally from the substantial traffic it can offer or withhold at many points along the carrier's system. The ability of the larger shipper to obtain a preferred rate derives from the total business volume it represents to the carrier. On what basis could the small shipper lacking this bargaining strength obtain a correspondingly low rate "simply" by exercising its right to take its limited business elsewhere? The idea that a shipper with limited traffic volume can obtain the low rate enjoyed by its high-volume competition by choosing another carrier "simply" is not convincing.

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

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

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

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

\(^{11}\) Id. at 103.

\(^{12}\) Interstate Commerce Act of 1943 (Regulation of Rate Bureaus), Hearings on S. 942, U.S. Senate Committee on Interstate Commerce, 78th Cong. 1st Sess. 822-82 (1943).
ers serve competing shippers located at different origins but nevertheless competing for the same destination markets, or located at the same destination but drawing supplies from different origins. In such situations, rate favoritism or discrimination having no foundation in cost justification can decisively affect the outcome of the competitive struggle for business at the shipper level, and even at the carrier level.

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

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

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

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

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

III. "OPTIMAL COMBINATION" OF STABLE AND REASONABLE RATES

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

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

14. Miller, supra note 3, at 293.
will choose this optimal combination through collective action.'''17 It might equally be said that there is no reason to assume that collective action will not produce that result. But both observations are beside the point; the optimality ideal as such is a theoretical one and is unattainable under any system.

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

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

It is clear even to the casual observer that each of these conditions (of theoretical perfect competition) is wildly at variance with actual facts. Why then is it that this theory has had such a profound effect on so many economists and has led some to a worship of the unconstrained price system? The honest answer is 'I have no idea how it could possibly happen.' . . .

What we cannot do is to assume that economic theory predicts that any increase in the degree of competition in the economy always—or even is likely to—increases the efficiency of resource allocation in the economy.\textsuperscript{20}

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

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

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

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

\textsuperscript{20} Lipsey, \textit{supra} note 18, at 357-77.
perfect competition are inevitable, pervasive and many of them useful to com-
petition as a dynamic process.\(^\text{23}\)

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

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

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

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

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


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

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

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

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26. Miller, supra note 3, at 292.
27. Rebuttal statement of James C. Miller III, Interstate Commerce Commission, Ex Parte No. 297 (Sub-No. 4), Section 5a Application No. 61, at 15 (1978).
solid reasoning based on real-life facts. Apparently, in reaching for an argument in the present exchange, Miller has failed to heed his own counsel.

IV. INTERLINE SERVICE

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

A. INCENTIVE FOR INTERLINING

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

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

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

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

B. ANTITRUST IMMUNITY

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

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

30. Friedman, supra note 2, at 44.
31. Id.
be equalized with each other. Without antitrust immunity, such equalization agreement would, of course, be forbidden.

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

C. COLLECTIVE CLASSIFICATION

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

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

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

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

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

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

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

A. RATE UNIFORMITY

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

33. Miller, supra note 3, at 295.
34. Friedman, supra note 2, at 41.
35. Miller, supra note 3, at 296.
36. Friedman, supra note 2, at 42.
Aside from the value of the collective ratemaking system as a means of avoiding unjustified rate discrimination, the value of the type of rate uniformity it achieves is particularly significant with respect to equalization of rates for all routings, single-line and joint-line alike, for given movements. I have already discussed the need for such equalization in preserving a coordinated national network of general-freight trucking service and the indispensable role of collective pricing in achieving that result. The problem of achieving rate uniformity for alternative routings, and the importance of collective ratemaking in meeting that problem, are evident from the number of actual and potential carrier combinations available to serve various routes. In my article, I cited some examples for selected routes in New England and Middle Atlantic territories. In Eastern Central territory, to mention but one other, there are twenty-eight rate-bureau members competing for traffic with single-line service between Chicago and Trenton and another 165 two-carrier joint-line services involving fifty-one interchange points. Between Cleveland and Boston, there are thirty-one carriers offering single-line service, and another 117 two-carrier joint-line services involving twenty interchange points. Between Columbus and Philadelphia, twenty-six carriers offer single-line service and there are another 113 two-carrier joint-line services involving eighteen interchange points. Between Dallas and Albany, there are thirteen carriers offering single-line service plus another 289 two-carrier joint-line services involving forty-two interchange points. Between Kansas City and New York, there are twenty-one single-line services and another 357 two-carrier joint-line services involving twenty-three interchange points. Other such examples are numerous.

B. COMPETITIVE VS. MONOPOLISTIC PRICING

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

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

37. Friedman, supra note 2, at 39-40.
38. Rebuttal Statement of Jesse J. Friedman, Interstate Commerce Commission, Ex Parte No. 297 (Sub-No. 4), Eastern Central Motor Carriers Association (1978). Each of the joint-line services indicated involve the participation of two carriers only. Many additional joint-line services involving three or more carriers are also available.
out, there remain many strong competitive forces—inddependent actions, private carriers, contract carriers, non-member carriers, other transport modes—to hold rates in check, and all rate actions are subject to close regulatory review. This hardly conforms to the classic model of the "monopolistic" firm. It is equally loose to attribute to a system in which rates were individually rather than collectively made all of the virtues with which economic theory invests its idealized model of perfect competition. No amount of such looseness of terminology can obscure the plain prospect that elimination of collective ratemaking would not eliminate or reduce the potential for serious and competitively-damaging discrimination but would greatly increase it.

C. INDEPENDENT ACTION

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

D. COMMISSION POLICIES

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

40. Friedman, supra note 2 at 37-40.
41. Miller, supra note 3, at 296.
posed rate reductions and cease consideration of carrier protests.

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

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

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

E. Carrier Profits

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

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

42. Id.
43. Id. at 297.
this time rather threadbare from overuse by deregulation enthusiasts as "proof" that rates established under collective ratemaking must be above a "competitive" level. In waving once more this tatter of "evidence" of monopoly profits Miller chooses to ignore the more workaday and straightforward explanation of the value attached to operating rights by purchasing carriers, namely the increased economies and efficiencies of operation that usually accompany an expansion of the size and scope of the purchaser's system. That such operating-cost advantages do accompany the enlarged operations of carriers is conceded by the Council on Wage and Price Stability when it states that the purchase of operating authority "is in almost all cases likely to increase the efficiency of trucking." 44 This view is confirmed in a recent extensive study of the subject by the Commission, which concludes that "the anticipated market opportunities and potential economies of operation have a substantial influence on certificate values." 45

VI. INDEPENDENT ACTION AND BUREAU COERCION

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

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

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

46. Miller, supra note 3, at 297.
been able to get another rate bureau to protest the action." 47 Miller presents no evidence, no citation of facts, just a speculative "may."

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

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

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

47. Id.
48. Id. at 298.
49. Id.
50. Id.
51. Id. at 299, n.26.
52. Annual Reports of the following rate bureaus for 1978: Central & Southern, Central States, Eastern Central, Middle Atlantic, Middle Western, New England, Niagara Frontier, Pacific Inland, Rocky Mountain, Southern.
54. Friedman, supra note 2, at 38.
tion of the term will affect the numbers. But more basically, independent action operates both as an actual and as a potential force to assure that the opportunity to price in common does not override the power to price independently. Obviously, if independent action became the commonplace form of ratemaking, collective action would wither away. But independent action does not have to be invoked indiscriminately—or does it have to be approved by the Commission every time it is invoked—to have a healthy competitive influence on the ratemaking process.

VII. SHIPPER PARTICIPATION

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

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

VIII. CONCLUSION

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

55. Miller, supra note 3, at 298.
56. Id. at 293.
from it favor the view that the public interest will be better served by continuing and improving the present system than by abolishing or drastically modifying it.
Governmental Claims For Salvage*

JAMES S. COHEN**

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I. INTRODUCTION

Few areas of admiralty law have more of a public policy basis than that of salvage awards. It is an area which emphasizes the fundamental public policy of encouraging seamen to render prompt service in future emergencies.¹ Entitlement to salvage awards is based on three requirements. The first is that there be a maritime peril from which rescue without the salvor's assistance is impossible. Second, the salvor's act must be voluntary: he must not be under any official or legal duty to perform such an act. Third, the effort must be successful.²

* Paper originally published as part of the proceedings of the Southeastern Admiralty Law Institute, 1979. The paper won the Institute's writing competition for 1979.
1. Kimes v. United States, 207 F.2d 60, 63 (2d Cir. 1953).
In the case of a private individual or ship these three requirements are often easily satisfied. Where the salver is a government vessel or employee, however, the requirement that the act be voluntary and done without any official or legal duty becomes difficult to meet. This article examines this problem.

As a foundation, the relevant statutes will be examined. This will be followed by an historical review of nineteenth and early twentieth century cases where claims for salvage were made by ships. In discussing the uniform services, the Navy and Air Force will be segregated from the Coast Guard until all three services come together in one instance. The remainder of this section will deal with claims put forth by individuals who are either military members or civilian employees of the government. This will be followed by a discussion of prize cases and wartime salvage.

II. Statutory Basis

Despite the statement that "'[i]t has not been the policy . . . to maintain actions for salvage awards, especially against the owners of small vessels,'" statutes governing both Navy and Air Force operations permit the claim and receipt of payment for salvage efforts. The Navy’s statute reads: "'The Secretary of the Navy, or his designee, may consider, ascertain, adjust, determine, compromise, or settle and receive payment of any claim by the United States for salvage services rendered by the Department of the Navy. . . ."' Air Force conduct in this area is governed by the following provision: "'The Secretary of the Air Force may settle, or compromise, and receive payment of a claim by the United States for salvage services performed by the department of the Air Force. Amounts received under this section shall be covered into the Treasury.'" A third statutory basis for the permitting of salvage awards may be found in the Suits in Admiralty section of the United States Code, which provides:

The United States, and the crew of any merchant vessel owned or operated by the United States, or a corporation mentioned in section 741 of this title, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of such corporation, having control of the possession or operation of such vessel.

Only the latter statute permits recoveries by crew members. This probably

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stems from the higher standard of duty owed by the military.\(^8\)

Were the statutes governing Coast Guard operations as explicit as the aforementioned, many of the problems in the area of government claims for salvage would not exist. Two statutes pertaining to the Coast Guard must be examined. The first deals with the Coast Guard’s primary duty. It reads:

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States. . . shall develop, establish, maintain, and operate, with due regard to the requirements of national defense. . . rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States.\(^9\)

Specific tasks are allocated to the Coast Guard in the area of saving life and property. The statutory language governing this is as follows:

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

1. perform any and all acts necessary to rescue and aid persons and protect and save property;

2. take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes;

3. furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

4. destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.\(^10\)

This last section deals with the essence of what is considered a circumstance warranting salvage. The statute addresses itself to the question of voluntariness as it twice employs the word “may” as opposed to “will” in describing Coast Guard duties. This seems to imply that these activities on the part of the Coast Guard are permissive and that the requisite requirement of voluntariness is present and therefore awards should be allowed. This has not been the case, however.

One commentator has implied that the sole reason for denying awards to the Coast Guard while permitting them for the Navy and Air Force is the absence of specific statutory language permitting the Coast Guard such an


award.\textsuperscript{11} This appears to be a manifestation of congressional intent based more on tradition than on logic, and it warrants a contemporary examination.

III. HISTORICAL BACKGROUND

Salvage by government ships, particularly those of the Navy, has long been recognized by the courts. In 1801, \textit{Taibot v. Seeman}\textsuperscript{12} dealt with the recapture of a neutral merchant vessel from the French, the award of salvage by the district court, and the subsequent reversal by the circuit court. Chief Justice Marshall, who delivered the opinion of the Supreme Court, reasoned that the taking must have been lawful, and there must have been a meritorious service rendered to the recaptured vessel.\textsuperscript{13}

Marshall viewed the recapture as legal, relying upon a series of statutes passed in 1798 which permitted the United States vessels to capture armed vessels of France,\textsuperscript{14} protect United States shipping,\textsuperscript{15} and recapture vessels taken by France.\textsuperscript{16} With respect to recapture, salvage awards were specifically permitted, and parameters were established for them.\textsuperscript{17}

On March 3, 1800, Congress passed "An act providing for cases of recapture."\textsuperscript{18} This extended the right to salvage where a vessel owned by a resident of a country "in amity with the United States" had been taken by a government "against which the United States have authorized, or shall authorize, defense or reprisals."\textsuperscript{19} Marshall concluded that since this was at the time of recapture an armed vessel under French authority, the taking was lawful, and the fact that the recapture took place before the passage of the act did not bother him. He viewed the acts prior to the recapture as the basis for a general system of resistance to aggression, and therefore he felt that no additional specific statutory basis was necessary.\textsuperscript{20}

The question of what meritorious service was rendered the recaptured

\textsuperscript{11} Zendel, \textit{Coast Guard Entitled to Salvage Award for Expenses Incurred by Other Armed Forces During Rescue}, 2 J. Mar. L. 682-83 (1971).
\textsuperscript{12} Taibot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).
\textsuperscript{13} Among counsel on the argument before the circuit court were two of America’s most famous antagonists, Alexander Hamilton (Taibot) and Aaron Burr (Seeman). id.
\textsuperscript{14} Act of May 28, 1798 "An act more effectually to protect the commerce and coasts of the United States." id. at 29.
\textsuperscript{15} Act of June 25, 1798 "...to authorize the defence of merchant vessels of the United States against French depredations." id.
\textsuperscript{16} Acts of June, 1798, and July 7, 1798 These latter two expanded the May 28, 1798 Act.
\textsuperscript{17} Taibot v. Seeman, 5 U.S. (1 Cranch) 30 (1801). The amount would be from one-eighth to one-half of the value of the vessel and cargo.
\textsuperscript{18} id.
\textsuperscript{19} id. at 31.
\textsuperscript{20} id. at 35.
vessel was resolved in a similarly straightforward way. The logic ran as follows:

1. The vessel was being taken to a French port to be adjudged according to the rules of war.
2. The laws of France were such that condemnation of the vessel was extremely possible.
3. Therefore, the danger to the vessel was real and imminent.
4. The vessel was saved.
5. Therefore, salvage should be allowed.21

Forty years later, the Supreme Court had another opportunity to examine the question of when salvage would be permitted the crew of a United States warship. In United States v. The Amistad22 a ship was towed into Connecticut from a point near Long Island. When found, the Amistad was crewed by kidnapped Africans who, had they not risen and taken over the ship, would have been sold into slavery. The commander of the American vessel made a claim for salvage on behalf of himself and his crew. The claim was allowed to the extent of one-third of the ship’s value.23 The Supreme Court affirmed, holding that the efforts of the officer and his crew were highly meritorious and of useful service to the ship’s and cargo’s proprietors.

Not every effort by a warship which resulted in the saving of property qualified for a salvage award, however. In The Josephine,24 an abandoned vessel was towed into port and the crew claimed salvage (the officers having renounced their claim), but the libel was dismissed. The circuit court affirmed, not because the services were rendered under direction of the warship’s commander acting under general instructions from the Secretary of the Navy, but because of the nature of the act involved. The court held that for salvage awards to be permitted a government vessel, unusual peril must be encountered and extraordinary service rendered.25 The rescue must exceed the duty imposed by employment,26 and that requirement was not met here. The court found the acts neither particularly meritorious nor hazardous. Also, as a matter of public policy, the court did not want to place the crew on the same footing as common salvors.27 The Josephine appears to be the first instance of a court expressing concern about the

21. Id. at 37-45. The Court lowered the amount of award from one-half to one-sixth the value of the vessel and cargo.
23. This amount did not include any value for the Africans, since they were considered free by the circuit court. This reversed a district court decision which ordered them turned over to the President for deportation. Id. at 519.
24. 13 F. Cas. 1150 (C.C.S.D.N.Y. 1851) (No. 7,546).
25. Id. at 1152.
26. Id.
27. Id. at 1153.
military status of the salvor; had great efforts been involved in effectuating
the salvage, an award would likely have been permitted even there.

In Rees v. United States,\textsuperscript{28} the fact that both the salved vessel and the
salvor were owned by the same party (in this case the government), did not
preclude libellant’s right to salvage compensation. This concept, subse-
sequently codified,\textsuperscript{29} is applicable to both government and privately owned
vessels.

In The Kanawha\textsuperscript{30} a United States revenue cutter and a steamer
owned by the Dominion of Canada both assisted in the salvage of the
Kanawha. No claim was made for their services because of their status as
government vessels,\textsuperscript{31} but an award was made in their name so as to
properly fix compensation for the entire salvage effort.\textsuperscript{32}

Later, in The Ockson,\textsuperscript{33} the unilateral actions of the crew and cap-
tain of a government owned tug in towing an abandoned vessel were found
compensable. The crew’s efforts in establishing a tow saved the aban-
doned vessel. In awarding salvage the court pointed out that the tug was
not like a fire fighter putting out a blaze: the tug was performing a function
outside the scope of its employment.\textsuperscript{34} The dissent maintained that since
the tug was for hire, the contract which sent it out included rescue and the
saving of ship and cargo, and since salvage was contemplated, no sepa-
rate award should have been made.\textsuperscript{35}

Modern precedent for the claim of salvage by government vessels was
clearly established by The Impoco.\textsuperscript{36} There the owners of the saved vessel
admitted that the master and crew of the salvor had a right to recover but
denied that right to the government.\textsuperscript{37} The government asserted its claim
on the basis that the vessel involved was a steamer acting as a merchant
vessel and therefore a salvage claim was proper under section 9 of the
Shipping Act of September 7, 1916\textsuperscript{38} and section 10 of the Suits in Admi-

\textsuperscript{28} 134 F. 146 (N.D. Cal. 1904).
\textsuperscript{29} 46 U.S.C. § 727 (1976) which provides: “The right to remuneration for assistance or
salvage services shall not be affected by common ownership of the vessels rendering and receiving
such assistance or salvage services.”
\textsuperscript{30} 254 F. 762 (2d Cir. 1918).
\textsuperscript{31} Id. at 764.
\textsuperscript{32} Id. The two vessels were awarded a total of $12,000 of a total award of $34,000. Where
such an award is made but not paid, it is not put into the pot to be pro-rated among other salvors. It
returns to the salved vessel’s owner.
\textsuperscript{33} The Ockson, 281 F. 690 (5th Cir. 1922).
\textsuperscript{34} Id. at 694.
\textsuperscript{35} Id. at 695. The majority in considering the tug’s contract felt that this did not stop the
crew from claiming salvage and that the existence of such a contract was a factor to be considered
in determining the size of the award.
\textsuperscript{36} 287 F. 400 (S.D.N.Y. 1922).
\textsuperscript{37} Id. at 401.
\textsuperscript{38} 46 U.S.C. § 808 (1976) which provides:
ralty Act of March 9, 1920.\(^{39}\)

The court rejected this argument, yet it found that the government had a right to make a claim. The mere fact that the United States had a long practice of not asserting such claims did not affect its right to do so. Congress, the court held, "may restrict the inherent right of the United States to claim salvage, that right remains...until it is restricted."\(^{40}\) As to the crew the court said "such services are voluntary, and they are just as voluntary in the case of "men at war and public vessels generally as they are in the case of" private vessels; i.e., it is no part of their duty to render such services."\(^{41}\) The court added: "I can see that a sovereign would and perhaps should consider it beneath his dignity to ask for compensation for services in saving property at sea, I can imagine no legal reason to prevent him from doing so."\(^{42}\)

The court quoted English statutes which expressly precluded a salvage claim absent specific consent of the Secretary of the Admiralty,\(^{43}\) but it maintained that either an Act of Congress or an expression of executive

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Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold mortgage, lien, or other interest therein.

\(^{39}\) 46 U.S.C. § 750 (1976) which provides:

That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation having control of the possession or operation of such vessel.

\(^{40}\) The Impoco, 287 F. 400, 402 (S.D.N.Y. 1922).

\(^{41}\) Id.

\(^{42}\) Id.

\(^{43}\) The Merchant Shipping Act of 1854, §§ 484, 485, which provides:

484. In cases where salvage services are rendered by any ship belonging to her majesty or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage, or risk thereby caused to such ship, or the the stores, tackle, or furniture thereof or for the use of any stores or other articles belonging to her Majesty supplied in order to effect such services, or for any other expense or loss sustained by her majesty by reason of such services.

485. No claim whatever on account of any salvage services rendered to any ship or cargo or to any appurtenances of any ship by the commander or crew or part of the crew of any of her Majesty's ships shall be finally adjudicated upon unless the consent of the Admiralty has first been obtained, such consent to be signified by writing under the hand of the Secretary to the Admiralty, and if any person who has originated proceedings in respect of any such claim fails to prove such consent to the satisfaction of the court, his suit shall stand dismissed and he shall pay all the costs of such proceedings: Provided that any document purporting to give such consent and to be signed by the Secretary to Admiralty shall be prima facie evidence of such consent having been given.
authority would be required to so limit the United States.\textsuperscript{44}

IV. POST WORLD WAR II: THE MOVE TO QUANTUM MERUIT

The post World War II era has not seen any radical developments in this area. In 1947 a salvage award in excess of $66,000 was given to the owner (the United States), officers and crew of the S.S. Puente Hills.\textsuperscript{45} The award was divided into four components: expenses, a general award to the owner, an award to the crew, and special awards to certain crew members. Neither the court's opinion nor the Commissioner's report it adopted addressed itself to the fact that the salvor was owned by the government and operated by the War Shipping Administration;\textsuperscript{46} the right to an award was not questioned.

The problem of what constitutes a salvage award versus a quantum meruit award for services rendered was addressed in Tampa Tugs and Towing v. M/V Sandanger.\textsuperscript{47} There the government initiated a claim for salvage based on negotiations between the Navy, a marine surveyor, and the owner of a tug then involved in the salvage of the Sandanger. The result of these negotiations was that the Navy agreed to fight the fire raging aboard the Sandanger upon being guaranteed its expenses. After three vain attempts by YTBs to put out the fire, Navy personnel boarded the vessel and succeeded in extinguishing it. The court characterized this undertaking as "extremely difficult and hazardous."\textsuperscript{48}

The Navy stipulated expenses in excess of $9,800 and waived the salvage claims for the crews of the YTBs. The court determined that the Navy's claim was for services rendered as opposed to salvage. This conclusion was based on the Sandanger's seizure by a U.S. Marshall prior to the Navy's major and most successful efforts.\textsuperscript{49}

Ultimately, the Navy was awarded $25,000 as reasonable value of its services. In making this award the court was concerned with two factors. The first was the amount of benefit conferred. Had not the Navy intervened, the vessel would probably have broken up and valuable cargo would have been lost. The second factor was that the Navy bore the risk of death and

\textsuperscript{44} Id. The concept of a claim for an award absent expressed statutory prohibition is now followed on both sides of the Atlantic. England retains a standard which forces the line not to be drawn between duty and voluntariness, but between duty and "exceeding the scope of their ordinary function." M. Norris, LAW OF SALVAGE 133 (1958).

\textsuperscript{45} The Donbass, 74 F. Supp. 15 (W.D. Wash. 1947).

\textsuperscript{46} Id. at 15-24.

\textsuperscript{47} 242 F. Supp 576 (S.D. Cal. 1965).

\textsuperscript{48} Id. at 579. YTB's are a type of harborcraft.

\textsuperscript{49} Id. at 581. The seizure was initiated by Tampa Tugs and Towing and was effectuated by service upon masters of the tugs then with tow lines connected to the Sandanger. Such service is valid given the control of the tugs over the Sandanger and its inability to be boarded (it was still on fire).
injury to the men involved in the action.\footnote{50} The court rejected claims that the Navy had a public duty to fight the fire and that it was extinguished solely to protect naval facilities nearby.\footnote{51} The concept of "public duty" seems to lose import when it is realized that the Navy, in this case, was given a maritime lien for expenses incurred in de-oiling and towing the Sandanger into harbor.\footnote{52} The author feels that any "public duty" here would have been more in de-oiling and towing than in extinguishing a blaze.

The question of "public duty," salvage and reasonable value for services rendered, as indicated by \textit{Tampa Tugs}, appears to turn on the existence of an agreement between the Navy and other parties involved in the action. The actions of the Navy clearly warranted a salvage award. The court's language indicates that the requirements for a salvage award were met: a maritime peril, success and no pre-existing duty. Absent the Navy's waiver of a salvage claim, such a claim would have been appropriate.

\textit{Amoco Virginia}\footnote{53} is the most recent case of a salvage award to the uniformed services. Not only does it follow the lead of \textit{Tampa Tugs} in awarding only expenses for services rendered, but it also bridges the gap between the Navy and Air Force being authorized awards and the Coast Guard not being so authorized.

In \textit{Amoco Virginia}, a tanker carrying six million gallons of gasoline and heating fuel caught fire in the Houston Ship Channel. The fire and resulting explosions created a major disaster. After the supply of foam available to agencies fighting the fire (the Houston Fire Department, the fire departments of eighteen other municipalities, the Houston Navigation District and the Coast Guard) has been exhausted, a military airlift was instituted to effectuate a resupply of foam. Before the airlift ended, the Navy and Air Force had flown 47 missions, involving 400 military personnel and 42 vehicles. Over one-half million pounds of foam were flown into Houston.\footnote{54}

The lower court rejected government claims totalling $89,676 for salvage.\footnote{55} In doing so, the court looked at the claim in two parts. Concerning

\begin{center}
\begin{tabular}{l|c}
\hline
Cost of foam & $35,641.20 \\
Transportation costs—aircraft & 51,129.36 \\
Personnel costs—military & 2,168.23 \\
Personnel costs—civilian & 357.19 \\
Transportation costs—vehicles & 296.62 \\
Lost equipment & 90.00 \\
\hline
TOTAL & $89,682.60 \\
\hline
\end{tabular}
\end{center}
the cost of the foam, the court said that the government "as sovereign has no inherent right to recover for salvage services under the general maritime law." 56 As to the remaining parts of the claim, the court maintained that the government failed to carry its burden of proving to what extent its efforts contributed to preserving the S.S. Amoco Virginia. 57 The rejection of the salvage claim flies in the face of the court's own finding that "[i]t would have been impossible to put out the fire at the time it was extinguished without the cooperation of the United States Air Force and Navy...[T]he efforts of the Air Force and Navy were a contributing factor in preserving more than $900,000 worth of property..." 58

The Fifth Circuit reversed. In so doing, the court adopted American Oil's position that the salvage services performed were rendered by the Coast Guard. The court then separated the Coast Guard's efforts from those of the Navy and Air Force. 59 (It must be remembered that all references to Coast Guard salvage in this opinion can be viewed only as dicta, since the Coast Guard did not submit a claim.) As to the Navy and Air Force, the court established that the decision to claim salvage is one made by the government, and here it chose to do so only on behalf of the Navy and Air Force. 60 This claim was entirely permissible pursuant to statute. 61

American Oil maintained that the Navy and Air Force were obligated to come to the assistance of the Coast Guard, that they could not legally refuse to do so, and therefore that they were precluded from an award. This argument was rejected by the court. If such an obligation did exist, it ran to the Coast Guard and not to American Oil. There was no pre-existing duty here which would preclude the award. 62

A final defense to the claims of the Navy and Air Force was that the National Search and Rescue Plan [SAR] established duties which encompassed the efforts involved in this incident. The court rejected this by illustrating that the SAR included the utilization of facilities of the signatories (Army, Navy, Air Force, Joint Chiefs of Staff unified commands and Coast Guard) "consistent with the statutory responsibilities and authorities and assigned functions of such agencies." 63 and that SAR did not encompass salvage operations. 64

Thus the claims of the Navy and Air Force were successful. The Fifth Circuit's approach to the Coast Guard warrants analysis. The court ap-

56. Id.
57. Id.
58. Id.
59. Id. at 167.
60. Id. To this end the court relied on The Impoco, 287 F. 400 (S.D.N.Y. 1922).
62. Id.
63. Id. at 170.
64. Id.
pears to say that had the Coast Guard made a salvage claim, there was no pre-existing duty which would bar the claim. More specifically, the Court stated that the government’s claim for salvage for the Navy and Air Force does not mean that the Coast Guard has no right to salvage for its own services and supplies.”

The court’s analysis turns on statutory interpretation of 14 U.S.C. § 88. It concludes that acts such as these are performed in a permissive context. Analogizing to the permissiveness of Coast Guard rescue operations the court concluded that “there was no pre-existing legal duty which compelled the Coast Guard to render fire fighting and salvage services in this case.” The court further emphasized the permissive nature of the Coast Guard’s duty given SAR.

Comment after Amoco Virginia indicates disagreement with the court’s holding as to the Coast Guard. Much of it seems to stem from those timeless concepts of tradition. One author, rejecting the permissiveness of the Coast Guard’s function, could find “no good reason to award salvage as an incentive to an agency whose very function is to aid persons and ships in distress at sea.”

In coming to its conclusion, the Fifth Circuit was not taking a blind shot in the dark. In a footnote in United States v. Gavagan the court, although it chose not to decide the issue, expressed no doubt that the Coast Guard could claim salvage. In arriving at this conclusion, they saw little valid distinction between the Coast Guard and other government personnel jointly engaged in a rescue operation.

Additional support for this proposition can be found in Beach Salvage Corp. of Florida v. The Cap’t Tom. There the Coast Guard was party to a salvage award of $2,000, one-half of which was apportioned to it. As the government did not, however, put forth a claim, the award was not paid. What is important is that the Coast Guard was a party to the award, even if it appears that the amount was specified solely for the purpose of determin-

65. Id. at 168.
67. 417 F.2d at 168.
68. See discussion of the standard of care to be exercised in regard to this and salvage operations, Frank v. United States, 250 F.2d 178 (3d Cir. 1957).
69. 417 F.2d at 168-169. To buttress this the court relied on a Coast Guard publication which permitted Coast Guard fire fighting equipment to be utilized to assist local fire officials.
70. Id. at 170.
71. Zendel, Coast Guard Entitled to Salvage Award for Expenses Incurred by Other Armed Forces During Rescue, 2 J. MAR. L. 682, 688 (1971).
72. 280 F.2d 319 (5th Cir. 1960).
73. Id. at 326, n. 15.
74. Id.
ing the extent of the complete award.⁷⁶

After Amoco Virginia it appears that the following conclusions may be
drawn concerning governmental claims for salvage:

1. The government will decide on a case-by-case basis if a claim for
salvage is to be put forth.
2. There is a statutory basis for such claims on behalf of the Air Force
and Navy.
3. Policy and tradition preclude the Coast Guard from making salvage
claims.
4. Claims are limited to the amount of expenses incurred.⁷⁷
5. There is not, per se, a pre-existing duty on the part of any government
military agency, including the Coast Guard, to render salvage services.

The standard of care to be applied in situations where the government
acts either as a rescuer or salvor is that which would be applied by a private
party in a like situation. In Frank v. United States,⁷⁸ the government was
held not liable when a passenger on a ship being towed by the Coast Guard
fell overboard and drowned. The court refused to hold the Coast Guard to
a higher standard solely because it was a public agency.⁷⁹ Further, the
court looking at 14 U.S.C. § 88(b) found that "[T]his legislation falls short of
creating a governmental duty of affirmative action owned to a person or
vessel in distress."⁸⁰

V. INDIVIDUAL CLAIMS

As illustrated above, the government may, and does, exercise its pre-
rogative to make salvage claims. These claims do not currently permit
awards to individuals, but this has not always been the case.

Le Tigre⁸¹ gives an example of an official going beyond his duty and
therefore being held entitled to a salvage claim. The court emphasized that
where the service performed is required by law no additional compensation
may be paid,⁸² but that going beyond this entitles one to a salvage award.
The court said:

[T]he general principle of law then may be, we have no doubt, that, if a
collector, or other revenue officer, intending to act in the line of his official
duty, but mistaking the law, and transcending his authority, is the meritorious cause
of saving property to the owner, he is not precluded, on account of the motive

⁷⁶ See The Kanawha, 254 F. 762 (2d Cir. 1918).
⁷⁷ United States Air Force, AFM 112-1 (C4) para. 11-8 (14 Oct. 1977) specifically limits
claims to operational costs where the Air Force is concerned. 32 C.F.R. §§ 752.1-754.3 (1979)
deals with the Navy and accomplishes the same result. It goes into detail as to rates and costs to
be used when necessary.
⁷⁸ 250 F.2d 178 (3d Cir. 1957).
⁷⁹ Id. at 179.
⁸⁰ Id. at 180.
⁸¹ 15 F. Cas. 404 (C.C.D.N.J. 1820) (No. 8,281).
⁸² Id. at 405.
which actuated him, from claiming salvage . . . . The owner, whose property has been preserved from destruction by the acts of a stranger, has no right to inquire into the motives which influenced his conduct, provided he acted legally. It is sufficient to entitle the salver to a just compensation, that a beneficial service has been rendered, by which the property has been rescued from imminent danger.  

This case seems to set out general guidelines for the claims of salvage by individuals in the government employ; the act must be beneficial and not within the scope of the employee's official duties.

A specific statute may provide the basis for the denial of a salvage award to individuals. Such was the case in The Lyman M. Law. The court although recognizing the valuable and effective services performed by the crew of a life saving station, denied them an award because existing statutes required them to function as life savers.

An award was permitted to employees, however, where a government-owned life saving station was operated by a private contractor. In Kittelsaa v. United States, a disabled and abandoned government vessel was salved by a government-owned tug operated under a contract from the government by a private towing company, and a salvage award was approved for the meritorious services of the crew of the tug. The court considered it significant that the tug had not been ordered out by the contractor, and that he had not advanced a claim.

The court was able to sweep away any pretense of an agency argument to preclude an award. Otherwise the claim would probably have been rejected, particularly since the contract the parties were operating under contemplated salvage.

The Lyman M. Law lost favor during the post World War I era. In Jacobson v. Panama Railroad Co., after reaffirming Rees, which held that common ownership was no bar to recovery by master and crew, the court said that "members of the crew had an independent right accorded them by law for compensation for salvage." This idea was reaffirmed in The Olochson where the court said:

Whether the tug be strictly a merchant vessel or a quasi public vessel, her crew are not, by reason of any agreement as to compensation or her character, debared a reward by way of salvage for the responsibility which the master assumed and efforts of himself and crew, which resulted in the saving of the cargo and of the vessel, in its damaged condition . . . . It has never been held

83. Id. at 407.
84. 122 F. 816 (D. Me. 1903).
85. Id. at 827. The court neglects to specify what statutes.
86. 75 F. Supp. 845 (E.D.N.Y. 1948).
87. Id. at 846.
88. Id.
89. 266 F. 344 (2d Cir. 1920).
90. Id. at 347.
that the crews of public vessels are not be be compensated in any case by way of salvage. 91

Cases arising during and after World War II began to scrutinize the issue of duty, particularly where the individual claimant was not attached to a ship. Two cases, Thornton v. The Livingston Roe 92 and Spivak v. United States, 93 examined the question of a non-crew member’s claim for salvage.

In The Livingston Roe, the libelant Thornton was a Commander in the Navy stationed at Recife, Brazil, during World War II. At this time Thornton was on the staff of the Commander, Fourth Fleet, at Recife. He was charged with the preservation of shore based care facilities in addition to his normal duties. Although not the salvage officer, he had on nine previous occasions conducted salvage operations successfully. In May, 1943, a fire broke out on the S.S. Livingston Roe, and Thornton was in charge throughout the entire firefighting operations. The situation was so grave that the entire port was endangered. For his efforts Thornton was decorated and promoted. 94 He also sued to recover an award in salvage.

The question of Thornton’s entitlement to salvage went to issue of duty. The court saw two co-existing rules of law: one permitting recovery, and the other precluding it. The performance of salvage service precludes recovery if the salvor is under a duty to the salvaged ship. However, naval personnel, not assigned to the endangered vessel, performing salvage under direction and control of their superiors, would not be so denied. 95 Thornton would seem to fit into this criterion.

The second rule, which ultimately precluded Thornton from recovery, dealt with the nebulous quality of "public duty." The court termed it the "public duty disqualification." 96 It is applicable even when there is no duty to a specific ship. The crux of the disqualification is the question "whether the operation for which salvage is claimed is one which the individual or group was expected to perform as a result of his or its public status." 97

The answer turns on the facts of any given case. In its analysis of the facts in The Livingston Roe, the court was particularly impressed by Thornton’s status as a member and high ranking officer of the military. This thrust upon him a duty and obligation to do whatever would be beneficial in the emergency; actions such as his were to be expected. 98

91. Falk v. United States Shipping Board Emergency Fleet Corp., 281 F. 694 (5th Cir. 1922).
93. 203 F.2d 881 (3d Cir. 1953).
94. 90 F. Supp at 344.
95. Id. at 345.
96. Id.
97. Id.
98. Id. at 346.
A similar case was decided a few years later where the employee was a civilian.\textsuperscript{99} In \textit{Spivak v. United States} the libelant was a civilian employee of the War Department stationed in Korea. His duty was that of Advisor (Korean Merchant Marine). A ship went aground and Spivak was sent to look into the matter.

Before the ship was refloated Spivak had left to return to his station. He filed a libel for salvage based on his actions at the wreck. The district court dismissed the libel, finding that Spivak had acted within the scope of his duties, and that his services were not voluntary.\textsuperscript{100} This was affirmed by the court of appeals. They examined Spivak's job, his employer and the fact that he was acting under proper orders, and concluded that he had a duty throughout this incident. The fact that he continued to draw a government salary was also a factor in the court's determination.\textsuperscript{101}

\textit{Spivak} and \textit{The Livingston Roe} demonstrated that an employee, whether military or civilian, has a difficult burden to overcome: the concept of a pre-existing duty based upon his status. In \textit{The Livingston Roe}, the actions of the libelant were insufficient to sustain an award, despite the magnitude of his efforts. There the efforts were expected from a person of his rank and position. \textit{Spivak} saw the establishment of a test whereby the operative question was whether the conduct was within the range of the claimant's duty.

A third case denying an award to a government employee was \textit{W.E. Rippon & Son v. United States}.\textsuperscript{102} There an Air Force employee whose duty it was to advise the Air Force on marine matters supervised the attempted salvage of a government vessel by libelant Rippon. An award was made to Rippon. In determining the value of such an award, the efforts of the civilian employee were considered for calculation purposes only.

Where the government may have a salvage claim but waives it, the crews may still sue in their own right, with permission. In \textit{Nolan v. A.H. Basse Rederi Aftieselskaten},\textsuperscript{103} an Army tug and Navy LST went to the aid of an abandoned ship fifty miles off shore.

The court rejected a public duty disqualification by using analysis from both \textit{The Livingston Roe} and \textit{Spivak}.\textsuperscript{104} In looking at the LST, the court concluded:

\begin{quote}
[There is no serious question but that her services, and consequently those of her personnel, were above and beyond those which they were expected to
\end{quote}

\textsuperscript{99.} 203 F.2d at 881. \\
\textsuperscript{100.} \textit{id.} at 882. \\
\textsuperscript{101.} \textit{id.} at 883. \\
\textsuperscript{102.} 348 F.2d 627 (2d Cir. 1965). \\
\textsuperscript{103.} 164 F. Supp. 774 (E.D. Pa. 1958). Ultimately the award to the tug was trebled as a result of their participation in putting out the fire on board the abandoned vessel. \\
\textsuperscript{104.} \textit{id.} at 776.
perform as a result of her and their public employment. There was no legal obligation . . . upon her as a naval vessel to go out of her course or to incur any risk in bringing an abandoned and burning derelict into port.\textsuperscript{105}

The Army tug was equipped with special fire fighting equipment, and this placed her in a different situation. Still, an award was upheld. The court looked to the situs of the activity and said: "If the Else Basse had caught fire while in the harbor or while berthed where Army installations might have been in danger, the tug claimants might well be disqualified, but I do not think that the tug's duties extended to a foreign ship 50 miles at sea . . . ."\textsuperscript{106}

The make-up of the respective crews, military on the Army tug and civilian on the Navy LST, was not a factor.\textsuperscript{107} The bottom line is that because of the situs and absence of threat to governmental operations (consider The Livingston Roe in this regard) both crews were found to be outside the scope of their public duty in effectuating salvage, and thus entitled to an award.

Although enlistment in the Coast Guard is a bar to recovery, membership in the Coast Guard Auxiliary is not such a bar.\textsuperscript{108} In Dominguez v. Schooner Brindicate, the voluntary actions of salvors who happened to be members of the Coast Guard Auxiliary qualified for a salvage award. Differentiating a member of the Auxiliary from a member of the Coast Guard, the court recognized strong public policy grounds for allowing such an award, saying:

It certainly would be contrary to good public policy, and to the wording of the Act of Congress, if members of the Coast Guard Auxiliary, by the mere fact of such membership, would be disentitled to claim a salvage award for services they voluntarily undertook and rendered when they were not acting as members of the Coast Guard by designation from competent Coast Guard authority.\textsuperscript{109}

\textsuperscript{105} Id.
\textsuperscript{106} Id. at 777.
\textsuperscript{107} Id. at 776, n. 1.
\textsuperscript{108} 204 F. Supp. 817 (D.P.R. 1962).
\textsuperscript{109} Id. at 818. The act of Congress referenced by the court is 14 U.S.C. § 831 (1956), which provides:

No member of the Auxiliary, solely by reason of such membership, shall be vested with, or exercise, any right, privilege, power, or duty vested in or imposed upon the personnel of the Coast Guard or the Reserve, except that any such member may, under applicable regulations, be assigned specific duties, which, after appropriate training and examination, he has been found competent to perform, to effectuate the purposes of the Auxiliary. No member of the Auxiliary shall be placed in charge of a motorboat, yacht, aircraft, or radio station assigned to Coast Guard duty unless he has been specifically designated by authority of the Commandant to perform such duty. Members of the Auxiliary, when assigned to specific duties as herein authorized shall, unless otherwise limited by the Commandant, be vested with the same power and authority, in the execution of such duties, as members of the regular Coast Guard assigned to similar duty. When any member of the Auxiliary is assigned to such duty he may, pursuant to regulations issued by the Secretary, be paid actual necessary traveling expenses, including a per diem al-
This decision can be easily reconciled with other cases involving employees of the government. As the statute shows, there is no connection with the Coast Guard absent a specific designation of such status. Once that status is conferred, but not before, the member becomes subject to the same standards as any other Coast Guard personnel. The applicable test then becomes Spivak. Until such time, the Auxiliary member acts as a private individual.

VI. MILITARY SALVAGE

*Talbot* was, in today's vernacular, a "prize" case. Military salvage is defined as having the same general rules as a civil salvage except that it involves an award for recapture of property taken by an enemy. The district court would be the prize court.

Given her long naval tradition, England led the way in formulating guidelines of military salvage. Early on, they recognized that civil salvage may be superadded to military salvage. In sustaining an award for civil salvage in the case of a prize vessel an English court said: "The captain of a man-o'-war is not bound to put himself or his men in danger to preserve a merchant vessel from sinking, and I do not know that he is bound to take her in tow." In that instance the question of whether the act was within the scope of duty was raised and answered in favor of the warship and her crew.

Times and the nature of war change. Prize cases were threatened with extinction during World War I because of the increase in submarine warfare. In some circles this was viewed as a loss of chivalry.

World War II initiated the view that bringing a disabled enemy vessel into port was an opportunity for salvage in the traditional sense. Prize courts were perceived as courts of equity with broad jurisdiction that paralleled traditional salvage courts. For example, when a Dutch ship was salved and, before an award could be paid, the country was occupied, the ship became a prize and the claim for salvage remained. In this case the

\hspace{1cm} form in conformity with standardized Government travel regulations in lieu of subsistence, while traveling and while on duty away from his home. No per diem shall be paid for any period during which quarters and subsistence in kind are furnished by the Government, and no per diem shall be paid for any period while such member is performing duty on a vessel.

110. See text accompanying notes 12-21 supra.


112. Id.


114. Id.

English court held that the right to salvage should be disallowed only where there is the clearest of reasons.\textsuperscript{116}

There are two major cases involving United States ships and wartime claims for salvage. One approximated a prize case,\textsuperscript{117} but the other was along more traditional salvage lines.\textsuperscript{118}

In \textit{The Odenwald}\textsuperscript{119} two American warships came upon a merchantman flying American colors but taking evasive action, prior to our entry into World War II. A boarding party was sent out in response to her request for assistance. Upon boarding the Odenwald, it was discovered that the crew had abandoned ship and were attempting to scuttle her. She was, in fact, a German motorship. Ultimately, the damage was repaired, and the ship was made seaworthy and convoyed into Puerto Rico. These efforts showed "great skill, resourcefulness and courage."\textsuperscript{1120} The government then filed a libel for salvage. The district court awarded more than $397,000\textsuperscript{121} and this amount was affirmed by the court of appeals.

As to the question of the propriety of an award to the government, the court, using concepts from \textit{The Impoco}, was concerned with the mission of the vessels involved and the risks taken. As salvage was not the mission of the vessels, considerable time had been lost from their primary mission, and great risks had been incurred, the court held that salvage was wholly appropriate.\textsuperscript{122} Because of the United States' neutrality with Germany at the time of the incident, it is unlikely that the government could have claimed the Odenwald as a prize. The penalty for flying a false flag was exclusion from American ports, not capture. Therefore, one author concluded, there was no alternative but to bring her into port as a salvaged vessel.\textsuperscript{123}

The second case, \textit{Kimes v. United States},\textsuperscript{124} involved the claim for salvage by the crew of a liberty ship for services rendered to a sister ship in the same convoy. The district court said that the libelants were entitled to an award of $10,000 but that there were set off costs such as wages,

\textsuperscript{116} France Fenwick Tyne Wear Co., Ltd. v. H.M. Procurator-General, 58 T.L.R. 368 (1940), 54 JURID. REV. 163 (1942).
\textsuperscript{117} Hamburg-American v. United States, 168 F.2d 47 (1st Cir. 1948) [hereinafter referred to as \textit{The Odenwald}].
\textsuperscript{118} Kimeš v. United States, 207 F.2d 60 (2d Cir. 1953).
\textsuperscript{119} 168 F.2d at 47.
\textsuperscript{120} 168 F.2d at 49.
\textsuperscript{121} \textit{Id.} at 52. This was broken down as follows:
\textsuperscript{122} \textit{Id.} at 55.
\textsuperscript{124} \textit{Kimes v. United States}, 207 F.2d 60 (2d Cir. 1953).
overtime, and bonuses which were paid during the operation. Since the
crew had already received remuneration in excess of the award, the libel
was dismissed.

On appeal, the court of appeals was concerned with the policy ques-
tion of the right of one warship to claim salvage for services rendered
another ship. They termed this wrong, but not so wrong as to preclude an
award, given traditional salvage concepts and the absence of prohibitory
legislation. Further, they found that the libelants did not fall under the
Spivak doctrine, since their efforts had been entirely voluntary. To this end
the court concluded: "We cannot therefore hold that, whatever their moral
obligation to render these services for the effective prosecution of an all-out
war effort libelants were under a legal duty to perform salvage work." The
court relied on Spivak, possibly because of the civilian nature of
the libelants' employ. The Livingston Roe, however, decided prior to Spi-
vak, appears to preclude such an award if the claimants are military. Thus,
military or civilian status seems to be the differentiating factor in cases of
wartime salvage.

VII. CONCLUSION

The question of when the government may claim salvage appears to
be well settled. By virtue of judicial and legislative decision, the right of the
Navy and the Air Force to salvage awards is well established. The appropri-
ateness of such claims is to be determined on a case-by-case basis by the
Secretary of the department involved. It appears that claims will not be
made absent extraordinary circumstances, and then only for the amount of
the costs incurred. This seems to ignore the traditional concepts of the
purpose of salvage, which was to reward past efforts in order to encourage
future efforts, and in its place substitute a services rendered quasi-contract.

The Coast Guard has no such statutory base. This lack of authority,
coupled with tradition, has precluded claims or awards on behalf of the
Coast Guard under either traditional salvage concepts or the quasi-contract
cost concept currently applicable to the Navy and Air Force. Such thinking
is clearly antiquated, as Amoco Virginia recognizes. Were the Coast Guard
to make a claim for costs in the event of a salvage operation the size of that
in Amoco Virginia, there appears no bar to its being awarded. If nothing
else, the rising costs of such operations dictate that the person who re-
cieves the benefit should bear the costs.

Individuals in government employ may receive an award for their ef-
forts where appropriate, and the test to be applied is that of Spivak. This is
an inquiry into whether the act came within the claimant's scope of duty. A

125. 207 F.2d at 62.
126. Id. at 63.
higher standard of duty is apt to be required of a military man than a civilian, because of the special circumstances of the military.

The question of wartime salvage claims is virtually moot, primarily because of the changing nature of war in the past sixty years. No longer do raiders cruise the seas looking for prizes by which to win glory and awards. The cold realities of both submarine warfare and airpower preclude the type of action which would once have given rise to such claims.
Loss and Damage From a Shipper's Standpoint: A Provocative Assessment of Key Factors Requiring Analysis in the Deregulation Arena

JOSEPH L. CAVINATO

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I. INTRODUCTION

Loss and damage, and the claims process ensuing from them, represent a large economic cost in the U.S. logistics system. The gross dollar

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amount of loss and damage events and the costs incurred to recover or minimize their effect is significant in the transportation network. Regulated for-hire motor and rail carriers alone, annually report over one billion dollars in net claims paid.¹ Not included in this figure are costs incurred by users (shipping and receiving parties) for claims processing, arbitration, lost value opportunity costs, claims not settled, and loss and damage not claimed at all.

Loss and damage obligations are defined by an intricate pattern of relationships between shippers, receivers and carriers as discussed below. The deregulation movement will no doubt affect this pattern. An analysis is needed concerning the possible regulatory changes, directly or indirectly bearing on the loss and damage area, so that they can be weighed within the overall perspective of the major thrusts of entry and rate policy changes being proposed. The effects of deregulation or reregulation in the carrier obligations and claims area are largely economic. The effects lend themselves to logical analysis and some quantifiable measurement.

The obligations and legal relationships surrounding rail and motor common carrier loss and damage occurrences stem from a framework of Congressional legislation, administrative rulemaking, institutional arrangements in the form of tariffs, and precedents (both judicial and commercial).² Loss and damage is a critical, highly visible and often identifiable cost to carriers, shippers, and receivers. It is a cost and a time factor that receives constant attention by all parties. Based upon the present structure of responsibilities and relationships, efforts to reduce its incidence and/or its cost of payout continue. The Association of American Railroads and The American Trucking Association study improved packaging and handling techniques and often publish the results in the form of "shipper's advisories." These efforts will continue despite the outcome of the regulation debate, but regulatory changes might cause the penalties and burdens of various responsibilities to shift from one party to the other. Many forms of liability limitation by carriers have been attempted throughout the past period of regulation.³ In a profit maximizing endeavor, it can be expected carriers would increase these efforts especially following the lifting of present regulations. An analysis from a shipper's point of view can be used to highlight some of the expected loss and damage practice changes that might arise in a deregulated environment.

². The primary requirements for these obligations and relationships are in the Interstate Commerce Act, 49 U.S.C. § 11707 (1978); and 49 C.F.R. § 1005 (1978).
³. See, e.g., Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage, 340 I.C.C. 515 (1972), also referred to as Ex Parte 263.
II. LOSS AND DAMAGE IN CARRIER SELECTION AND THE TOTAL COSTS OF TRANSPORTATION

Loss, damage and the promptness of claims settlement are cited as factors in shippers' mode and carrier selection decisions and are a major part of the total costs of transportation.4

A. LOSS AND DAMAGE AS A CARRIER SELECTION FACTOR

A review of the literature that attempts to capture shipper modal and carrier selection behavior substantiates loss and damage as a major shipping variable.5 Table 1 shows that loss and damage factors range from medium in importance (middle ranking) to fairly high in importance. The Stock and LaLonde study additionally presents the ranking of factors that might cause a firm to alter modal choice in the future.6 Unsatisfactory loss and damage experience ranked 8th out of 19 factors, indicating it could influence shippers to switch modes, a major investment and strategic undertaking.

B. ROLE OF LOSS AND DAMAGE IN TOTAL COSTS OF TRANSPORTATION

The total costs of transporting a firm's goods includes the most visible factors of freight charges, packaging, loading and unloading, and dunnage and bracing. Many peripheral, indirect, and overhead costs are built into the traffic function as well. The importance of these additional costs depends upon the firm’s loss and damage experience with carriers, and/or the freight-on-board (F.O.B.) or selling terms contracted with the other shipping party. For example, the size and related operational cost of a firm's traffic department will tend to be large, if it purchases goods on F.O.B. origin and sells them on F.O.B. destination bases.7 Other costs of loss and damage that are part of the total traffic management overhead are claims processing, settlement time costs, replacement goods movement, and related production and inventory costs. Table 2 lists and analyzes transportation cost factors which are affected by the incidence of loss and damage.8

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7. See K. Flood, supra at Chap. I.
8. See Cavinato, supra at Chap. II.
# TABLE 1

Research Indicating Loss and Damage Factors in Mode/Carrier Selection

<table>
<thead>
<tr>
<th>Researcher(s)</th>
<th>Factor</th>
<th>Basis of Measuring each Factor</th>
<th>Loss and Damage Factor Ranking with Other Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bardi&lt;sup&gt;7&lt;/sup&gt;</td>
<td>Frequency of Damage</td>
<td>Ranking of 21 transportation selection factors</td>
<td>3rd out of 21</td>
</tr>
<tr>
<td></td>
<td>Ease of claim settlement</td>
<td></td>
<td>4th out of 21</td>
</tr>
<tr>
<td>Flood&lt;sup&gt;8&lt;/sup&gt;</td>
<td>Loss and Damage Experience</td>
<td>Ranking of 17 transportation selection factors</td>
<td>8th out of 17</td>
</tr>
<tr>
<td></td>
<td>Promptness of claim settlement</td>
<td></td>
<td>12th out of 17</td>
</tr>
<tr>
<td>Jerman, Anderson and Constantin&lt;sup&gt;9&lt;/sup&gt;</td>
<td>Freight damage and damage experience</td>
<td>5 point scale (1 or “no importance”; 5 “extremely important”)</td>
<td>4.03 on scale of 5</td>
</tr>
<tr>
<td>Stock and LaLonde&lt;sup&gt;10&lt;/sup&gt;</td>
<td>Loss and/or damage history</td>
<td>Ranking of 23 transportation selection factors</td>
<td>6th out of 23</td>
</tr>
<tr>
<td></td>
<td>Prompt claim service</td>
<td></td>
<td>10th out of 23</td>
</tr>
</tbody>
</table>

9. See Bardi, supra.
TABLE 2
Shipping, Receiving and Transportation Factors in Relation to
Loss and Damage Costs—from Shipper’s Point of View

<table>
<thead>
<tr>
<th>Element of Transportation</th>
<th>Loss and Damage Related Cost within the Transportation Element</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Freight Rate</td>
<td>L&amp;D or carrier payout on claims reflected in the rate</td>
</tr>
<tr>
<td>2. Transit Time</td>
<td>Significant loss and damage factor with perishable goods and with others receiving special damages</td>
</tr>
<tr>
<td>3. Variability of Transit Time</td>
<td>Same</td>
</tr>
<tr>
<td>4. Equipment Availability</td>
<td>Affects dunnage and bracing expenses according to type of equipment used to reduce loss and damage during shipment</td>
</tr>
<tr>
<td>5. Equipment Condition</td>
<td>Affects dunnage and bracing expenses plus expenses of cleaning, patching and possibly disinfecting the equipment</td>
</tr>
<tr>
<td>6. Bracing and Dunnage</td>
<td>An inverse relationship (the greater amount used by shipper, the less occurrence of L&amp;D)</td>
</tr>
<tr>
<td>7. Packaging</td>
<td>An inverse relationship</td>
</tr>
<tr>
<td>8. Inspection by Consignee in Claim Process</td>
<td>Clerical costs, time in processing, photographs, etc.</td>
</tr>
<tr>
<td>9. Claim Settlement Time</td>
<td>Represents a lost opportunity cost on capital invested in the lost or damaged goods</td>
</tr>
<tr>
<td>10. Cooperage</td>
<td>Necessary for salvaging goods, cases, lot shipments</td>
</tr>
<tr>
<td>11. Claim Settlement</td>
<td>If paid in entirety, full cost loss is at minimum; if partial settlement paid, balance increases monetary impact on L&amp;D incident to shipper/receiver; if disallowed, monetary impact fully borne by shipper/receiver</td>
</tr>
<tr>
<td>12. Shipper/Receiver</td>
<td>An added cost to shipper/receiver that does not necessarily reduce the freight rate or L&amp;D experience, but does reduce claim settlement processing and time costs for the policy holder</td>
</tr>
<tr>
<td>Insurance Coverage</td>
<td></td>
</tr>
<tr>
<td>13. Replacement Goods</td>
<td>Presently a measure of damages covered in claim settlement if claim is allowed. If not, the extra cost of LTL (when original shipment may have been TL) is borne directly by shipper/receiver</td>
</tr>
<tr>
<td>Shipment</td>
<td>May have to ship via premium cost mode of transportation to maintain customer relations or product supply in production</td>
</tr>
<tr>
<td>14. Production and Inventory Costs</td>
<td>Many firms adjust inventories upward to provide a &quot;cushion&quot; in event of loss and damage to normal lot sizes or shipments. Research of three firms' distribution systems revealed L&amp;D was responsible for between 1% and 6.5% of extra upward purchase and manufactured product units that never were sold13</td>
</tr>
</tbody>
</table>

III. THE PROBLEM

The cost of loss and damage is shared by the shipper/receiver and the carrier. The burden of minimizing them or of placing their effects, however, can be shifted from one party to the other. Packaging and loading rules in carrier tariffs place much of the loss and damage prevention cost responsi-
bility onto the shipper.\textsuperscript{14} Carriers, on the other hand, are responsible for mishandling, etc.\textsuperscript{15}

If the responsibilities of current laws and regulations are lifted, carriers might seek new opportunities to limit this presently significant cost. The ways in which carrier loss and damage related cost minimization efforts could conceivably be attempted are discussed below. The effects of possible repeal, liberalization or altered loss and damage laws, and regulations should be analyzed and possibly quantified.

This article will examine and analyze present laws, regulations, institutional practices and decisions that pertain to transportation obligations and claims. Particular attention will be paid to those loss and damage areas and proposed practices which have been attempted and adjudicated in the past, and/or have come under regulation. It could be expected that such proposals, which are currently limited or not permitted, might come into use when regulations that prohibit or restrain their use are lifted. This article will provide a framework for an economic evaluation of this possibility.

The areas of investigation and analysis include, (1) Revised Interstate Commerce Act,\textsuperscript{16} (2) regulations in the Code of Federal Regulations,\textsuperscript{17} and (3) Interstate Commerce Commission Rulings.\textsuperscript{18} All may affect or allow greater freedom in carrier tariff provisions and practices.

\section*{IV. \hspace{1em} Analysis}

Potential areas for alteration of loss and damage obligations and practices by deregulation fall into four groups:

A. Extent of obligations and exposure to liability,
B. Measures of damages,
C. Means of settling claims, and
D. General loss and damage policies and practices.

\subsection*{A. EXTENT OF OBLIGATIONS AND EXPOSURE TO LIABILITY}

Several alternatives are possible in this realm.

1. Repeal of Revised Interstate Commerce Act (RICA) Sections Dealing with Loss and Damage: Section 11707 of the RICA states the explicit

\footnote{14. See packaging rules in Uniform Freight Classification Comm., Uniform Freight Classification; Nat'l Motor Freight Classification Comm., Nat'l Motor Freight Classification; Cavinto, supra Chap. II (for discussion).
16. 49 U.S.C. § 11707 (1978), also referred to as the Revised Interstate Commerce Act (RICA).
18. I.C.C. Reports and I.C.C. Motor Carrier Reports.}

powers Congress granted the ICC in dealing with loss and damage. This section requires that a receipt be given the shipper, that a liability be created by the receipt, that one is entitled to recovery, that liability limitations or exemptions are not allowed without ICC authorization, and that minimum time limit restrictions on claims filing be provided. Repeal of this section would revert control of the shipping transaction to state contract law which varies to some degree from state to state. This situation was the primary reason for originally enacting uniform claim legislation. Repeal of this section could further diminish the use of, or completely eliminate reliance upon, the provisions presently embodied in the bill of lading. The document, as a contract and a receipt from which claims arise, might conceivably lose its legal significance, thereby reducing the standing and protection now provided the shipper.

The provisions dealing with time limitations on claims and the call for inspections on concealed loss and damage that lead up to the Ex Parte 263 rulemaking proceeding in 1972 are an example of past carrier efforts of this type.

2. Repeal of RICA Sections That Affect Rules and Practices Concerning Packaging and Loading: A major area of concern to the shipping community is the rules dealing with packaging for shipment tendering. Sections 10701 and 10702 require that rules and practices be reasonable, section 10708 provides ICC authority to determine their lawfulness, and section 10704 allows the ICC to prescribe reasonable rules.

A requirement of extremely strong packaging favors carriers by unilaterally shifting a major cost of loss and damage prevention onto the shipper. Shippers now have the recourse of petitioning the ICC in a complaint or protest should a loading rule or tariff require unreasonably stringent packaging. Shipping firms might also have some ability to alter or prevent the use of such rules by alternative carrier selection, but this is not always feasible.

3. Repeal of the Claim Period Regulation, Section 11707(e): Currently, the RICA does not allow for any claim rule time limitation of less than nine months from the date of the cause of action. One effective means of liability limitation would be for carriers to shorten that period. This was attempted in the concealed loss and damage areas by the Association of American Railroads in 1970.\textsuperscript{19}

Though there is some merit to shortening the time period (due to freshness of memory, the exposure to subsequent damage, etc.), the alternative carrier limits could be made so short that concealed loss and damage discovery, the feasible filing of a claim, and the call for inspection would be impossible. Further, repeal of this time limit would no doubt cause a multi-

\textsuperscript{19} 340 I.C.C. 515 (1972).
tude of time limits being implemented in the field, thereby reducing the efficiency and uniformity called for by National Transportation Policy.\textsuperscript{20}

4. Repeal of Interline Obligations, Section 11707(a)(1): Congress specifically provided a party with damaged goods could file a claim against any of the line haul movement carriers. Repeal of this section could require an injured shipper/receiver to first determine which carrier is responsible for the loss and damage. The total costs of shipping would rise and shippers would send single line shipments only. Single line selection by a majority of shippers would lend impetus to mergers and carrier expansions, both of which would require separate analysis to determine their national effect. This situation might also cause firms to enter into private carriage commitments to alleviate liability problems and to protect customer service factors, rather than to minimize costs. Repealing the present interline claim system, which provides a seemingly insignificant remedy, would create additional administrative burdens and costs for shippers.

\section*{B. Measures of Damages}

Motor carrier loss and damage practices might also change with respect to the measure of damages.

. 1. Repeal or Administrative Relaxation of Section 10730, Rates and Liability Based on Value: The ICC has traditionally applied a basic set of guidelines in its decision process to determine whether a commodity's rates could be published under the released rate system. Because of past tendencies of carriers to avoid obligations and liabilities by seeking greater use of released value rates, this practice is limited by the requirement for ICC review and approval.

Carrier shifts in this area might take the form of: (1) a rate reduction on released rates not commensurate with the reduced liability, and/or (2) reduced liability on released rates with extremely high rates for full liability moves.

Given repeal of Section 10730, this would represent a fruitful profit maximization area for carriers. A major danger in the form of reduced carrier security and handling diligence arises with released rate liability. This was evidenced in the air cargo security proceedings before the U.S. Senate in the early 1970's.

General commodity motor carriers have recently offered a defense of the released rate system of extra charges for full coverage. Such charges would be subject to rate competition from alternative protection coverage by insurance firms, other carriers, and shippers' self insurance.\textsuperscript{21} Be that

\textsuperscript{20} Middle Atlantic Conference, Middle Atlantic Conference, Initial Statement, Proposed Rulemaking on Released Rates in Conjunction with a Small Shipments Tariff (1978).

\textsuperscript{21}
as it may, the simplicity of dealing with one firm (the carrier) for transportation and insurance, and the relatively low administrative cost of such full service, cause shippers at present to choose the more convenient alternative.

2. Repeal or Administrative Relaxation of Section 10730, Altered Measures of Damages: The application of the measures of damages might be altered to further limit dollar liabilities. Several means of settling released rate claims are possible.

The key components of released liability are (1) the dollar (or cents) amount stated, (2) the poundage basis for applying the dollars or cents, and (3) the unit(s) comprising the maximum liability limit per shipment. The third component can be a problem. The maximum liability limit, for example fifty cents per pound, might be applied against the weight of the entire shipment, the pallet load in which damage occurred, or the case or unit in which damage took place. At present, the ICC’s policy is to apply the released rate to the entire shipment. Thus, if a $100, ten-pound item carried at a released rate of fifty cents per pound in a shipment of 1,000 items is damaged, its loss is fully covered. If liability were calculated on the basis of each item, however, the shipper would only be protected to a maximum of five dollars. Without the Commission’s ability or willingness to apply a rule basing the maximum liability upon per shipment weight, carriers could retain the rate and pound basis but create more restrictive maximum liability unit bases.

3. Repeal or Administrative Relaxation of Section 10730, Wider Application of Released Rates in Certain Forms of Traffic: The ICC has allowed released value rates only on specific commodities. The Middle Atlantic Conference proposed a tariff with released rates in 1978 for small shipments regardless of the commodity. If allowed to go into effect, this precedent would open the way for carriers to broaden the use of released rates from specific commodities to traffic types (such as class rates, interline moves, residential deliveries, etc.) which would effectively reduce their liability exposure.

4. Repeal or Administrative Relaxation of Section 10701, The Use of a Claim ‘‘Tolerance:’’ Liability limitation could conceivably be applied in terms of allowances or tolerances for certain percentages of the shipment damaged or lost. One such landmark attempt was in Special Regulation, Eggs, whereby carriers sought to eliminate liability unless damages exceeded a specified percentage of the shipment.

5. Repeal or Administrative Relaxation of Section 10701, The Use of

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22. Id.

a Claim "Deductible." A further liability limitation might arise in the form of a claim deductible clause. With this approach, a deductible, similar to that found in automobile insurance policies, might be applied. Carriers would only be liable for loss in excess of the deductible amount.

Both the tolerance and deductible approaches would relieve carriers of a large number of claims, and could conceivably lead to a relaxation of their effective cargo handling and security practices. Furthermore, once this principle of rate and liability application is accepted, slight adjustments in the tolerance or deductibles could be made, thereby impacting total shipping costs (with possibly large increases). The use of these liability approaches would make the determination of full transportation costs more complex.

6. Changed Interpretation of Damaged Value of Replacement Goods and Shipments: Current claim settlement conventions provide for the damaged party to be made "whole." As the conventions are applied, a truckload shipper experiencing a loss of a small number of units can claim a replacement cost for those units based on the higher LTL rate since the LTL rate will be charged to ship the replacement units. If conventions are narrowly interpreted under relaxed standards, carriers might only settle at the unit TL rate originally paid.

7. Changed Interpretation of Damaged Value, Special Damages: Carriers are often held liable for special damages in actual or constructive notice situations. Current practice holds a carrier liable, when appropriate, for the difference between market values on the date and in the condition of actual arrival, and on the date and in the condition of arranged or normal transit time arrival. Possible carrier reactions to a relaxed regulatory environment in this situation might include decreasing special damages as a matter of policy, or increasing the transit time from a reasonable dispatch time to the worst transit time experienced to date.

8. Stringent Application of Concealed Loss and Damage Settlement Practices: The Ex Parte 263 proceedings were originally conducted in response to the Association of American Railroads proposed rule which would limit carrier liability to 50% of the net monetary loss in concealed loss and damage situations. While this rule would reduce the costs of claims settlement and litigation, the rationale for such a practice may not be placing actual responsibility on the party causing the economic loss.

C. MEANS OF SETTLING CLAIMS

The manner in which carriers settle loss and damage claims is generally covered in "Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims."}

1. Repeal of Section 10704 (ICC Power to Prescribe Reasonable Rules) or Administrative Relaxation or Revocation of Ex Parte 263: Part 1005 of 49 C.F.R. provides a uniform loss and damage claim disposition process for use by all regulated carriers. By providing for, (1) an acknowledgement of each claim, (2) a statement of remaining filing needs, (3) prompt investigation, and (4) prompt settlement or notification of outstanding claims, the process reduces the number of methods previously employed by the industry. Thus, while indirectly enforcing a time limit on settling claims, it tends to reduce some of the indirect costs of shippers' claims.

This regulation attempted to remove many of the technical bases for avoiding claim settlement while providing for some objectivity in settlement. The claim acknowledgement and statement of any remaining documentation required reduces claim avoidance through confirmation of the claim filing within the required time limits, and by reducing the ability to delay settlement of incomplete claims that would otherwise require constant claimant followup. Objectivity in the claim process is enhanced by the requirement to investigate each claim. This reduces indiscriminate claims by shippers and fosters corrective actions by both parties. Without the requirements set for in Ex Parte 263, many of the previously existing practices that were rectified or reduced by it would no doubt return.

2. Changed Form of Settlement: Carriers now settle claims by actual payment to the claiming party. Without restriction, a carrier could conceivably issue only a credit to be applied against future shipment freight invoices. This is a practice used widely in the retail sector, and it would be used in transportation if section 11707 of The Revised Interstate Commerce Act otherwise prohibiting it were repealed. The credit approach would bind the shipper to the carrier for future carrier selection decisions in a way that would tend to be anticompetitive in nature.

D. GENERAL LOSS AND DAMAGE POLICIES AND PRACTICES

Rate bureaus and the tariff publishing requirement are two regulatory elements presently in force that affect the loss and damage area.

1. Repeal of Section 10706, Antitrust Immunity of Rate Bureaus: Rate bureaus function primarily as collective rate making forums, but they also act on non-rate matters as well. Rate bureaus act as a forum for discussion to assure some uniformity in creating loss and damage related tariff rules and shipping practices (packaging, etc.). Without such immunity, carriers might tend to develop divergent loss and damage related rules, thereby further complicating the overall shipping process.

26. Id.
2. Repeal of Section 10761 and 10762, Tariff Publishing Requirement: Abolishment of tariff publishing and filing requirements has been mentioned in the current deregulation atmosphere. In the event of the repeal of the Reed Bulwinkle Act, the ICC would probably be forced to request the repeal of tariff filing requirements due to its practical inability to maintain such a tariff library. Without filed tariffs, each carrier would utilize, at most, an internal rate book which could be changed at will, or which could possibly contain different rates and loss and damage rules for different shippers or classes of shippers. This situation is beginning to appear in the deregulated air freight industry.

When the rules and practices must be published as tariffs, shippers may depend on the application of specific rules to future shipments. Without published loss and damage rules, the complexity of shipping would greatly increase, and shippers might tend to use fewer carriers due to the need to reduce the interfacing of variable operating practices of each carrier. Thus, inconsistent loss and damage practices might become a factor in decreasing the competitive choice now available to shippers.

V. Conclusions

The existing framework of legal responsibilities and relationships surrounding transportation loss and damage has evolved from a number of direct and indirect provisions. Common law, court decisions, Interstate Commerce Act provisions, as well as administrative regulations affect loss and damage events and shipping practices. Deregulation or reregulation will no doubt entail the modification or repeal of legal principles upon which the existing loss and damage legal framework is directly or indirectly based.

This loss and damage framework defines and maintains one major cost factor used by shippers to make distribution system design, modal and carrier selection choices. Loss and damage responsibilities may presently be perceived as minor cost factors, but when these responsibilities are easily alterable, they might cause major impacts. The current framework of loss and damage relations now provides a relatively stable, consistent, analytical medium for a shipper’s total transportation costs analysis.

The debate in the collective rate making area may have a profound effect upon loss and damage as well. The push for a totally competitive pricing system, without collective rate making immunity, but with individually created loss and damage rules by each carrier, may comport with the economic competitive model promising lower rates. However, that model also requires that individuals have full knowledge of all buying/selling elements. Determination of all carriers’ rates and loss and damage factors might not be possible nor economically feasible for even large shippers. Furthermore, a carrier “competitive” from a rate standpoint might not be so
when total costs, especially individual loss and damage regulations, are considered, provided it is possible to consider them at all! Thus, competitive individual pricing and full knowledge (of full costs) might not be attainable, but instead they might be inversely related to each other.

The essential point is that regardless of what regulatory changes are made, they should be done so on rational and practical grounds after all direct and indirect factors and impacts are carefully evaluated. Loss and damage, often incorrectly perceived as a minor transportation factor, warrants such an analysis.
Note

The Maryland Petroleum Divestiture Statute

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I. INTRODUCTION

Because of the constant threat of energy shortages\(^1\) it becomes important to consider what is the role of the federal government and what is the role of state government in preparing for a petroleum shortage? A recent United States Supreme Court decision may have partially answered this important question.\(^2\) In Exxon Corp. v. Governor of Maryland\(^3\) the United States Supreme Court, in a seven to one decision, declared constitutional an innovative Maryland statute\(^4\) that steps on the toes of big oil companies.\(^5\) The Maryland statute (1) prohibits a producer or refiner of petroleum products from operating retail service stations within Maryland, (2) requires producers and refiners to offer all "voluntary allowances," defined by the Court as temporary price reductions granted to independent dealers injured by local competitive price reductions\(^6\) uniformly to all stations they supply,

2. E.g., an estimate of costs to the United States of increases in world oil prices is a 2 million
   person increase in unemployment and a 60 billion dollar loss in gross national production in 1976
5. Or "lopes off the toes," to employ the "dismemberment" analogy used by Stark Ritchie,
   forceful general counsel for the American Petroleum Institute. Ritchie, Petroleum Dismemberment,
and (3) requires producers and refiners to distribute gasoline equitably during periods of shortage.\(^7\)

This note will outline the Exxon v. Governor of Maryland\(^8\) decision, including the arguments that were dropped at the appellate level,\(^9\) and analyze the impact the decision may have on our system of federalism, on petroleum industry practices, and on transportation in the future.\(^10\) Many of the tentative corporate decisions in the oil industry\(^11\) and possible changes affecting consumers\(^12\) that have emanated from the Exxon decision will be

7. The relevant provisions of the statute are as follows:
   
   (b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.
   
   (c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.
   
   (d) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
   
   (f) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.
   
   (g) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.
   
   (h) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon these facts. Md. ANN. CODE art. 56, § 157E (Supp. 1979).

9. Id. at 122 n.5.
10. The case could have a two pronged effect on transportation. On a realistic level, if the case impacts on the price of gasoline, that in turn could affect the use of gasoline-powered vehicles. On a theoretical level, if state legislation could cut back retail ownership, could it not also cut back transportation ownership (i.e., trucks, oil and gas pipelines, inland barges and supertankers)? For an excellent review of federal legislation on oil company ownership of pipelines see Hart, Antitrust Aspects of Oil Company Ownership of Deepwater Ports, 10 Transp. L.J. 67 (1978).
11. E.g., three refiners that marketed in Maryland solely through company-operated stations stated they may elect to withdraw totally from the Maryland market because of the statute. These refiners are Ashland Oil Company, Commonwealth Oil Refining Company (and its subsidiary Petroleum Marketing Corporation), and Continental Oil Company (and its subsidiary Kayo Oil Company). Exxon, 437 U.S. 117, at 122, 123 (1978).
12. E.g., the Maryland statute may indirectly change the price of gasoline. It remains to be seen if that change in the price of gasoline would, in turn, effect consumer consumption patterns. M. Willrich, Administration of Energy Shortages 120 (1976).
addressed briefly.

II. BACKGROUND

During the 1973 energy shortage, demand for petroleum increased, available supplies of petroleum diminished precipitously, and crude oil prices escalated.\(^\text{13}\) Maryland had just adopted antitrust legislation in 1972.\(^\text{14}\) It was admitted by the state that the retail petroleum market in Maryland was highly competitive.\(^\text{15}\) However, the total number of retail service stations in Maryland declined through the period 1972-1975, and a number of independent dealer-operated stations were converted to company-operated stations.\(^\text{16}\) The governor’s office received many complaints about inequitable distribution of gasoline among retail stations.\(^\text{17}\) No crude oil was produced or refined into motor fuel in Maryland in 1973, nor is any today.\(^\text{18}\) These facts contributed to the economic milieu which had an important influence on the legislative history of the Act.

On June 13, 1973, the Governor requested the Comptroller of the Treasury to conduct a study of gasoline retailing in Maryland. The study was to determine whether the shortage was genuine or artificially invented, and whether company owned and operated service stations were receiving disproportionately larger allocations of gasoline than other types of service stations. On June 29, 1973, the Gasoline Tax Division of the Comptroller’s Office sent out a survey, prepared in part by people who had previously been employed in the industry, to all registered gasoline service station dealers in Maryland. A total of 34.7% responded, some only in part.\(^\text{19}\)


\(^{15}\) Brief for Appellees at 9, Exxon. As of July 1, 1974, there were approximately 3800 retail service stations in Maryland, 5% of which were “company-operated” defined in Exxon as “a retail service station operated directly by employees of a refiner of petroleum products (or a subsidiary).” Exxon, 437 U.S. at 121 (1978). This is generally a microcosm of the nationwide picture. *E.g.*, as of Dec. 31, 1973, approximately 4% of Exxon’s 25,00 branded stations were company-operated nationwide.

\(^{16}\) Brief for Appellees, at 9, Exxon. For proof of a similar national picture, S. Rep. No. 95-731, 95th Cong., 2d Sess. 89 (1978). *Cf.* the oil companies said that the number of company-operated stations declined in Maryland and nationally. Court of Appeals of Maryland Brief at 7, but made no mention of the issue in their United States Supreme Court Brief.

\(^{17}\) Gov. of Md. v. Exxon, 279 Md. 410, 420, 370 A.2d 1102, 1108 (1977).


\(^{19}\) Brief for Appelles, Governor of Maryland, at 11.
Information in these responses and information gained from field investigations and telephone calls from service station dealers was summarized for the Governor. This summary was later presented to both Senate and House Committees which were considering the bill.

According to the summary, company operated stations were "either unrestricted in their purchases or were allocated 100% of their needs while both branded and unbranded independents experienced 'the greatest difficulty in obtaining gasoline' and 'the greatest cost per gallon increase.'"

On July 17, 1973, a questionnaire was also sent to twenty major oil companies operating in Maryland asking about allocation formulas, plans for the future, company activity in the past regarding closings of certain type stations, and the like. Nine companies responded, and their responses were also summarized and sent to the Governor.

After several discussions with the Governor, the Comptroller forwarded proposed legislation. Bills identical to the proposed legislation were introduced, and full hearings were held before both houses of the General Assembly. Representatives of the major oil companies as well as proponents of the bill appeared at these hearings. The legislature amended the bills by (1) deleting "'wholesalers'" from the ambit of the Act, (2) permitting the Comptroller to adopt rules and regulations defining circumstances in which a producer or refiner might temporarily operate a station, and (3) permitting the Comptroller to grant reasonable individual exceptions to the divestiture dates in the Act. The bills were then passed.

On May 29, 1974, the Governor held a special veto hearing at which, again, proponents and opponents testified. Thereafter the House bill was
vetoed and the Senate bill was signed into law.28

An observer may have wondered at the time if this law was a true solution to a bad problem or a reaction to public frustration with the big oil companies.29 Oil is big business. For instance, when viewed in terms of total sales, four of the top ten, eight of the top twenty-five, and twelve of the top fifty companies in the United States are major oil companies. When viewed in terms of assets, net income, stockholders' equity and total profits, the major oil companies rate even higher.30 Public opinion can move a legislature to act.31 Justice Holmes once philosophized, "Subject to compensation when compensation is due, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."32

Economist, I. Stelzer, senses that the force of public opinion is against the oil industry now.33 Considering just a few of the assumptions that have bred this antagonism, it might appear the companies have been victimized to some extent.34 However, a brief review of the structure and history of the oil industry is necessary in order to form some valid conclusions.

According to the classification system of Professor Bain, the petroleum industry is no more than a "low grade oligopoly."35 An oligopolistic industry or market is one containing a small number of large sellers supplying a large part of the output.36 These sellers "assertedly are protected by high barriers to entry and are connected by a multitude of interrelationships, consortia, joint production operations, joint pipeline ventures, exchange pipe-

30. Competition in the Oil Industry at 113.
33. "If it is felt that the system of income distribution in the country is somehow inappropriate, no one is going to trust the market to distribute available supplies of anything. Gasoline is a good example." Stelzer, An Economists View of Trends in Government Regulation, 31 BUS. LAWYER 831, 833 (1976).
34. E.g., Exxon stockholder's average annual rate of return during the period of 1953-1972 was 11.6%. During the period of 1960-1972 it was 10.7%. See Vertical Integration in the Oil Industry (E. Mitchel ed. 1976) [hereinafter cited as Vertical Integration]. Bureau of Census figures showed 40% of U.S. manufacturing industries are more concentrated than oil refining. Tell, Attacks on the Petroleum Industry: A Rebuttal, 20 ROCKY MTN. MINERAL L. INST. 94 (1975).
36. Id. at 124.
line agreements, et cetera."\textsuperscript{37} Posner has said "oligopolistic industries exhibit an inherent collusion phenomena which is called mutual inter-depency or conscious parallelism."\textsuperscript{38}

Collusive or not, all transactions in the industry can be divided into three groups: 1) horizontal transactions which take place between firms in actual competition with each other; 2) vertical transactions which constitute arrangements between suppliers and customers; and 3) 'conglomerate' transactions which include all other transactions.\textsuperscript{39}

Vertical integration takes place when the participants in a typical vertical transaction are merged under one company or contractually linked in a special way. In the oil industry, one large company, for instance, may be a producer, refiner, transporter\textsuperscript{40} and marketer.\textsuperscript{41} The process of a big company integrating even further (e.g., from wholesale marketing to operating retail gas stations with its own employees) is called forward vertical integration. Logically, then, if a retailer decides to purchase a refinery, this would be called backward vertical integration.\textsuperscript{42}

Vertical integration can be accomplished by outright ownership (i.e., stock or asset acquisition) or by contractual devices (i.e., requirement, output, franchise, exclusive dealing, real estate lease, or agency contracts).\textsuperscript{43}

One viewpoint holds that vertical integration is only a harmless, common sense way to reduce costs and increase efficiency, and that, for example, fixing one's own car or doing one's own painting is vertical integration.\textsuperscript{44} The United States Supreme Court has not recognized vertical systems as illegal per se. The Court has instead looked at the purpose of the initial integration or the power actually created.\textsuperscript{45} However, vertical integration in the oil industry has always been viewed as suspect.\textsuperscript{46} In 1949 Justice Douglas foresaw the advancement of large companies into the retail

\textsuperscript{37} Kestenbaum, Energy, supra note 29, at 371.
\textsuperscript{39} VERTICAL INTEGRATION, supra note 34, at 5.
\textsuperscript{40} E.g., one study showed very little pipeline is owned by firms with no interest in production, refining or marketing. See VERTICAL INTEGRATION, supra note 34, at 152.
\textsuperscript{42} VERTICAL INTEGRATION, supra note 34, at 129.
\textsuperscript{43} Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L.J. 1 (1959). For a long list of reasons corporations may wish to integrate vertically see id. at 2-14.
\textsuperscript{44} VERTICAL INTEGRATION, supra note 34, at 6.
\textsuperscript{46} E.g., FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968); Hearings Before the Temporary National Economic Committee, 76th Cong., 2d & 3d Sess., Parts 14-17A (1949-1950). The Supreme Court has said in dicta that elimination of retail service station dealers through forward vertical integration may be an "evil" requiring legislative action. FTC v. Sun Oil Co., 371 U.S. 508, 528 (1963).
market. He described this vertical movement as a "tragic loss to the nation."\(^47\)

While the first service stations were owned and operated by dealers, refiners were not happy with the service provided. In 1913 Atlantic Refinery first experimented with its own outlets. The system spread by the mid 1920's, then phased out in the mid 1930's\(^48\) for a variety of reasons.\(^49\) Company operated outlets were then replaced by franchises, although many companies continued to operate a few service stations for training and experimentation.\(^50\)

However, progress can often proceed only so far on ideas, and then a monetary stimulus is needed to take it further. The awesome financial capability of a huge oil company can be an asset in more ways than one. It is difficult for a dealer to open a gasoline station in a state where his brand of gasoline has not been sold before,\(^51\) or to finance new tanks, pumps and lines when this is required because of emissions standards calling for non-leaded gas,\(^52\) whereas a major oil company can absorb these types of costs with ease.

In conclusion, vertical integration is not patently iniquitous, but it must always be judged by how it is functioning in context. This article's judgment of the Maryland statute (and, reflectively, divestiture and vertical integration of the oil industry) will therefore be considered on two levels: state and national. It has already been stated that there was evidence in Maryland of some inequitable distribution. Nationally, too, it seems, there has been similar evidence.\(^53\)

An argument could be made that the oil companies should have the freedom to supply whichever gas stations they choose—to be able simply

\(^{47}\) Standard Oil Co. v. United States, 337 U.S. 293 (1949) (dissenting) at 321.

\(^{48}\) VERTICAL INTEGRATION, supra note 34, at 127.

\(^{49}\) E.g., (1) dealers could not unionize; (2) avoidance of federal social security and minimum wage and hour legislation, state unemployment insurance and workmen's compensation; (3) as independent businessmen, dealers of same supplier could not combine their buying power to obtain any volume-buying advantage without violating the Sherman Act. Gasoline Marketing and the Robinson-Patman Act, 82 YALE L.J. 706, 715 n.58 (1973) referring to FTC brief for FTC v. Sun Oil, 371 U.S. 505 (1963). Likewise, the Federal Trade Commission frowns on a discount given to a group of dealers who form a cooperative to purchase a warehouse. Beringer, The Validity of Discounts Granted to Dual Function Buyers Under the Robinson-Patman Act, 31 BUS. LAWYER, 783, 797 (1976).

\(^{50}\) VERTICAL INTEGRATION, supra note 34, at 128.

\(^{51}\) Brief for Appellants at 13, Exxon 437 U.S. 117 (1978).

\(^{52}\) VERTICAL INTEGRATION, supra note 34, at 132.

\(^{53}\) NEWSWEEK, Feb. 11, 1974 at 71. See FTC Complaint TRADE REG. REP. (CCH) ¶ 1120,527. E.g., in Romaco, Inc. v. Crown Petroleum Corp., [1973-2] Trade Cases, ¶ 1174,694 (M.D. Ala. 1973) an independent marketer alleged horizontal conspiracy among its suppliers to cut off its supplies. The court found that such action was natural and acceptable in view of the then-current shortage and the defendants' need to supply their contractual customers on a priority basis.
to refuse to deal with some stations. U.S. v. Colgate settled the argument long ago. A business can refuse to deal unless that refusal is designed to create or maintain a monopoly, to form a combination, or is in actuality, a conspiracy which is in restraint of trade. To conclude that a refusal to deal is illegal, it has traditionally been deemed necessary (at least prior to the recent interpretation of the Federal Trade Commission Act) to demonstrate refusal because of collusion of two or more firms in violation of Section 1 of the Sherman Act. This is virtually impossible to demonstrate; moreover, compulsory dealing is more of an indirect, short term remedy. 

An argument at the other end of the spectrum is that there exists proof of wrongdoing; thus divestiture of the oil companies is necessary to prevent further wrongdoing. Divestiture is not a new concept. It has been utilized by both the legislature and the Federal Trade Commission and is an accepted component of antitrust artillery. The Federal Trade Commission is powerful and can order divestiture for anticompetitive practices. Nevertheless, the validity of any remedy chosen by the Federal Trade Commission is subject to Supreme Court review, and a recent Federal Trade

54. 250 U.S. 300 (1919).
55. Id. at 307.
57. 15 USC § 1 et. seq. (1976).
59. See generally F. Allvine & J. Patterson, HIGHWAY ROBBERY; AN ANALYSIS OF THE GASOLINE CRISIS (1974). (Professor Patterson was the state’s only expert witness in Gov. of Md. v. Exxon, 279 Md. 410, 370 A.2d 1102 (1977)).
63. Interestingly, the only divestiture in the oil industry was Standard Oil of N.J., 221 U.S. 1 (1911) resulted in many of the severed companies becoming fully integrated oil companies and by the 1930s eight of them were among the twenty largest oil companies in the United States. VERTICAL INTEGRATION, supra note 34, at 191.
66. The Supreme Court’s test is whether the remedy that the FTC has selected has a reasonable relation to the unlawful practices found to exist. It has been expressed in at least one law review article that this reasonable relation test may, in fact, be a necessary relation test. “The
Commission complaint against the big oil companies met with abysmal failure.\(^6\)

Despite its vast power, Congress’ sporadic lurches toward divestiture of the large oil companies and economic regulation of the petroleum industry\(^6\) have failed so far. As of January 19, 1980, Congress’ reaction to President Carter’s suggestion of imposing a “windfall oil profits tax” is still being negotiated.

According to Senator McIntyre, testifying at a Senate hearing regarding six of the more than ten petroleum divestiture proposals defeated in 1976, marketing divorcement bills aimed at the petroleum industry were first introduced in the Seventy-fifth Congress in 1927. However, World War II and the Mother Hubbard antitrust case brought by the Justice Department seemed to sap the urgency from divestiture efforts for years after this first failure.\(^8\)

Testimonial recording was as far as any of the 1976 bills proceeded except for S2387.\(^7\) Although S2387 did die, it has been resurrected in the form of an identical bill recently sponsored by Senator Bayh.\(^7\) Even if this new bill passes (which is not likely), the logistics of divestiture might make its practical effective date sometime far in the future.\(^2\)

The Maryland statute chose an effective date for its divestiture section that brought immediate legal challenge to the entire statute by major

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6. See FTC Docket of Complaints 24, 474, No. 8934 (February 7, 1977). The FTC staff investigated for over three years and had to analyze several million documents and had to depose 500-700 industry officials.

7. E.g., Hearings on Consumer Energy Act of 1974, 93rd Cong., 2d Sess. 1357 (1975). (This Act, which was not passed, would have made oil and gas companies almost like public utilities). See Kestenbaum, Energy, ANTITRUST L.J. 373 (1974).


10. S. 82, 97th Cong., 2d Sess. (1979). A major operator would be allowed to engage in only one sector of the industry, or it would be allowed to split itself into smaller integrated units each falling under the size limits set by the bill. (Only largest producers, refiners and marketers would be affected). However, all petroleum transportation and pipeline companies would be subject to divestiture. Significantly, major marketers would be permitted to retain or acquire refining interests.


national oil companies involved in direct retailing in Maryland.\textsuperscript{74} The oil companies sought a declaratory judgment that the Maryland statute was unconstitutional, and requested injunctive relief prohibiting enforcement.\textsuperscript{75} Essentially, the oil companies won at trial level,\textsuperscript{76} but lost before both the Court of Appeals of Maryland\textsuperscript{77} and the United States Supreme Court.\textsuperscript{78}

III. Issues in the Trial, Appellate and Supreme Court Levels of Exxon v. Governor of Maryland

A. Due Process

It is interesting to note that although the trial court opinion rested almost entirely on the oil companies' substantive due process claim, only Continental Oil and its subsidiary pursued the due process claim before the United State Supreme Court, which dismissed the claim in a single paragraph.\textsuperscript{79}

The reason for this seeming contradiction is that prior to Exxon, the Court of Appeals of Maryland had generally applied the old United States Supreme Court standard of review,\textsuperscript{80} which requires that the Court uphold the challenged statute only if it believes the statute bears a "real and substantial relationship between its object and the means employed to attain that object."

\textsuperscript{81} The Maryland Court of Appeals in Exxon chose to set aside the old standard and shift to the current Supreme Court standard—the statute should be upheld if it bears a rational relationship to a legitimate state goal.\textsuperscript{82} In fact, both the Maryland appellate court and the Supreme Court

\textsuperscript{74} In a consolidated action in the Circuit Court for Anne Arundel County the plaintiffs were Exxon Corporation, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Ashland Oil, Inc., Continental Oil Company, and its subsidiary Kayo Oil Company, and Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation. Defendants were the Governor of Maryland, the Attorney General of Maryland, and the Comptroller of the Treasury of Maryland. Exxon Corp. v. Mandel, No. 22,066 (Anne Arundel County Cir. Ct. filed initially by Exxon Corp. June 17, 1974).

\textsuperscript{75} Gov. of Md. v. Exxon, 279 Md. 410, 416, 370 A.2d 1102, 1107 (1977).


\textsuperscript{77} Gov. of Md. v. Exxon, 279 Md. 410, 456, 370 A.2d 1102, 1127 (1977).

\textsuperscript{78} Id. at 124.

\textsuperscript{79} Exxon, 437 U.S. 117, 124.


\textsuperscript{82} E.g., Nebbia v. N.Y., 291 U.S. 502, 537 (1934); Olsen v. Nebraska, 313 U.S. 236, 246
quoted from Ferguson v. Skrupa to the effect that the judiciary is not empowered to "sit as a super legislature to weigh the wisdom of legislation," \(^{83}\) which almost seems to mock the old standard.

Continental Oil was represented by Wibur Preston, Jr., who specifies in a laudable article on due process that:

The appeal to the Supreme Court on substantive due process grounds was based on the appellant's argument that paragraph (c) relating to existing company-operated stations bore no rational relationship to the objective of preserving competition by assuring the continued existence of independent retail service station dealers. This appellant expressly disavowed any intention of requesting the Court to adjudicate the wisdom of paragraph (c) or deciding whether it served the public interest.\(^{84}\)

Therefore, it would seem the economic substantive due process approach that was in vogue from 1900 to 1936 is, as Justice Marshall recently said, "moribund." \(^{85}\) There are commentators who will say we should\(^{86}\) or we are\(^{87}\) returning to it. However, a constitutional law hornbook says of Exxon that it demonstrated that "a majority of the justices remain firmly committed to the use of the traditional rational basis test in cases that do not involve fundamental rights of suspect classifications." \(^{88}\) Professor D.E. Engdahl, a scholar in the federalism area of constitutional law,\(^{89}\) is quick to point out that substantive due process is still alive and well in other than economic or

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\(^{83}\) Ferguson v. Skrupa, 372 U.S. 726, 731 (1963). Justice Douglas, the source of this quote, has also said, "When the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the Court of revision which was rejected by the Constitutional Convention." \(^{84}\) Flast v. Cohen, 392 U.S. 83, 107 (1968) (Douglas, J., concurring). Judge Eldridge may have said the Maryland situation demanded even more restraint, "especially where reviewing legislation dealing with a serious problem in a new and untried fashion, the courts are under a special duty to respect the legislative judgment as to proper means of solving the problem." \(^{85}\) Gov. of Md. v. Exxon, 279 Md. 410, 428, 370 A.2d 1102, 1112 (1977).

\(^{86}\) Limitation, supra note 81, at 39.


\(^{88}\) E.g., Note, Federal Antitrust Policy State Anticompetitive Regulation, 1975 Utah L. Rev. at 79. One commentator has said regarding Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), "It now appears that the Court would sustain not only legislation for which a basis could be assumed, but also that which is expressive of a policy offensive to the public welfare." \(^{89}\) Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 N.W.U.L. Rev. 1 at 13 (1958).


\(^{89}\) D. Engdahl, Constitutional Law (Nutshell Series, 1974).
commercial spheres. Professor Engdahl does not consider Exxon a landmark case, only a strong illustration of the trend toward a generally more sympathetic tone on the Burger court for state regulation.90

B. Commerce Clause

The disposition towards less interference with state regulation has not been constant,91 however. An example of inconstancy is Raymond Motor Transportation v. Rice,92 analyzed in a previous issue of the Transportation Law Journal.93 Professor Engdahl notes that Raymond, decided only a short while before Exxon (but dealing with a state statute on safety rather than economics), seems to employ a three part test to determine whether a state statute violates the commerce clause:

1. if the statute does not safeguard an obvious and legitimate state interest;
2. if the statute discriminates against or unduly burdens interstate commerce
3. if the objective is sufficient to outweigh its impact on interstate commerce.94

Exxon's majority, on the other hand, seems to apply directly only the first two parts of the test.95 Mr. Justice Blackmun (who partially concurred but dissented from the Court's interpretation of the scope of the Commerce Clause) brought up two tests that have been used frequently in the past—the 'practical effect'96 test and the 'less onerous alternatives'97 test. The core of Mr. Justice Blackmun's dissent was: "The effect is to protect interstate retail service station dealers from the competition of the out-of-state

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94. Raymond Motor Transp. Inc., v. Rice, 434 U.S. 429 (1978), following Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) and in keeping with the "balancing" approach of Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) and Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 186 (1950); (Professor Engdahl notes that this third part is close to, but significantly different from, the "is this the right way to promote that objective?" question that can no longer be asked in economic substantive due process—Conversation with Professor Engdahl, March 29, 1979).
businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more even-handed regulation.98

The majority’s focus was on whether the state discriminated against or unduly burdened interstate commerce. The oil companies’ strongest “discrimination” argument was that the statute was both prompted by and designed to protect the local independent dealers.99 The Court points out, however, that local independent dealers still face competition with several major interstate marketers of petroleum who own and operate their own service stations but who do not produce or refine petroleum.100

The Court further stated that merely because the divestiture provision affects only interstate companies, that alone does not establish a claim against interstate commerce, and mildly rebuked Justice Blackmun’s practical effect argument in a footnote.101 The oil companies had referred to this same fact (i.e., that the divestiture provision falls solely on out-of-state companies) to try to bolster their ‘burden on interstate commerce’ argument. The oil companies particularly relied on evidence that at least three refiners would probably stop doing business in Maryland because of inability to comply profitably with the divestiture demands.102 The Court appeared especially unsympathetic to this argument.103

The first part of the Exxon two part test, state interest, was not overcome just because “the economic market for petroleum products is nationwide,”104 and other states might decide to enact similar legislation. The


One commentator has said of the ‘less onerous alternatives’ test, “Such hypothesizing of alternatives will in most instances give a predictable result—if the justices of the Supreme Court really want to, they will be able to hypothesize alternative, less restrictive solutions in nearly every case. Unfortunately, when doing so, their alternatives can turn out to be adequate abstract ideas but impractical real world solutions. The Contract Clause Reemerges: A New Attitude Toward Judicial Scrutiny of Economic Legislation, 4 S. Ill. Univ. L.J. 258, 272 (1978).


99. See, id. at 137-140, 141 n.8, 143 n.10 (Blackmun, J., dissenting); H.P. Hood & Sons v. du Mond, 336 U.S. 525 (1949); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). See Business Week, Dec. 15, 1973 at 20. Cf. Exxon, 437 U.S. at 125; in Breda v. Alexandria, 341 U.S. 622, 636 n.20, the Court had said in passing, “So far as this argument seeks to blame the passage of the ordinance on local retailers, we disregard it. Such arguments should be presented to legislators, not to courts.”

100. Exxon, 437 U.S. 117 at 125, 126 (1978).

101. Id. at 126 n.16. It should be noted that the majority took no cognizance of what Justice Blackmun and the oil companies considered additional evidence of practical discrimination, i.e. that the General Assembly amended the original bill and exempted wholesalers (who would be more or less local as a class) and that the statute might prevent any nonintegrated interstate company which wanted to do retail business in Maryland from integrating backwards. Id. (dissent).

102. Id. at 123 supra note 11.


104. Id. at 128.
cumulative effect of this type of legislation was recognized, but the Court immediately thereafter said, "while this concern is a significant one, we do not find that the Commerce Clause, by its own force, preempts the field of retail gas marketing."\textsuperscript{105}

C. FEDERAL PREEMPTION

The United States Supreme Court concluded that as the Commerce Clause did not preempt paragraphs B and C, so too neither the Sherman Act\textsuperscript{106} nor the Robinson-Patman Price Discrimination Act\textsuperscript{107} preempted the Maryland legislature from enacting paragraphs D (the voluntary allowance section) and F (the equitable allocation section) of the Maryland divestiture statute.\textsuperscript{108} The partial dissent, which really dealt only with the Commerce Clause, merely mentioned that unfair allocation already had been prohibited by the Emergency Petroleum Allocation Act of 1973.\textsuperscript{109}

There were two differences in this part of the opinion. Whereas the oil companies had challenged the other paragraphs as producers, refiners and retailers, the oil companies challenged paragraphs D and F as suppliers, and whereas the first part of the opinion was straightforward, the preemption section of the opinion was quite complicated.

Preemption is taken as a given in the area of natural gas.\textsuperscript{110} In the petroleum area the preemption issue is complex because of judicial gloss over the years in interpreting almost every word of the primary antitrust statutes.\textsuperscript{111} In today's milieu of cooperation between the national and state governments, the preemption doctrine is not as strong as it once was.\textsuperscript{112}

\textsuperscript{105} Id.
\textsuperscript{107} 15 U.S.C. § 13 et. seq. (1976). For an explanation of the Act see generally F. Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962); A. Sawyer, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT (1963); for a detailed analysis of the Maryland Court of Appeals rationale as to why the Act did not preempt the Maryland statute, see generally Gasoline Marketing Practices and "Meeting Competition" Under the Robinson-Patman Act: Maryland's Response to Direct Retail Marketing by Oil Companies, 37 Md. L. Rev. 323, 334-349 (1977).
but it has not been displaced by a counter doctrine.\textsuperscript{113} Beyond the traditional difficult questions that must be answered when deciding whether a state statute should be preempted by federal law,\textsuperscript{114} two intriguing questions have recently been added. One question is: even if the state statute is inconsistent with federal law, what if it is also consistent with some other federal policy?\textsuperscript{115} An intertwining question is: even if the state statute contravenes a clear federal purpose, what if federal policy on that matter lacks "preemptive capability?"\textsuperscript{116}

The Exxon Court is forced to apply these questions to the facts of the case and formulate an answer because the case is permeated with two often-opposing interests: protection of competition and protection of the small businessman.\textsuperscript{117} The Court's answer is an honest one:

This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.\textsuperscript{118}

The oil companies' underlying argument is that the pro-competition focus of the Sherman Act is made of basic national fiber; the small business spirit of the Robinson-Patman Act is just a heavy weight on that material, but the addition of the Maryland statute on the side of small business would tear some threads. The Court recognized that, "Indeed many have argued

\textsuperscript{113} Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75-Col. L. Rev. 623, 653 (1975).


\textsuperscript{118} Exxon, 437 U.S. 117, 133 (1978). A quote from the Harvard Journal on Legislation may give some insight into the Court's reasoning beyond the plain meaning of this answer. After explaining how divestiture might raise prices, the author conceded, "Society may desire smaller oil companies as an end in itself rather than as a means to lower gasoline prices. In that case, divestiture may be desirable even if it increases the cost of petroleum products slightly." Greening, Increasing Competition in the Oil Industry: Government Standards for Gas, 14 Harv. J. Leg. 193, 224 (1977).
that the Robinson-Patman Act is fundamentally anticompetitive and undermines the Sherman Act.\textsuperscript{119} Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act,\textsuperscript{120} provides in part that "[i]t shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition. . . ." However, § 2(b) of the same Act\textsuperscript{121} provides a seller with a defense to a charge of price discrimination "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor."

Section 2(b) seems perfectly in keeping with the Sherman Act, so it was Section 2(b) and the Sherman Act that the oil companies argued were in conflict with the Maryland statute.

Again, paragraph D of the Maryland statute requires voluntary allowances to be extended to all retail service stations within the state.\textsuperscript{122} "Voluntary allowances" refers to "temporary price reductions granted by the oil companies to independent dealers who are injured by local competitive price reductions of competing dealers."\textsuperscript{123} If these voluntary allowances had to be granted state-wide, the major suppliers would not be permitted to charge different prices in artificially drawn zones, and price competitors would be able to enter the market more easily.\textsuperscript{124} That would seem to be the unspoken worry of the oil companies. What was articulated by the companies was a legal argument that the Robinson-Patman Act gave the oil companies an absolute right to keep the price reduction localized if the price was reduced within the scope of the "meeting competition" defense of section 2(b).\textsuperscript{125} The oil companies argued that, as suppliers, if

\textsuperscript{119} Exxon, 437 U.S. at 133, n.26 (1978); e.g., Robinson-Patman is against price discrimination but some sporadic price discriminations are procompetition in an oligopolistic structure. Comment, Interseller Price Verification of the Sherman Act, Robinson-Patman Act and the Forces of Competition, 46 Fordham L. Rev. 824, 825 (1978). A defense to a Robinson-Patman Act violation is meeting (not beating) competitor's price. There is a judicially-developed requirement that the seller verify that it is meeting the lower price of a competitor. Interseller communication regarding prices is directly against the Sherman Act. United States v. Container Corp. of America, 393 U.S. 333 (1969); Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476 (1977). Cf. Eaton, Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act, 18 Antitrust Bull. 411 (1973). See generally Yes, Virginia, There Still is a Robinson-Patman Act (But Should There Be?), 40 Antitrust L.J. 14 (1976).


\textsuperscript{121} 15 U.S.C. § 13b.

\textsuperscript{122} Reproduced supra n.7.

\textsuperscript{123} Exxon, 437 U.S. 117, at 122, 123.

\textsuperscript{124} Application to facts in Exxon from general economic theories expressed in Note, Gasoline Marketing and the Robinson-Patman Act, 82 Yale L.J. 1706, 1712 (1973).

\textsuperscript{125} The two major decisions on the "meeting competition" defense had said it was a complete defense. Standard Oil Co. v. FTC, 340 U.S. 231 (1951); Federal Trade Commission v. Sun Oil, 371 U.S. 505 (1963). In agreement with the oil companies' reading of the defense, Effective
they complied with the voluntary allowance section of the Maryland statute, out-of-state dealers located around the Maryland state borders who were not receiving the voluntary allowance could hold the oil companies liable for damages under section 2(a).\textsuperscript{126} The central problems with this argument were that the Maryland statute offered no such defense and the scope of the "meeting competition" defense was a matter that had been in great dispute in the circuit courts and the Federal Trade Commission.\textsuperscript{127}

Therefore, the Court considered (1) when the oil companies could qualify for the federal defense, (2) once qualified, if the defense was an absolute right, and (3) if Maryland's not including the defense in this statute was serious enough to call for preemption.

As a prelude to the Court's analysis on the first question considered, a basic economic observation should be noted. Competitive 2(a) injury may theoretically occur at the following levels: (1) primary-line injury at the level of the seller's competitors; (2) secondary-line injury at the level of the buyer's customers (but since consumers are not in competition this is not considered an injury).

Any of these injuries are actionable under 2(a). However, it is only the primary-line injury which allows the 2(b) defense.\textsuperscript{128}

In considering whether the oil companies could qualify for the federal defense (i.e., when they were "meeting competition" in good faith),\textsuperscript{129} the Court looked first at when the oil companies definitely would not qualify. When a retailer (who is competing with the supplier-oil company's retailer-buyer) lowers its price on its own and the oil company gives its buyer a price reduction so its buyer can meet that lower price, the oil company does qualify for the defense. In this situation, the oil company is not responding to its own competitor, but to its buyer's competitor.\textsuperscript{130}

There has been a long-standing question whether the oil companies would qualify for the defense in the hypothetical situation when a retailer (who is competing with the supplier-oil company's retailer-buyer) lowers its

\textsuperscript{126} Brief of Appellants, Exxon at 77.


\textsuperscript{128} Supra note 124, at 1710.


price because it is being subsidized by its supplier.\textsuperscript{131} If the oil company gives its buyer a price reduction so that the buyer can meet that lower price, the Maryland Court of Appeals said the oil company would not qualify for the defense.\textsuperscript{132} The United States Supreme Court, on the other hand, left the discordance to be settled another day. The Court said: "In our opinion, it is not necessary to decide whether the § 2(b) defense would apply in the second situation, for even assuming that it does, there is no conflict between the Maryland statute and the Robinson-Patman Act sufficient to require pre-emption."\textsuperscript{133}

The Court came to this conclusion by answering the second question above, whether the defense was an absolute right, in the negative: "The proviso in § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, it defined a specific, limited defense and even narrowed the good-faith defense that had previously existed."\textsuperscript{134}

The Court then rejected the oil companies' claims that paragraph D of the Maryland statute would make them liable to the out-of-state bordering dealers. After all, the Maryland statute did not require any voluntary allowances in the first instance. It was only after an oil company freely opted to extend such an allowance that the statute's force took hold and required uniformity in extension of the allowance. The Court restrained itself from seeing any conflict that was not apparent, "Instead, the alleged 'conflict' here is in the possibility that the Maryland statute may require uniformity in some situations in which the Robinson-Patman Act would permit localized discrimination. This sort of hypothetical conflict is not sufficient to warrant preemption."\textsuperscript{135}

Never mentioned was whether the border dealers even had standing\textsuperscript{136} or would vindicate a claim\textsuperscript{137} under the Robinson-Patman Act or the

\textsuperscript{131} Of the many cases, two especially have emerged as representatives of the divergent sides. Bargain Car Wash v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972) said the defense would apply. Enterprises Industries v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955), rev'd on other grounds, 240 F.2d 457 (cert. denied), 353 U.S. 965 (1957) said the defense would not apply. See Covey Oil Co. v. Continental Oil Co., 340 F.2d 998 (10th Cir. 1965), where an integrated supplier-retailer was involved. See generally supra note 124, at 1708-1718.

\textsuperscript{132} Gov. of Md. v. Exxon, 279 Md. 410, 449, 370 A.2d 1102, 1123 (1977).

\textsuperscript{133} Exxon, 437 U.S. 117, 133 (1978).

\textsuperscript{134} Id. at 131.

\textsuperscript{135} Id.

\textsuperscript{136} Robinson-Patman Act—Price Discrimination Between Two Purely Intrastate Sales by a Corporation Engaged in Interstate Commerce Satisfies the Jurisdictional Requirements of § 2(a) of the Act, 86 Harv. L. Rev. 765 (1973); Klein, Robinson-Patman Act in Commerce Jurisdiction Not Satisfied by Sales of Asphalt Within One State for Use in Interstate Highways, 43 Fordham L. Rev. 1036 (1975); Klein, Corporate Price Planning in Light of the In Commerce Requirements of the Robinson-Patman Act, 43 Detroit Lawyer, 4 (1975). Distavored Indirect Purchaser Under the
Sherman Act,\textsuperscript{138} or if the oil companies’ traditional methods of avoiding a section 2(a) violation could alleviate any potential violation.\textsuperscript{139} Never mentioned was the fact that if oil companies decided to refrain from voluntary allowances altogether, they could lose buyers as customers;\textsuperscript{140} or the fact that even if voluntary allowances were given statewide, it might not make much difference in consumer prices.\textsuperscript{141} Nor was there ever any discussion, beyond reviewing the original purpose of the Robinson-Patman Act, about modern economic realities not foreseen by the drafters and whether courts should consider those realities when applying the Robinson-Patman Act.\textsuperscript{142} These were all seemingly relevant issues, but not to discuss them was in keeping with the Supreme Court’s avowed policy of avoiding review of the wisdom of state legislation in this area, and favoring nonpreemption when possible.

Another issue not mentioned by the majority was any possible conflict between the Maryland statute and the Emergency Petroleum Allocation Act of 1973.\textsuperscript{143} It is difficult to detect a conflict after reviewing the legislative history\textsuperscript{144} of the Act and the case\textsuperscript{145} which some consider\textsuperscript{146} the precurs-

\begin{thebibliography}{146}
\bibitem{Meeting Competition} See generally ‘Feathering’ Gasoline Marketing Practices and ‘Meeting Competition’ Under the Robinson-Patman Act: Maryland’s Response to Direct Retail Marketing by Oil Companies, 37 Mo. L. Rev. 340 (1977).
\bibitem{Standing to Assert a Primary Line Robinson-Patman Act Violation} See \textit{Standing to Assert a Primary Line Robinson-Patman Act Violation: A Proposal}, 1974 Utah L. Rev. 61.
\bibitem{15 U.S.C. § 751 et seq.} (amended 1978). (Note: there is a bill now before Congress to repeal the Emergency Petroleum Allocation Act—H732). For explanation of the Act see generally Cockell, \textit{Federal Regulation of Energy: The Exceptions Process} 7 Trans. L.J. 83 (1975); Dileo, \textit{Introduction to the Mandatory Petroleum Allocation Requirements}, 22 La. B.J. 107 (1974). Basically service station operators are limited to the same profit they made in 1973 plus a 3-cent increase for labor and other non-gasoline costs. Since January 1, 1979 they also have been allowed a 2-cent increase for higher rent and pollution controls. 1978 was recently made the base year for fuel allocations. Under Department of Energy regulations, a dealer who sold gasoline below the ceiling price any time since 1973 can “bank” the difference between his lower price and the higher ceiling. He later could increase his selling price until the “bank” was used up.
\bibitem{P.L. 93-159} 87 Stat. 627 (Nov. 27, 1973).
\bibitem{Davis v. Crown Central Petroleum Corp.} 483 F.2d 1014 (4th Cir. 1973).
\end{thebibliography}
sor of the Act, even though the express preemption words of the Act speak in terms of conflict with the scheme administered by the Federal Energy Administration.\textsuperscript{147}

The case was \textit{Davis v. Crown Central Petroleum Corp.}\textsuperscript{148} An independent refiner had stopped supplying his non-contractual customers and two independent marketers sued the refiner. The Court of Appeals dismissed the case, telling the marketers to take their case to Congress.

The legislative history is divided into three main goals:

(1) distribution of scarce supplies to protect the public and the economy;
(2) protection of the public from price gouging; and
(3) preservation of the market share of the independent sector and the competition the independents create.\textsuperscript{149}

The oil companies also chose not to pursue before the high Court several constitutional arguments which they had argued before the Maryland Court of Appeals and which had been rejected by that court. These arguments included contentions that the statute was void for vagueness, that it constituted an unlawful delegation of legislative authority and an unlawful taking of property without just compensation, and that it denied equal protection of the laws to the oil companies.

IV. FEDERALISM

When an issue of genuine national concern is one in which the states have a valid interest, but the federal government has failed to confront it adequately, the states should be allowed to legislate responsibly, at least until such time as the vacuum is filled by the federal government. Hence, this section is devoted to a concept only mentioned in the \textit{Exxon} decision—federalism.

Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or 'states' for common purposes; (2) the division of legislative powers between a ‘National Government’ on the one hand, and constituent ‘States’ on the other, which division is governed by the rule that the former is a ‘government of enumerated powers’ while the latter are governments of ‘residual powers’; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the ‘National Government’ within its assigned sphere over any conflicting assertion of ‘State power; and

\begin{footnotes}
\item[146] Supra note 20, at 10 (1976).
\item[148] 483 F.2d 1014 (4th Cir. 1973).
\item[149] M. Willrich, \textit{Administration of Energy Shortages}, at 142 (1976).
\end{footnotes}
(6) dual citizenship. 150

In the 1930's, states' interests were paramount. In the 1940's through the end of the 1960's, federal interests were paramount. The 1970's may represent a revival of state importance. 151 The Antitrust Division of the Department of Justice and the Federal Trade Commission both strongly support state involvement and enforcement; 152 after all, each state has its own economic conditions and a number of distinct business practices. 153

There are some definite liabilities to state legislation. It may affect non-residents and thereby burden individuals who had no representation in the state. 154 Where state agencies are evaluating effects of an activity on competition, they usually employ state rather than federal law. 155 Yet the United States Supreme Court chose to uphold the Maryland statute. 156

V. THE FUTURE

What kind of state antitrust legislation can the oil companies expect to survive judicial scrutiny in the future? Also, what cutback on present practices will the federal government propose now that the cutbacks in the Maryland statute have been deemed permissible? Conclusive answers to these questions are impossible to formulate but this discussion will enumerate some of the possibilities.

Maryland already has a barrage of at least facially strong antitrust laws, 157 the Comptroller of the Treasury has promulgated regulations under the Maryland divestiture statute, and, at least to the knowlege of the Assistant Attorney General of Maryland and Chief of the Antitrust Division, Charles O. Monk II, the Maryland legislature is not contemplating any legislation which would impose additional restrictions on the leases of retail service stations or make the major oil companies sell station properties. 158

151. Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 at 626 (1975); supra note 116, at 188; Gribbs, New Federalsim is Here to Stay, 52 J. Urbani L. at 55 (1974).
152. Supra note 31, at 655.
Some legislators tried the latter course in California, but their bill was de-
feated.\textsuperscript{159} 

At least twenty state legislatures have divestiture bills now pending, most of them similar to Maryland’s. Some include wholesalers within the class that cannot operate retail stations directly. As has been mentioned, S82 calls for complete divestment of the entire petroleum industry. On June 19, 1978,\textsuperscript{160} the United States congress passed legislation, the Petroleum Marketing Practices Act;\textsuperscript{161} prior to its promulgation a section was deleted which could have been regarded as requiring a very limited divorce-
ment at the retail and wholesale marketing level. Section 302 would have prohibited:

certain persons from subsidizing any of their motor fuel marketing opertions.
Persons subject to the prohibition of subsidization are those who meet each of the
following three tests:

(1) Are engaged in commerce.

(2) In the course of such commerce are engaged in—
(a) exploration for crude oil;
(b) production of crude oil;
(c) refining of crude oil; or
(d) wholesale distribution of petroleum products; and

(3) in the course of such commerce market petroleum products through
persons owned or controlled by them. The term ‘markets’ is meant
to include wholesale or retail operations beyond the stage of refining
of petroleum.\textsuperscript{162}

There are those who believe present antitrust laws are sufficient for courts
to order divestiture.\textsuperscript{163} There are those, on the other hand, who believe ‘vigorou
 enforcement of existing antitrust laws by the Justice Department,
the Federal Trade Commission and private plaintiffs is in order as an alter-
native to new divestiture legislation . . . .’\textsuperscript{164}

The oil companies argued in Exxon that, beyond the host of antitrust
laws already in existence, pares patria actions are available if any wrong-
doing is taking place.\textsuperscript{165} However, it is extremely doubtful that federal au-
thorities would rely on such actions to any real extent to heal injustices in
the future, for as one commentator has observed, pares patria actions

\textsuperscript{159} Calif. S2121 (defeated April 16, 1974).
\textsuperscript{160} Exxon was argued Feb. 28, 1978, decided June 14, 1978.
\textsuperscript{162} Id. § 302.
\textsuperscript{163} Novotny, Gasoline Marketing Structure and Refusals to Deal With Independent Dealers: A
\textsuperscript{164} Supra note 41, at 609.
(1976). A pares patria action “in which a state, through its attorney general may sue to recover
damages for injuries sustained either by its individual citizens or its general economy as a result of
an antitrust violation. Rubin, Rethinking State Antitrust Enforcement, 26 U. Fla. L. Rev. at 717
(1974).
have thus far received meager support in the courts when premised at least on federal antitrust claims.\textsuperscript{166}

Antitrust class actions have been more successful. For instance, independent gasoline distributors of branded gasoline recently were allowed to proceed as a class on the issue of whether the oil company in question had engaged in a nationwide conspiracy to eliminate the distributors as competitors in sales to service station operators. This class action was allowed even though there was a possibility that release clauses in distributors' contracts would have to be examined under various state laws.\textsuperscript{167}

Beyond merely keeping the status quo, or implementing the type of government regulation of which the Maryland statute is an example, another alternative to total divestiture is nationalization.\textsuperscript{168} Yet another alternative to total divestiture that has been suggested is allowing the market forces free rein and establishing a system of government standards for gasoline. The three standards would be "lead content, cleanliness and driveability," so consumers could obtain precisely the grade of gasoline required by their automobile.\textsuperscript{169}

With respect to the equitable allocation referred to in the Maryland divestiture statute,\textsuperscript{170} Stuart Eizenstat, President Carter's chief domestic advisor, has made at least one commitment for the Carter administration supporting greater state flexibility in the allocation of extra gasoline if rationing is imposed.\textsuperscript{171}

Companies in the petroleum industry may be bidding for gasoline in the future, but it is highly unlikely, for bidding, by its nature, involves price discrimination.\textsuperscript{172} Likewise, little is mentioned about legally mandatory research by private companies on feasible alternatives to gasoline.\textsuperscript{173}

In order to continue to give discounts to their own stations, the oil companies may attempt to remain in other states where they are still allowed to operate retail stations directly.\textsuperscript{174} The law is in a state of confusion as to

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{166} Id.
\item\textsuperscript{167} Jennings Oil Co., DC N.Y. 1162, 314 per FED. TRADE REG. REP. No. 358 (Nov. 6, 1978).
\item\textsuperscript{170} Mo. ANN. CODE art. 56 § 157E (Cump. Supp. 1979) at paragraph f (Reproduced supra Note 7).
\item\textsuperscript{172} Competitive \textit{Bidding Under the Robinson-Patman Act}, 49 St. John's L. REV. at 540 (1975).
\item\textsuperscript{173} Wisc. Leg. Council, \textit{An Introduction to the Feasibility of Gasohol Production and Use in Wisc.}, (1978) SB-78-11 (incl. summary of legislation by other states and the federal government).
\item\textsuperscript{174} Calvani, \textit{Functional Discounts under the Robinson-Patman Act}, 17 BOSTON COLLEGE INDUSTRIAL & COM. L. REV. at 543 (1976).
\end{enumerate}
\end{footnotesize}
whether functional discounts (when a buyer is permitted to purchase gasoline at a lower price because of a special service or function the favored buyer performs for the seller) are permissible generally. Under the Robinson-Patman Act,¹⁷⁵ cost justification is measured by suppliers' cost savings, so internal savings achieved by integration are not taken into account. Therefore, an integrated retailer has no claim to a wholesale functional discount.¹⁷⁶

Even when franchising through dealers, it has traditionally been possible to maintain so much control that there was, in reality, forward vertical integration.¹⁷⁷ One recent federal law now covers abuses in termination and nonrenewal of franchise agreements.¹⁷⁸ Effective July 21, 1979, the Federal Trade Commission joins a number of states in regulating franchisors in their disclosures to prospective franchisees.¹⁷⁹ Price restrictions for dealers are per se illegal,¹⁸⁰ except that the owner of a trademark or brand name may generally establish a minimum resale price.¹⁸¹ It was thought that setting retail prices by a consignment arrangement was settled fifteen years ago by prohibition by the United States Supreme Court.¹⁸² However, there may be a technical wrinkle that the federal legislature will have to deal with by changing the type of injury that plaintiff must show. If the federal legislature chooses not to change the law, the consignment arrangement could be a practice to which the oil companies would gravitate in the future.¹⁸³ The Maryland statute's wording, prohibiting a "fee arrangement" and a "commissioned agent,"¹⁸⁴ should effectively preclude this route in Maryland, at least with a producer or refiner.

The law on the validity of location clauses in retail franchise agreements was upset in 1977, changing the clauses from per se violations of the Sherman Act to being judged by the rule of reason.¹⁸⁵ Nothing indicates that there would be any changes on this stance in the future.¹⁸⁶ Presumably, tying arrangements (a supplier agrees to sell his products to the customer at some price below market value if the customer agrees to

¹⁷⁶. Supra note 174, at 553.
purchase only the supplier’s products in locations where there are competing suppliers)\textsuperscript{187} will continue to be outlawed.\textsuperscript{188}

As long as the Federal Emergency Petroleum Allocation Act\textsuperscript{189} is in effect, the oil companies as suppliers will be able to prevent arbitrage (the resale of gas by low price zone dealers to high price zone dealers).\textsuperscript{190}

VI. CONCLUSION

Notwithstanding some of the substantial arguments against divestiture of the oil companies,\textsuperscript{191} if there is not total divestiture by the United States government, additional state antitrust legislation of the oil companies may well be forthcoming. Review of that legislation will be modest.\textsuperscript{192} Perhaps that is because the Cooley doctrine,\textsuperscript{193} delineating national and state roles, is still viable today. In fact, the United States Supreme Court,\textsuperscript{194} as well as the Maryland Court of Appeals,\textsuperscript{195} cited Cooley\textsuperscript{196} in the Exxon opinions. The present Supreme Court believes that states should be allowed the flexibility of creative responsible action\textsuperscript{197} in economic matters that seem important to states where Congress, for one reason or another, has not precluded state action.\textsuperscript{198} This author concludes, then, not that the Maryland law was 'right' or 'wrong', but that Maryland had every right to pass the law in light of present federal antitrust laws and policies.

Mary M. Josefiak

\textsuperscript{188} E.g., [1978] FED. TRADE REG. REP. NO. 324 at 3.
\textsuperscript{190} Arbitrage was discussed in Bargain Car Wash v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972).
\textsuperscript{191} E.g., VERTICAL INTEGRATION, supra note 34, at 101; Ritchie, Those Integrated Oil Companies: Is a Breakup Desirable? 60 A.B.A.J. at 830 (1974); supra note 5, at 1133.
\textsuperscript{192} Choper, Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review, 86 YALE L.J. 1552 at 1621.
\textsuperscript{194} 437 U.S. 117, 126 (1978).
\textsuperscript{196} 53 U.S. (12 How.) 299 (1851).
\textsuperscript{197} C. Douglas III, 10th Amendment: The Foundation of Liberty, 16 N.H.B.J. 293 (1973).
\textsuperscript{198} Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).
Recent Decision

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I. INTRODUCTION

Late in 1976, the Federal District Court for the District of Columbia handed down its decision in County of Los Angeles v. Coleman. In the spring of 1978, that decision was affirmed by the D.C. Circuit in County of Los Angeles v. Adams. These decisions upheld as constitutional the enforcement of some important conditions imposed by the Secretary of Transportation on the availability of federal highway funds. What is more significant, they have expanded the federal government’s spending power and further reduced the effectiveness of state government. In this article, the case will be examined in some detail.

II. BACKGROUND

A. THE STATUTES

States receive substantial amounts of federal aid for highways under authority of the Federal-Aid Highway Act of 1956 and its subsequent amendments. This aid comes in the form of matching funds appropriated from a trust fund. Percentages of federal taxes on fuel, tires, and trucks—highway user taxes—provide income for this trust. Section 104 of the Highway Act is the statutory provision for apportionment of aid to the several states. Portions of such funds are specifically earmarked by statute for allocation to urban areas.

The Highway Act designates four federal-aid systems:
(1) the federal-aid primary system, "rural arterial routes and their extensions into or through urban areas";
(2) the federal-aid secondary system, "rural major collector routes";
(3) the federal-aid urban system, arterial and collector routes exclusive of urban extensions of the federal-aid primary system;
(4) the interstate system.

In this case, the parties were concerned only with the federal-aid urban (FAU) system. All the projects for which the County of Los Angeles sought funding were FAU projects.

In the Highway Act of 1962, as amended by the Highway Act of 1970, Congress put forth its specifications for a highway planning process. (These specifications are contained in section 134(a) of Title 23.)

7. "Urban area," for the purposes of the Highway Act, is defined by 23 U.S.C. § 101(a) to be an area so designated by the Bureau of the Census.
13. Brief for Appellant at 6, County of Los Angeles, Cal. v. Adams, 574 F. 2d 607 (D.C. Cir. 1978) [hereinafter cited as Appellant’s Brief].
15. 23 U.S.C. § 134(a) (1976) reads as follows:

   It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States, as authorized in this title, in the development of long-range highway plans and programs which are properly coordinated.
Congress therein originated its "3-C" planning process; the three C's are "continuing, comprehensive, cooperative." In urban areas of more than fifty thousand, planning is to be long-term (continuing), consideration of future effects (comprehensive), and is to involve local officials (cooperative). Thus the Secretary of Transportation is to approve no project unless that project has satisfied the 3-C requirements. Congress left to the Secretary the authority to promulgate the necessary regulations.16

B. STATUTORY INTERPRETATION

In 1969, the Department of Transportation, via the Federal Highway Administration (FHWA), issued a memorandum17 [hereinafter Memorandum 50-9] which indicated what would be required from state and local planners if they were to meet the 3-C standards. Memorandum 50-9 was revised in 1971 to include requirements that projects be part of an area wide plan and that the 3-C process be certified annually by the FHWA.18 The most pertinent section of the 1969 Memo is that which sets forth the FHWA's construction of the statutory (section 134) language mandating "cooperation." That part of the Memo provides that cooperation is to mean that local officials "should have appropriate voice in the transportation planning process, either through direct participation or through adequate representation." State solicitation of such participation can be made "directly to the governing bodies of each individual political subdivision or through an appropriate local agency." This interpretation obviously did not require states to create or use any particular "local agency," nor did it grant to such agencies any particular authority in the planning process.

with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. No highway project may be constructed in any urban area of fifty thousand population or more unless the responsible public officials of such urban area in which the project is located have been consulted and their views considered with respect to the corridor, the location and design of the project.

Essentially the same language is found in the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1604(1)(1976). Although the UMT Act also governs urban transportation funding, it is the Highway Act that is applicable to the present case.

17. BUREAU OF PUBLIC ROADS, FED. HIGHWAY ADMINISTRATION, DEP'T OF TRANSP., POLICY AND PROCEDURE MEMORANDUM 50-9 (1969) [hereinafter cited as MEMORANDUM 50-9].
18. FEDERAL HIGHWAY ADMINISTRATION, DEP'T OF TRANSP., INSTRUCTIONAL MEMORANDUM 50-3-71 (1971) [hereinafter cited as MEMORANDUM 50-3-71].
C. OMB A-95

Apart from the highway statutes and their interpretation, there is a broader mandate for cooperation among state and local agencies: OMB Circular No. A-95. This circular was first issued in 1969, long before promulgation of the regulations here at issue, and has not been substantially changed since then. The purpose of OMB A-95 was to "encourage" (by requiring) regional review of all proposed federally-funded projects. A regional clearinghouse body collects input from local officials on each proposal. The clearinghouse body then makes its recommendation (to whichever federal agency controls the funds) as to the proposed project's compatibility with regional plans. Highway projects are included within the purview of OMB A-95. Note that OMB A-95 did and does require the establishment of regional agencies, and it gives those agencies at least a power of recommendation. Thus, the A-95 requirements of state-local cooperation exceed those of the FHWA Memos described above. OMB A-95 is important here, not because it was the subject of dispute in the present case, but because its requirements existed before the Secretary issued the regulations here at issue, and because it creates just the sort of state-local cooperation that section 134(a) appears to require.

D. The Regulations At Issue

To further implement the congressional 3-C mandate, the Secretary delegated to the administrators of the Federal Highway Administration and the Urban Mass Transportation Administration (UMTA) his authority to promulgate the necessary rules and regulations. The final regulations were published in 1975. They are generally referred to as the Transportation Improvement Program (TIP) regulations. These regulations, which represent the Secretary's current interpretation of his administrative responsibili-

20. Appellant's Brief, supra note 13, at 11.
21. The federal funding agency must be assured "that all applications for assistance under programs covered by this part have been submitted to the funding agency." OMB A-95, supra note 19, at Attachment A, Part I, § 6b, 41 Fed. Reg. at 2054.
22. OMB A-95, supra note 19, at § 3a, 41 Fed. Reg. at 2052.
ties under section 134(a), were the cause of Los Angeles County's complaint.

The TIP regulations set up a system of highway planning that must be used by all states seeking federal funds. The system is to be established in urbanized areas. The Governor is to designate a Metropolitan Planning Organization (MPO) for each urban area. The MPO is "responsible for carrying out the urban transportation planning process"; it is to be "the forum for cooperative decision-making by principal elected officials of general purpose local government." Hence, the MPO is a regional council composed of representatives of local governments and agencies. The idea is to implement the mandate of section 134(a), the 3-C process, by making the MPO the body that does the programming of highway projects. "Programming" is the development of both long-term (multi-year) plans and annual (single-year) project proposals. The regulations require each MPO to develop a transportation improvement program, which includes an "annual element" within the long-range program. ("Annual element" is a list of the upcoming year's project proposals.) "Programming," more specifically, includes three stages: (1) initiation and development of project proposals, (2) endorsement of proposals, and (3) submission of those proposals. With a minor exception, these three functions are presently the exclusive province of the MPOs. The state is left with only a veto power over the MPO-approved proposals. When the state does veto a proposal, that state must in certain cases provide written reasons for its disapproval. The state can submit to the FHWA only those federal-aid urban proposals that have been developed, endorsed, and submitted by the MPO. Hence, the MPO has taken over, by regulation, most urban highway planning activities. More importantly, the state depends for its FAU highway funds upon the MPO's; the TIP regulations prohibit the Secretary from approving any FAU project unless it has been endorsed and submitted by the MPO. Even more important, from the perspective of local jurisdictions, is that their project funds cannot be allocated without MPO approval.

26. The 3-C process is specifically designed for urban areas of over 50,000 population. 23 U.S.C. § 134(a) (1976).
27. 23 C.F.R. § 450.106(a) (1978).
30. The state can only initiate "urban extension and Interstate System projects." 23 C.F.R. § 450.310(e) (1978). "Urban extension" means urban extensions of the federal-aid primary and secondary systems. 23 C.F.R. § 318(b)(3) (1978). This exception is irrelevant to this case, however, because we are here concerned only with the federal-aid urban (FAU) system.
31. 23 C.F.R. §§ 450.310(a)-(d), 450.316(a), (b) (1978).
E. CALIFORNIA BEFORE THE REGULATIONS

A regional council of governments has existed in the Southern California area since 1965 — the Southern California Association of Governments, or SCAG. SCAG is an association of representatives of the six counties that make up the Los Angeles-Long Beach urbanized area.\textsuperscript{33} Since 1967, SCAG has been the clearing house for purposes of the regional review required for all federal-aid projects by OMB A-95.\textsuperscript{34}

California law made SCAG the Regional Transportation Planning Agency for Southern California in 1973.\textsuperscript{35} This, in turn, made SCAG responsible for the preparation of a Regional Transportation Plan. This plan is designed for incorporation into the California Transportation Plan.\textsuperscript{36} Data for the regional plan were obtained from studies conducted by SCAG pursuant to the directives of Memorandum 50-9.\textsuperscript{37} Included in the regional plan was the Los Angeles Master Plan of Highways, which was developed and continues to be updated by "input from the planning agencies of all jurisdictions within the country, under priorities established by the elected officials of those jurisdictions."\textsuperscript{38}

SCAG, the regional body, thus had a planning role, but such planning was limited to something like the clearing house function described in OMB A-95. SCAG reviewed project proposals and made comments thereon, coordinated local planning agencies' efforts, and defined regional transportation goals.\textsuperscript{39} There was no requirement that SCAG endorse local proposals before those proposals are submitted to the state. Los Angeles County performed its own programming and, by agreement with its member jurisdictions, provided programming services for those jurisdictions as well,\textsuperscript{40} even to the point of submitting its project proposals directly to the state.\textsuperscript{41} In short, Los Angeles County did not depend for its funds, or its planning, on SCAG.

The situation in Southern California before promulgation of the TIP regulations was, arguably, entirely within the intent and letter of Congress' 3-C.

\textsuperscript{33} The six counties are Los Angeles, Orange, Riverside, San Bernardino, Ventura, and Imperial.

\textsuperscript{34} Brief for Appellee at 16, County of Los Angeles, Cal. v. Adams, 574 F.2d 607 (D.C. Cir. 1978) [hereinafter cited Appellees' Brief].


\textsuperscript{37} Appellant's Brief, supra note 13, at 12.

\textsuperscript{38} Complaint for Declaratory Judgment and for Temporary and Permanent Injunctive Relief at ¶ 7, County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496 (D.D.C. 1976) [hereinafter cited as Complaint].

\textsuperscript{39} Appellees' Brief, supra note 34, at 17.

\textsuperscript{40} Complaint, supra note 38, at ¶¶ 7, 9.

requirements, including the Secretary's existing interpretation of that program. That there was comprehensive, long-term planning is evidenced by the existence of the three plans already mentioned: the Los Angeles Master Plan, the Regional Transportation Plan, and the California Transportation Plan. That this planning involved local agencies is apparent and was not disputed by the Secretary. Regional review and coordination was mandated not only by the existing requirements of OMB A-95, but by California state law as well, and such review and coordination did in fact exist. In sum, Congress' requirements for "continuing, comprehensive, and cooperative" planning were met, without the existence of any veto power or exclusive programming authority in SCAG.

F. LOS ANGELES AFTER THE REGULATIONS

With the promulgation of the TIP regulations came the requirement that all locally-initiated project proposals be submitted to SCAG for endorsement and inclusion of the proposal in the regional plan. In May of 1976, Los Angeles County submitted its fiscal year 1976-77 requests to SCAG. In October of 1976, the State of California sent its requests to DOT. For some reason, there was no annual element from SCAG in the California submission: SCAG had been unable to get its annual element to the state in time. Hence, none of the county's projects could be approved by the Secretary because the Secretary cannot approve proposals that have not been submitted to the state by the appropriate MPO. Federal funds became suddenly unavailable to the county for its highway projects, and several projects had to be discontinued or not commenced at all. The delay in funding was ended when SCAG's annual element was finally submitted and accepted; the funds became available to the county as of November 22, 1976. There would have been no delay in availability of federal funds but for the TIP regulations — under the former system, the county could have submitted its requests directly to the state, and the proposals would have been approved by the Secretary in time to allow the continuation of ongoing projects and the commencement of planned projects.

42. Memorandum 50-9, supra note 17, as amended by Memorandum 50-3-71, supra note 18.
44. Appellees' Brief, supra note 34, at 16.
47. 23 C.F.R. § 450.320 (1978).
49. Appellees' Brief, supra note 34, at 19.
III. The Complaint

The County of Los Angeles brought suit in the Federal District Court for the District of Columbia against the Secretary of Transportation and the administrators of the Federal Highway Administration and the Urban Mass Transportation Administration. The county claimed that it suffered irreparable injury solely as a result of the TIP regulations.\(^{50}\) The regulations were alleged to be illegal because (1) they exceed and even contradict the intent of Congress,\(^{51}\) and (2) they are in violation of the Constitution.\(^{52}\) The county asked for declaratory relief, in the form of a declaration that the regulations are unconstitutional,\(^{53}\) and injunctive relief, in the form of an order to the Secretary to immediately consider and approve the county’s highway proposals.\(^{54}\) It should be noted that, if granted, injunctive relief of the kind sought here would have negated not only the TIP regulations but also the congressional mandate for regional and state review\(^{55}\) because the county would be taking its proposals directly to the federal funding agency without stopping at SCAG or the governor’s office along the way.

IV. The Decisions

The trial court denied relief and dismissed the case.\(^{56}\) The appellate court, in a per curiam opinion, upheld the dismissal and added some discussion of its own.\(^{57}\) What follows is a discussion of the arguments advanced by the plaintiff and the rebuttals offered by the defendants. Where appropriate, that is, where the courts discussed an issue, the court’s comments will be included. Editorial remarks will be set out in separate paragraphs.

A. Arguments of the Parties

As mentioned previously, Plaintiff’s arguments fall within two general categories: first, the Secretary exceeded his delegated authority when he promulgated his TIP regulations; second, the regulations are, on their face and in their interpretation, unconstitutional. Within these two categories were expressed several more specific arguments.

\(^{50}\) Complaint, supra note 38, at ¶¶ 14-16, 18-21.
\(^{51}\) Id. at Counts II, III.
\(^{52}\) Id. at Count I.
\(^{53}\) Id. at 15.
\(^{54}\) Id.
\(^{56}\) Id. at 503.
\(^{57}\) County of Los Angeles, Cal. v. Adams, 574 F.2d 607, 609 (D.C. Cir. 1978); Bazelon, C.J., and Leventhal and Robinson, Circuit Judges.
1. **ULTRA VIRES**

In support of its claim of ultra vires action by the Secretary, Plaintiff argued that the TIP regulations (a) give the MPOs powers unintended by Congress, (b) have created discord instead of cooperation, (c) inevitably cause delay, (d) have actually encountered Congressional disapproval, and (e) have replaced a system that worked well. These arguments, the Secretary’s answers, and editorial comments are presented below.

### A. UNINTENDED POWERS

**County’s Argument:** Congress intended the metropolitan planning organizations to be nothing more than planning and advising bodies. The term “metropolitan planning organization” is mentioned only once in the Highway Act, and then only as the organization which is to receive highway funds and be responsible for implementing the provisions of section 134. Nowhere is there any statutory language that indicates that the MPOs should have the ultimate authority to select and implement highway projects or the exclusive authority to perform a programming function. Thus, there is no statutory basis for the TIP regulations, at least in the form in which they were promulgated. In fact, the situation before the TIP regulations were issued was adequate to meet the statutory requirements; SCAG’s “A-95” clearinghouse function was all that was intended by Congress for any MPO to do.

**Secretary’s answer:** It was Congress’ intention that local officials do the selection of projects and that there be only a power of concurrence in the state. There is a clear trend in recent years toward increasing decision-making power in regional and local officials. The system imposed by the TIP regulations, including the programming authority that has been invested in the MPOs, is not an unreasonable means of implementing Congressional intentions. Those intentions are clear; planning is to be done in large measure by local agencies, and in every case local officials are to have a voice in planning. The TIP system is a way to give those local officials that voice.

### B. DISCORD

**County’s argument:** Congress’ mandate was for cooperation among all levels of government agencies involved in highway planning. Contrary to that intent, however, is the situation which has developed since the promul-

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60. Appellee’s Brief, supra note 34, at 23.
61. Id. at 32.
igation of the TIP regulations. In giving programming authority that is practically exclusive to the MPOs, the Secretary has created discord among local agencies. "Politics," rather than cooperation, now dominates highway decisionmaking. Since the MPOs are made up of representatives of local jurisdictions and agencies, and since it is the MPO that must do the planning and approving of highway projects, there is too much opportunity for contention among individual interests. Under the "old" system, wherein funds were allocated strictly on a population basis, there was no such discord. As evidence of its "discord" allegation, Plaintiff offered a study done by the Defendants themselves, wherein significant political problems were noted in more than one metropolitan area.

Secretary's answer: There is no evidence of discord in Southern California (at least concerning highway planning). In fact, there has been no known occasion whereon SCAG failed to approve one of the county’s projects, for political or other reasons.

C. DELAY

County’s argument: The new system creates delay in the programming process and in the delivery of highway funds, and this delay is an inevitable result of the nature of the system, because the system requires a new step on the planning process—endorsement of each project and submission of endorsed projects through the state to the FHWA by the MPO. While this delay would not always lead to the cutoff of funds that was experienced in this case by the county, it did happen here, and the nature of the system makes it very possible that it will occur again. Before the regulations made the extra step mandatory, the county submitted its proposals directly to the state. The extra step was eliminated, and the possibility of fund cutoff that is raised by the requirement of MPO endorsement did not exist.

Secretary’s answer: The delay in this case was not the fault of the TIP system; rather, it was the result of some administrative malfunction within SCAG itself. In any case, the Secretary was prevented from acting on the county’s proposals as long as those proposals were not submitted by SCAG. That restriction came not only from the Secretary’s own regulations, but from section 105 of Title 23; that is, the Secretary was confined

62. Appellant’s Brief, supra note 13, at 22, 33.
63. Id. at 12, 22. See also text accompanying note 74, infra.
64. Appellant’s Brief, supra note 13, at 21.
65. Appellees’ Brief, supra note 34, at 28.
66. Appellant’s Brief, supra note 13, at 34-35.
by statute\textsuperscript{68} as well as by regulation.

\textit{Comment:} The Secretary’s response does not explain away the fact that if there had been no requirement of the extra step, then this kind of problem could not occur. Section 105 does \textit{not} specifically require the MPO-approval step.

\textbf{D. DISAPPROVAL}

\textit{County’s argument:} As further proof that the TIP regulations exceed Congressional intentions, and therefore are an ultra vires act by the Secretary, the county offered letters\textsuperscript{69} written to the Secretary by the authorizing committees of both the House and the Senate. The letters, actually written by the chairmen of those committees, were a response to the Secretary’s notice of intent to promulgate the TIP regulations. The suggested regulations, as published in the Federal Register, were unacceptable to the chairmen of the authorizing committees for some of the same reasons that the county found them objectionable; the regulations give more authority to the MPOs than the authorizing committees had contemplated. Despite the disapproval of the chairmen of the authorizing committees of both houses of Congress, the Secretary promulgated the TIP regulations without removing the extensive grant of authority to the MPOs.

Further, the fact that Congress did not invalidate the regulations when it passed the 1976 Highway Act was not, according to Plaintiff, equivalent to a ratification of those regulations.\textsuperscript{70} At the time, the Secretary was still waffling on interpretation of his own regulations. A letter was written by the Defendants to Omaha,\textsuperscript{71} a region that was having trouble meeting the requirements of the regulations. In that letter, the Secretary indicated that his interpretation of the regulations, and their application to the situation in Omaha, would not necessarily be as stringent as the language of the regulations might suggest. Since there was no clear interpretation, Congress’ failure to pass legislation that would invalidate the regulations was not an approval of them, especially in light of the letters from the authorizing committees.

In the 1976 Act there was some indication of Congressional concern, however; section 149 authorized the Secretary to conduct a study to determine how well the 3-C process was being implemented. Plaintiff maintained that the fact that Congress chose to authorize a study instead of enacting more specific guidelines for the implementation of its directives

\begin{itemize}
  \item \textsuperscript{68} \textit{Id.}
  \item \textsuperscript{69} Appellant’s Brief, supra note 13, at 17; the text of the letters may be found in Appendix at 208, \# 212.
  \item \textsuperscript{70} Appellant’s Brief, supra note 13, at 38.
  \item \textsuperscript{71} \textit{Id.} at 24; the text of the letter is reproduced in Appendix at 205.
\end{itemize}
was, like its failure to invalidate the regulations, not a tacit approval of the regulations.

Secretary's answer: The Secretary's response\textsuperscript{72} was one which the trial court found very persuasive.\textsuperscript{73} Congress had, argued the Secretary, the opportunity to act. Not only did Congress choose deliberately not to contravene the clear intent of DOT, but the action that was chosen was simply an authorization of the study mentioned above. The letters held out by Plaintiff as being indications of Congressional disapproval are inadequate as legislative history.\textsuperscript{74} The stronger evidence, in the view of the court, showed that Congress was fully aware of the situation and chose to act by authorizing only a study.

E. OLD PROCEDURE

County's argument: An argument that "tagged onto" the ends of some of Plaintiff's other arguments\textsuperscript{75} concerns the OMB A-95 review process which has previously been mentioned. Plaintiff argued that the A-95 review requirements were being met by the procedures followed by itself and SCAG and that those requirements were essentially the same as the section 134 Congressional requirements. There was enough cooperation among regional and local officials under the old system to satisfy Congress' mandate. Also, the previous method of fund distribution, which was allocation on a population basis, created no problem at all as far as intergovernmental cooperation was concerned.\textsuperscript{76} The regulations have "rendered nugatory" the previous population-based suballocation procedures by causing funds to be divided "according to putative regional priorities."\textsuperscript{77} Local jurisdictions will now be competing with each other for funds.\textsuperscript{78} MPO members, who represent the interests of local jurisdictions and agencies, will be contending for money for their own projects.

Secretary's answer: The regulations have no effect on the process of suballocation; that suballocation is "purely a matter of state policy."\textsuperscript{79}

Comment: While it is true that the regulations do not specifically require any method of suballocation, it seems equally true that, regardless of

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\textsuperscript{72} Appellees' Brief, supra note 34, at 35.
\textsuperscript{74} Id. at 501, n. 19.
\textsuperscript{75} Appellant's Brief, supra note 13, at 12, 16, 27, 31.
\textsuperscript{76} Id. at 12, 22.
\textsuperscript{77} Reply Brief for Appellant at 7, County of Los Angeles, Cal. v. Adams, 574 F.2d 607 (D.C. Cir. 1978).
\textsuperscript{78} Appellant's Brief, supra note 13, at 33.
\textsuperscript{79} Appellees' Brief, supra note 34, at 27.
any state allocation policy, the MPO will still decide which projects (hence, which local interests) will be funded. Although the MPO could attempt to do its planning so that funds would be allocated on a population basis, it could just as easily not do so.

Neither the Defendants nor the court discussed the county’s more general argument that the section 134 planning requirements were being complied with long before the Secretary issued his regulations. The OMB A-95 procedure was mentioned only in Defendants’ descriptions of the statutory scheme and in their description of SCAG as the region’s OMB A-95 clearinghouse. The court’s mention of SCAG’s OMB A-95 function was taken directly from the Defendants’ brief.

This part of the county’s argument is essentially one of ‘lack of necessity.’ In other words, the TIP regulations were unnecessary since the Congressional directives for cooperation and for comprehensive, long-term planning were already being met in the Los Angeles area. In its attack on the regulations, Plaintiff did not make enough of this ‘unnecessary.’ While it has generally been true that administrative regulations cannot be overturned simply because they are unnecessary, the argument is at least worth making. The approach the court took caused it to avoid this kind of discussion; the court chose to stand on the presumption of validity that administrative regulations have long enjoyed. ‘In the absence of any compelling indication to the contrary,’ said the court, the regulations must be allowed to stand.

2. UNCONSTITUTIONALITY

The next arguments fall within the second category, that of constitutionality. The first is a federalism argument, and the second concerns interference with state police power.

A. FEDERALISM

County’s argument: The regulations violate the Tenth Amendment because they interfere with matters which have been properly left to state governments. There is a precedent in National League of Cities v. Usery. In Usery, the Supreme Court prohibited federal interference with functions carried out by states as states. One of the specific prohibitions was against

80. Id. at 9.
81. Id. at 16.
83. Id. at 503.
84. Complaint, supra note 38, at ¶¶ 35-37. In its brief, however, the county addresses this issue only in a footnote, Appellant’s Brief, supra note 13, at 32 n. 13.
any federal attempt to alter the actual structure of state government. In the instant case, there is an alteration of state governmental structure inasmuch as the federal TIP regulations require the creation, where one does not already exist, of some regional organization to be the MPO.

B. Police Power

County's argument: The TIP regulations are an interference with the state's police power; the delay in the funds, which were already earmarked for specific street projects, caused Plaintiff to be unable to finish these safety-related projects. Since the public welfare and safety are matters that are within the province of the police power, which is in turn within the province of state government, the delay in funding caused by the TIP-required procedures was an interference with state police power. This is a violation of the Tenth Amendment and of basic federalism principles.

Secretary's answer: Both of Plaintiff's arguments pertaining to the constitutionality of the regulations were answered by Defendants thus: there has been no reduction of the state's sovereignty, since the final decision (approval or disapproval) on each project rests with the state even under the TIP system. In addition, since it is federal money in the form of grants-in-aid under discussion here, the federal government has the right to place conditions on the granting of these funds. If any state does not wish to meet the conditions, that state can simply not participate in the program.

Comment: As to the County's own sovereignty as differentiated from that of the state, Defendants said nothing. Federalism has traditionally been exclusively a state issue, a matter of contention between only the federal government and the states. Regional and local governments have not been parties to the discussion, except in their roles as units of state government, and these sub-state governments have not had standing to bring actions under federalism theories. A 'sovereignty' in regional and local governments has not been recognized. That is why the court in this case took Defendants' arguments as its own and remarked: 'Inasmuch as the Secretary's regulations in no way diminish the power of the State, Plaintiff's "federalism" argument (even if it were the proper party to advance it) must fail.' Even if the state's sovereignty were unimpaired by the regulations (a questionable assumption, as will be noted later), the 'sovereignty' of the county has been impaired. It is not necessary to put forth a whole new theory of federalism wherein the sovereignty of each municipality and

86. 426 U.S. at 849.
87. Complaint, supra note 38, at ¶¶ 17, 26-30.
88. Appellees' Brief, supra note 34, at 40.
county is treated like that of the state, and the relationship between such local governments and the federal government is equivalent to that which exists (or is supposed to exist) between the state and federal governments. It is only necessary to recognize the fact that Plaintiff is a part of the governmental structure of its state, and an action against it is an action against the state itself.

As the court said, Plaintiff was not the proper party to raise the federalism issue. By traditional standards (that is, under the federalism-is-strictly-a-state-issue approach), Plaintiff had no standing to complain. But as mentioned above, there is a trend in Congressional thinking toward a sort of "urban sovereignty." Our large cities receive more and more attention directly from the federal government. This attention is directed right by, without stopping it, state government. The eventual effect of this trend may be to create the very kind of new federalism that was described above as unnecessary. In other words, metropolitan areas will be treated as independent governments in many ways. If that happens, then the courts will have to recognize the propriety of local governments bringing actions on this expanded theory of federalism.

At present, however, there is no such expanded theory, and we must deal with realities. Thus, the trial court in this case found the Defendants' response to the federalism arguments sufficiently persuasive to enable the court to dismiss the entire federalism issue in a footnote. This summary dismissal was possible because the court followed the current practice (Usery was an exception held inapplicable in this case) of finding no interference with a state's sovereignty whenever that state has the option of simply refusing to participate in the federal government's offered program. That this practice may no longer be appropriate is an argument raised later in this article.

3. **Summary**

Plaintiff contended that the regulations were in contravention of both Congressional intent and constitutional principles. The court said that the first of those arguments was Plaintiff's strongest, but the fact that Congress could have invalidated the regulations and did not do so tipped the balance in Defendants' favor. Constitutional principles were not violated, because the federal government may properly put conditions on the distribution of its funds. Where those conditions do not remove the states' option of nonparticipation in the program, there is no improper interference with state sovereignty. Overall, the trial and appellate courts found the TIP regulations to be both consistent with the language of section 134 and "a reasonable

90. See text accompanying note 60 supra.
means of effectuating the statutory command."

B. ARGUMENTS OF THE AMICI

Two amicus curiae briefs were filed at the appellate stage by the States of Virginia and Oklahoma. The fact that these briefs were filed by state attorneys is important — there were no constraints of the type faced by the County of Los Angeles regarding the federalism issue. Virginia and Oklahoma were the proper parties to advance this type of argument, and they did so. Both states strongly opposed the regulations. Their arguments were essentially the same as those advanced by the county: (1) the regulations are inconsistent with Congress' section-134(a) mandate, (2) congressional inaction should not have been considered by the trial court to be an indication that the regulations are consistent with section 134(a), and (3) the institutionalization of the MPOs and the MPOs' assumption of powers that had previously been vested in state governments constitute invasions of state sovereignty.

1. LESS COOPERATION

Argument: Oklahoma mentions the "interjurisdictional strife" that was alleged by Plaintiff, but the amici's primary argument here is slightly different — giving the MPOs exclusive planning power will create less, not more, cooperation among the MPOs, the state, and the local agencies. The MPO will either take all the decision-making power itself and make decisions unilaterally, or it will become the sounding board for "political squabbles."

Comment: It is difficult to see how interjurisdictional strife would be any different when the MPO is the sounding board than it would when the state is the sounding board. The MPOs are made up of representatives from local agencies, so the outcome of their "cooperation" would likely be no different from the outcome of their interaction with state-level planners as it existed prior to the regulations. What would be different, though, is the role of the state in the whole process. Congress specifically stated that the authority of the states was not to be decreased, even though cooperation between the states and local agencies was required. Removal of a state's programming and project-initiation powers is removal of its ability to effectively cooperate with local agencies. All a state can do under the present regulatory regime is to disapprove projects; it can initiate only a few,

and those few are not the ones with which local agencies would be most concerned. The "interjurisdictional strife" argument as advanced by the county may be as yet unresolvable, since the system is still only a few years old. But the state's argument seems to have more immediate truth; when there is only veto power, "cooperation" tends to be more negative than positive. The latter is the type of argument that the Plaintiff, being a county and not a state, was in no position to pursue.

2. **Congressional Inaction**

   **Argument:** The "Congressional inaction" argument advanced by Oklahoma is not much different from Plaintiff's, except that Oklahoma added a discussion of the Missouri v. Volpe precedent. This discussion centers on the idea that congressional inaction could mean almost anthing, so it should not be a heavily-weighted factor in any court's decision (much less the determining factor). Virginia took the trial court to task for improperly relying on several cases; these cases were intended by the court to support its reliance on Congress' inaction as being indicative of Congressional approval. Those cases were Red Lion Broadcasting Co. v. FCC, Zemel v. Rusk, FHA v. The Darlington, Inc., and Costanzo v. Tillinghast. Each of these cases involved both long-standing regulations and subsequent affirmative legislative action which upheld the regulations. That is not true in the present case.

   **Comment:** It might be counter-argued that Congress' authorization of a study of the highway planning situation after promulgation of the TIP regulations is equivalent to at least provisional approval of those regulations (provisional, that is, upon the outcome of the study). This argument is like clutching at straws. As was mentioned earlier, the Secretary's own interpretation of the regulations was in question at the time the study was authorized. At any rate, the cases relied upon by the trial court do not apply to the present case. The Volpe case seems much more reliable; Congressional inaction really does not mean much. This, taken into consideration

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95. Under the current regulatory restrictions, a state may initiate only Interstate and "urban extension" projects; see note 30 supra.
96. Oklahoma's Brief, supra note 93, at 13.
97. See text accompanying note 70 supra.
98. 479 F.2d 1099 (8th Cir. 1973).
99. Virginia's Brief, supra note 93, at 17.
102. 381 U.S. 1 (1965).
103. 358 U.S. 84 (1958).
104. 287 U.S. 341 (1932).
105. See text accompanying note 71 supra.
together with the arguments in paragraph one immediately above, makes the court's perception of the importance of Congressional inaction seem unfocused at best.

3. STATE SOVEREIGNTY

Argument: With the state's rights argument the amici most clearly distinguished themselves from Plaintiff. Since both were arguing the interests of their states, there was no problem of standing, and both argued forcefully that the sovereignty of their states has been infringed upon.106 Both amici cite the Usery case.

Comment: It is common knowledge that until the Usery decision, the Tenth Amendment had been reduced to a "mere truism."107 But the Usery decision was seen by many commentators as giving the Tenth a new lease on life. It was still a new case when the present case was being argued on appeal. Since it has been thoroughly discussed elsewhere, there is no need to discuss Usery here. It is only necessary to say that the Supreme Court in Usery found a violation of the Tenth Amendment in an attempt on the part of Congress to direct an activity carried on by a state in its role as a state. A "restructuring" of government operations was held to be interference with actions done by a state as a state and was therefore prohibited. In the present case, both amici argued108 that the Secretary's creation of the MPOs, especially in states wherein such organizations did not previously exist, was an interference with state governmental function comparable to that which was struck down in Usery; it was (and is) a "restructuring" of state government.

The arguments set forth in the amicus curiae briefs have been discussed separately from those contained in the county's pleadings because they approach the problem from a different point of view - the point of view of state rather than local interests. The amici give us an idea of what the case would be like if a state were a party. This latter is not an unforeseeable possibility. County of Los Angeles v. Adams will be an unfortunate precedent in that event, but there are further arguments that could be made in an attempt to tip the balance of the states.

V. FURTHER OBSERVATIONS

A. ENTITLEMENT

The federal government has created an entitlement in the states to highway funds. This is not the same limited kind of post-allocation entitle-
ment that the County of Los Angeles claimed in this case;\textsuperscript{109} this is a more general "right" in the states to federal aid for highway projects, a right to funds that have not yet even been allocated. An unbroken, high-quality national system of highways is required as much by the federal government\textsuperscript{110} as by each individual state government. If only in furtherance of efficient interstate commerce, it is in the national interest to promote such a system. Since the highways are required, and since the federal government controls the means (i.e., the money) to build them, surely the states (for it is the states that do the actual building) cannot be denied access to those means. It is useless to pretend that any state could simply take over the funding of its highway construction and maintenance. Such a shift of responsibility is unthinkable, given the large amount of aid that the federal government currently provides. The situation is such that the states not depend on federal highway funds. For the federal government to use this situation not only for the purpose of altering state governmental organization, but also in at least temporary contravention of its own policy, is unnecessary and improper.

B. SOVEREIGNTY

The states cannot simply refuse to participate. Highway planning, construction, and maintenance are no longer voluntary activities, if indeed they ever were. A good highway system is required by practical necessity as well as by national policy. If a state were to cease its highway work, that state would soon face economic ruin. Interstate commerce would be impeded and would soon simply be carried on elsewhere. Highway construction-related activities provide jobs for thousands of people. To say that the states retain their sovereignty under the TIP regulations because they can choose not to receive federal aid is to deny the practical reality of the situation. The states have no real choice, and whatever sovereignty the federal courts saw was illusory.

C. SPENDING POWER

The TIP regulations cannot stand upon Congress' spending power. If one assumes arguendo that the TIP regulations are consistent with the statutory (section 134) language, then the statute itself is unconstitutional. Congress' power to spend for the "general welfare" (Article I, Section 8 of

\textsuperscript{109} Appellant's Brief, supra note 13, at 5. The county claimed that, since a certain amount of federal highway money had already been allocated to it, a statutory entitlement had been created, and the Secretary could not lawfully prevent or delay the county's use of that money.

\textsuperscript{110} Congress has stated that the national transportation policy shall be "[t]o ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense . . . ." 49 U.S.C.A. § 10101 (Supp. 1979).
the Constitution) has not been unduly restricted by the judiciary; in fact, it is often taken for granted. There are limits, however. In United States v. Butler,\textsuperscript{111} it was stated that Congress could not use its spending power to accomplish a purpose "beyond the powers delegated to the federal government." Since the Constitution specifically grants Congress the authority to establish "post roads,"\textsuperscript{112} and since mail is delivered on virtually every street in the country, it is apparent that Congress' highway spending is not beyond the powers delegated to it. It is then necessary to ask, can Congress spend to achieve a constitutionally prohibited end—an end that it could not achieve by direct legislation? The answer is clearly no.

In Steward Machine Co. v. Davis,\textsuperscript{113} the Supreme Court indicated that where legislation is coercive it will not stand. The party assailing the legislation must show "coercion, destroying or impairing the autonomy of the states."\textsuperscript{114} It has been shown that federal highway aid is not voluntary; the threat of its withdrawal is a club in federal hands. The form of coercion taken by the TIP regulations (assuming, again, that they are consistent with the section 134 legislation) does impair the autonomy of the states. What has been done before by state planning organizations will now be directed by a federally-imposed procedure. It would be clearly unconstitutional for Congress to pass legislation that had no purpose but the express one of reorganizing state highway planning systems, yet the same result has been reached here by a less direct route. Admittedly, it has been held that Congress can place conditions on its funding,\textsuperscript{115} but a condition impairing state integrity is one condition that has not been allowed.\textsuperscript{116}

VI. CONCLUSION

The ostensible objective of both section 134 and the TIP regulations is improvement of the nation's system of highway transportation. There is evidence that the opposite has happened,\textsuperscript{117} at least in several instances. A second objective is to ensure that local officials have a role in highway planning. Both of these are worthwhile goals. The TIP regulations, though, are improper and unnecessary means to achieve the desired ends. The structure of state and local decision-making processes is so much a matter of state authority and so little a matter of federal authority that "state sovereignty" is inseparable from it. If a state is sovereign of anything, surely it is sovereign in its own political subdivisions and decision-making processes.

\textsuperscript{111} 297 U.S. 1, 68 (1935).
\textsuperscript{112} U.S. Const. art. I, § 8.
\textsuperscript{113} 301 U.S. 548 (1936).
\textsuperscript{114} 301 U.S. at 586, at 1290.
\textsuperscript{116} Fry v. United States, 421 U.S. 542 (1975).
\textsuperscript{117} See text accompanying note 62 supra.
County of Los Angeles v. Coleman was not a good case for a full-blown debate of many of the important issues created by the Secretary's regulations, especially those issues which concerned the Tenth Amendment. It is appropriate at this point to return to a subject that could have been discussed by the parties—that of the lack of necessity of the regulations. Neither the Secretary nor the courts denied that the section 134 "3-C" requirements were being met before promulgation of the TIP regulations in Southern California. There is no reason to believe that this was not also the case in most urban areas. Why create new bureaucracies in every urban area of the United States? There is a better way; an administrative remedy could be provided for those local agencies, or even state agencies, that have been excluded from the planning process. Administrative hearings could be made available for the complaining parties. If funding of the particular project in question were required to be withheld pending resolution of the dispute, the resulting delay and inconvenience would undoubtedly be an incentive for all parties involved to cooperate, at least in the vast majority of instances. (There will be exceptions no matter which system is used.) This procedure should be adequate in the few situations in which the already-required OMB A-95 review is not working.

If local interests are truly to be made influential in the highway planning process, and if the goal of multi-level cooperation is to be realized, then it seems counterproductive for a centralized federal agency to impose new structure and procedures upon state governments. It is difficult to see how Congressional goals will better be achieved by means of a new bureaucracy than by adherence to existing procedures. OMB A-95 created procedures designed to result in the multi-level cooperation that was intended by Congress when Congress enacted section 134. Even if OMB A-95 procedures are insufficient to meet the "continuous and comprehensive" requirements of the "3-C" mandate, would it not be better to set forth standards that must be met by every state highway planning agency than to set up a new agency with accompanying new procedures? Whatever the theoretical benefits that may be gained by making every local agency a member of a new regional agency, those benefits are outweighed by the fact that the states have been deprived of much of their ability to coordinate and unify highway planning processes. The states have been left with only a power to veto; they are left, now that the TIP regulations have been upheld, with the ability to exercise only a negative influence on planning. This is indeed unfortunate. It is hoped that, should a similar case soon arise, the courts will see fit to stop the trend toward centralized, federal decision-making and will allow the states to perform those functions that states are best suited to performing.

Philip L. Dubois
HAROLD S. SHERTZ ESSAY AWARD CONTEST

The Film, Air and Package Carriers Conference of the American Trucking Association, in conjunction with the Motor Carrier Lawyers Association, in an endeavor to encourage interest within the legal education community in the field of transportation, annually holds the Harold S. Shertz Essay Award Contest. The contest title was selected to honor Harold S. Shertz, Esq., of the Philadelphia, Pennsylvania, Bar for his long service to the transportation industry and to the legal profession.

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

1. **Eligibility:**
   The contest is open to any law student of a school in the United States or Canada. An essay may be written in collaboration with another student provided there is full disclosure.

2. **Subject Matter:**
   A contestant may write on any area of transportation law.

3. **Determination of Award:**
   Essays will be judged on timeliness of the subject, practicality, originality, quality of research, and clarity of style. The Board of Governors of Transportation Law Journal shall act as judges. In the discretion of the judges, no prize may be awarded. The decision of the judges shall be final.

4. **Prizes:**
   A prize of $500.00 will be paid and the winning essay will be published in the Transportation Law Journal.

5. **Right of Publication:**
   Each contestant is required to assign to the Transportation Law Journal all right, title, and interest in the essay submitted, and shall certify that the essay is an original work and has not had prior publication. Papers written as part of a contestant’s law studies are eligible provided first publication rights are assigned to the Transportation Law Journal.

6. **Formal Requirements:**
   Essays must be submitted in English and be typewritten (double space) on 8 1/2” x 11” paper with 1” margins. Footnotes shall be typed separately and all citations must conform to A Uniform System of Citation 12th ed., 1976, Lorell Press, Avon Mass. The essay shall be limited to forty pages including text and footnotes.

7. **Submission Requirements:**
   Three copies of the essay should be enclosed in a plain envelope and sealed. Contestant’s name should not appear on either the envelope or the essay. The envelope containing the essay should be placed in another envelope with a letter giving the name and address of the contestant and stating that the article is submitted for the contest and that the author has read and agrees to be bound by the Rules of the contest. Enclosed with this letter must be the certification set forth in Rule 5 above and a brief biographical sketch of the contestant.

8. **Date of Submission:**
   The essay must be received at the University of Denver College of Law, 200 West 14th Avenue, Denver, Colorado 80204 on or before March 31, 1981.
Harold S. Shertz Essay Award

The Short Haul Survival Committee v. U.S.: An Industry Deregulated Without a Substantial Basis in Fact

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I. INTRODUCTION

In March of 1978, the United States Court of Appeals for the Ninth Circuit entered its decision in the case of the Short Haul Survival Committee v. United States and Interstate Commerce Commission.1

This suit was filed by the Short Haul Survival Committee,2 numerous individual motor carriers and other associations. The Survival Committee was unsuccessful in its attempts to have set aside a report and an order issued by the Interstate Commerce Commission (ICC) that effected a massive deregulation of the short haul transportation industry nationwide.3

The Ninth Circuit in affirming the Commission’s report failed to take cognizance of recent developments in the law of judicial review of adminis-

* Winner of the Harold S. Shertz Essay Award Contest.
1. 572 F.2d 240 (9th Cir. 1978).
2. The Short Haul Survival Committee is an ad hoc committee of the Local and Short Haul Carriers National Conference of the American Trucking Association, Inc.

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trative rulemaking. These developments are the topic of this paper. Initially, however, some discussion of the genesis of this controversy is warranted.

The ICC, administratively, effected a massive deregulation of the short haul motor carrier industry through that body’s redefinition of Commercial Zones and Terminal Areas. By expanding these zones and areas, the ICC removed from economic regulation massive quantities of what otherwise would be regulated freight. The establishment of these massive regulation free zones has proven to be one of the ICC’s more controversial decisions.

Historically, the Commission employed the rulemaking provisions of the Administrative Procedures Act (APA) to define the scope of Commercial Zones and Terminal Areas in the mid-1940’s. Those proceedings culminated in the development of a population-mileage formula for Commercial Zones in 1946, and for carriers’ Terminal Areas in 1952.

On August 12, 1975, the ICC, pursuant to the notice and comment rulemaking provisions of the APA, caused notice to be published in the Federal Register of its intention to propose a revised population-mileage formula. The Commission stated that a new formula was desirable due to changing demographics and increasing urbanization occurring throughout the nation. The notice, which invited the submission of written data, views and arguments, received wide response. The result was the issuance by the Commission of an interim report, fifty-five pages in length plus appendices, stating tentative conclusions and inviting further comment. Again, the

7. The notice, in pertinent part, read:

The purpose of this document is to institute a proceeding to determine whether commercial zones and terminal areas of motor carriers and freight forwarders should be redefined.

Section 203(b)(8) of the Interstate Commerce Act exempts motor carrier operations about municipalities from Federal economic regulation. The geographic area within which exempt motor carrier operations may be performed is referred to as a commercial zone. The existing regulations provide two methods of defining the size of a particular commercial zone. The customary method is by reference to a population mileage-formula developed in the mid-1940’s. The alternative method provides for an individual determination of the commercial zone of a specific municipality. The present proceeding is instituted for the following three purposes: (1) to determine whether, and the extent to which commercial zones (and corresponding terminal areas of motor carriers and freight forwarders) should be enlarged by expanding or otherwise changing the present population-mileage formula; (2) to attempt to devise a rule of general applicability for all commercial zones and terminal areas of motor carriers and freight forwarders, at least with respect to incorporated communities, thus dispensing with the need for the present individual definition of irregularly shaped zones which are sometimes difficult to describe and in need of subsequent revision; and (3) to make adjustments in the rule of applicability about unincorporated communities compatible therewith. (Citations omitted).
response was widespread, causing the compilation of a massive record some twenty-three large volumes in length.\(^8\)

On December 17, 1976, a divided Commission issued its final report, 134 pages in length, plus an expansive appendix. The report affirmed the findings of the interim report and stated that the proposed expansion would become effective on March 29, 1977. A temporary stay pending judicial review was granted by the Ninth Circuit Court of Appeals on March 18, 1977, having been previously denied in a 5-4 decision on March 4, 1977. The Survival Committee et al., then filed their appeals.

Petitioners, particularly the Survival Committee, brought a series of significant procedural and policy issues before the court. In this regard, the Survival Committee certified the following issues:\(^9\)

1. Whether the Commission’s action expanding the population-mileage formula for Commercial Zones and Terminal Areas, thereby establishing massive exempt zones, was contrary to the intent of Congress, the Interstate Commerce Act, and case precedent.
2. Whether the Commission’s action was arbitrary, capricious, an abuse of discretion, unsupported by the record, and without substantial evidence.
3. Whether the Commission’s action was in violation of the substantive and procedural requirements of the National Environmental Policy Act (NEPA), and therefore arbitrary, capricious and legally unsupportable.
4. Whether the Commission’s action was contrary to the public interest and the National Transportation Policy.

Detailed analysis of each issue presented is beyond the scope of this article. Rather, concentration here will be focused on the second issue stated above, dealing with the procedural requirements of the APA, both in rulemaking and in the scope of judicial review pursuant thereto. Consequently, it will be suggested that the Ninth Circuit was something less than thorough in its analysis of the issues presented.

II. Scope of Review

Traditionally, a reviewing court’s determination regarding the applica-

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8. 128 M.C.C. 422, 434 (1976). There the Commission noted the extent of the response stating:

A numerical breakdown of the representation indicates that 313 motor carriers have filed individual and joint representations and 13 motor carrier associations also presented their views. Two freight forwarders filed comments, and the Freight Forwarder Institute submitted evidence on its own behalf and that of its 28-member forwarders. Individual shipper and warehouse interests filed 63 representations, and 23 shipper associations and conferences presented their views. Various local interests (i.e., local governments, realtors, land developers, and chambers of commerce) filed 58 representations. Four state agencies have submitted written comments. Two labor unions, 144 individuals, one maritime interest, and one law firm also filed representations. Four members of the United States House of Representatives expressed views concerning our proposed commercial zone expansion on their own behalf and on behalf of their constituents.

9. C.A. No. 77-1070, Brief for Petitioner, at 1.
bable standard of judicial review has pivoted on the form of administrative rulemaking which had been employed by the agency below.\textsuperscript{10} If the rulemaking involved is quasi-legislative, or informal, then the arbitrary and capricious test is generally employed. If, however, the rulemaking was adjudicative, or formal, then the substantial evidence test is generally employed.

The arbitrary and capricious test\textsuperscript{11} has been defined as a highly deferential standard of review which presumes agency action to be valid.\textsuperscript{12}

The substantial evidence test allows for the review of the factual basis for an agency decision. It is reserved primarily for review of adjudicatory type rulemaking pursuant to sections 556 and 557 of the APA. The Supreme Court defined the substantial evidence test as "such relevant evidence as a reasonable mind might accept as adequate to support (the agency's) conclusion."\textsuperscript{13} The rulemaking format is quite structured, and follows the procedural guidelines established in the APA. The procedure is designed to produce a full record exclusively upon which all agency action must be based. It involves a hearing officer and includes the opportunity for cross examination so that a full and true disclosure of the facts is accomplished.

The Survival Committee argued that the proposed standard of review to be applied to the Commission's order must be both searching and careful to insure that "the decision (under review) is based on a consideration of the relevant factors . . . ."\textsuperscript{14} In the alternative, the Committee urged that the court apply the substantial evidence test.\textsuperscript{15} Essentially, petitioner sub-

\textsuperscript{10} The APA, 5 U.S.C. §§ 551 et seq. (1970), recognizes four formats for administrative decisionmaking. In descending order of procedural formality, they are: adjudication, 5 U.S.C. § 554; formal rulemaking, 5 U.S.C. § 553(c), invoking the formal procedures of §§ 556 and 557 when rules are required by statute to be made on the record after an opportunity for an agency hearing”; informal rulemaking, 5 U.S.C. § 553(c); and nonformalized decisionmaking, 5 U.S.C. § 553(a), (b)(A)-(B), and any agency action not included in the definition of "rule," "order," "adjudication," "license," or "sanction." 5 U.S.C. § 551(4), (6), (7), (8), (10). These four modes of decisionmaking are generally invoked explicitly or implicitly in the enabling acts of administrative agencies.

\textsuperscript{11} This test is whether there is a "rational nexus" between the facts and the policy chosen. SEC v. Chenery Corp., 318 U.S. 80 (1943). There need only be demonstrated a rational connection between the facts found and the choice made. Bowman Transp. v. Arkansas-Best Freight, 419 U.S. 281 (1974).

\textsuperscript{12} Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976).


\textsuperscript{14} Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The Court's dicta in this case started the judicial restructuring of the arbitrary and capricious test into the more substantive form of review sought by the Survival Committee.

\textsuperscript{15} The substantial evidence test was posited only alternatively. The substantial evidence test, 5 U.S.C. § 706(2)(E), allows for the review of the factual basis for an agency decision, and is reserved primarily for review of adjudicatory type rulemaking pursuant to 5 U.S.C. §§ 556-557 of the APA, "[W]hen rules are required by statute to be made on the record of an agency hearing.
mitted that whatever the label used for the appropriate standard of review in this rulemaking, the court was bound to make a substantial inquiry into the record below to determine whether that record contained substantial evidence to support the Commission’s actions.16

The Ninth Circuit, however, retreated from petitioner’s plea that the court make a substantive review of the facts. Instead, it applied the arbitrary and capricious test in its more pristine form wherein the court “presumes agency action to be valid.”17 This decision to restrict review is singularly unenlightened as judged by the Supreme Court’s decision in Citizens to Preserve Overton Park v. Volpe18 and cases subsequent to Overton in which the Courts have reviewed or discussed informal rulemaking.

III. Overton and its Progeny

The main issue in Overton was Secretary Volpe’s decision to allow a highway to be built through a park. The rulemaking involved was neither formal nor informal; rather, it was an administrative action which was something less than informal. The Supreme Court rejected both de novo review19 and the substantial evidence test20 when it held for the use of the arbitrary and capricious standard.21

Had the Court stopped there, no problem would have arisen. However, in dicta, the Court cautioned that despite its adoption of the least stringent test, the reviewing court would also have to consider “whether the decision [under review] was based on a consideration of the relevant factors and whether there has been a clear error of judgement.”22

Cases subsequent to Overton which have discussed or reviewed informal rulemaking have similarly strengthened the arbitrary and capricious test into one requiring some form of substantive review.

In United States v. Midwest Video,23 the plurality opinion held that in

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16. C.A. No. 77-1070, Petitioner’s Brief, at 16.
17. 572 F.2d 240, 244 (9th Cir. 1978).
22. Overton, supra note 14, at 416 (emphasis added).
Federal Communication Commission notice and comment procedures for formulating cable television regulations, the standard applicable to review of the record of written comments was whether the regulation was "supported by substantial evidence that it will promote the public interest."24

In Ethyl Corp. v. EPA,25 the D.C. Circuit engaged in a lengthy discussion rejecting substantial evidence and adopting arbitrary and capricious as the appropriate standard of review for informal rulemaking.26 The court nevertheless declined to allow the presumption of the validity of an agency action when it said that the reviewing court "must engage in a substantial inquiry into the facts, one that is searching and careful."27

Similarly, in Freight Forwarders v. United States,28 a three judge district court strengthened the arbitrary and capricious test by requiring substantive review of an ICC informal rulemaking determination that defined the scope of terminal area exemptions under section 202(c) of the Interstate Commerce Act. Therein, the court stated that review was "normally confined to an affirman of the Commission's findings unless there is a clear showing of an abuse of discretion."29 However, the court went on to state that "our function is to ascertain whether the Commission has correctly applied the law, and if so . . . whether the evidence contains substantial support for the finding."30

The restructuring of the arbitrary and capricious test continued in Chrysler Corp. v. Dept. of Transportation,31 an action involving the review of informal rulemaking by the National Highway Traffic Administration. Therein, the Sixth Circuit, citing Overton, emphasized that:32

[i]t is the substantial evidence test may be applied to agency action even when the agency is performing a rulemaking function. Accordingly, the reviewing court must "engage in a substantive inquiry" and a "thorough, probing, in-depth review," yet at the same time must be mindful that the ultimate scope of its review is narrow and that it may not substitute its judgement for that of the agency's [sic].

Moreover, in response to the agency's contention that the scope of review for informal rulemaking is limited to a determination of whether the agency's rule reflects a rational consideration of the relevant matters presented by the interested parties, the court emphasized that such a

24. Id. at 671, 673, n.71.
25. 541 F.2d 1 (D.C. Cir. 1976), cert. denied, 426 U.S. 941.
26. Id. at 33-35.
27. Id. at 35, citing Overton, supra note 14.
29. Id. at 706-07.
31. 472 F.2d 659 (6th Cir. 1972).
32. Id. at 669.
scope of review "is virtually no review at all."\(^{33}\)

Judge Lumbard, in a concurring opinion in *National Nutritional Foods Ass’n v. Weinberger*,\(^ {34}\) pointed out that when an agency engages in substantive rulemaking it abuses its discretion (or acts arbitrarily) if its actions are not supported by substantial evidence.\(^ {35}\)

Recently, in *U.S. Lines v. Federal Maritime Comm’n*,\(^ {36}\) the U.S. Court of Appeals for the D.C. Circuit reviewed the applicable standard of review of an order of the Federal Maritime Commission (FMC). The order approved an amendment to a joint service agreement which was issued by the FMC under its limited authority to grant exemption from the antitrust laws for anti-competitive agreements among ocean carriers. Such authority arises only when it is in the public interest to grant such exemptions.

The court rejected the substantial evidence test as being inapplicable to the case at hand.\(^ {37}\) However, in discussing the standard of review applicable to this agency action, the court citing *Overton* noted that the agency decision was "entitled to a presumption of regularity."\(^ {38}\) That presumption, however, could not act as a shield to preclude a "thorough, probing, in-depth review." The review must be "searching and careful"\(^ {39}\) to insure that the agency action complies with the standards set forth in the APA, the FMC enabling act and the agency’s own regulation.\(^ {40}\)

These cases are all significant in their support of the Short Haul Survival Committee’s argument that the court has an affirmative obligation to search the record below to insure fairness in the promulgation of administrative actions. Mere recital by the agency that it has made a rational consideration of the relevant matters is clearly no longer acceptable.

Essentially, the petitioner pleaded that irrespective of the label attached, there was an affirmative obligation on a reviewing court to perform an in-depth and probing review of the facts underlying the agency decision. Petitioner pleaded *only in the alternative* that the Ninth Circuit should apply the substantial evidence test.

The Ninth Circuit, misstating petitioner’s pleadings, said that the "Survival Committee exhorts us to apply the ‘substantial evidence’ test of 5 U.S.C. § 706(2)(E) in reviewing the commission’s action."\(^ {41}\)

Irrespective of these considerations, the Ninth Circuit elected to apply

\(^{33}\) *Chrysler*, supranote 30, at 867.

\(^{34}\) 512 F.2d 688 (2d Cir. 1975), cert. denied, 423 U.S. 827.

\(^{35}\) *id.* at 705.

\(^{36}\) 584 F.2d 519 (D.C. Cir. 1978).

\(^{37}\) *id.* at 526.

\(^{38}\) *id.*

\(^{39}\) *id.*

\(^{40}\) *id.*

\(^{41}\) 572 F.2d 240, 244 (9th Cir. 1978).
the arbitrary and capricious test with no substantive search into the underly-
ing record. Its interpretation of the Supreme Court's invitation in Overton to
make a searching and careful inquiry into the facts was to hold that the
lower court was bound to "the highly deferential' standard of review which
'presumes agency action to be valid (1)."42 What is more, the court in the
Survival Committee case imposed upon petitioner the burden of showing
that the Commission acted unreasonably. The court declined to remand
the proceeding, preferring instead to affirm the order and report based on a
demonstrated rational basis for the agency action. In short, the court chose
to apply the arbitrary and capricious test in its most elemental form. This
posture is not totally wrong, but it is exceptionally unenlightened.

IV. SUMMATION

The scope of judicial review for agency determinations is prescribed by
the APA. Essentially there are two tests which may be employed. One is
the substantial evidence test, which reviews the factual basis for an agency
determination by inquiring into the entire record below. The second is the
arbitrary and capricious test, which in its pristine form seeks only to ensure
that there is a rational nexus between the facts found and the policy cho-

In 1971, the Supreme Court handed down its decision in the Overton
Park case. In dicta the Court noted that there was an obligation on the
courts to effect a searching inquiry into the facts underlying an agency's
decision. This challenge was embraced, and in the years following Overton
the arbitrary and capricious test has developed into a reasonable standard
of review and not just a rubber stamp for agency actions.

Whatever label is chosen for the standard of review, it is now reason-
ably clear that a substantive inquiry is required. This is where the Ninth
Circuit failed when it reviewed the ICC decision noted above.43

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42. Id. at 244.