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# State Action Antitrust Immunity

For Airport Operators

Christopher A. Hart*

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I. INTRODUCTION

Until recently, the operators of most major airports in the United States enjoyed nearly complete freedom from antitrust scrutiny in their decisions concerning access for air carriers and concessionaires operating at the airport. Private entities doing business with those airports were similarly confident in most instances that their contracts with the airport operators were immune from antitrust scrutiny.

Two developments are drastically altering this antitrust situation. First, government entities such as those which operate most major airports are being increasingly subjected to antitrust scrutiny, largely as a result of the decision in City of Lafayette v. Louisiana Power & Light Co. Thus, airport operators must begin to consider competitive impacts in many of their operational decisions, and those who do business with the airport operators must similarly be more circumspect.

Second, while the number of major airports with scheduled commercial service will not increase measurably in the foreseeable future because of environmental and other constraints, the number of air travelers seeking to use those airports is expected to increase steadily. As the capacity of an increasing number of major airports is being met or exceeded by the demand, the value of the ability to serve and do business at those airports will increase. As the "stakes" go higher, airport operators can expect ever more stringent scrutiny of their activities.

This article discusses the impact of the eroding antitrust immunity upon the manner in which the operators of the major airports may conduct

2. If an airport operator is immune from antitrust scrutiny as to an agreement with a private entity, the private entity is, of course, also immune as to that agreement as well. See Caribe Trailer Systems v. Puerto Rico Maritime, 475 F. Supp. 711, 720-21 (D.D.C. 1979); Trans World Assoc., Inc. v. City & County of Denver, [1974-2] TRADE CASES (CCH) ¶ 75,293 at 97,899-900 (D. Colo. 1974). Conversely, if airport operators must become more concerned about the antitrust status of their agreements, the private entities entering into agreements with the airport operators must be similarly cautious.
3. As noted below, the terms "immunity" and "exemption," which are used interchangeably in this article, are used loosely here to describe what should more appropriately be considered a preemption issue rather than an exemption issue. See cases cited note 96 and accompanying text infra.
various activities. The problems presented are enumerated, the legal framework within which these problems must be analyzed is set forth, and this legal framework is applied to several activities of airport operators.

This article considers antitrust immunity, but not antitrust liability.4

II. STATEMENT OF THE PROBLEM

This article considers in general terms the antitrust problems which may be encountered by the major airports with scheduled commercial service.6 These problems may result from an exercise of monopoly power

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4. Also not discussed at length here is sovereign immunity deriving from state law because, among other reasons, most airport operators are given the power to sue and be sued, which generally constitutes a waiver of that immunity, e.g., in a federal context, Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939); Federal Land Bank v. Priddy, 295 U.S. 229, rehearing denied, 295 U.S. 769 (1935). It is true that the eleventh amendment of the United States Constitution provides that there is no federal jurisdiction over cases by citizens of one state against another state, and has been construed to preclude federal jurisdiction over cases by citizens against their own state, e.g., Edelman v. Jordan, 415 U.S. 651 (1973), rehearing denied, 416 U.S. 1000 (1974); Parden v. Terminal Ry., 377 U.S. 184, rehearing denied, 377 U.S. 1010 (1964); Hans v. Louisiana, 134 U.S. 1 (1890). As a result, the eleventh amendment would, if applicable, bar any available forum because federal jurisdiction with respect to federal antitrust laws is generally considered to be exclusive, see generally Union Oil Co. v. Chandler, 84 Cal. Rptr. 756, 4 Cal. App. 3d 716 (1970); Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 315 N.Y.S.2d 894, 64 Misc.2d 894 (1970), aff’d, 318 N.Y.S.2d 924, 36 A.2d 582 (1971). However, this eleventh amendment “immunity” is not usually relevant in this context because the administrative and fiscal ties between the states and most airport operators are not sufficiently strong to qualify the airport operators for eleventh amendment protection, e.g., Doris Trading Corp. v. SS Union Enterprise, 405 F. Supp. 1093 (S.D. N.Y. 1976); George A. Fuller Co. v. Coastal Plains, Inc., 290 F. Supp. 911 (E.D. La. 1968), but see Howell v. Port of New York Auth., 34 F. Supp. 979 (E.D.N.J. 1940). Even for those airport operators which constitute the state for eleventh amendment purposes, the operation of a proprietary enterprise in interstate commerce with federal permission, and the power to sue and be sued, probably waive the protection, see Maryland Port Admin. v. SS American Legend, 453 F. Supp. 584 (D. Md. 1978).

5. This article is limited to the antitrust concerns of “municipalities,” which, for the purposes of this article, include counties and their agencies, cities and their agencies, and other local government entities which are not directly appointed by or accountable to the state administrative hierarchy. As a practical matter, however, it is expected that airports operated by states and state agencies will be subject to antitrust scrutiny very much like that described in this article (assuming the eleventh amendment does not bar a federal antitrust action, as discussed in note 4 supra), attenuated only by the principle enumerated in Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 719 (3rd Cir.), cert. denied, 439 U.S. 966 (1978), that “the closer the relationship between the state and the defendant, the less clearly the state need command the precise action for the defendant to enjoy the exemption.” Conversely, if a private entity contracts to operate an airport that is owned by a government entity, very close supervision would be required, especially where the private contractor may compete with entities which deal with the airport, e.g., Alphin v. Henson, 392 F. Supp. 813 (D. Md. 1975), aff’d, 538 F.2d 85 (4th Cir.), cert. denied, 434 U.S. 960 (1976). Airports which are owned by private entities, and the two major airports which are owned and operated by the Federal Aviation Administration—Dulles International and Washington National Airports—are not included within the scope of this article.

6. Some of the antitrust problems which can result from airport operations may, of course, be shared by smaller airports with little or no scheduled commercial service, e.g., Alphin v. Henson,
by the airport operator, or from unjust discrimination as between participants engaged in or seeking to engage in business at the airport, or both.

A. MONOPOLY ABUSES

The fact that most major U.S. airports are natural monopolies, and the fact that the demand is increasing steadily while the capacity is relatively constant, contribute to the need for airport operators to become increasingly responsive to the competitive impacts of their operational decisions.

1. Natural Monopoly Attributes

In theory, a facility is a natural monopoly by virtue of being a “geographically fixed facility” designed to serve customers in close proximity to such facility and almost entirely useless for any other purpose.” A facility is a natural monopoly because the economies of scale make it more efficient to obtain a given level of output at a given location from only one such facility.

As points of origin and destination, most major airports enjoy both of these attributes—they serve passengers in close proximity to the airport and are useless for any other function; and theoretically they can serve a given level of traffic more efficiently at one facility than at two or more facilities due to the very high fixed costs. In most cities the airports are natural monopolies even if there is more than one major airport in the area because the location or other attributes of the airports generally prevent the airports from being considered by passengers or by airlines as interchangeable under normal circumstances.


8. As points of connection between flights, however, airports may not be natural monopolies. They are, as connecting points, largely interchangeable to the passenger; and to the airlines, there is generally nothing inherent in the nature of any given airport that makes it more or less desirable as a point of connection—that desirability is usually a function of the system-wide totality of airline route planning.

9. The extent of “close proximity” for an airport depends upon the nature of the service. Passengers will come from much farther away to use an airport for an international flight than for a short domestic flight.

10. As a practical matter, airports may not always enjoy such economies of scale. For example, unless an airport can accommodate simultaneous traffic on several runways, the total economic efficiency, including the direct and indirect costs of ground and air delays, may be better with several proximate facilities.

11. Other airports are not a realistic alternative for short trips because the impact of ground transportation time is much more significant in connection with a short air trip. In the New York City area, for example, domestic traffic with a New Jersey origin or destination prefers Newark Airport; and domestic traffic with a New York or Connecticut origin or destination prefers LaGuardia Airport or, when feasible, Westchester County Airport. Other airports are not a realistic alternative for long trips because, although the relative impact of ground transportation time is less, there are usually
In addition, the development of a new major airport in or near any city in the foreseeable future is highly unlikely in view of the strenuous noise and other environmental opposition, as well as the social and economic costs of acquiring land and displacing residents. This opposition, in turn, increases the costs of acquisition for a new airport by increasing the amount of land which must be acquired around the airport to act as a buffer zone between the airport activities and the surrounding residents. Consequently, very few new airports will be constructed, and most increases in the number of airports with commercial service will result from the introduction of commercial service into existing airports. In this sense, airports may be considered as "practical" monopolies as well as natural monopolies.

2. Demand Exceeds Capacity

The airport's status as a natural monopoly does not, in itself, give the airport operator the "power to control market prices or exclude competition" which constitutes monopoly power. In order to have monopoly power, the airport must also be enjoying demand which is substantial in relation to the most limiting—airside, groundside, or other—capacity constraint. Accordingly, at the many airports which are operating at less than capacity and are eagerly seeking more business, there is little potential for monopoly abuse. At several airports, however, the potential for abuse arising from the airport's natural monopoly is exacerbated by the substantial and increasing demand which results from the fact that the number of passengers is increasing but the number of major airports is essentially constant.

The number of passengers carried by the scheduled air carriers has increased more than five-fold in twenty years (from about 58 million in 1960, to about 170 million in 1970, to about 275 million in 1978, to more than 316 million in 1979), and this number is expected to double again in the next ten to fifteen years. The increase in the number of air travelers results from several factors, including population growth; greater public acceptance of air transportation as safe; relatively reduced air transportation costs because of technological improvements, wide-body aircraft, and air-

fewer airports within a metropolitan area which can accommodate longer distance air traffic. Long distance domestic and international traffic in the New York City area, for example, cannot be accommodated at LaGuardia or Westchester.


13. AIR TRANSPORT 1980 (published by the Air Transport Association of America); AEROSPACE FACT AND FIGURES 1979/80 (published by the Aerospace Industries Association of America, Inc.). Present indications are that, largely because of recessionary factors, this number may drop to about 300 million in 1980.

line economic deregulation; and reduced highway speed limits.\textsuperscript{15}

The number of major airports, on the other hand, will not be increasing measurably because of the costs and environmental opposition noted above. Moreover, the same few major airports will continue to be the backbone of the system and absorb the brunt of the increase.\textsuperscript{16} Today the five busiest air carrier airports handle twenty-eight percent of the scheduled air carrier passengers and twenty percent of the scheduled air carrier operations; and the 100 busiest air carrier airports handle ninety-two percent of the scheduled air carrier passengers and eighty-two percent of the scheduled air carrier operations.\textsuperscript{17}

3. The Absence of Effective Constraints

While there are theoretically both economic and legal external constraints (\textit{i.e.}, constraints not within the monopolist’s control)\textsuperscript{18} on the ability of a monopolist to manipulate the market, the practical efficacy of either constraint is questionable as to airports. With respect to the external economic constraints, the limits beyond which additional monopoly abuses provide no additional benefits to a monopolist are normally established by the comparability, availability, and price of the substitute goods or services to which customers would convert as the monopolist approaches those limits. This economic limitation is not very effective in the airport context because the substitutes for the passengers—other airports, other forms of transportation, or not traveling at all—are not alternatives in any practical sense. As noted above, other airports are generally not viable alternatives as a practical matter even when there are other airports in the same metropolitan area. Other modes of transportation are not generally a comparable alternative except for very short (\textit{e.g.}, less than two or three hundred miles) trips, particularly as longer distance air fares approach or go below the fares of other modes.\textsuperscript{19} Not traveling at all may or may not be an alterna-

\textsuperscript{15} Also important for purposes of airport planning is the number of air carriers. The number of air carriers which may result from this substantial increase in the number of passengers is not presently known.

\textsuperscript{16} The present increase in traffic at the busiest airports will, however, probably be less than the percent increase in the total system because, among other reasons, these airports will be used less as connector airports as they become more congested.

\textsuperscript{17} \textbf{Terminal Area Forecasts, 1980-1991} (published by the Federal Aviation Administration). These concentrations of service will probably be alleviated to some extent in the future as the use of the busiest airports as connector airports is proportionately reduced, and as commercial service to satellite “reliever” airports is encouraged pursuant to 49 U.S.C. § 1302(a)(6) (Supp. III 1976).

\textsuperscript{18} Not discussed in this article are the political constraints which can influence any entity (such as an operator of a major airport) which is ultimately responsive to elected officials, especially when dealing with an air carrier or concessionaire, for example, which is a large taxpayer or employer in the local area.

\textsuperscript{19} In 1976, 85.5\% of intercity common carrier passenger miles were by air carrier, and 12.0\% of all intercity passenger miles were by air carrier. These numbers were up from 74.7\%
tive, depending upon the reason for the travel. Once within the airport confines, of course, the passenger is captive and the availability of alternatives varies from none—e.g., as to parking—to very little—e.g., as to restaurants, gift shops, and newsstands.

Consequently, there is little economic deterrent to monopoly abuses by airports with monopoly power because the concessionaires and airlines can normally pass to the passengers most or all of the price impact of such abuses, and the passengers have little real choice. Moreover, the excess of demand over capacity at these airports undercuts the potential limiting effect of alternatives upon the monopolist’s ability to impose abuses because the monopolist can afford to lose some of the demand before responding to the existence of alternatives by curbing monopoly abuses.

At airports with monopoly power, the efficacy of the legal constraints upon airport operator monopoly abuses is likewise limited. The air carriers and concessionaires who deal directly with the airport operator may be reluctant to complain because, as a natural monopoly, the airport is figuratively the “only game in town,” and there is little reason to incur the wrath of the airport operator when the price impact of any monopoly abuses can simply be passed to the passengers. The passengers, on the other hand, rarely have sufficient incentive or resources to complain individually, and there is no practical vehicle for collective passenger complaints.

With perfect competition, the economic feedback provided by the supply-demand relationship assures resource utilization which is optimally responsive to the society’s wants and needs because the prices of goods and services are a reflection of their real value to society, and the quantity of goods or services is the quantity desired by society. At several major airports at which demand exceeds capacity, the airport operators are insulated from this economic feedback by the absence of effective competition, the capacity-demand relationship, and the absence of effective external constraints. Consequently, these airport operators are able to manipulate the market in a manner which is not necessarily optimal to society.

B. Other Antitrust Problems

Irrespective of whether an airport enjoys sufficient demand to give it monopoly power, the airport operator may encounter antitrust challenges whenever it limits the number of participants who may engage in any given

and 8.7% in 1969, respectively. Statistical Handbook of Aviation, (Calendar Year 1978) (published by the Federal Aviation Administration).

20. See cases cited note 12 and accompanying text supra.

business at the airport. The legal issue created by such limitations is whether they are applied to present and potential participants in a manner that is not unjustly discriminatory. The factual details as to these limitations and the problems which may result are discussed in more detail below in relation to each type of activity.

III. STATE ACTION ANTITRUST IMMUNITY

Recent Supreme Court cases have created considerable uncertainty for many government entities, such as the operators of most major airports, about the extent to which competitive impact must be considered in their operational decisions. This section sets forth the legal framework for consideration of this issue.

A. GENERAL

The antitrust immunity for activity by airport operators must be viewed in the context of the state action immunity generally. With the general principles as a background, the aspects which apply to airport operators will be considered.

1. The Statutes

Private federal antitrust actions are brought under the Sherman Act and the Clayton Act. The Sherman Act provides at section 1, in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

section 2 of the Sherman Act provides, in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or com-

22. Indeed, despite the reduction of federal economic regulation of air transportation which results from the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.), these problems pose the real question, not discussed in this article, whether major airports should be federally regulated.


25. 15 U.S.C. § 1 (1976). This article does not consider the impact upon interstate commerce that is required to constitute "trade among the several States" for this purpose. However, it is noted that no state action antitrust immunity case has been found in which the Sherman Act was found to be inapplicable because of insufficient impact upon interstate commerce. If such a case were to arise, it certainly would not relate to the operation of a major airport, e.g., Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978).
merce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."26 section 8 of the Sherman Act further provides: "[T]he word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations. . . ."27

The private right of action for damages for violations of the Sherman Act is provided by section 4 of the Clayton Act,28 and private injunctive relief may be sought under section 16 of the Clayton Act.29

2. The Cases

Because the Sherman Act and the Clayton Act contain no specific reference to the antitrust liability of government entities, the law on this issue derives entirely from judicial construction. In the wake of several recent Supreme Court cases, the vitality of many older lower court cases is questionable. The general judicial background presented here therefore consists primarily of cases decided by the Supreme Court.

The first federal case relating to an antitrust claim under the Sherman Act against a government entity was Lowenstein v. Evans,30 in which the court held that the sale of liquor by the South Carolina State Board of Control, to the exclusion of private sellers, was not a violation of the Sherman Act because the system of liquor sales was required by state law; there was no contract, combination, or conspiracy; and the state was neither a "corporation" nor a "person" under the Sherman Act.

The first case decided by the Supreme Court relating to a Sherman Act claim against a government entity was Olsen v. Smith,31 in which the Court saw no antitrust problem in the regulation by the State of Texas of vessel pilots in its ports, and the prohibition against unlicensed pilots.

The next case decided by the Supreme Court on this issue was Parker

28. 15 U.S.C. § 15 (1976), which provides, in pertinent part:
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
29. 15 U.S.C. § 26 (1976), which provides, in pertinent part:
   Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . .
30. 69 F. 908 (D.S.C. 1895).
31. 195 U.S. 332 (1904).
v. Brown, which is generally considered to be the genesis of the state action antitrust immunity doctrine. Parker involved a challenge of the activities of the (California) Agricultural Prorate Advisory Commission, which was established as a state agency under the California Agricultural Prorate Act for the purpose of restricting competition among growers and stabilizing prices in their commodities. Upon petition from at least ten producers for the establishment of a prorate marketing program, the Commission would decide, after notice and hearing, whether the program would prevent agricultural waste and preserve agricultural wealth without permitting unreasonable profits to producers. If so, the Commission would select a prorate program committee. After notice and hearing, the plan developed by the committee was subject to approval, with modification if necessary, by the Commission. If enough producers consented, the plan would go into effect.

The specific plan under attack in Parker established categories for raisins and controlled their sale in order to stabilize raisin prices. The Supreme Court stated that the plan would have violated the Sherman Act if it had been organized and conducted entirely by private persons. However, because the state created the machinery for establishing the prorate program, adopted the specific plan, supervised it closely, and enforced it, the Supreme Court unanimously held that the raisin prorate program was not subject to Sherman Act scrutiny, stating:

[There is] nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government . . . an unexpressed purpose to nullify a state's control over its officers is not lightly to be attributed to Congress . . . The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

Based upon Parker, the state action immunity was generously applied to a variety of government entities with little analysis beyond whether the activity was a bona-fide activity of the government entity. This relatively

32. 317 U.S. 341 (1942).
33. 317 U.S. at 350, 352.
automatic grant of state action immunity lasted for more than thirty years until the Supreme Court’s next major state action immunity decision, *Goldfarb v. Virginia State Bar*.

*Goldfarb* was an action to enjoin minimum attorney fee schedules which were established by the Fairfax County Bar Association (a private voluntary association of attorneys) and enforced by the Virginia State Bar (a state agency whose members were attorneys appointed by the Virginia Supreme Court). After deciding that the fee schedule constituted price fixing which affected interstate commerce, and that the fee schedule was not entitled to a “learned profession” exemption, the Court looked to whether the state action antitrust immunity applied. The Court held (8-0) that there was no such immunity:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. [I]t is not enough that ... anticompetitive conduct is “prompted” by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign.

After this introduction by *Goldfarb* of “compulsion” as a requirement for immunity, the state action immunity was dramatically converted from being granted in most instances to being denied in most instances.


35. *Parker* the Supreme Court held that a state resale price fixing scheme for liquor was preempted by the Sherman Act. Schwemmann Bros. v. Calvert Corp., 341 U.S. 384 (1951). The Court stated that “the fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress.” 341 U.S. at 386. The view has been expressed that *Parker* and *Schwegmann* are factually so similar that the implicit federal statutory support for the scheme in *Parker*—the *Parker* plan could have been implemented by the U.S. Secretary of Agriculture under 7 U.S.C. § 601 (1976) (originally enacted as the federal Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246)—“may well have been crucial” to the *Parker* result because there was no such federal statutory support for the scheme in *Schwegmann*. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 238, at 734 (1977).


37. Id. at 790-91.


pany that encouraged the use of electricity by distributing free light bulbs. The light bulb plan was conducted in accordance with a tariff which had been filed by the utility company and approved by the Michigan Public Service Commission. Unlike Parker and Goldfarb, Cantor produced a divided Court. Five Justices held that the program might be exempt from antitrust scrutiny if a private person did "nothing more than obey the command of his state sovereign;" however, a private person cannot file a tariff and then, upon routine approval of the tariff by the appropriate state agency, claim that any action pursuant to the tariff is thereby "compelled" for antitrust purposes. These five Justices also agreed that immunity might be appropriate if the Sherman Act conflicted with the state regulatory mechanism, stating: "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" However, the Justices noted that the lack of state regulation of the electric light bulb market alleviated any possibility of conflict between the antitrust laws and a state regulatory scheme.

In a concurring opinion, Mr. Justice Blackmun questioned the advisability of the "compulsion" test, doubted the relevance of whether the state or the private party initiated the practice, and found the "affirmative articulation" test to be "wanting." He suggested a "rule of reason" balancing of the benefits and harms of the state-sanctioned activity. The three dissenting Justices indicated generally that any pervasively regulated utility scheme should be exempt from Sherman Act scrutiny.

The Cantor opinion created the need for the courts to examine in detail the role of the private person in the development of the regulatory scheme in order to determine who actually made the decision in the "blend of private and public decisionmaking." By adding the "when and only to the extent necessary" test to the "compulsion" test, it also compounded the confusion as to whether state action immunity derives from an exemption

40. Id. at 592.
41. Id. at 594. Only four of those five Justices agreed that Parker was not applicable to the private activities in Cantor; the other five Justices stated that Parker applied both to state activities and to state-sanctioned private activities.
42. Id. at 597.
43. Id. at 596. Indeed, the Court "inferred that the State's policy is neutral on the question whether a utility should, or should not, have such a program." Id. at 585.
44. Id. at 609.
45. Id.
46. Id. at 610.
47. Id. at 610-11.
48. Id. at 615.
49. Id. at 592.
analysis or from a preemption analysis.50

The next state action immunity case in the Supreme Court, Bates v. State Bar of Arizona,51 enumerated the state action immunity tests which now appear to be emerging as the tests generally to be applied. In Bates, a unanimous Court (on this issue) held that the Arizona Supreme Court’s disciplinary rule prohibiting advertising by attorneys was immune from antitrust scrutiny.52 The Court distinguished Goldfarb by noting that the Virginia Supreme Court in Goldfarb did not compel the subject anticompetitive activities, while the advertising ban in Bates resulted from an “affirmative command of the Arizona Supreme Court” and was therefore, in the words of Goldfarb, “compelled by the State acting as sovereign.”53 The Court distinguished Cantor by noting that (1) Cantor related to activities of a private person, as contrasted with the activities of the Arizona Supreme Court in Bates; (2) in Cantor there was no state regulatory interest in the light bulb market, and an antitrust exemption as to light bulbs was not essential to the state’s regulation of electric utilities, while in Bates the “controls over solicitation and advertising have long been subject to the State’s oversight;”54 and (3) the light bulb program in Cantor was privately initiated, with mere acquiescence by the state regulatory agency, while in Bates the disciplinary rules “reflect a clear articulation of the state’s policy,” and “it [is] significant that the state policy is so clearly and affirmatively expressed and that the state’s supervision is so active.”55

Although the Court discussed the Goldfarb “compulsion” test in Bates,56 it was not enlightening because the “compulsion” in Goldfarb relates to the command from the highest state level to the implementing state level (i.e., the lowest level at which discretion concerning the manner of implementation could be exercised), while the implementing state level in Bates—the Arizona Supreme Court—was the highest state level.

Shortly after Bates, a new wrinkle appeared. The Supreme Court decided City of Lafayette v. Louisiana Power & Light Co.,57 relating to whether a municipality can obtain state action immunity for its operation of an electric utility. Lafayette is discussed here in greater detail than the other Supreme Court cases because the operation of an electric utility is roughly analogous for this purpose to the operation of a major airport.

50. The Court began this exemption line of reasoning as to state action immunity in Goldfarb, in which it noted that there is a “heavy presumption against implicit exceptions” from the Sherman Act, 421 U.S. at 787. See discussion note 96 and accompanying text infra.
52. The prohibition was found, however, to run afoul of the first amendment.
53. 433 U.S. at 360.
54. Id. at 362.
55. Id. at 362.
56. Id. at 360.
In Lafayette, two cities which owned and operated electric utility systems brought an antitrust action against Louisiana Power and Light Co. (LP&L), an investor-owned electric utility company which competed with the city-owned utility companies outside their city limits. LP&L counterclaimed that the cities committed antitrust violations in their operation of the utilities.

The District Court for the Eastern District of Louisiana dismissed the counterclaim on the ground that Parker, and a more recent case in the Fifth Circuit, Saenz v. University Interscholastic League, rendered the antitrust laws inapplicable to the alleged activities. The Court of Appeals for the Fifth Circuit reversed the dismissal and remanded the counterclaim on the basis that, after the decision in Goldfarb (which came subsequent to the District Court’s dismissal), the cities were not necessarily exempt from antitrust scrutiny. Rather, the exemption determination required a closer examination of whether the state legislature contemplated the type of activity alleged.

In affirming the Court of Appeals, five Justices (Burger, Brennan, Marshall, Powell and Stevens) joined in opinion that under Section 8 of the Sherman Act and sections 1 and 4 of the Clayton Act, states and municipalities as plaintiffs are “persons” and that there is no reason under the Sherman or Clayton Acts not to consider a municipality which is a counterclaim defendant as a “person” as well.

Those five Justices rejected the three policy reasons advanced for exempting municipalities as such from the antitrust laws. First, as to the problems of imposing civil and criminal antitrust liabilities upon municipalities, the Court simply noted, to the dismay of the dissenting Justices, that the issue of remedy was not presented in Lafayette. Second, as to the desirability of limiting the scope of the Sherman Act to abuses of private power and exempting government proprietary activities, the Court responded that the alleged abuses by the cities—selling gas and water only to those who purchased electricity from the city utilities rather than from LP&L, and instituting “sham” litigation to delay LP&L’s nuclear plant—adversely impact competition as much as if they were committed by private parties, but have no greater countervailing benefit than if they were conducted by private parties. Finally, to the claim that the citizens can use the legislative process to correct antitrust wrongdoings by a municipality,

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58. 487 F.2d 1026 (5th Cir. 1973).
62. See Georgia v. Evans, 316 U.S. 159 (1942); Chattanooga Foundry v. City of Atlanta, 203 U.S. 390 (1906).
63. Lafayette, 435 U.S. at 394-95.
64. Id. at 403-05.
the Court responded that legislative redress would be no more effective or desirable as a remedy for municipal antitrust problems than for private antitrust violations, and that Congress did not leave the fundamental national policy of competition to be enforced by the "vagaries of the political process." Thus, the Court concluded that these policy reasons were not "sufficiently weighty to overcome the presumption" against "repeal by implication" of the antitrust laws.

As to whether the cities were entitled to Parker exemption as agents of the state, however, only four of those five Justices (Brennan, Marshall, Powell and Stevens) agreed. As a result of the decisions in Goldfarb and Bates, in conjunction with cases in other contexts which indicate that municipalities are not necessarily entitled to the deference afforded to states, the four-Justice plurality was "unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach" and would not automatically extend Parker immunity to municipalities. Instead, they concluded that: "[T]he Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." Accordingly, those four Justices affirmed the Fifth Circuit, remanding the case for a determination of whether the state "authorized or directed a given municipality to act as it did." More particularly, the plurality noted:

This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

Chief Justice Burger concurred in the result, saying that Parker does not exempt a proprietary enterprise from the Sherman Act merely because it is engaged in by a municipality. He sought a remand for the purpose of determining whether there was a "state policy to displace competition with

65. Id. at 405-07.
66. Id. at 399, 400.
67. Id. at 408-14.
68. Id. at 413.
69. Id. at 414. The Court noted that, unless there were such authorization, "The most that could be said is that state policy may be neutral." Id. The same lack of deference to neutral state policy was shown in Cantor v. Detroit Edison Co., 428 U.S. at 585.
70. Id. at 415 citing the Fifth Circuit, 532 F.2d at 434.
71. Id. at 418.
regulation or monopoly public service,'" consistent with the plurality, but he wanted to add the Cantor test to the remand—a determination of whether the implied exemption from federal law was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary." Mr. Justice Marshall added that Chief Justice Burger's additional test was already inherent in the plurality's holding.

The dissenting Justices indicated that the Sherman Act was concerned with "attacking concentrations of private economic power unresponsive to public needs," which is not the situation for municipalities that are instrumentality of the state and are subject to direct popular control through the political process. The dissent further disagreed with the plurality's two reasons for holding that Parker is inapplicable to municipalities. In particular, the dissent viewed as irrelevant the plurality's assertion that cities are not afforded the same deference as states under the Eleventh Amendment, and argued that the question, which was answered in the affirmative in National League of Cities v. Usery, should more appropriately be whether cities are afforded the same deference as states under the Commerce Clause; and the dissent argued that the plurality's reliance upon Goldfarb was misplaced because Goldfarb applies only to private actions.

The four dissenting Justices also argued that the Court's decision will fundamentally interfere with the method by which states delegate functions to municipalities because (1) the requirement for a state legislative mandate will hamper municipal action, (2) the "authorize or direct" standard is vague, and (3) there is rarely any state legislative history from which to determine intent. These dissenting Justices added further that the decision will interfere with the substance of municipal activity because the uncertainty of the "authorize or direct" standard will discourage innovation by state agencies and subdivisions and will invite wide-ranging federal judicial scrutiny into the reasonableness of state regulations. Finally, the dissent was concerned that the costs to municipalities, in terms of the cost of litiga-

72. Chief Justice Burger also stated that the plurality advocated the Goldfarb "compulsion" test, id. at 425. Although the plurality discussed this Goldfarb test, id. at 410, it does not appear that the plurality applied the test in Lafayette.
73. 428 U.S. at 597.
74. 435 U.S. at 426.
75. Id. at 417-18.
76. Id. at 428. Note the very broad statement in Parker that the Sherman Act "must be taken to be a prohibition of individual and not state action." 317 U.S. at 352.
77. 435 U.S. at 430-31.
79. U.S. Const. art. I, § 8, cl. 3.
80. 435 U.S. at 431-34.
81. Id. at 434-38.
82. Id. at 436-40.
tion and treble damages, could be staggering.83

Mr. Justice Blackman separately expressed concern that imposition of treble damages is mandatory under section 4 of the Clayton Act,84 and that the decision will therefore leave no way to avoid the imposition of treble damages upon municipalities if liability is found.85

Lafayette added considerably to the confusion by introducing the "authorized or directed" and "contemplated by the legislature" tests, without indicating whether the Goldfarb "compulsion" test was being abandoned generally,86 or whether these Lafayette tests were to be applied only to its facts (proprietary activities by municipalities). It is submitted here that the two Supreme Court cases decided on this issue since Lafayette suggest that the "compulsion" test is being abandoned, and provide a reasonable basis for concluding that the Bates tests may prevail and become the general tests in situations beyond the facts presented in Bates. As noted in Chief Justice Burger's concurring opinion, the analysis in Lafayette also indicates that, for all practical purposes, the antitrust immunity analysis for state proprietary activities will be essentially the same as the antitrust immunity analysis applied in Cantor for state-sanctioned private activities.87

In New Motor Vehicle Board of California v. Orrin W. Fox Co.,88 the Supreme Court decision (8-0 on this issue) permitted antitrust immunity for the activities of the California New Motor Vehicle Board pursuant to a state statute which required an automobile manufacturer to obtain state approval for the placement of a dealership if any existing nearby dealer protested. The only private action was the protest; thereafter, the response to the protest, which determined whether and when the new dealer would obtain state permission, was wholly with the Board under its statutory mandate. The Court stated: "[The California statute's] regulatory scheme is a system

83. Id. at 440-41. The damages claimed in Lafayette, multiplied by three, would have been $540 million. With a combined population of the two defendant cities in 1970 of about 75,000, this would have resulted in a per-capita assessment for damages alone of about $7,200. Id.
86. As to the undesirability of "compulsion" as a requirement for state action antitrust immunity, see 1 ARREDA & TURNER ¶215b, supra at 92-97.
of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the manner of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption." 89 Thus, without any reference to the "compulsion" test, the Court used the much clearer and more easily applied Bates tests.

The most recent Supreme Court case to consider the state action immunity issue, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 90 involved wine price-fixing under a California statute which required wine producers, wholesalers, and retailers to file their prices with the state, whereupon wine merchants were required to sell to retailers at that price. The prices were established by the private persons who filed them, but the state did not review the prices for reasonableness. After deciding that the price-fixing scheme violated the Sherman Act, the Court reviewed its previous state action immunity decisions and stated that those decisions "establish two standards for antitrust immunity under [Parker]. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself." 91 The Court decided (8-0) that the price fixing satisfied the "clearly articulated and affirmatively expressed" requirement, but failed the "actively supervised" requirement:

The State simply authorizes price-setting and enforces the prices established by private parties. The State neither established prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination of the program." The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement. 92

Thus, although the primary actors in Midcal were private parties, the Court applied the standards from Bates, in which the primary actor was the state. Moreover, the Court noted that a compulsion standard was used in Goldfarb, but again did not apply compulsion as a standard in Midcal. Taken together, these analytical developments refute the contention that a "compulsion" standard applies to state-sanctioned private activities and to government proprietary activities, 93 while a lesser standard applies to government sovereign activities. 94 Instead, the Bates standards are apparently

89. Id. at 109.
91. Id. at 105.
92. Id. at 105-06.
93. Government proprietary activities and state-sanctioned private activities have been subject to a similar analysis since Lafayette. See cases cited note 87 and accompanying text supra.
94. It has been argued that the Goldfarb "compulsion" test reflected the Court's desire to apply a more stringent standard of analysis to state-sanctioned private action than to state action.
of general applicability, not limited to the fact situation in Bates.

3. The Standards From the Cases

There is little agreement as to the standards which can be distilled from these cases. It is submitted here that the later Supreme Court cases are beginning to create a path out of the confusion, and that the path is to be found in a two part test: (1) is the state statute preempted by the Sherman Act; and if not, then (2) are the actions pursuant to the state statute sufficiently the actions of the state to enjoy this protection from preemption. 95

a. Preemption rather than exemption. One major area of uncertainty relates to whether the state action “immunity” reflects a preemption analysis or an exemption analysis. While the matter is certainly not free from doubt, 96 it is submitted here that the state action immunity cases fit partially into both categories and squarely into neither category, but that a preemption analysis is conceptually more appropriate.

Preemption, on one hand, derives from the Supremacy Clause 97 and relates in broad terms to the supremacy, by occupation 98 or conflict, 99 of federal statutes over state statutes. According to principles of federalism,
preemption is not to be lightly inferred, and the courts generally avoid finding preemption if possible—thus, the assertion in Parker that: "In a dual system of government . . . an unexpressed purpose to nullify a state's control over its officers is not lightly to be attributed to Congress."101 Some state statutes which may have anticompetitive effects are preempted by the Sherman Act and others are not.102 The exemption from the Sherman Act by the terms of a state statute is preempted.103 Thus, the Parker Court noted that: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."104 Parker has been interpreted to mean that a state statute may not, by its terms "determine the extent to which a particular government agency under its control should be exempt from the provisions of the Sherman Act."105

The application of principles of federalism in determining whether a state statute is preempted has varied over the years. Recently, this application has apparently been shifting in favor of the states.106

Exemption, on the other hand, relates to the relationship between the laws of one sovereign107 and results, in the antitrust context, in frequent assertions that "repeals of the antitrust laws by implication . . . are strongly

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100. See e.g., Exxon Corp. v. Governor of Md., 437 U.S. 117, 132, rehearing denied, 439 U.S. 884 (1978).
101. 317 U.S. at 351.
102. The Court in New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. at 111, cited the following language from Exxon Corp. v. Governor of Md., 437 U.S. 117, 133, rehearing denied, 439 U.S. 884 (1978): "[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed." On the other hand, note the assertion in Cantor that: "The mere possibility of conflict between state regulatory policy and federal regulatory policy is insufficient basis for implying an exemption from the federal antitrust laws." 428 U.S. at 596.
107. A substantially increased federal role in the proprietary activities of the airport operators could transform the antitrust analysis for airport operations into an exemption analysis. For example, if the Federal Aviation Administration (FAA) allocated takeoff and landing slots among the carriers at the busier airports (see discussion note 211 and accompanying text infra), this allocation function, rather than being subjected to the state action preemption analysis, would undergo an exemption analysis which would weigh the FAA's actions against the national competition policy.
The exemption doctrine is the source of the statements in Cantor and Lafayette that exemptions from the antitrust laws are implied only after "first determining that exemption was necessary in order to make the regulatory Act work and even then only to the minimum extent necessary." 109

For state action "immunity," a preemption analysis is more appropriate than an exemption analysis for several reasons. First, the basic presumptions in a preemption analysis support the principles of federalism described in Parker.110 A preemption analysis presumes that state action will not be preempted by the Sherman Act, while an exemption analysis, as stated in Cantor and Lafayette, presumes that exemption is granted only when necessary, and then only to the extent necessary. Thus, once an action meets the demanding tests for being "state" action for this purpose, it obtains antitrust immunity under a preemption analysis; under an exemption analysis, on the other hand, there is no theoretical reason why the mere fact of being "state" action would or should excuse it from the Cantor "exempt when and only to the extent necessary" standard.

Second, the concept of federalism reflects a view of state sovereignty which suggests a presumption that the states will act responsibly. As to a state action for which a state has a valid interest in regulating or displacing competition with monopoly public service, such a presumption should theoretically preclude any federal analysis into the competitive aspects of the basic state scheme111 and should render generally inappropriate a federal "when and only to the extent necessary" inquiry. This "when and only to the extent necessary" test is inherent to an exemption analysis, but would not arise in a preemption analysis. The cases from which this test was taken112 all relate to conflicts between the antitrust laws and federal regulatory schemes. The casual extension of this concept to a conflict between the antitrust laws and state regulatory schemes was protested by the dissent in Cantor113 and prompted the warning by Areeda and Turner against "applying standards developed for accomplishing accommodation within

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109. 428 U.S. at 597; 435 U.S. at 426.


111. As to the implementing details, on the other hand, see discussion note 130 and accompanying text infra.


113. 428 U.S. at 629.
the federal system to the very different context of federal/state conflict." 14

Finally, the results of the cases fit better into a preemption framework than into an exemption framework. For example, contrary to the "exempt when and only to the extent necessary" test, it is clear from Bates that minimal impact of the basic state scheme upon competition is not a requirement for state action antitrust immunity. 15 Moreover, the activities conducted by municipalities as such are not afforded as much deference for antitrust immunity purposes as action by states. Affording greater deference to the states than to municipalities is theoretically more justified under a preemption analysis than under an exemption analysis. 16

Accordingly, the phrase state action "immunity" is used in this article, because of its widespread use, although it refers to what actually results from a preemption analysis.

b. State action. Because the protection from preemption which is provided by principles of federalism applies only to "state" action, an activity is entitled to antitrust "immunity"—protection from preemption—only if that activity is sufficiently clothed with the indicia of state participation and control to become "state" action for this purpose. In broad terms, the recent Supreme Court cases suggest that the standards for state-sanctioned activities by private parties, or for proprietary activities conducted by government entities other than the state itself, 17 to be "state" action for the purpose of the state action immunity, are:

14. 1 Areeda & Turner, ¶ 2144a supra, at 83 note 11; Handler, Antitrust—1978, 78 Colum. L. Rev. 1363, 1378 (1978). As to the implementing details of the scheme, on the other hand, principles of federalism would not preclude an application of the "when and only to the extent necessary" standard. See discussion note 130 and accompanying text infra.

15. In particular, the Court was not concerned that "the advertising ban is not tailored so as to intrude upon the federal interest to the minimum extent necessary." 433 U.S. at 361. Also, with respect to attorney advertising, see Foley v. Alabama State Bar, [1980-2] TRADE CASES (CCH) ¶ 63,396 (N.D. Ala. 1979). Prior to Bates, of course, this result was also apparent from the facts in Parker, and a fact situation analogous to Parker appeared subsequent to Bates in Hinshaw v. Beatrice Foods, Inc., [1980-81] TRADE CASES (CCH) ¶ 63,584 (D. Mont. 1980).

16. Even under a preemption analysis, however, the different levels of deference may remain only theoretical. The plurality in Lafayette discusses this issue in a non-preemption context, 435 U.S. at 411-13, and dictum in several preemption cases implies that state statutes and municipal ordinances are due the same degree of deference, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Huron Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Chase v. McMaths, 573 F.2d 1011 (8th Cir.), cert. denied, 439 U.S. 965 (1978); Rogers v. Larson, 563 F.2d 617 (3d Cir. 1977); United States v. City of New Haven, 496 F.2d 452 (2d Cir.), appeal dismissed, 419 U.S. 958 (1974); DeKalb County, Ga. v. Henry C. Beck Co., 382 F.2d 992 (5th Cir. 1967); United States v. City of Pittsburgh, 467 F. Supp. 1080 (N.D. Cal. 1979); 515 Assoc. v. City of Newark, 424 F. Supp. 984 (D.N.J. 1977); but no case was found which holds that municipal ordinances are or are not entitled to the same deference as state statutes for preemption purposes, and there is little likelihood that a comparative situation would be presented in one case to result in such a holding.

17. See discussion note 87 and accompanying text supra.
1. The state must have a valid interest in displacing competition with regulation or monopoly public service as to the activity;

2. The State’s policy to displace competition with regulation or monopoly public service as to the activity must be clearly articulated and affirmatively expressed; and

3. The activity must be actively supervised by the state.\textsuperscript{118}

The first standard, although discussed in some of the state action cases,\textsuperscript{119} presents the most difficult federalism policy issues of the three standards and is generally not discussed in cases in which the other standards were not met, e.g., \textit{Midcal}, \textit{Lafayette}, \textit{Cantor}, and \textit{Goldfarb}. As a result of principles of federalism, this test does not require a state to show that it \textit{must} displace competition; only that it has a \textit{valid interest} in displacing competition as to the activity.\textsuperscript{120} Use of a “valid interest” test rather than a “must” test, i.e., rather than the \textit{Cantor} “exempt when and only to the extent necessary” test, on this standard avoids the use of an exemption standard in a preemption context, and substantially responds to the concern expressed in the dissenting opinion in \textit{Lafayette} about the “wider-ranging [federal] inquiry into the reasonableness of state regulations.”\textsuperscript{121}

The second standard will often be difficult to apply because many state statutes do not specifically address the competitive aspects and few states have legislative histories. This standard reflects the fact that the state must clearly intend the general activity, and the intent may be shown if, for example, the activity is compelled, as required in \textit{Goldfarb},\textsuperscript{122} or “authorized or directed,” as required in \textit{Lafayette}.\textsuperscript{123} This should not, however, be taken

\textsuperscript{118} For sovereign activities conducted by the state, the standards are slightly different: (1) the state must have a valid interest in the activity; (2) the state’s scheme must be clearly articulated and affirmatively expressed; and (3) the activity must be actively supervised by the State. See discussion note 184 and accompanying text infra.


\textsuperscript{120} See, Bates v. State Bar of Ariz., 433 U.S. at 361.

\textsuperscript{121} 435 U.S. at 439.


\textsuperscript{123} 435 U.S. at 413; see also United States v. Texas State Bd. of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), aff’d as modified, 592 F.2d 919 (5th Cir.), cert. denied, 444 U.S. 925 (1979).
by state legislatures as an invitation to legislatively authorize, direct, or compel anticompetitive activities. Such legislation, if not carefully drawn, may not only be unhelpful in attempting to provide immunity, it may in fact precipitate a preemption confrontation.  

The clear intent test should be applied only to the basic scheme, but not to the specific implementing acts. As several courts have indicated, the legislature need only contemplate the type of activity in order for the immunity to be available. This is a desirable result because state legislatures rarely address, and for sound reasons of public policy should not generally address, the day-to-day operating details of a government proprietary activity. Again, therefore, the Cantor "when and only to the extent necessary" standard is inappropriate in this context. For basic schemes that are essential to the state, there is disagreement as to whether the state should nonetheless have to "clearly articulate" its intent in order for the activity to be immune.

Directing the intent test toward the general and away from the specifics does not, however, leave free reign as to the specifics. Thus, for example, a state statute allowing the government proprietor to have a monopoly would not constitute authority to abuse the monopoly. Rather, the specific activities, assuming they will not normally be legislatively mandated, should be subject to a loosely applied Cantor "exempt when and only to the extent necessary" test. So applied, this Cantor test would be ap-


128. In Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543, 552 (M.D.N.C. 1979), the court stated: "[A]lthough a particular area of activity may be directed or authorized by the state, the actual implementation of that authorization or direction can fall outside of which the legislature intended and thus not be covered by the Parker doctrine."


130. It has been stated that the "when and only to the extent necessary" standard was appro-
proximately equivalent to a "least anticompetitive" test. As long as the basic schemes are selected by the state and are not subject to the "least anticompetitive" test, requiring the states to consider the competitive impacts and to select one of the less anticompetitive methods to implement their basic schemes would pose no problems of federal intrusion into state functions.\textsuperscript{131}

Contrary to suggestions drawn from Cantor that private initiation of a scheme may be fatal to antitrust immunity, this standard does not depend upon who initiates a scheme, but upon the extent of state analysis in considering and approving it. Thus, for example, if the state agency would not have approved a contrary plan, the fact that the plan was privately conceived is irrelevant.\textsuperscript{132}

As to the third standard, active state supervision of an activity indicates either that the state is continually aware of the details, and conditions have not justified the withdrawal of its approval (for approval functions); or that the state maintains active oversight as to those activities for which regulation or monopoly public service displaces competition (for oversight functions). This supervision is essential to assure that the displacement of competition is not proceeding without close state involvement and continuous approval.

B. \textit{Relationship to Usery}

Two years before Lafayette the Supreme Court decided \textit{National League of Cities v. Usery},\textsuperscript{133} in which the issue was whether state and local employees could be covered by the minimum wage provisions of the

\textsuperscript{131} To some extent, even a loose application of the "least anticompetitive" test would undercut a basic premise of federalism, which is that states will act responsibly. However, the strength of the federal policy favoring competition justifies "warning" in advance that responsible competitive behavior is expected as to the implementing details, rather than waiting to see whether responsible competitive behavior will occur. Moreover, although not directly relevant in a preemption context, a loosely applied "least anticompetitive" test is also useful as a threshold matter because there is no federal-state conflict, and therefore no problem with granting the state action immunity, if the state's valid regulatory interest is being implemented in one of the less anticompetitive ways, e.g., Cantor v. Detroit Edison Co., 428 U.S. at 595.


\textsuperscript{133} 426 U.S. 833 (1976).
(federal) Fair Labor Standards Act. The divided (5-4) Supreme Court held that the ability of local governments to determine the wages of their employees is essential to the ability of those local governments to handle their affairs, and that:

This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged [Fair Labor Standards Act] amendments operate to directly displace the State’s freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.135

Concern has been expressed that Lafayette conflicts with Usery. In his concurring opinion in Lafayette, Chief Justice Burger stated that Lafayette presented no conflict with Usery because Usery applied, by its terms, only to the “State’s freedom to structure integral operations in areas of traditional government functions,” while the operation of a business enterprise, or at least the operation of the electric utility in Lafayette, “is not an integral operation in the area of traditional government functions.” This response erroneously equates the traditional/non-traditional distinction with the sovereign/proprietary distinction and fails to recognize that many business enterprises, such as airports, have historically been operated by government entities and are therefore traditional government functions for Usery purposes.

It is submitted here that there is no conflict between Lafayette and Usery, irrespective of whether proprietary functions constitute traditional government functions. The state action immunity doctrine developed by

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135. 426 U.S. at 852.
137. 426 U.S. at 852.
138. 435 U.S. at 424.
139. See Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979), which held that “operation of the [airport] is an integral governmental function within the meaning of [Usery].” Because the traditional/non-traditional distinction is not equivalent to the sovereign/proprietary distinction, this decision is not inconsistent with decisions which rely upon the proprietary nature of airport operations, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), and other cases cited note 219 infra (sovereign/proprietary distinction in relation to state’s police power); and see cases cited in note 153 infra (sovereign/proprietary distinction in relation to Noll v. Pennington immunity).
140. Usery was also discussed in Lafayette in relation to whether municipalities as such are sovereign—the dissent said they are, 435 U.S. at 430, citing Usery at 426 U.S. at 855 n.20; and the plurality said they are not, 435 U.S. at 412 n.42.
Parker and its progeny relates to preemption—"the supremacy of federal law over state law—and federalism—including the applicational principle that preemption is not to be lightly inferred—and is based upon the premise that Congress could occupy the field and preempt state law if it desired. Usey, on the other hand, relates to whether Congress may preempt state law and concludes, also applying principles of federalism, that the Commerce Clause does not give Congress the authority to enact statutes which "operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions." The absence of conflict between the two therefore results from the fact that the Usey analysis and the state action immunity analysis can only be applied sequentially, i.e., the latter is applied to a given situation only if the former leads to the conclusion that Congress can, if it desires, exercise its commerce clause authority and preempt state laws as to that situation. Moreover, in an antitrust context, a Usey analysis will almost always lead to the conclusion that Congress can preempt state law because the likelihood is slim, as a practical matter, that any reasonably foreseeable scenario of federal control over the competitive aspects of state activities would be so intrusive as to rise to the level of "directly displac[ing] the State's freedom to structure integral operations in areas of traditional government functions" under the stringent tests established in Usey.

C. RELATIONSHIP TO THE NOERR-PENNINGTON DOCTRINE

The Noerr-Pennington doctrine relates in general terms to the potential antitrust liability of private enterprises for influencing a legislature or government entity to take actions which may cause economic injury to other private enterprises. This general issue was decided by the Supreme Court in Eastern Railway Conference v. Noerr Motor, and Mine Workers v. Pen-

141. The view that Parker is not a preemption case is expressed in Davidson & Butters, supra note 136, at 598.
142. In Parker, the Supreme Court "assume[d] . . . without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining [the program sued upon]." 317 U.S. at 350. The premise that the federal statute is valid would clearly also be implicit even if state action immunity derived from an exemption analysis.
143. U.S. Const. art. I, § 8, cl. 3.
144. 426 U.S. at 852.
145. Id. at 853.
146. But see Jordan v. Mills, 473 F. Supp. 13, 19 (E.D. Mich. 1979), in which the operation of the state prison store was "immune [from antitrust scrutiny] under Usey." Although the Usey doctrine is not an appropriate conceptual basis for granting immunity from a federal statute, the Jordan result probably typifies the strength of many traditional state functions against antitrust attack, which in turn reduces the likelihood of attempts at overly intrusive federal control with respect to such activities.
In Noerr, the Supreme Court held that the lobbying and publicity campaign by railroad representatives seeking to obtain the passage and enforcement of laws that were injurious to the trucking industry was not a Sherman Act violation. The Court held that their activity must be immune from antitrust scrutiny in order to preserve the lines of communication between the citizens and their elected representatives, and in order to avoid possible conflicts with the First Amendment right to petition. In Pennington, relating to an alleged conspiracy to force small coal companies out of business by lobbying the Secretary of Labor to obtain certain wage and purchasing policies for the Tennessee Valley Authority, the Supreme Court added that such lobbying efforts are not an antitrust violation even if they are conducted with the specific intent of eliminating competition.

Taken together, these cases established what is commonly referred to as the Noerr-Pennington doctrine. As a result of California Transport v. Trucking Unlimited, the immunity is generally considered also to apply to attempts to influence administrative processes.

The Noerr-Pennington doctrine is mentioned here only for the purpose of noting that, insofar as this analysis is concerned, the doctrine is not affected by the developments as to state action immunity. Thus, the state action immunity developments do not alter the fact that less antitrust deference is shown for lobbying of a "local municipal body acting on a nonlegislative capacity" (such as the operators of most major airports) than for attempts to influence the state legislature, or the fact that lobbying by a private enterprise of a government proprietary enterprise concerning a commercial relationship between them is not generally entitled to Noerr-Pennington immunity.

149. Unlike the state action "immunity," the Noerr-Pennington doctrine is, strictly speaking, an immunity.
150. 404 U.S. 508.
151. In broader terms, however, the Noerr-Pennington doctrine may be affected by changes in the boundaries of the state action immunity. This development can be traced to careless application of the statement in California Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972), that, "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful." Based upon this broad language, some courts have suggested that lobbying for an activity that does not enjoy the state action antitrust immunity may not be entitled to the Noerr-Pennington immunity, e.g., Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975); In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979). Because of the tremendous uncertainty concerning the boundaries of the state action antitrust immunity, and because this uncertainty is often resolved only by litigation after the fact, linking Noerr-Pennington to Parker in this fashion will have a very unfortunate and unnecessary chilling effect upon lobbying activities. Conditioning one immunity upon the other effectively shifts from the government agency to the prospective lobbyists the decision as to whether an activity would qualify for Parker immunity.
IV. APPLICATION OF STATE ACTION IMMUNITY TO AIRPORT OPERATORS

A. LEGAL FRAMEWORK

The various legal constraints which apply to airport operators must be set forth as background for considering the availability of antitrust immunity for airport operators.

1. Federal (Non-Antitrust) Constraints

All of the major airports to which this article applies are recipients of federal airport development funds and are therefore subject to the legal constraints imposed by section 308(a) of the Federal Aviation Act of 1958, as amended, which provides, in pertinent part: "There shall be no exclusive right for the use of any landing . . . facility upon which Federal funds have been expended." The phrase "any landing area or air navigation facility" in section 308(a) has been held to apply, for example, to airport ramp and hangar space but not to ground transportation concessions. In an interpretation of "exclusive right" in section 303 of the Civil Aeronautics Act of 1938, which is the predecessor of the language in section 308(a) of the Federal Aviation Act, the U.S. Attorney General has stated that this exclusive use proscription not only prohibits the exclusion of any class of user, it also prohibits the exclusion of users within any class of airport user. The Attorney General stated that this interpretation is confirmed by the legislative history which shows that the purpose of the provisions is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics in accordance with the policy of the [Civil Aeronautics Act of 1938].

The Federal Aviation Administration (FAA) has interpreted section 308(a) to prohibit the exclusion of users except as necessitated by complete and immediate use of all available space by the existing users. The FAA requires assurances of compliance with section 308(a) from recipients of federal airport development funds.

160. The "Sponsor Assurances" in the grant agreement which must be executed by recipients of airport development funds under the Airport and Airway Development Act of 1970, 91 Pub. L. No. 258, 84 Stat. 219 (current version at 49 U.S.C. § 1711 (1976 & Supp. III 1978)), include the following provisions:
In addition, section 18(a)(1) of the Airport and Airway Development Act of 1970 requires an airport to assure the Secretary of Transportation, as a condition precedent to the Secretary's approval of an airport development project, that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination." Although this provision has been construed to apply only to the access by air carriers and fixed-based operators, it is broader than section 308(a) because air carrier access includes all access required by air carrier passengers, such as ticket counter, gate, and baggage space (even though federal funds are not generally expended on these facilities). As with section 308(a), however, this provision does not apply to ground transportation or to on-site concessions other than fixed-based operators.

19. The Sponsor—
   a. Will not grant or permit any exclusive right forbidden by Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1349(a)) at the Airport, or at any other airport now owned or controlled by it;
   b. Agrees that, in furtherance of the policy of the FAA under this covenant, unless authorized by the Administrator, it will not, either directly or indirectly, grant or permit any person, firm or corporation the exclusive right at the Airport, or at any other airport now owned or controlled by it, to conduct any aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity.
   c. Agrees that it will terminate any existing exclusive right to engage in the sale of gasoline or oil, or both, granted before July 17, 1962, at such an airport, at the earliest renewal, cancellation, or expiration date applicable to the agreement that established the exclusive right; and
   d. Agrees that it will terminate any other exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Development Act.

21. Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of nonaviation products and services for any service of a nonaeronautical nature or to obligate the Sponsor to furnish any particular nonaeronautical service at the Airport.


162. The "Sponsor Assurances" in the grant agreement which must be executed by recipients of airport development funds under the Airport and Airway Development Act of 1970 include the following provisions:

18. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes. Provided, That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; And Provided Further, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public.

20. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. In furtherance of
No court has yet opined as to whether these statutory provisions may be construed so broadly as to provide the FAA with the authority to "prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics" as suggested in the Attorney General's Opinion.\(^{163}\) Nonetheless, the federal mandates against exclusionary or discriminatory use, and the encouragement of more competition in air commerce in, among other places, section 3(a) of the Airline Deregulation Act of 1978,\(^ {164}\) clearly militate against activities by airport operators which adversely affect competition in the aeronautical and related activities at the airport.\(^ {165}\)

2. Non-Federal Constraints

On the state and local levels, the state usually provides the airport operator with a broad mandate, by legislation or otherwise, to conduct the airport affairs in a manner which best serves the public interest, with general powers to operate and maintain the airport, negotiate and enter into contracts, fix terms, conditions, and charges for services and rentals, and engage in other activities as necessary and appropriate. Most such mandates provide that the airport operator’s activities must comply with all state and federal laws (including, presumably, the antitrust laws). Specific legislative approval of any type of anticompetitive activity, and specific legislative requirements for any consideration of competition, are rare.


\(^{165}\) This is not necessarily to suggest, however, that these federal statutes provide a private right of action, see Guthrie v. Genesee County, N.Y., 494 F. Supp. 950 (W.D.N.Y. 1980).
3. Antitrust Immunity

Because the operators of most major airports are municipalities, and because the operation of an airport is generally considered to be proprietary, it is useful to review here the state action antitrust immunity cases relating to municipalities and to proprietary activities.

a. Municipalities. As Lafayette made clear, a municipality is not necessarily entitled to the same deference for antitrust purposes as a state. The treatment of municipalities for antitrust purposes has been the subject of extensive comment, especially after Lafayette.

Prior to Goldfarb there were very few antitrust challenges of municipal activity, and most of the challenges failed on the basis that government activities generally, including regulatory activities, operating a monopoly enterprise, and contracting with private parties, were exempted by Parker

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166. For the purposes of this article, the term "municipality" is defined at note 5, supra.
from antitrust scrutiny. In some instances, the courts noted that antitrust immunity cannot casually be extended to government bodies and activities, and immunity was generally denied in more extreme cases, such as when the government entity was influenced by a private party to modify the bidding specifications to allow the private party to win the competitive bid. Allegations of government conspiracy with private persons have always been detrimental to a claim of immunity.

After Lafayet, the number of antitrust cases against municipalities increased substantially, and immunity was no longer automatic. In some cases the immunity was granted on the basis that the state legislature contemplated that implementing the basic scheme might entail anticompetitive activities. In other cases the immunity was not granted because the stat-


171. See Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974).


174. According to a Deputy Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, the Lafayette decision should cause municipalities to exercise more caution in the following areas, among others: (1) any regulatory activity, including occupational licensing and regulation; (2) the operation of sports arenas or convention centers; (3) the provision of water, electric, and other utility services; (4) garbage collection; (5) transit systems, including taxis; (6) public health services; (7) airports; (8) parking lots; (9) procurement practices generally; and (10) zoning. Remarks of Joe Simms, 72nd Annual Conference of Municipal Finance Officers Association (May 15, 1978).

ute did not contemplate anticompetitive activities to implement the basic scheme, and the activity was not essential to the proper operation of the scheme.\textsuperscript{176}

In view of these cases, airport operators have been afforded less deference for antitrust purposes than states subsequent to Lafayette, consistent with Princeton Community Phone Book, Inc. v. Bate,\textsuperscript{177} in which the court stated:

The weaker the relationship between the state and the defendant, the more clearly the state must command the precise action taken by the defendant for the defendant to enjoy the state action exemption. Conversely, the closer the relationship between the state and the defendant, the less clearly the state need command the precise action for the defendant to enjoy the exemption.\textsuperscript{178}

In the extreme, of course, a municipality which merely implements detailed instructions from the state would be considered as the state for this purpose,\textsuperscript{179} but a municipality with only the broadest of guidelines from the state, such as the operators of most major airports, will not be able to claim the state contemplated the details to the day-to-day operations unless those operations are inherently essential to the general activity.\textsuperscript{180} Accordingly, even if the state contemplates government operation of a monopoly, the state does not necessarily contemplate that the monopoly be operated in a manner that unnecessarily restricts competition.\textsuperscript{181}


\textsuperscript{177} 582 F.2d 706 (3d Cir. 1978).
\textsuperscript{178} Id. at 719.
\textsuperscript{179} Lafayette, 435 U.S. at 412 n.42.
\textsuperscript{180} Despite the absence of any detail in the "delegation," it has been held, even after Lafayette, that home rule charters in which a municipality's powers flow directly from the state constitution may confer the state's sovereignty upon the municipality for this purpose, e.g., Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980); Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979); but see in re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978).
b. Proprietary activities. Prior to Lafayette, the distinction between sovereign and proprietary activities by a government entity was not generally considered to be relevant to the analysis and immunity was essentially automatic for government activities even if proprietary.\textsuperscript{182} In Lafayette, Chief Justice Burger highlighted the issue in his concurring opinion: "There is nothing in [Parker], or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality."\textsuperscript{183} Moreover, Chief Justice Burger noted that the principles of federalism apply differently to sovereign functions, when the state chooses to supplant competition with regulation, than to activities in which the state itself decides to compete.\textsuperscript{184} The dissent in Lafayette argued, on the other hand, that neither the Sherman Act nor Parker justifies any difference in treatment as between sovereign and proprietary actions by a government entity. Furthermore, argued the dissent, the distinction between sovereign and proprietary activities by a government entity is not clear, and "has been aptly described as a 'quagmire' ... [w]ith [these] 'distinctions [which] are so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.'"\textsuperscript{185} Irrespective of whether a formal distinction between proprietary and sovereign activities is maintained for this purpose, it is clear that proprietary activities by a government entity will, as a practical matter, encounter close antitrust scrutiny and encounter more difficulty than sovereign activities in obtaining antitrust immunity.

Except as to procurement activities, most government proprietary activities are monopolies. The cases suggest that the antitrust immunity analysis of such a monopoly will depend upon whether the activity is traditionally engaged in by a government entity. For proprietary activities


\textsuperscript{183} City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 418.

\textsuperscript{184} \textit{Id. at }422. See also Davidson & Butters, supra, at 591-92; Pinehurst Airlines, Inc. v. Resort Air Serv., 476 F. Supp. 543, 552 (M.D.N.C. 1979). It is not clear whether this would apply to all government proprietary activities or only to those which are also engaged in by private entities.

which are not traditionally conducted by government entities, the immunity analysis will go to whether the statute contemplated that the government conduct and monopolize the activity, and if not, the immunity may not be available. 186 For more traditional government proprietary activities, which are often natural monopolies, the fact that the government is operating the monopoly will normally not be challenged, 187 but the manner of conducting the monopoly will be subject to immunity scrutiny. In Lafayette, for example, the allegations related to sham litigation and market abuses, including boycotts and product ties. The problem, of course, is that the state legislature normally will not, and for sound reasons of public policy should not, legislate as to the day-to-day business management decisions of the government proprietary activity. Therefore there will be little or no "clear articulation" as to how the monopoly should be operated.

Prior to Lafayette the operating details in the conduct of a proprietary activity by a government entity received little scrutiny. After Lafayette, the necessary absence of clear articulation as to the operating details has resulted in the application of the Cantor "when and only to the extent necessary" standard. 188 As Chief Justice Burger noted in his concurring opinion in Lafayette, the application of this test will have the practical effect of subjecting proprietary activities traditionally engaged in by government entities to essentially the same immunity analysis that is applied to state-sanctioned activities by private parties. 189

c. Airports. Because the major airports have traditionally been operated by government entities, the cases discussed above suggest that an antitrust immunity analysis will not examine whether the natural monopoly airport should be operated by a government entity. Rather, the immunity analysis will look to how the airport is operated, and the operating details will probably be subject to the Cantor test—"exempt when and only to the extent necessary"—which translates loosely for this purpose into a "least anticompetitive" test, as discussed above. 190


188. See City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), vacated and remanded, 435 U.S. 992 (1978) (purchase of hospital from one hospital operator and lease to only other hospital operator, thereby eliminating competition); Shrader v. Horton, 471 F. Supp. 1236 (W.D.W. Va. 1979), aff'd, 626 F.2d 1163 (4th Cir. 1980) (requirement to tie into city water system does not destroy immunity).

189. See note 87 supra.

190. See note 131 and accompanying text supra.
It is submitted here that, in order to satisfy this Cantor test, airport operators must treat air carriers and concessionaires in a manner that is not unjustly discriminatory. In effect, this would require the airport operator to apply to all of its activities the "available for public use . . . without unjust discrimination" standard which federally funded airports must use for air carrier and fixed-based operator access. In addition, in order to meet the Cantor test, airport operators with monopoly power must carefully avoid monopoly abuses. This would require the airport operator to apply to all of its activities the "available for public use on fair and reasonable terms" standard which federally funded airports must use for air carrier and fixed-based operator access.

With respect to the anti-discrimination guideline, the cases thus far have been clear—exclusionary practices, such as exclusive concessions, were generally permitted prior to Lafayette, but exclusive concessions or exclusionary practices by airport operators have not usually received immunity subsequent to Lafayette. It is noted, however, that this guideline does not ban all discrimination, it bans only unjust discrimination. Thus, differences in treatment by an airport operator of air carriers and concessionaires would not preclude immunity if the differences were justified by the circumstances.

Although there is little antitrust law with respect to natural monopolies because most natural monopolies have historically been free of antitrust scrutiny by being either regulated or operated by a government entity, it is apparent that this antidiscrimination guideline for immunity goes well beyond the standards for antitrust liability. With respect to the guidelines

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192. Id.
195. This may even apply to unjust discrimination as between a fixed-based operator or other concessionaire, on one hand, and, on the other hand, the airport operator engaged in a comparable activity. See Sponsor Assurances 20(d) note 162 supra.
196. This does not include the "brand"—as opposed to "market"—natural monopolies which result from the fact that, in theory, every manufacturer has a natural monopoly over its own product, e.g., V&L Cicione, Inc., v. C. Schmidt & Sons, Inc., 403 F. Supp. 643 (E.D. Pa. 1975) aff’d per curiam, 565 F.2d 154 (3rd Cir. 1977); Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972); Neugebauer v. A.S. Abell Co., 474 F. Supp. 1053 (D. Md. 1979).
197. As between persons similarly situated, a monopolist acting alone may, without incurring antitrust liability under the Sherman Act, grant exclusive rights or concessions, e.g., Golden Gate Acceptance Corp. v. General Motors, 597 F.2d 676 (9th Cir. 1979); Bushie v. Stenocord Corp.,
against monopoly abuses, the result is less clear, and no reported federal cases were found relating to monopoly abuses by an airport operator. However, unlike the antidiscrimination guidelines, the monopoly abuse standards for antitrust immunity are quite similar to the standards for antitrust liability in relation to monopolization by an entity acting alone.\textsuperscript{198} The prohibition against monopoly abuse applies both to unwarranted capacity constraints and to the imposition upon air carriers and concessionaires of unfair or unreasonable rates, terms, or conditions.

Concerning capacity constraints, it is submitted here that an unfounded lack of desire by an airport operator to expand in response to excess demand will probably jeopardize the antitrust immunity for capacity limitation constraints, particularly if the failure to expand results in undue profits or other benefits for the airport operator.\textsuperscript{199} On the other hand, if expansion as to the most limiting capacity constraint is difficult or impossible under the circumstances, for sound financial, environmental, or other reasons beyond the airport operator’s control, a failure to expand would not jeopardize the antitrust immunity.

\textsuperscript{198} As to liability for unregulated single-entity monopolies, the Sherman Act, \textsuperscript{\textsection} 2, 15 U.S.C. \textsuperscript{\textsection} 2 (1976), proscribes conduct not status. Thus, the mere existence of a monopoly is not unlawful, e.g., United States v. C. E. DuPont DeNemours & Co., \textsuperscript{118} F. Supp. 41 (E.D. Va. 1951), \textit{aff’d}, 351 U.S. 377 (1956), but the monopoly must not be wrongfully obtained and it must not be abused, e.g., United States v. United Shoe Mach. Corp., \textsuperscript{110} F. Supp. 295 (D. Mass. 1953), \textit{aff’d} \textit{per curiam}, 347 U.S. 521 (1954). Monopoly abuse may result generally from any buying, selling, or licensing practice which has little business purpose other than to create or enhance a competitive advantage, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366, \textit{rehearing denied}, 411 U.S. 910 (1973); United States v. Griffith, 334 U.S. 100 (1948); Berkey Photo, Inc. v. Eastman Kodak Co., \textsuperscript{603} F.2d 263 (2d Cir. 1979), \textit{cert. denied}, 100 S. Ct. 1061 (1980); Fulton v. Hecht, \textsuperscript{580} F.2d 1243, \textit{rehearing denied}, \textsuperscript{585} F.2d 520 (5th Cir. 1978), \textit{cert. denied}, 440 U.S. 981 (1979); United States v. Aluminum Co., \textsuperscript{148} F.2d 416 (2d Cir. 1945).

\textsuperscript{199} Most monopolists exercise caution in restraining capacity because the resulting higher prices increase the incentive for others to provide the goods or service or a substitute. With a \textit{natural} monopoly, however, the goods or service cannot economically be provided by a second source, and the lack of substitutes for airport natural monopolies in particular is noted in the discussion note 11 and accompanying text supra.
If capacity could not be expanded to meet the demand, then the antidiscrimination guideline for antitrust immunity would require the airport operator to give all interested and able takers an opportunity to participate unless there were sound economic justification for precluding a larger number of participants. With respect to air carriers, this requirement for an opportunity to participate has already been effectively imposed by the Civil Aeronautics Board (CAB) at four airports with excess demand. This requirement falls short of strict prorationing, in which each participant would be permitted the same percentage of its demand, and at least in situations in which air carriers or concessionaires have made substantial capital inputs or improvements at the airport or have otherwise helped the airport obtain financing which could not otherwise have been obtained, strict prorationing by an airport operator would not be required for antitrust immunity.

d. Similarity to common carrier standards. The antitrust immunity standards enumerated above are quite similar to the standards which must be observed by a common carrier in relation to the service provided by the carrier to its passengers and shippers. In particular, a common carrier is required to charge rates for those services which are just, reasonable, and not unjustly discriminatory, and to give no undue, unreasonable, or unjustly discriminatory preference or advantage. Moreover, common carriers are generally required to have sufficient capacity to meet the reasonably foreseeable demand unless it is impractical or impossible under the circumstances to increase capacity. When capacity exceeds demand and expansion is not possible, the prohibition against discrimination becomes, under some circumstances, a requirement to prorate the existing capac-

200. See discussion note 209 and accompanying text infra.
201. The capital input by the air carriers at an airport distinguishes the airport situation from situations in which proration has been required, such as petroleum pipelines, see note 205 and accompanying text infra, and would justify a sharing of capacity that is short of strict prorationing.
203. Note, for example, the statutory requirements for rail, 49 U.S.C. § 11121(a) (Supp. III 1979), motor, 49 U.S.C. 11101(a) (Supp. III 1979), and air carriers, 49 U.S.C. 1374(a)(1) (1976 & Supp. III 1979). These provisions would not necessarily require the common carrier to have the equipment necessary to meet peak period demand; nor would slack period demand suffice to define the need, e.g., Vulcan Coal & Mining Co. v. Illinois Cent. R.R., 33 I.C.C. 52, 70-71 (1915). The actual amount of equipment required under these provisions would have to be determined in each instance, based upon the circumstances such as the demand patterns.
204. Petroleum pipelines, for example, are not required to expand when demand exceeds capacity. This generic distinction from other common carriers is justified by the fact that, while an airline or a railroad, for example, can increase capacity simply by adding more airplanes or cars, the maximum safe capacity of a pipeline common carrier (i.e., the capacity when no more pumping stations can be added or enlarged because of pressure or other structural limitations of the pipeline) can be increased only by adding a parallel pipeline.
B. APPLICATION OF VARIOUS SITUATIONS

This section presents a broad overview of the applicability of the legal principles enumerated above to the various situations encountered by the major airports.

1. Nondiscriminatory Treatment

1. Air access. Air access to and from airports is generally on a first-come, first-served basis—each airplane is handled in turn as it arrives or departs. From the standpoint of congestion in the air, only a few of the airports in the United States with scheduled commercial service have serious problems accommodating aircraft on a first-come, first-served basis. At four of these airports, the FAA has established limits on the number of hourly operations. The primary impetus for these limits was the delays and associated costs encountered by aircraft at these airports under instrument flight rule conditions. At several other airports with scheduled commercial service, aircraft may encounter considerable delays during rush hours, especially in bad weather, and it is expected that within ten years, a total of about thirty-five airports will have either severe congestion or capacity constraints.

At the four airports which presently have FAA hourly operations limits in effect, the air carriers (other than air taxis) allocate the slots among them-
selves pursuant to an antitrust exemption granted by the CAB. Accordingly, airport operators have not played a role in allocating slots for air carriers other than air taxis, and few have shown any desire to become involved in the problem. However, it is conceivable that some airport operators may in the future become involved in allocating these slots to alleviate airside or other congestion.

Another allocation system now in effect is the seniority list slot allocation mechanism which is used by commuter carriers at Washington National Airport when the demand for slots exceeds the number available. The original seniority list was determined by the longevity of the carrier service at National (or by the date of the carrier’s application for slots, if service has not yet begun). The carrier at the top of the list is entitled to take the next slot that becomes available for that hour. If the carrier accepts a slot which was also requested by one or more other carriers, it goes to the bottom of the list. This system of allocation has the tacit approval of the FAA as the operator of National Airport.

209. Each of the four airports has an Airline Scheduling Committee, consisting of all certificated air carriers with CAB authority to serve the respective airport. In 1968, the CAB granted antitrust immunity to these Committees, subject to the conditions, among others, that (1) all air carriers with CAB authority to serve the airport be permitted to participate in the Committee meetings; (2) all scheduling agreements of the Committees must be voluntary; (3) city pairs, rates, fares, and charges must not be discussed at the Committee meetings; and (4) notice of the meetings must be given, and representatives of the CAB, DOT/FAA, air carriers, and the affected airport authorities must be permitted to attend, CAB Order 68-12-11 (Docket 20051, Dec. 3, 1968). Until recently, this immunity has been renewed annually: CAB Order 77-10-49 (Docket 20051, Oct. 19, 1977); CAB Order 76-9-24 (Docket 20051, Sept. 10, 1976); CAB Order 75-10-78 (Docket 20051, Oct. 20, 1975); CAB Order 74-9-80 (Docket 20051, Sept. 23, 1974); CAB Order 73-12-94 (Docket 20051, Dec. 26, 1973); CAB Order 72-11-72 (Docket 20051, Nov. 16, 1972); CAB Order 71-10-23 (Docket 20051, Oct. 6, 1971); CAB Order 70-11-112 (Docket 20051, Nov. 23, 1970) (deleting Newark Airport and helicopter operations); CAB Order 70-3-140 (Docket 20051, March 27, 1970). In 1978, the CAB announced by CAB Order 78-7-110 (Dockets 31448, 31596, and 32014, July 21, 1978) that it was reconsidering whether to renew the immunity, and that any application for renewal would have to include a clear showing of a serious transportation need or other important public benefits, in accordance with the standards in its Local Cartage Agreement Case, 15 C.A.B. 850 (1952), as enunciated in the Capacity Reduction Agreements Case, CAB Order 75-7-98 (Docket 22909, July 21, 1975). The CAB later announced CAB Order 79-1-119 (Docket 20051, Jan. 19, 1979) that, pursuant to 5 U.S.C. § 558(c) and 14 C.F.R. § 377.10(a), it would extend the antitrust immunity for the Committees until reaching a final decision concerning how the slots should be allocated. The final decision process was underway at the time of this writing, CAB Order 80-9-148 (Dockets 20051, 20700, Sept. 30, 1980), 45 Fed. Reg. 64,999 (1980). Meanwhile, due to the inability of the carriers of National Airport to reach agreement after the addition of several new carriers, the FAA, as proprietor, has begun to reconsider the slot allocation process there, 45 Fed. Reg. 71,236 (1980).

210. See Sections 2 and 3 of Article IX of the By-laws of the Washington National Commuter Airline Association. FAA approval of this allocation mechanism probably does not confer antitrust immunity upon the participating carriers. However, the CAB apparently considers the antitrust exemption originally conferred upon air taxi scheduling committees, CAB Order 69-2-52 (Docket 20700, Feb. 12, 1969) to still be effective CAB Order 90-9-148 (Dockets 20051, 20700, Sept. 30, 1980), 45 Fed. Reg. 64,999 (1980), although the issue is not free from doubt.
Environmental constraints have also led to capacity limitations at airports. For example, in order to control the impact of aircraft noise on the community, the Orange County (California) Board of Supervisors has imposed a limitation of approximately forty-one "average daily departures" for air carriers at its John Wayne Airport.\(^{211}\) This limitation, which provided absolute grandfather rights to the two existing carriers, resulted in the denial of several applications by air carriers for entry into the airport. After the FAA warned that the absolute grandfathering violated the airport's non-exclusive use and non-discrimination obligations,\(^{212}\) the Board of Supervisors began to formulate other methods of allocation. One plan under consideration at the time of this writing was a slot auction which, within those forty-one average daily departures, would permit substantial grandfather rights (provided that the two existing carriers agreed to pay the auction price for their grandfathered slots), and the remaining slots would go to the highest bidder.

Finally, the lack of desire by an airport operator to increase the airport's passenger capacity generally, for whatever reason, e.g., because the road congestion to and from the airport is become unmanageable, may result in capacity limitations.

The antitrust analysis of these capacity limitations and allocation mechanisms is made in the context of the federal statutes which prohibit exclusive rights for the use of any landing areas upon which federal funds have been expended,\(^{213}\) and which require federally funded airports to be made available for public use on fair and reasonable terms and without unjust discrimination,\(^{214}\) in conjunction with the general federal mandate favoring freedom of competition in commercial air transportation.\(^{215}\)

Within this statutory context,\(^{216}\) the first question for antitrust immunity

\(^{211}\) In its capacity as proprietor, the FAA has also recently imposed capacity limitations upon Washington National Airport for noise reasons which are more restrictive than the capacity constraints imposed by the FAA in its capacity as regulator of the nation's airspace, see note 206 and accompanying text supra; 45 Fed. Reg. 62,398 (1980). The method of allocating slots at National Airport, see note 209 and accompanying text supra, was not altered by this new constraint and is the subject of a separate rulemaking, 45 Fed. Reg. 71,236 (1980).

\(^{212}\) Letter from Clark H. Onstad, Chief Counsel of the FAA, to Philip L. Anthony, Chairman of the Orange County Board of Supervisors (dated Apr. 3, 1980). This, in turn, prompted an action by one of the incumbent carriers for an injunction to prevent the FAA from forcing the airport away from its initial absolute grandfathering plan, Air California v. Dep't of Transp., No. CV-80-1827-TJH(KK) (C.D. Cal., filed May 6, 1980).


\(^{216}\) These statutory constraints are mentioned here primarily because the Statutory context is useful for the antitrust immunity analysis. In addition, it may be simpler in some situations to pursue the available administrative avenues provided by these statutes before commencing with antitrust litigation. This is not, however, intended to suggest that an administrative ruling by the FAA would be dispositive of the antitrust immunity issue or that prior recourse to the FAA would be required.
purposes is the source of the limitation. If the limitation is derived from state sources, then the existence of a limitation, in addition to the method of allocation, would be scrutinized for state action immunity purposes. Because a state law limiting airport noise, for example,\textsuperscript{217} clearly contemplates the possibility of operating limitations, the existence of a limitation to comply with such a law would probably survive immunity scrutiny.\textsuperscript{218}

If the limitation resulted from federal constraints, the state action antitrust immunity analysis would be directed only at the method of allocation. Each particular method of allocation would, of course, have to be examined for a determination under the circumstances of whether immunity would be available. Applying this analysis to a system of allocating slots to the carrier at the top of the list, such as the system for commuter carriers at National Airport, and assuming that the state legislation is silent as to the method of allocation, this method of allocation, if implemented by a non-federal airport operator, would not satisfy the generalized common carrier standard discussed above and therefore would probably not obtain antitrust immunity except in the unlikely event that absolute grandfather rights were essential to the airport financing and no other allocation technique would suffice.\textsuperscript{219} The auction system proposed for John Wayne Airport, on the other hand, has the benefit, from an antitrust standpoint, of providing little opportunity for unjust discrimination or for competitors to use the municipality to help

\begin{footnotes}
\item[217] There is little question that the state’s police power includes the power generally to regulate noise, but the extent to which federal regulation of aircraft and air navigation has left any room for state police power to regulate community noise impact from aircraft was cast into considerable doubt by City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); \textit{but see} Santa Monica Airport Ass’n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979); Air Transport Ass’n of America v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975). Thus, a noise limit will be more likely to pass constitutional muster if it is imposed by the airport operator as the proprietor, rather than by the state pursuant to its police power, \textit{e.g.}, British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75 (2d Cir. 1977); San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978); National Aviation v. City of Hayward, Cal., 418 F. Supp. 417 (N.D. Cal. 1976). The method of allocation within that limit would be subject to scrutiny for state action immunity purposes, but the extent to which a federal court would, for antitrust purposes, scrutinize the airport operator’s choice of a limit is not clear. Detailed federal scrutiny of the activities of local governments was feared by the dissent in City of Lafayette v. Louisianna Power & Light Co., 435 U.S. at 439-40.
\item[218] This would not, however, justify a permanent limit of the number of operations. Because newer airplane designs are quieter than older designs, a number limit based upon aircraft noise should be reviewed periodically by the airport operator.
\item[219] The extent to which a federal court would scrutinize the airport operator’s judgment concerning the importance of grandfather rights for airport financing is not clear. Detailed federal scrutiny of the activities of local governments was feared by the dissent in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 439-40.
\end{footnotes}
them accomplish their economic goals. At the same time, unlike the commuter allocation system at National Airport, it would not freeze out newcomers unless grandfather rights applied to an unreasonable number of slots. Accordingly, the availability of antitrust immunity for an auction with partial grandfather rights would depend, among other things, upon the degree of grandfather rights permitted and upon the extent to which that degree of grandfather rights was necessary to the proper operation of the airport.

b. Airline access to terminal and ground space. Groundside airline access—ticket counter, baggage handling area, waiting area, and hangar and ramp space—is a potential capacity constraint in many more airports than the airside access. Unlike expansion of the airport's air capacity, however (such as by building more runways), expansion of ground facilities rarely encounters serious environmental or other opposition, and is normally limited only by the amount of space and financing available. Accordingly, experience has generally shown that, one way or another, there is always a way to provide ground space for more carriers, ranging from new construction to rotation of facilities among carriers (even though the arrangements for newcomers may initially be less desirable than those for the incumbent carriers).

One of the major problems with respect to groundside access is that in many airports, either the air carriers themselves have built some or all of their facilities at their own expense (more typically as to cargo facilities and hangars, for example), or long-term terminal and hangar space agreements between the airport operator and the air carriers directly or indirectly underlie the airport financing. Where the air carrier owns the facility, it generally has the right to exclude other carriers from the facility. Where the air carrier has executed long-term agreements to help buttress the financing, the agreements often give the carriers the right to veto airport expansion plans in order to provide the carriers the ability to assure that their landing and other fees will not be used for lavish or unnecessary growth, but may also give the airport operators the right to modify the agreement or require subleasing of unused space (and, in some instances, even when the space is already fully utilized) when needed to accommodate air carriers.

As with air access, the antitrust analysis of ground access is made in the context of the federal prohibitions against exclusive rights (as to the

220. From a national air transportation system standpoint, however, the desirability of an auction to allocate slots at one airport in a complex interdependent system is questionable.
221. There may, however, be environmental opposition to groundside expansion if such expansion is viewed as a thinly veiled attempt to facilitate total airport expansion for which there is opposition.
ramp and hangar space) and unjust discrimination, and the general federal mandate in favor of freedom of competition in commercial air transportation. The relevant state statutes from which most airport operators derive their authority are generally silent concerning air carrier access to terminal and gate space, and most require compliance with all state and federal laws in the operation of the airport.

Viewed in the context of these state and federal statutes, the antitrust cases, and the practical realities, any plan which does not utilize all conceivable reasonable measures to provide ground access to all carriers on an equitable basis in the existing facilities will probably encounter difficulty obtaining antitrust immunity, and any limitation in facility capacity which is not well founded may encounter such difficulty as well.

To the argument that the carrier must either construct terminal and ground space facilities or help support the airport financing in order for such facilities to be built, the response is that (1) the existence or absence of air carrier agreements is not itself determinative of the airport’s ability to obtain financing, but is merely indicative of the determinative factor, which is the economic desirability of the airport in the national air transportation system; (2) even if a concern about the adequacy of business made the carrier agreements critical to financing, an express reservation in the agreements of a right for the airport operator to require modification or subleasing as appropriate for new entrants would not undermine the effectiveness of the agreement as a support to financing because new entrants would not generally seek entry unless business was more than adequate; and (3) air carrier restrictions, such as rights to veto an expansion, may actually have a negative effect upon the financing because such restrictions may hamper the airport operator’s flexibility to respond to growth. Accordingly, in order to retain the flexibility it needs to respond to changing conditions, and in order to increase the likelihood of obtaining antitrust immunity, the airport operator should seek the maximum degree of financial self-sufficiency which the importance of the airport in the national air transportation system will support.

c. Concessions. Except as to fixed-based operators, the federal non-exclusive use and non-discrimination statutes and the federal mandate favoring competition in commercial air transportation do not apply to on-site concessions. State laws are generally silent on the issue.

For many types of concessions, the economic feasibility of multiple on-

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224. See note 216 supra.
site concessions or concession operators or concessions depends largely upon the passenger volume of the airport. A very small airport, for example, might support only one restaurant with a small newsstand at the cash register, while a large airport might support at least one high-priced restaurant, banks, a barber shop, several lower-priced restaurants at diverse locations, and cocktail lounges, vending machines, newsstands, and gift shops in every terminal finger. In these cases it can reasonably be argued, in response to an antitrust challenge, that operating an airport inherently entails decisions as to the feasibility of multiple concessions, and nondiscriminatory limitations as to the number of concession operators or concessions, if economically justified, will probably be entitled to antitrust immunity.

The economic feasibility of ground transportation systems is also generally determined largely by passenger volume at the airport.\textsuperscript{227} The ability of an airport to accommodate multiple ground transportation systems must be determined on a case-by-case basis using a number of factors, including the demand patterns at the airport (both daily and seasonal), the utility to the airport of the city’s mass transit system, the disparity between the price and utility of dedicated (only to the airport) systems\textsuperscript{228} and general taxicab systems, and other factors. If nondiscriminatory limitations on competition are, under the circumstances, essential for a profitable ground transportation system to function, and if the airport operator actively supervises the situation to assure the continued necessity of such limitations, then antitrust immunity may be available as to the limitations. In the extreme, if there is not enough business even to support one ground transportation service and there is no inexpensive and convenient taxicab or mass transit service, the existence of a monopoly ground transportation service provided by the airport operator would probably be immune from antitrust scrutiny.\textsuperscript{229}

For some types of concessions, even minimal passenger flow may not justify exclusions of competitors. With car rental agencies, for example, the airport may only represent a small part of the company’s total operation and the on-site capital expenditure and space requirements are minimal. Ac-

\textsuperscript{227} Beyond broad limits, ground transportation may create demand for the airport if there is more than one airport in a metropolitan area. Thus, vast improvements in ground transportation, e.g., a direct high speed rail link from downtown, would generally increase demand for an airport relative to other airports in the area. Conversely, the total absence of inexpensive transportation to an airport would generally decrease demand for an airport relative to other airports in the area.

\textsuperscript{228} If the presence of a dedicated system decreases the airport’s ability to permit non-dedicated service, then the dedicated service must itself be amply justified by the circumstances.

\textsuperscript{229} Immunity as to the existence of a monopoly would not extend to the manner of operating the monopoly. Accordingly, although the airport operator may enjoy immunity in having a monopoly ground transportation system, it should carefully avoid monopoly abuses in operating the system.
Accordingly, there is usually little economic reason to limit competition.\textsuperscript{230}

For other types of on-site concessions, bona fide physical limitations are more likely to justify exclusive concessions. For example, each fixed-based operator may require a separate building and dedicated ramp space.\textsuperscript{231} By the same token, few airports could accommodate multiple parking lot concessions.

2. \textit{Monopoly Abuses}

The need for airport operators with monopoly power\textsuperscript{232} to avoid capacity limitations that are not well-founded applies separately to each aspect of the airport operation. Thus, if there is airside congestion, the analysis as to whether the capacity could reasonably be expanded would look to the general feasibility of adding more runways. If there is groundside congestion, the analysis would look to the type of facility affected. Moreover, if expansion is possible, the airport operator should consider the desirability and feasibility of interim measures to expand capacity until more permanent measures are implemented.

Consistent with this obligation to meet the demand where possible, at any airport where demand in the foreseeable future will approach the capacity of any aspect of the airport operation, the airport operator should assure that any agreement with an air carrier or concessionaire for the use of airport space or facilities provides the airport operator the right, one way or another, to make unused space or facilities available to another prospective user. Moreover, the agreements should provide the airport operator the ability to prorate space and facilities when demand equals or exceeds capacity as to any activities for which prorating might be appropriate and might be required in the foreseeable future.

Little can be said in the abstract about the need for the airport operator with monopoly power to avoid taking undue advantage of that power in setting the rates, terms, and conditions of agreements with air carriers and\textsuperscript{233}

\textsuperscript{230} See Note The Airport Car Rental Concessions: The Role of City of Lafayette v. Louisiana Power and Light Co. in Restricting Threats to Free Competition, 14 Cal. W.L. Rev. 325 (1978).

\textsuperscript{231} In recognition of this problem as to fixed-based operators, the FAA has stated that a bona fide and immediate need by one fixed-based operator for all available space may justify an exclusive concession under 49 U.S.C. § 1349(a) (1976). E.g., 27 Fed. Reg. 7055 (1962); 30 Fed. Reg. 13661 (1965); Exclusive Rights as Airports, FAA Advisory Circular AC 150/5190-2A. In addition, H.R. Rep. No. 6721, 96th Cong., 2d Sess. (1980) discussing the House version of the Airport and Airway Improvement Act of 1980, provides that the federal prohibition against exclusive use of any landing area would not apply to an exclusive fixed-based operator franchise if it would be "unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the modification of an existing agreement between such single fixed-based operator and such airport." Id. § 10(a)(2) at 39.

\textsuperscript{232} See cases cited note 12 and accompanying text supra.
concessionaires. The potential for monopoly abuse as to cost conditions may be substantially reduced for agreements which are let by competitive bidding and for agreements relating to any aspects of the airport operation which are conducted on a not-for-profits basis. However, as to the other terms and conditions of such agreements, as well as all of the terms and conditions of all other agreements, there is generally no clear line beyond which "undue" advantage has been taken, and there is little adequately comparable experience upon which to base such a determination. The terms and conditions of a car rental or restaurant concession agreement, for example, cannot necessarily be compared with similar agreements for car rental or restaurant operations downtown because of the vastly different situations, including the fact that the passengers are relatively captive at the airport. Moreover, the comparability of the terms and conditions of similar agreements at other airports is questionable for the purpose of determining whether those terms and conditions are unfair or unreasonable.

Monopoly abuses by an airport operator, if proven, would almost certainly undermine the state action antitrust immunity because such abuses are not necessary to the proper operation of the airport and would not generally be authorized (let alone directed or compelled) by state statute, and there is probably no state supervision relating to the existence or extent of such abuses.

C. Remedy

One of the major unanswered questions which would be of considerable interest to airport operators, although not directly relevant to the antitrust immunity analysis, is the remedy that could be awarded against a municipality. No court has yet assessed federal antitrust damages against a municipality. One objection to the Lafayette decision was its failure to address the remedy issue because it is generally agreed that treble damages are mandatory under section 4 of the Clayton Act in its present form and many cities could easily be bankrupted by a massive treble damage award.

As a practical matter it is reasonable to expect that until the remedy issue is resolved, the undesirability of imposing massive antitrust damages upon a municipality may cause the courts to lean toward finding either that

233. The extent of monopoly abuse that would be necessary to destroy immunity or create liability is not clear in this context. Moreover, there is little predictability as to what any given court might consider to be monopoly abuse, either in the form of an unwarranted failure to expand or in the form of unfair or unreasonable terms conditions, largely because of the absence of sufficiently comparable experience upon which to base a determination of abuse. In view of these uncertainties, airport operators should be particularly circumspect about monopoly abuses.


235. See discussion note 83 and accompanying text supra.
antitrust immunity is available or that the municipality has incurred no anti-
trust liability.

V. CONCLUSION

Because an airport is a natural monopoly for which, in several in-
stances, the demand is equal to or greater than the capacity, and because an airport is a facility which is necessarily limited in its ability to accommo-
date all who wish to operate a business on the premises, an airport operator may be a target for antitrust challenges from present and prospective air carriers and concessionaires who are doing or seeking to do business at the airport. The airport operator’s first line of protection against such chal-
lenges lies in the state action immunity doctrine.

The state action “immunity” is not, strictly speaking, an immunity; it results from a preemption analysis. Principles of federalism cast an un-
brella over most types of state action (short of express attempts by state legislation to exempt activities from the Sherman Act, and short of state participation in conspiracies in restraint of trade) that protects such action from preemption by the federal antitrust laws, but this protection of federal-
ism is available only for activities which meet the demanding tests as to what constitutes state action for this purpose.

Prior to Lafayette, most non-private airport operators were immune from antitrust scrutiny for almost any activity, except conspiracies with a private entity to exclude another private entity, because their activities were generally considered to be state action. The recent line of Supreme Court cases which made the “state action” tests much more demanding gener-
ally, and the Lafayette decision which resulted in the application of these more demanding tests to entities such as those which operate most major airports, suggest that antitrust immunity will be available to the operators of the major airports only if they treat present and prospective air carriers and concessionaires in a manner that is not unjustly discriminatory. Moreover, for airport operators which enjoy monopoly power, antitrust immunity will be “available” only if that power is not abused—in particular, the airport oper-
ator must avoid unwarranted capacity constraints and unfair or unreasonable terms and conditions in agreements with air carriers and concessionaires.

The monopoly abuse prohibition for antitrust immunity is similar to the monopoly abuse standard for antitrust liability, but the antidiscrimination re-
quirement goes well beyond the standards for liability because discrimina-
tion by a monopolist is generally not, in itself, an antitrust violation. Taken together, these standards for antitrust immunity are quite similar to the stan-
dards of service which must be observed by common carriers as to their passengers and shippers.
The existing state statutory mandates are generally adequate for airport operators to avoid antitrust scrutiny if they operate the airport without monopoly abuses or unjust discrimination. However, a state legislative mandate requiring, for example, exclusive car rental concessions at the airports would probably not increase the likelihood for antitrust immunity for the airport operator because the state normally has no valid interest in limiting car rental competition at airports.

The operation of an airport without monopoly abuses or unjust discrimination may in some instances require more careful planning and more detailed consideration or competitive factors in the airport operator's decisions as to users and concessionaires, but these standards are not likely to create any serious operational problems in the long run.
Entry Control and the Federal Motor Carrier Act of 1980

DONALD V. HARPER*

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I. INTRODUCTION

The Motor Carrier Act of 1980 was signed into law by President Jimmy Carter on July 1, 1980. This event was the culmination of a long and controversial effort to reform economic regulation (e.g., regulation of entry, prices, and quality of service) of the interstate for-hire motor trucking industry. It was the first substantial change in the federal regulatory system for motor trucking since the enactment of the Motor Carrier Act of 1935, which instituted federal economic regulation.

From its inception in 1935, there was criticism of federal economic regulation of motor trucking, principally on the ground that the industry (1) was comprised of a large number of relatively small carriers, (2) was basically "competitive," and (3) had none of the characteristics of "public utility" type industries that were usually deemed proper candidates for economic regulation. However, the Interstate Commerce Commission (ICC), which was given the task of carrying out the regulatory system established by Congress, proceeded to establish and develop an elaborate system of regulation.

Efforts to reform the system began to show life in the early 1970's when the U.S. Department of Transportation (DOT) and the President demonstrated serious interest in general transportation regulatory reform (not just in motor trucking) and, ultimately, important members of Congress joined the movement. In the meantime, the ICC, with strong support from the Carter administration, substantially reinterpreted the law in favor of reduced regulation. The bill that was signed by President Carter in July, 1980, was the result of a three-year legislative battle.

Contributing to the eventual success of the reform movement, in addi-
tion to the support of the executive branch and the personal support of the President and the support of the ICC, were (1) the alleged connection between economic regulation of motor trucking and energy use inefficiency and inflation, (2) the strength of the consumer movement which was anti-transportation regulation (but pro-regulation of consumer safety and other consumer matters), (3) the prior success in enacting airline regulatory reform, and (4) the anti-government, anti-regulation sentiment in the country.

It is the purpose of this article to summarize the entry control provisions of the new Act, to compare them with the legislation that preceded it, and to evaluate the new provisions in terms of their probable effectiveness in achieving the goals that Congress had in mind when passing the legislation.

II. THE ISSUES INVOLVED IN REGULATORY REFORM

The issues involved in the movement toward less or no economic regulation were several. However, the principal criticisms of regulation were that entry control, operating restrictions on carriers, and rate regulation resulted in inadequate incentive to the carriers to exercise managerial initiative and to strive for efficiency. And it was argued that regulation led to poor service, wasteful use of energy (because of under-utilization of vehicles), and high transportation prices. Reformers, therefore, wanted freer entry, freer exit, and more reliance on the market place to determine prices in the motor trucking industry. The critics of economic regulation charged that the reasons for bringing the motor trucking industry under economic regulation do not exist in modern times and, in fact, some critics claimed that such reasons never existed at all.

The principal defenders of regulation were the regulated motor trucking companies themselves, as represented by the American Trucking As-

3. There is a tremendous amount of literature on the subject of the need for, criticisms of, and reform of economic regulation of transportation in general. The arguments for and against economic regulation of motor truck transportation are set forth in Steinfeld, Regulation Versus Free Competition—The Current Battle Over Deregulation of Entry Into the Motor Carrier Industry, 45 ICC PRAC. J. 590 (1978), and Burck, The Pros and Cons of Deregulating the Trucking Industry, FORTUNE, June, 1979, at 146.

sociations (ATA), which waged a long war against reform. The defenders based their arguments on the claim that freer entry and exit and pricing would result in an excessive number of carriers, destructive pricing, and a deterioration of services to the public. This argument was based in large part on experiences prior to the institution of regulation in 1935. They claimed that carriers would abandon service to undesirable traffic and places, particularly smaller towns, and concentrate their efforts where the traffic was more lucrative. They also disputed arguments that there would be better truck utilization and more efficient use of energy under less regulation, contending that the amount of traffic available is fixed and would be shared by more operators and vehicles under less regulation, resulting in lower load factors and less efficient use of energy. Some defenders of regulation also argued that the survivors in the competitive struggle that would follow regulatory reform would be the giant trucking companies, and that the public would suffer from monopolistic practices at their hands. The defenders of regulation, in other words, were not entirely unified in their arguments—some arguing that there would be a perennial problem of excessive competition and destructive competitive practices and others arguing that the eventual result would be monopoly. Both sides of the controversy offered estimates of the "costs" of regulation to the public or the "benefits" of regulation to the public, none of which had much validity because of the difficulty in making such estimates.

III. AN INTRODUCTION TO THE NEW LEGISLATION

Perhaps because it promised an end to a long, drawn-out controversy over regulatory reform, the bills that became the Motor Carrier Act of 1980 passed with large majorities in both the House of Representatives and the Senate. The ATA actually supported the enactment of the bill that was ultimately passed because it was preferable to a more extreme measure. The ATA also preferred the new law to further destruction of economic regulation by the ICC.

The Motor Carrier Act of 1980 amends and supplements subtitle IV of

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1980]  

Entry Control  

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Title 49, United States Code,\(^6\) containing thirty-six sections dealing with a variety of subject areas including entry control, rate regulation, financial responsibility of carriers, exemptions from regulation, for-hire transportation by agricultural cooperatives, intercorporate private transportation, discrimination, through routes and joint rates, interchanging trailers with railroads, carrier relations with freight forwarders, security issues, mergers, pooling of traffic and revenue, loading and unloading trucks, time limits on ICC procedures, and state regulation and state taxation of motor trucking. With the exception of the philosophy of the Act and the oversight provision, the remainder of this article deals with the entry control provisions of the new law.

In signing the Act of 1980, President Carter said he believed the legislation will reduce consumer costs by as much as eight billion dollars per year and save hundreds of millions of gallons of fuel annually. He also said the Act "will eliminate the red tape and the senseless over-regulation that have hampered the free growth and development of the American trucking industry."\(^7\)

A. PHILOSOPHY OF THE ACT

Section 2\(^8\) of the 1980 Act states that the new law is part of a continuing effort by Congress to reduce unnecessary regulation by the federal government. The philosophy of the new law, as stated in section 3,\(^9\) is based on the findings of Congress that the 1935 Motor Carrier Act, as amended, was outdated and needed to be revised to reflect the transportation needs and realities of the 1980’s. Congress had also found that the existing regulatory structure had tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry. Further, Congress concluded that regulation had resulted in some operating inefficiencies and some anti-competitive pricing. Recognizing the problems created by the ICC’s dramatic change in its interpretation of the Act relative to motor trucking since 1977, Congress also concluded that, in order to reduce the uncertainty felt by the transportation industries, the Commission should be given explicit direction for regulation of the motor trucking industry and that the ICC should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation.

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6. In 1978, the Interstate Commerce Act and certain related statutes were recodified, replacing without substantive change the former act with a five-digit numbering system.
8. Section 2 does not refer to the Code. Section 1 is the title of the Act.
9. Section 3 does not refer to the Code.
B. OVERSIGHT

Section 3 of the new legislation addresses the problem of oversight by Congress which emerged during recent years. It provides that the appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of the new legislation, no less than annually for the first five years, to insure that the Act is being implemented according to Congressional intent and purpose.

The prior law contained no such provision. In the author's opinion, this provision is badly needed. There is no question that the independent transportation regulatory agencies have gotten out of the control of Congress and better oversight by Congress is needed to insure, in this case, that the ICC carries out the intent of Congress. A likely problem with the implementation of the Act of 1980 is that the Commission, as presently constituted, will go beyond what Congress intended in reforming regulation and will deregulate to an extent even greater than that provided for in the new law. Whether or not the oversight provided for in the legislation will be effective depends upon how seriously the appropriate authorizing committees view their oversight responsibilities and whether or not they will have the time and the resources with which to carry out the oversight.

IV. ENTRY CONTROL—COMMON CARRIERS

A. ISSUANCE OF CERTIFICATES

The most important aspect of economic regulation of the motor trucking industry has always been control over entry; hence, much of the controversy surrounding regulatory reform concerned the question of entry control. Section 5 of the Act of 1980 amended the Code by providing that the ICC shall issue a certificate of public convenience and necessity to a common carrier applicant if the Commission finds the applicant to be fit, willing, and able to provide the transportation and to comply with the law and the regulations of the ICC and that, on the basis of evidence presented by persons supporting the issuance of the certificate, the service proposed will serve a useful public purpose responsive to a public demand or need, unless the ICC finds that the transportation is inconsistent with the public convenience and necessity. In making this determination, the Commission shall consider and, to the extent applicable, make findings, inter alia, on (1) the National Transportation Policy and (2) the effect of issuance of the certificate.

11. The National Transportation Policy, 49 U.S.C. § 10101 (1979), was amended by section 4 of the Act to state that it is the policy of the federal government to achieve various noble objectives in regulating motor truck transportation. These objectives are stated in general terms and it is likely that the amendment will have little impact on individual decisions of the ICC, as has been the case in the past with the National Transportation Policy.
certificate on existing carriers; however, the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

Under the old law, the ICC was free to issue a certificate of public convenience and necessity to an applicant to perform common carrier service if the applicant was fit, willing, and able to provide the transportation and conform with the law and the regulations of the Commission, and if the transportation to be provided was or would be required by the present or future public convenience and necessity. The ICC was left to interpret the latter. The important thing to note is that the old law provided that the proposed service was to be required by the present or future public convenience and necessity. The new law insists that a certificate will be issued unless the proposed service will be inconsistent with the public convenience and necessity. Whether or not a useful public need would be served was considered by the Commission under the old law as part of the public convenience and necessity test.

In addition, section 5 of the 1980 Act supplemented the existing law by providing that no motor common carrier of property may protest an application to provide common carrier service by motor vehicle unless it either: (1) possesses the authority to handle, in whole or in part, the traffic in question, is willing and able to provide the service, and has performed service within the scope of the application within the previous twelve-month period or has solicited service during such period; or (2) has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or (3) is granted leave to intervene. No motor contract carrier of property may protest an application to serve as a common carrier. In contrast, prior law made no reference to who could or could not protest a common carrier application.

These provisions are, perhaps, the heart of the new law. Not only is the role of public convenience and necessity changed, as noted above, but the ICC’s decision in Pan American Bus Lines Operation,12 traditionally used to interpret the meaning of public convenience and necessity, was formally discarded by Congress. The Pan American guidelines provided that the issues of whether existing carriers could provide the service applied for and the extent to which the existing carriers would be harmed by the new entry had to be considered. The Commission itself had already, in recent years, for the most part abandoned consideration of these factors. Whether or not existing carriers could provide the service was discarded entirely as a factor and harm to an existing carrier’s overall operations had to be shown to carry any weight with the ICC. And the protesting existing common carrier had the burden of proving substantial injury and harm to its

12. 1 M.C.C. 190, 203 (1936).
operations such that it would be contrary to the public interest. In fact, since 1977, the Commission had been approving almost all common carrier applications received. Thus, in effect, the new law provides statutory backing for what was already a fact administratively.

The provision of the 1980 Act dealing with the right to protest a common carrier application reduces the ability to protest and is consistent with recent Commission policy on the question. In November of 1978, the ICC ruled that a protesting carrier had to be participating in the traffic in question in order to protest. Prior to that time, the Commission had been liberal in granting the right to protest to existing carriers, whether or not they were participating in the traffic involved.

These are drastic changes in common carrier entry control; the potential consequences are serious for regulated common carrier trucking companies. The new statute alters the process of regulating common carrier entry from a complex system involving several factors to be considered by the ICC to one in which only two factors need be considered—whether the applicant is fit, willing, and able, and whether the proposed service will serve a useful public purpose responsive to a public demand or need. And the ability of existing carriers to protest is significantly reduced.

In the aggregate, these changes, combined with those discussed below (involving partial exemptions from common carrier entry control, temporary common carrier operating authority, removal of common carrier operating restrictions, and reduced control over contract carrier entry), plus changes in the various complete exemptions from regulation not discussed here, essentially mean that the statutory barriers to entry have been significantly reduced and there is little protection of existing carriers. If, however, the ICC administers the new common carrier entry control provisions in such a way as to examine carefully the fitness and ability to serve of each applicant and the useful public purpose and public need to be served, then there will be an entry control structure that has some meaning. If, on the other hand, the Commission adopts a casual attitude about fitness and ability to serve and finds a useful public purpose and public need in every entry control case, then the for-hire common carrier trucking industry will be faced with what would be tantamount to free entry. The existing carriers would receive no protection from competition and the certificates of public convenience and necessity they hold would become worthless.

B. Partial Exemptions from Common Carrier Entry Control

Section 5 of the new law amended the Interstate Commerce Act\(^\text{15}\) so that the fit, willing, and able test will be applied in all cases where applications for common carrier authority are filed, but the other provisions regarding entry will not be applied in the following situations: (1) transportation to any community not regularly served by a motor common carrier of property certificated by the ICC; (2) transportation service which will be a direct substitute for abandoned rail service if the community has no rail service at all; (3) transportation for the U.S. Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions; and (4) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds. In addition, owner operators\(^\text{16}\) were given special treatment in that they must meet only the test of being fit, willing, and able provided that the transportation they propose is transportation of food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, or agricultural fertilizers, if such transportation is provided with the owner of the vehicle in such vehicle and, after issuance of the certificate, such transportation does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt under the agricultural exemption provision in the Act.

There were no partial exemptions of this kind under the old law. Carriers were either subject to the full entry control requirements or they were completely exempt from them.

The partial exemptions (fit, willing, and able being the only test) for common carrier service to communities without regulated common carrier service or where the service is a direct substitute for abandoned rail service are designed to encourage continued service to small communities under less regulation. It was claimed by the opponents of reform that small communities would not be served by motor trucking companies under less regulation. Unfortunately, by permitting almost free entry into such service, the new Act may merely mean that no carriers would want to serve because there will not be protection from competition for service that may be marginally profitable, at best.

The exemption of government traffic should result in a large quantity of service available to government agencies and increased opportunities for


\(^{16}\) An owner operator, or "independent trucker," is a person who owns a motor truck and operates it himself or herself and carries exempt commodities for hire and/or hires himself or herself and the vehicle to a regulated carrier to carry regulated traffic for hire under that carrier's operating authority.
entry by small and large carriers alike. The loss of traffic by currently regulated carriers could be great.

The exemption of small shipments of less than 100 pounds is designed to encourage service in a traffic area that has had service problems for a long time. The same result may occur, however, as with the partial exemptions for service to small communities discussed above. Even prior to the promulgation of this legislation, the Commission had been granting certificates to anyone applying for small shipment authority without much success, and it is difficult to imagine that anyone would apply for such restricted authority, i.e., the shipments must be of less than 100 pounds and carried in a vehicle in which no one package exceeds 100 pounds.

As to owner operators, the new Act permits them to carry regulated traffic under their own names without meeting all of the usual entry control tests. This is in response, at least in part, to the problems faced by owner operators in recent years and their strikes in 1974 and 1979. The food area offers a great potential market for them and can help agricultural haulers obtain legal for-hire traffic on the back haul from processing centers to rural areas. Their unbalanced traffic problem may also be reduced through their carriage of soil conditioners and fertilizers. Confining them to an amount of traffic not greater than what they carry as exempt haulers limits the partial exemption to owner operators who haul exempt commodities (as opposed to those who work for regulated carriers). The partial exemption may prove to be a great policing and enforcement headache. In any case, the loss of revenue by regular certificated carriers could be substantial if owner operators are willing to apply for certificates and thereby subject themselves to regulation by the ICC. They may choose to pass up the opportunity.

C. Temporary Operating Authority

Section 23 of the new law added a provision that permits the Commission to grant a motor common carrier of property temporary authority to provide transportation service to a place or in an area that has no motor carrier of property service capable of meeting the immediate needs of the place or area. The ICC may grant temporary authority for not more than 270 days and must take action on an application for temporary authority within ninety days after the application is filed. Emergency temporary authority for up to thirty days may be granted in such cases where there is not sufficient time to process an application. Emergency authority may be extended for an additional ninety days. The ICC must take action in emergency authority cases within fifteen days of the time of filing the application.

Prior law established a 180 day maximum on temporary authority with no provision for the extension of time and no provision for granting of emergency temporary authority, although it was often granted by the Commission.

This is another attempt to make entry control more liberal and motor carrier transportation more flexible. It is likely that temporary authority will be very easy to acquire from the Commission, although the need for it will be less since permanent authority will be relatively easy to obtain in a short period of time. By May of 1980 the Commission had already begun to permit its field offices to grant emergency temporary authority for up to thirty days under certain circumstances,\(^{18}\) had indicated an interest in making temporary authority easier to obtain, and had unsuccessfully tried to eliminate notice to competing carriers before issuing emergency temporary authority.\(^{19}\)

D. REMOVAL OF OPERATING RESTRICTIONS

The Code was amended by section 6\(^ {20}\) of the 1980 Act to require the Commission to eliminate within 180 days gateway restrictions\(^ {21}\) and circuitous route limitations imposed upon common carriers of property, and to implement procedures to process expeditiously applications of individual carriers seeking removal of operating restrictions to provide for final ICC action not later than 120 days (extendable by 90 days) after the date the application is filed with the Commission. The kinds of restrictions to be dealt with have to do with the kinds of commodities carried, service to intermediate points on a carrier’s routes, one-way only authority, and territorial limitations. In deciding such cases, the ICC must consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings, and improved efficiency, and it must give special consideration to providing and maintaining service to small and rural communities and small shippers.

Operating restrictions of this kind were permitted under the old law and, in fact, the law required that the Commission was to specify the service to be rendered; however, no specific reference to their severity or removal was included.

The overparticularization of operating authority in terms of what could

\(^{19}\) See Court Vacates ICC “Rule” on ETA Notification, Ends Case on T.I.M.E.—D.C. Grant., 180 TRAFFIC WORLD, Dec. 10, 1979, at 96.
\(^{21}\) A gateway restriction is a requirement that service be through a certain “gateway” point and was often the result of “tacking” of operating authority, i.e., adding two certificates together at a common point.
and could not be done by a regulated common carrier had long been in need of reform.\textsuperscript{22} The ICC had begun to eliminate operating restrictions before the legislation was enacted. In late 1979, the Commission began to consider issuing "master" certificates and permits in twelve different commodity fields wherein there would be no geographic restrictions whatever, and it was in the process of granting such master certificates to carry government traffic when the Motor Carrier Act of 1980 was signed by the President. The Commission was also removing gateway restrictions from certificates. In early 1980 the ICC proposed to allow regular route common carriers to operate over the most direct routes between terminal points in their certificates.\textsuperscript{23} However, in the 1980 Act, Congress required that all gateway restrictions and circuitous route limitations be eliminated within 180 days, regardless of justification for them. This appears to be a less desirable approach than permitting the ICC to decide whether or not and when such restrictions should be removed, as is being done with other kinds of operating restrictions. Moreover, the ICC may not be able to remove gateway and circuitous route restrictions except on a blanket order basis of some kind because of the large number of certificates in its files which the Commission could not physically cul on within 180 days. Another possible difficulty is that the ICC may well be deluged with so many applications to remove operating restrictions that it will not be able to handle the flood of paperwork and still meet the 120 day deadline established in the Act.

V. ENTRY CONTROL—CONTRACT CARRIERS

A. CONTRACT CARRIER DEFINITION

Section 10 of the 1980 Act amended the Interstate Commerce Act\textsuperscript{24} by redefining contract carriage of property. A contract carrier of property is now defined as a person who provides service under continuing agreements with one or more persons (1) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or (2) designed to meet the distinct needs of each such person. Prior to this amendment, the Act defined a contract carrier in a similar fashion with the additional feature that the continuing agreements were with "a person or a limited number of persons." This provision carries forward the ICC's decision in 1978 to eliminate the "rule of eight" that had previously been adopted by the Commission as a test of how many shippers a carrier could

\textsuperscript{22} See, e.g., Nupp, Control of Entry As an Economic and Regulatory Problem, 35 ICC PRAC. J. 591 (1968).
serve and still retain the status of a contract, rather than a common, carrier. (See the discussion of contract carrier entry control below.) It means that there is no longer any statutory limit on the number of customers a contract carrier can have, and this could result in overexpansion of the number by some carriers and consequent difficulty for competing common carriers. The ICC may find it necessary to establish a new version of the "rule of eight."

B. ISSUANCE OF PERMITS

The entry control provisions of the old law relative to contract carriers were amended by section 1025 of the Act of 1980. The new law provides that in deciding whether to approve an application of a person for a permit as a motor contract carrier of property, the ICC shall consider (1) the nature of the transportation service proposed, (2) the effect the granting of the permit could have on the protesting carriers if such grant would endanger or impair their operations to an extent contrary to the public interest, (3) the effect denying the permit would have on the carrier applying for the permit, its shippers, or both, and (4) the changing character of the requirements of those shippers. No motor carrier of property may protest an application to provide transportation as a motor contract carrier of property unless it either (1) possesses authority to handle, in whole or in part, the traffic for which authority is sought, is willing and able to provide the service, and has performed service within the scope of the application within the previous twelve-month period or has solicited such service during such period, or (2) has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic, or (3) is granted leave to intervene.

Prior legislation provided that the Commission could issue a permit to a contract carrier if the carrier were fit, willing, and able and the transportation service to be provided was or would be consistent with the public interest and the National Transportation Policy. These requirements are retained in the new Act. The old law also provided that, in deciding whether to approve an application, the ICC had to consider (1) the nature of the transportation proposed to be provided, (2) the number of shippers to be served, and (3) the effect that granting the permit would have on the transportation of carriers protesting the granting of the permit. There was no reference in the law to the extent of the effect on protesting carriers. The latter two provisions were deleted in the 1980 Act.

The entry of contract carriers will be easier under the new law. The number of shippers to be served is no longer a consideration and the effect on protesting carriers must be contrary to the public interest to warrant con-

sideration by the Commission, while the existing carrier’s ability to protest is limited. As to the number of shippers, the ICC had, in 1978, already removed the "rule of eight." The rule, adopted by the ICC in 1962, had provided that a contract carrier usually should serve no more than six or eight shippers unless a very specialized service was involved. However, the Commission will probably be forced to deal with the question of the number of shippers anyway, unless it adopts an attitude of indifference toward maintaining a distinction between contract and common carriage.

C. Restrictions on Operations

The Act was amended by section 10 of the new legislation to prohibit the ICC from requiring a contract carrier of property to limit its operations to carriage within a particular industry or within a particular geographic area. The ICC may prescribe the person or class of persons to be served by a contract carrier of property.

Under prior law the Commission was required to prescribe various conditions and limitations under which a contract carrier of property could perform service but no specific conditions were prohibited and the Commission could prescribe the number of persons to be served.

These changes allow contract carriers of property more freedom in whom they serve and the number of persons served and will enable them to expand the scope of their operations geographically and otherwise to the detriment of competing common carriers. As has been noted, problems with the number of persons served may develop.

D. Partial Exemptions from Entry Control

The Code was further amended by section 10 of the new Act to provide that certain kinds of contract carrier transportation performed by an owner operator, when the owner is in the vehicle, need not be justified by showing that it will be consistent with the public interest, and the ICC need not consider the effect on protesting carriers. The applicant must, however, be fit, willing, and able. This exempt traffic includes food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, or agricultural fertilizers. The annual transportation of this partially exempt traffic (measured by tonnage) shall not exceed the

transportation provided by the motor vehicle which is exempt under the agricultural commodity exemption in the Act. Partial exemptions of this kind for contract carriers did not exist under prior law.

Since this amendment allows owner operators to hold contract carrier permits without having met some of the usual entry control tests, it will work to the disadvantage of competing common carriers. The food area offers a potentially large market for owner operators, and all of the partially exempt traffic offers possibilities to balance their traffic. However, it may be that owner operators will forego this opportunity to carry regulated traffic because of the cost of subjecting themselves to interference by the ICC. In addition, the exemption may be difficult to police in terms of limiting it to no more traffic than that carried in exempt commodities.

E. **Conversion of Contract Carriers to Common Carriers**

The Act of 1980 in section 10 added a new provision to the Code to the effect that if the Commission determines that the operations of a contract carrier of property or any part thereof do not conform to the operations of a contract carrier and instead are those of a common carrier of property, the ICC may amend or revoke the permit or part thereof to conform the operations to those of a contract carrier. The Commission may issue in place of a revoked permit or part thereof a certificate which authorizes operations as a common carrier.

The old law provided an amendment and revocation power but without specifying operation as a common carrier as a possible reason for amendment or revocation. However, such could be done under the old law.

This addition to the law is necessary in view of the fact that the ICC no longer has specific authority to prescribe the number of persons to be served by a contract carrier of property. The provision may get extensive use and present considerable legal difficulty.

VI. **Dual Operation**

The Interstate Commerce Act was amended by section 10 of the Act to permit dual operation as both a common carrier of property and a contract carrier of property. Further, a person holding both a certificate as a common carrier and a permit as a contract carrier may transport property under the certificate in the same vehicle and at the same time as property under the permit. In contrast, dual operation was prohibited under the Act of 1935 except where the ICC would find good cause consistent with the public interest to allow it.

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The new provisions go beyond the Commission's 1978 decision to allow dual operation except in situations where it could be shown that there is a "realistic opportunity" for rate or service discrimination to occur. Prior to that time, dual operation was prohibited by the ICC if there was a "mere possibility" that a carrier would unjustly discriminate against a customer. Dual operation was permitted usually only where the services involved were not competitive (i.e., different commodities and/or routes were involved).

The possible danger here is discrimination between customers who buy basically the same service but are served by a common carrier or a contract carrier, depending upon how the carrier wants to serve them, and the carrier has the opportunity to offer different rates and services accordingly. This is made more likely by allowing activity as both kinds of carrier in the same vehicle at the same time, which is permitted under the new Act. It also presents great enforcement problems for the Commission in the area of unjust discrimination.

VII. MASTER CERTIFICATES AND PERMITS

Section 5 of the new Act provides that with respect to common carrier applications, the ICC may not make a finding relating to public convenience and necessity which is based upon general findings developed in rulemaking proceedings. Section 10 of the new law amended the Code to the effect that, with respect to applications for permits as contract carriers of property, the Commission may not make a finding relating to the public interest which is based upon general findings developed in rulemaking proceedings. The previous law made no mention of these matters.

These provisions prohibit the Commission from issuing so-called "master certificates" and "master permits," which constitute operating authority granted after the ICC has made a general finding that granting of certificates or permits to carry a given kind of traffic would not be inconsistent with the public convenience and necessity (certificates) or the public interest (permits). Individual certificates or permits would not be issued. Applicants would merely make application and they could begin operations shortly thereafter unless some unusual circumstance prevailed. The ICC, in 1980, was considering issuing master certificates and permits for nationwide authority to carriers involved in certain kinds of traffic and had already done so for common carriers of government freight.

35. Ex Parte MC-107, Transp. of Gov't Freight, 45 Fed. Reg. 3,586 (1980). When the 1980 Act was passed, the ICC said that all notices of applications for master certificates to carry govern-
The issuance of master certificates and permits was one of the reform proposals most threatening to the regulated trucking industry, and the industry fought very hard against it. The prohibition of master certificates and permits in the new law prevents almost automatic entry for large numbers of carriers and helps to keep intact at least a semblance of an entry control system.

VIII. ENTRY CONTROL—BROKERS

Section 1736 of the 1980 Act provides that the ICC shall issue a license to a person to be a motor carrier broker for transportation of property (other than household goods) if the Commission finds the applicant to be fit, willing, and able to be a broker and to comply with the law and regulations of the Commission. Prior law included this limitation in addition to the requirement that the transportation for which the person is to be a broker will be consistent with the public interest and the National Transportation Policy.

Even prior to the promulgation of the Motor Carrier Act of 1980, the ICC had indicated interest in deregulating entry of brokers. This provision is consistent with the relaxation of carrier entry control contained in other provisions of the Act, and it will certainly make entry into transportation brokerage easier. This, combined with the increasing difficulty of managing and marketing motor carrier service in a less structured regulatory environment, could lead to a growth in the number and size of motor carrier brokers as more smaller carriers rely on them as a source of traffic.

IX. SMALL COMMUNITY SERVICE STUDY

Section 2837 of the Act of 1980 requires the ICC to study motor trucking service to small communities, with emphasis on those of 5,000 or less population, and to submit findings to the President and to Congress by September 1, 1982. The study is to include an analysis of (1) the common carrier obligation to provide service, (2) whether the Commission is enforcing such obligation, (3) the extent to which motor carriers were providing such service prior to the enactment of the Act, and (4) ways to ensure maintenance of service to small communities. The Act also authorized to be appropriated for fiscal years 1981 and 1982 such sums as are necessary to pay for the study.

One of the issues in the reform controversy was the effect of reform on small communities—the anti-reformers claimed that such service would be reduced as carriers concentrated their efforts on more lucrative larger com-

37. Section 28 does not reference the Code.
munities and heavy traffic routes. Studies were cited to "prove" both sides of the argument. Properly done, the study provided for in the 1980 Act should help to resolve this controversial issue and to ensure that small communities are properly served by motor carriers of property.

X. TIME LIMITS ON ICC PROCEDURES

Section 2538 of the new law contains several procedural reforms for non-rail cases. The more important changes are mentioned here. Where there is an oral hearing or the Commission has found the issue to be of general transportation importance, the ICC must complete all evidentiary proceedings within 180 days and issue an initial decision in writing within 270 days following institution of the proceeding. In all other proceedings, an initial decision must be issued in writing by the 180th day following institution of the proceeding. An initial decision becomes a final decision on the twentieth day after it is served on the interested parties unless an appeal is filed or the Commission stays or postpones the decision. If a timely appeal is filed, the final determination shall be made not later than the fiftieth day after the appeal is filed. If a further hearing is involved, a final decision must be made within 120 days following the date the further hearing is granted. Other changes have to do with reopening proceedings, granting rehearings, and the effective date of final decisions.

These time limits do not apply to entry control cases involving modification of restrictions on motor carrier operations, issuance of temporary authority, and formal investigations by the Commission. In these situations, the Act provides for specific time limits. Prior law did not contain time limits on entry control cases.

Time limits on ICC proceedings were needed, but the limits set forth in the 1980 Act are liberal and may not do much to speed up Commission action. What the work load of the ICC will be under reformed regulation is difficult to predict, and the time limits established in the new law may or may not be practical. Much of this will be determined by how the Commission responds to the Act of 1980. If the ICC decides to use as little of the authority that it now has as is possible, the activity of the Commission may be less than in the past and these time limits may be easily complied with.

XI. CONCLUSIONS

The Motor Carrier Act of 1980 added a number of new subject areas to the statute regulating entry into the motor trucking industry, areas that had not been previously dealt with in the law. These include provisions dealing with partial entry control exemptions, favorable treatment of owner

operators, required removal of operating restrictions, conversion of contract carriers to common carriers, prohibition of master certificates and permits, time limits on ICC decision making, and a required study of service to small communities.

In addition, the Act substantially amended provisions of the prior law on entry control, such as factors to consider in entry control of both common and contract carriers, issuance of temporary operating authority, dual operation as both a common carrier and a contract carrier, and entry of brokers. Thus, it may be concluded that the Act of 1980 significantly changed the structure of regulation of entry into the motor trucking industry.

And yet much of what Congress did in the Act of 1980 relative to entry control had already been done, at least in part, or was shortly to be done, by the ICC; hence, the Act merely endorsed what already was or was soon to be. The subject areas where this occurred include the tests for common carrier entry, the removal of operating restrictions, permitting dual operation as both a common carrier and a contract carrier, the tests for entry of brokers, making it possible for agricultural haulers to carry some regulated traffic on the back haul, removing the restrictions on the number of shippers to be served by a contract carrier, and issuance of temporary operating authority. Similar to the experience with the Civil Aeronautics Board and the airline deregulation legislation of 1977 and 1978, this was a rare case when a regulatory agency was way ahead of the legislature and led the way to substantial change in the statute. In only one important area did Congress reverse a policy that the Commission had been fostering—that of issuing master certificates and permits.

Did the Motor Carrier Act of 1980 reduce the amount of regulation of entry into the motor trucking industry? It did so in several areas. The most notable are in the factors to consider in entry control of both common carriers and contract carriers and the removal of operating restrictions. Other areas where there is less regulation are in the number of shippers served by contract carriers and in the control of entry of brokers.

At the same time, the Act of 1980 provided that the ICC will have more authority in several areas not related to entry control. These include the areas of control of transportation performed by agricultural cooperatives, financial responsibility (with DOT), rate bureau procedures, monitoring allowances for pickups when zone pricing is used by a seller, guidelines for entertainment expenses, through routes and joint rates, loading and unloading vehicles, and written contracts between shipper and carriers. In addition, the Commission is required to make several studies (loading and unloading vehicles, state regulation, service to small communities) which will add to its involvement in regulation. Consequently, it is difficult to conclude that the Commission will be less involved in the affairs of motor trucking companies in the future.
That the ICC will not have a less responsible role or an easier time of it in the future is further indicated by the administrative and enforcement obligations it has under the new law. Although a reduction in some kinds of regulation will reduce the Commission’s work load, and it is expected that most Commission cases will be handled under modified procedure with hearings only in extraordinary circumstances, several features of the Act result in an additional administrative burden that will be substantial. As to entry control, these include handling the flood of applications for operating authority under the liberal entry provisions of the Act and the job of removing operating restrictions.

Several changes made in the Act of 1980 will lead to difficult policing and enforcement problems for the ICC. In connection with entry control, they include enforcing the conditions necessary to qualify for a partial exemption as to entry control (e.g., transportation to replace abandoned rail service, transportation of small packages), preventing unjust discrimination by carriers holding dual operating authority as both a common carrier and a contract carrier, preventing contract carriers from becoming common carriers without the proper operating authority, and policing mixed loads to prevent exempt carriers from carrying regulated commodities they are not authorized to carry. Thus, the ICC may be as busy as ever in the future, although the character of the work will be somewhat different, and the job of regulating the motor trucking industry may be no less difficult.

A critical aspect of the Act of 1980 is how the ICC interprets its various provisions and how efficiently the Commission works. The success or failure of the Act will be largely determined by the Commission. As in any regulatory system, the persons performing the regulating are more important to its success than the law upon which the regulation is based.

As to interpretation of the Act by the ICC, although the Act of 1980 is more specific in what Congress wants done than most other transportation regulatory legislation has been, there is still room for considerable “interpretation” by the ICC. Should the Commission choose, it can interpret the new law in such a way as to produce almost total deregulation of entry, even though beyond the intention of Congress. If the oversight provision of the Act does not protect against this, the determination of the future of economic regulation of motor trucking will be left by default to the ICC.

What about oversight? Senator Howard W. Cannon (D., Nev.), in commenting on the Act at the time of its passage by Congress, was quoted as saying, “In the legislation we admonish the ICC to follow the directives of the new law faithfully—and we mean it. We [the Senate Commerce, Science, and Transportation Committee] intend to hold oversight hearings at
least once a year over the next five years."\textsuperscript{39} The likelihood is that the ICC will try to go as far as possible to deregulate trucking and that oversight will be concerned with that kind of problem. The oversight provision of the Act may turn out to be the most important of all. But will Congress really put in the time and effort to exercise effective oversight?

The problem with oversight is that it can take considerable time and effort on the part of the legislators. And it is clear that in this day of show business politics, there are few votes and no glamour in legislative oversight, as compared with writing new legislation. Instead, oversight can be difficult and dreary work. In addition, oversight of the ICC and its interpretation of the Motor Carrier Act of 1980 is not likely to be a high priority item for Congress because motor trucking regulation, although its impact on the public can be important, does not rank with inflation, the defense budget, and other conspicuous domestic issues in terms of public, and hence Congressional, interest.

Immediately after the new law was signed by the President, the ICC took steps to carry out the provisions of the Act. The Commission sought public comment on a number of proposals for implementing the new law,\textsuperscript{40} continued proceedings which were in line with the provisions of the Act, and discontinued its proceeding on master certificates and permits for twelve proposed specified fields of transportation.\textsuperscript{41} These and other steps taken in the first few months following the signing of the Act indicate that the Commission will probably stretch the reduced regulation aspects of the new law to the limit in order to deregulate the motor trucking industry as much as possible. Evidence of this in the entry control area is found in the Commission’s intention to use very broad descriptions of commodities and territories in operating authorities, its lack of consideration of protesting carriers in entry control cases, the large proportion of applicants that have been admitted, and its flexible rules for owner operators when attempting to qualify for authority to carry food and other items on back hauls. Congressional oversight is likely to be given a severe test by the Commission.\textsuperscript{42}

\textsuperscript{39} Truck Deregulation Bill Is Passed by Congress, Sent to President, 182 TRAFFIC WORLD, June 30, 1980, at 11.


\textsuperscript{41} Ex Parte MC-135, Master Certificates and Permits, 44 Fed. Reg. 57,139 (1979); see Comments Sought on ICC Proposals Implementing Motor Carrier Act, 183 TRAFFIC WORLD, July 14, 1980, at 36.

\textsuperscript{42} President Ronald Reagan will have the opportunity to appoint several new members to the ICC. Should he choose to do so, he could slow down or stop the Commission’s efforts to totally deregulate the trucking industry by appointing, with the consent of a Republican-controlled Senate, persons not committed to that goal. Or he could continue the Carter policy of appointing those who are in agreement with a philosophy of deregulation. The latter is more likely to be the case.
Some questions may be raised concerning the Act of 1980. First, how will the trucking industry react to the new law over time? If the new law is administered in such a way as to virtually eliminate meaningful entry control (and regulation of rates and the rate bureau method of establishing rates collectively), the trucking industry may decide that total free enterprise would be better than a regulatory structure that is burdensome (e.g., regulating financial responsibility, security issues, accounts, and mergers) but does little to help the carriers (i.e., no meaningful entry control and rate regulation). The industry may then work to have all regulation repealed.

Second, will reform of economic regulation produce the societal benefits claimed for it? Will it result in eight billion dollars in savings for consumers and save substantial amounts of energy, as was claimed? Will it improve service to the public and hold rates down? Or will it lead to poor service, rates that are too high (or too low), no energy savings, and no savings to the consumer? And will it result in less or more regulation and red tape overall?

Third, is the Motor Carrier Act of 1980 a large step toward total deregulation of the motor trucking industry? Three possible developments could lead to total deregulation. If the ICC proceeds to seek total deregulation and administers the law accordingly, and Congress does not exercise adequate oversight, virtual total deregulation may occur. Or, if the Commission adheres to the intent of Congress and the reforms in the Act actually prove to be effective in improving motor truck service and rates, without substantial damage to the trucking industry, a next logical step might be further decontrol by Congress. Finally, as noted above, the trucking industry itself might strive for total deregulation if it finds the present situation intolerable, with many disadvantages and few advantages in regulation for the carriers.

The Act of 1980 retains statutory economic regulation of the trucking industry, including entry control, although news reports and statements by government officials at the time of its passage and signing made it look as though regulation had been abolished. A good deal of statutory regulation remains and, in fact, a case could be made that a net reduction in total regulation has not been accomplished but, instead, reduction in some aspects and increases in others took place.

But the new law is a giant step toward regulatory reform. In the most important aspect of economic regulation of motor truck transportation—entry control—Congress went very far toward free enterprise, perhaps too far, and it is this part of the new law that will be the most important in determining its success or failure.

It is difficult to conceive of an effective, workable regulatory system where there is not some control over entry. How, for example, can a regulatory agency establish a level of rates that is reasonable to the public if it is
necessary to have the rate level produce adequate revenue for an excessive number of carriers? And would it be possible to effectively regulate financial responsibility, security issues, accounting systems, quality of service, non-discriminatory service, and other matters without some control over the number and quality of carriers? And would there be any point in worrying about such things as partial exemptions, numbers of shippers served by contract carriers, operating restrictions, or any other aspect of the entry control picture if the Commission admits virtually all who apply for anything anywhere any time?

If the dire predictions of open entry opponents prove accurate, the Act will be a failure, regardless of the outcome of rate regulation and other features of the Act. And the openness of entry depends in large part on the ICC.

Overall, the Motor Carrier Act of 1980 is a well written, well structured, and comprehensive law. Several problems and weaknesses\(^\text{43}\) in the law relative to entry control have been noted above but it is, in general, a carefully drafted piece of legislation. Congress has provided what appears to be a generally workable law that, given reasonable interpretation by the ICC, can provide substantial regulatory reform without destroying the regulatory system altogether.

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\(^{43}\) A weakness in the new law not discussed here is its lack of consideration of the intermodal consequences of the legislation, \textit{i.e.}, its impact on other modes of transportation, particularly railroads, and to what extent it will influence economic regulation of other modes.
Railroad—Motor Carrier Intermodal Ownership

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I. INTRODUCTION

This article explores the law of rail-motor intermodal ownership as it has evolved since the passage of the Motor Carrier Act of 1935.¹ Intermodal ownership signifies the operation of transportation services of two different transport modes² under single ownership or control, not merely intermodal operations in which two or more modes are utilized to perform a particular transportation service. Railroads are generally in favor of com-

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2. For example, railroads, motor carriers, water carriers, or air carriers.

75
mon ownership while motor carriers are almost uniformly opposed to it.\(^3\)
This is hardly a surprise. While the railroads' share of intercity freight traffic has been steadily decreasing since the late 1930's, the truckers' share has been steadily rising.\(^4\)

Surprisingly, the national policy on this subject is based almost entirely on ideological argument and not on economic data.\(^5\) The basic argument supporting national policy is a fear that if the railroads are allowed to own and operate subsidiary motor carriers, they will dominate the motor carrier industry.\(^6\) This argument is expressed as follows:

The immediate result of a change in the law to allow common ownership would be that competition for available motor and water traffic would be increased and intensified. Independent motor and water carriers, most of which are financially sound, might be able to withstand such competition for a time; but, eventually, the railroad parents' financial power would sharply reduce, and possibly completely eliminate, competition by independent motor and water carriers. . . .

Once a sharp reduction in competition by independent motor and water carriers had been achieved, the railroads could be expected to look to their ultimate objective which, because of their investment in rail plant, would be to get traffic which formerly moved by motor and water onto the rails.\(^7\)

An embellishment of the monopoly argument is that if monopoly would not necessarily occur as a result of railroads being able to participate freely in highway carriage, it would come about by predatory tactics which might be expected from the railroads in the form of cutting truck rates in order to eliminate other truckers and subsequently increasing such rates or deteriorating service in order to force the highway business back to the railroads.\(^8\)

Does this reflect unrealistic paranoia? Certain evidence suggests that it may not.\(^9\) Some of the alleged evils said to result from a monopoly situation include price fixing, limitations on service, discriminations among ship-

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4. Compare I.C.C. Annual Report statistics over the years.
6. One commentator has turned the tables somewhat and argues: "Indeed, if the traffic trends established in 1966-1968 are projected to 1975, motor carrier acquisition of railroads, if 'common ownership' becomes legal, seems a more likely development than railroad purchase of truck lines." Douglas, supra note 3, at 1798.
pers, and obstructions of technological progress in the transportation
field.\textsuperscript{10} Observers have also expressed fear that independent truckers
would be "driven" out of the motor carrier field.\textsuperscript{11} Finally, antitrust policy
discourages mergers of directly competing entities.\textsuperscript{12}

On the other hand, observers advance a number of positive benefits to
be achieved if intermodal ownership is allowed without restrictions. Some
of these observations include: (1) rail-motor coordination simply will not in-
crease until unified and unrestricted transportation companies exist;\textsuperscript{13} (2)
motor operations will increase the total profitability of rail lines needing in-
creased profits in order to continue to successfully compete; and (3) cen-
tralized planning and operations would result in economies of scale and
reduced personnel, management, and facilities, leading to reduced costs
which would be passed on to the consumer in the form of lower rates. It is
also argued that the trucking industry is no longer an infant industry requir-
ing excessive protection from additional competition\textsuperscript{14} and that it is imprac-
tical to hope for coordinated rail-motor service through voluntary
cooperation between independent business units.\textsuperscript{15}

Whatever the ideology or the argument, it is necessary to review the
legislative history of particular provisions of the Motor Carrier Act to un-
derstand why the national policy against common ownership is restrictive.

II. LEGISLATIVE HISTORY

The passage of section 213(a)(1) of the Motor Carrier Act of 1935\textsuperscript{16}

\begin{flushright}
\begin{itemize}
\item 12. This approach should not be taken to extremes.
\item 13. Under the approach adopted in the antitrust laws, the creation of intermodal owner-
ship patterns by direct investment rather than acquisition would not be barred, except and
to the extent such investment monopolized or was used as a part of an attempt to monop-
olize a line of commerce. Whether intermodal ownership produced superior transportation
service would be tested by the marketplace. As to merger, such intermodal
ownership patterns as did not eliminate or prejudice competition would be permitted
freely, those which do so would be prevented.
\item 15. Some observers blame the railroads for this lack of coordination because of their reluc-
tance to participate in joint rates with motor carriers. See Beardsley, Restrictions Against Rail Entry
Into Other Transportation Fields, 24 Law & Contemp. Prob. 643 (1959); Fulda, supra note 9, at
208. Others chalk it up to the natural tendency of transportation competitors to want to "gain the
greater return for its share of the haul." See Buland & Fuhrman, supra note 8, at 185.
\item 16. 49 U.S.C. § 313(a)(1) (1935). This section permitted consolidation, merger, and acquisi-
tion of control upon Commission approval with, however, the following proviso:
That if a carrier other than a motor carrier is an applicant, or any person which is con-
climax a series of developments going back to the early years of the twentieth century. Of course, the first truly modern form of transportation was railroading, and it dominated this early transportation scene.

Railroads were early discovered to require exclusive control of the entire operation by a single management including control of the use of the traveled way. This was in contrast to road and water transport where a multiple control system could operate on a common way. Railroads thus became inherently a common carrier service, not easily dominated by any shipper or receiver of goods. This was because of the need for common operational control, plus the enormous capital requirements for a threshold into the business. . . .

Newer forms of modern transportation by water, pipeline, highway, and air lived in fear of the already established behemoth railroad industry. The railroad industry itself tended to look with disdain upon its newer and more puny rivals and either ignored the opportunities to get into the new transport enterprises or, if they did get in, took a rather restrictionist point of view, usually with the aim of limiting competition with the railroad.

In this way a political situation was created—the railroad and its supporters versus its newer competitors and their supporters. . . .17

Politics, then, led to the passage of the Panama Canal Act of 1912,18 which prohibited rail ownership or control of water carriers except under certain defined circumstances. Its purpose was to protect the water transportation industry from rail domination. The underlying policy was expressed as follows: “The proper function of the railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition.”19

The Commission picked up the ball and ran away with it. In Lake Line Applications Under Panama Canal Act,20 the Commission eliminated the extensive rail ownership of water services on the Great Lakes. The rail companies had formed an association to operate boat lines for the benefit of the rail lines and had divided traffic and determined rates so that independent boat lines could not compete. They had temporarily reduced their rates to drive out independent boat lines. The Commission denied all rail applications to continue such water operations on the Great Lakes. Commenting on this Commission decision, a few observers deemed it to be

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20. Lake Line Applications Under Panama Canal Act, 33 I.C.C. 699 (1915) [hereinafter cited as Lake Line].
a political diatribe, abounding in rhetorical statements, and lacking the most elementary judicial or economic analysis of the problem presented. 21

In Lake Line, the Commission made no distinction between the use of Great Lakes shipping to destroy competition and the constructive use of it to improve transportation service. The end-to-end service of small railroads, such as the Lehigh Valley, was wiped out along with the parallel routes of other lines. The constructive work of the Pennsylvania in transforming an old obsolescent fleet into first class water service was eliminated, along with the most blatant anti-competitive "fighting ship" outfits. Lake Line was in reality a necktie party motivated by political rhetoric and nothing more. It not only eliminated rail control of Great Lakes shipping, it was probably the most important single event in the elimination of common carrier service on the Lakes. Certainly, the liberated forces of independent water lines did not respond after their unleashing by the ICC rhetoricians. By the 1930's the last common carrier on the Lakes of general cargo had disappeared. 22

Political rhetoric had established its place in the national transportation policy. Yet, before 1935, no special restrictions upon rail control of motor carriers existed. In fact, in the 1920's and 1930's the railroads found that utilizing motor carriers was useful as a substitute for branch line rail service and for use in pickup and delivery. A few also employed motor carriage in linehaul service. 23 The Commission concluded that railroads should be specifically authorized to engage in motor carriage of both passengers and property over the public highways. 24 These conclusions were based on a mass of data accumulated by the Federal Coordinator of Transportation (I.C.C. Commissioner Eastman).

For example, after several months of hearings held in seventeen cities around the country, a Commission examiner recommended that "[r]ail carriers should be permitted the same opportunity to engage in motor vehicle operations and upon the same terms as any other corporation or individual." 25 Subsequently, the entire Commission adopted this recommendation saying:

That railroads, whether steam or electric, and water carriers, subject to the act, should be specifically authorized to engage in the transportation of both persons and property by motor vehicles in interstate commerce over the public highways and that thereafter such service, when directly engaged in by any such rail or water carrier, should be subject to the provisions of the interstate commerce act and legislation supplemental thereto. . . . 26

The Commission therein recommended participation of the railroads "on an

22. Id.
24. Id. at 745.
equal basis with independent operators in the transportation of freight by motor truck\(^{27}\) since \textquote{\textquote{unrestrained competition is an impossible solution.}}\(^{28}\)

Later, however, Commissioner Eastman, commenting on a wider application of common ownership asserted:

While railroads should be permitted to use trucks freely in connection with their rail service, there appears to be no present need for encouraging a movement toward the absorption by them of truck, bus, and water operations. Railroad credit conditions permit of no such movement at the present time, and a more or less independent development of the rival agencies is plainly desirable. It is possible that experience may later furnish occasion for changing this view, but that is a bridge that need not be crossed now.\(^{29}\)

He also offered testimony before a Congressional committee that advocated greater utilization by the rails of motor operations in combination with, and not independent of, railroad service.\(^{30}\)

These evolving views were based on conditions at the time immediately preceding passage of the Motor Carrier Act of 1935.\(^{31}\) These views, plus continuing fears regarding rail domination of the motor carrier industry absent a restrictive policy, formed the basis for the language passed by the Congress in the proviso to section 213(a)(1) of the Motor Carrier Act of 1935.\(^{32}\)

The legislative history of the proviso shows that it was intended to prevent rail monopoly over highway transportation while permitting railroads to utilize motor carriage in coordination with their own rail operations. For example, Senator Wheeler, the chief Senate spokesman for the legislation which became the 1935 Act, made it clear that unrestricted entry by railroads into the motor carrier field was not the intention of Congress. "With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests."\(^{33}\) Congressman Sadowski,
Chairman of a Subcommittee of the House Committee on Interstate and Foreign Commerce put it more bluntly:

I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor carrier industry, that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation.34

The legislative history of the Motor Carrier Act demonstrates that it was the intent of Congress to restrict rail entry into the motor carrier field.

III. THE STATUTE

The language of the proviso to section 213(a)(1) is general in nature. It fails to define how or in what manner any motor carrier operations would be used to public advantage by a rail carrier in its operations. The three words “in its operations,” however, have been held to have a restrictive meaning.35

In contrast, there is no express restriction on railroads being authorized to engage in motor operations under new certificates or permits as distinguished from the acquisition of these operating authorities already in existence and held by other carriers. In fact, the provisions of sections 207 and 209 of the Motor Carrier Act of 193536 authorize the Commission to grant new certificates or permits to applicant carriers: (1) where they are found to be fit, willing, and able to properly perform the service proposed (as either a common or contract carrier) and to conform to the provisions of the Act and Commission regulations thereunder; and (2) where the applicant makes certain showings that its proposed service is or will (a) be required by the present or future public convenience and necessity (for common carriers), or (b) be consistent with the public interest and the national transportation policy declared in the Act (for contract carriers).37 There are no restrictions in these sections determining what the Commission can or cannot do if the applicant for motor carrier authority is a railroad. Hence, a literal reading of the language of the statute would open the door to easy circumvention of the policy of the proviso to section 213(a)(1).


Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves.

35. See the discussion in the text encompassing notes 45 and 46 infra.


37. The National Transportation Policy is now found at 49 U.S.C. § 10101 (1980).
In 1938, an amendment was proposed to close this loophole between sections 213(a)(1) and 207 by inserting into section 207 the same language contained in the proviso.\textsuperscript{38} The amendment was withdrawn after testimony by Commissioner Eastman that:

\[\text{[\text{In administering the provisions of section 207, it would be the duty of the Commission to read the act as a whole and to apply the same policy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of Section 213.}}\text{39}\]

Consequently, the general policy underlying the restrictive provisions of section 213 was to be applied to applications for new authority under sections 207 and 209, even though specific restrictions need not be. A healthy body of authority for this proposition has developed over the years from the Federal courts,\textsuperscript{40} the Commission,\textsuperscript{41} and the observations of leading commentators.\textsuperscript{42}

IV. "\textit{AUXILIARY AND SUPPLEMENTAL}" DOCTRINE

Recognizing Congress’ strong general policy against railroad invasion of the motor carrier field, the Commission, in a series of early decisions, set forth certain basic conditions that non-motor carriers were required to meet in order to qualify for motor carrier authority. These were the first indications of the Commission’s attempt to apply Congressional policy.

The first case, \textit{Pennsylvania Truck Lines, Inc.—Control—Barker},\textsuperscript{43} involved a section 213 acquisition proceeding which established the "auxiliary and supplemental doctrine." Here, a rail subsidiary sought to acquire an independent motor carrier both to establish coordinated rail-motor operations and to provide independent motor carrier services unconnected with the railroad. The Commission had this to say:

The proof is convincing that over some of the routes in question the railroad can "use service by motor vehicle to public advantage in its operations." The motor vehicle can undoubtedly be used as a very valuable auxiliary or

\begin{itemize}
  \item \textsuperscript{38} See \textit{Hearings on S. 3606 Before Senate Subcomm. on Interstate Commerce, 75th Cong., 3d Sess}. 23-29 (1938).
  \item \textsuperscript{39} Id. at 30.
  \item \textsuperscript{40} \textit{E.g., Auclair Transp., Inc. v. United States}, 221 F. Supp. 328, 334-35 (D. Mass. 1963); \textit{American Trucking Ass’ns v. United States}, 364 U.S. 1, 6-7 (1960); \textit{American Trucking Ass’ns v. United States}, 355 U.S. 141, 149-50 (1957).
  \item \textsuperscript{42} \textit{Beardsley, supra note 7, at 94-95; Fulda, supra note 9, at 180; Guandolo, Intermodal Acquisitions Under The Interstate Commerce Act, 2 Transp. L.J. 11, 12 (1970); Hale & Hale, supra note 11, at 804 n.130.
  \item \textsuperscript{43} 1 M.C.C. 101 (1936).
\end{itemize}
adjunct to railroad service, particularly less-than-carload service. . . . Such coordination of rail and motor-vehicle operations should be encouraged. . . .

While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was convinced that this should be done. Truck service would not, in our judgement, have developed to the extraordinary extent to which it has developed if it had been under railroad control. . . .

We have authority to approve the instant transaction upon such terms and conditions as we may find just and reasonable and with such modifications as we may prescribe. . . . The conditions . . . involve action on the part of the new company to divest itself of authority to conduct operations not auxiliary and supplementary to those of the railroad. 44

In a subsequent phase of the same case, the Commission added:

Approved operations are those which are auxiliary and supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier. 45

Thus, the "auxiliary and supplemental" doctrine emerged as the Commission's basic policy regarding acquisitions of motor carriers by railroads. These words are not found in the Act. They do, however, describe how the Commission interprets the section 213 statutory proviso language "enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations."

The earlier decisions following Barker only required restriction of the proposed auxiliary truck service, usually for less-than-carload freight, from or to points which are stations on the railroad, with a reservation of power to impose additional conditions if deemed necessary. 46 But the meaning of the phrase "auxiliary and supplementary" was hardly crystal clear.

In a series of Commission decisions, this concept was clarified. For instance, in Texas & Pacific M. Transport Co. Common Carrier Application, 47 the Commission defined the concept "auxiliary and supplemental" as limiting the character of service to be performed:

44. Id. at 111-12.
46. See Fulda, supra note 9, at 166, and n.55.
47. 41 M.C.C. 721 (1943).
to that which is auxiliary to or supplemental of the rail service of the railway. It limits the service to be performed by truck to the transportation of the rail traffic of the railway. . . . [This condition] permits all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading.\textsuperscript{48}

The Texas & Pacific case further defined the concept as meaning that the motor carrier subsidiary of the railroad may not be a party to tariffs containing all motor local or all motor joint rates, precluding interlining with other motor carriers.\textsuperscript{49} It must be substituted in lieu of, and be functionally related to, an existing rail operation conducted by the parent railroad.\textsuperscript{50}

This is in opposition to the theory that the words "auxiliary and supplemental" might connote mere geographical limitations on service. It is clear that the phrase implies a limitation of function (type of trucking service) and not merely a geographical limitation (place where the service is performed).\textsuperscript{51} The Commission's power to impose "auxiliary and supplemental" conditions has been confirmed in a number of Supreme Court opinions.\textsuperscript{52}

We think that at the time of issuance of the certificate, if the Commission reasonably deems the restriction useful in protecting competition, or for other statutory purposes, the Commission may require the railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service. . . . Such a restriction is a logical method to insure the maximum development of the two transportation agencies—rails and motors—as coordinate transportation services in accordance with [the National Transportation Policy].\textsuperscript{53}

In 1940, Congress passed a new transportation act.\textsuperscript{54} Under that act, section 213(a)(1), including the proviso, was re-enacted as section 5(2)(b) of the Interstate Commerce Act.\textsuperscript{55} The new act narrowed the restrictions against common ownership so as to apply only to rail ownership of motor carriers, and it liberalized the language of the new section to enable the Commission to grant an acquisition application if it found the transaction to be "consistent with the public interest," rather than requiring that the transaction "promote" the public interest.

The Commission viewed these Congressional actions as supporting its

\textsuperscript{48} Id. at 726.


\textsuperscript{50} American Trucking Ass'ns v. United States, 364 U.S. 1 (1960); Green Bay & W.R.R. Extension—Neenah, 91 M.C.C. 363 (1962).

\textsuperscript{51} American Trucking Ass'ns v. United States, 364 U.S. 1, 9 n.50 (1960); Rock Island M. Transit Co.—Purchase—White Line M. Frt., 40 M.C.C. 457, 470-71 n.41 (1946).

\textsuperscript{52} See United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951); see also American Trucking Ass'ns v. United States, 364 U.S. 1 (1960); American Trucking Ass'ns v. United States, 355 U.S. 141 (1957).


\textsuperscript{55} Now 49 U.S.C. § 11344(c) (Supp. II 1978).
previous interpretations of the necessity that motor operations be "auxiliary and supplementary" to rail service.

[The National Transportation Policy made it] inconsistent with the public interest, and a priori something not required by the public convenience and necessity, for railroads directly or indirectly . . . to engage, except in special circumstances, in motor-carrier operations other than those auxiliary to, and supplemental of, their own train service and designed to be coordinated with train service to produce in effect a new and improved type of coordinated motor-rail service.\(^{56}\)

V. "'AUXILIARY AND SUPPLEMENTAL' CONDITIONS"

Having defined the type of motor operations to be performed by railroads, it is now necessary to examine the specific conditions imposed in acquisition cases under section 5(2) and operating authority applications under sections 207 or 209. As has already been stated, there is no language within sections 207 or 209 comparable to that contained in section 5(2)(b).\(^{57}\) However, the general policy underlying the restrictive provisions of section 5(2)(b) was indeed applied to section 207 and 209 operating authority applications. The specific conditions which were often imposed on applications by rail carriers to conduct motor carrier operations were intended to ensure that such operations were auxiliary and supplementary to rail service, thereby preventing railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. The conditions attempt to prevent the dual competition of an all-motor service (operated by a railroad) in addition to the rail service itself.\(^{58}\)

The five basic conditions imposed in acquisition and extension applications were enunciated in Kansas City S. Transport Co., Common Carrier Application.\(^{59}\) These are:

1. The service to be performed by motor vehicle shall be limited to service which is auxiliary to, or supplemental of, the rail service [of the railroad];\(^{60}\)

2. The motor carrier shall not render any service to or from, or interchange traffic at any point [rail terminal area] not a station on a rail line of the railroad,


\(^{57}\) See the discussion in the text encompassing notes 35-42 supra.


\(^{59}\) 28 M.C.C. 5 (1941).

\(^{60}\) As previously indicated, this condition limits the character of the service to be rendered and not merely the territorial scope of the service. "It is best illustrated by the substitution of trucks for peddler or way-freight service or station-to-station service. It requires that the traffic handled be that of the railroad, under rail responsibility to the public, and on rail billing and rail rates." Reading Transp. Co.—Control and Merger, 93 M.C.C. 11, 19 (1963).
(3) No shipments shall be transported by the applicant between any of the following points, or through or to or from more than one of the following points: [a list of the points follows].

(4) All contractual arrangements between the applicant and the railway shall be reported to the Commission and shall be subject to revision, if it is found necessary, in order that such arrangements shall be fair and equitable to the parties.

(5) Such further specific conditions as the Commission may find it necessary to impose in the future in order to insure that the service shall be auxiliary to, or supplemental of, train service.

These conditions are generally imposed today just as they were in 1941. It may be argued that they are discretionary with the Commission as to whether they shall be imposed or not. They certainly are discretionary in

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61. This is the "key point" restriction. Key points are larger communities on the rail line. This restriction prohibits railroad controlled motor operations between such points, while still permitting those operations to and between smaller way stations. The purpose of the condition is to permit substituted truck service between major distribution (break-bulk) centers and smaller way stations, and between the way stations themselves, but preventing operations in competition with independent motor carriers on longer hauls. In lieu of the key point restriction, certain cases impose an "immediately prior or subsequent movement by rail" restriction. This restriction requires that shipments move partly by railroad and partly by motor vehicle. It is somewhat less liberal than the key point restriction since motor deliveries could not be made between way stations without a prior or subsequent movement by rail. In either form, however, the restriction supplements and insures the effectiveness of the "auxiliary and supplemental" concepts by insuring that the motor operations be performed on rail billing at rail rates and only between points served by the railroad. Illinois Cent. R.R., Ext.—New Orleans and Baton Rouge, 81 M.C.C. 83 (1959) and 83 M.C.C. 79 (1960). A full discussion of when the key point restriction is imposed or not and under what circumstances it may be removed can be found in Fulda, supra note 9, at 184-91.

62. The last condition was inserted as a precautionary measure at first. However, beginning with Frisco Transp. Co.—Purchase—Reddish, 35 M.C.C. 132 (1940), and continuing into the mid 1940's, this condition was not imposed in virtually all such cases. With this departure, carriers began to treat the restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the service which might be rendered by the railroad or its affiliate. The Commission began to reimpose the condition. This reservation of power is comparable to the equity practice of retaining jurisdiction after issuance of a final decision for the purpose of permitting reopening of the case if required by changed circumstances. See Fulda, supra note 9, at 167 n.58. The reservation has been upheld. See United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951).


64. At least the Commission believes that the "auxiliary and supplemental" conditions may or may not be imposed as are found appropriate under the circumstances of a particular case. See Santa Fe Trail Transp. Co.—Purchase—Meddock Truck Line, 87 M.C.C. 211, 213 n.49 (1961) (and cases cited therein). Specifically the Commission has asserted:

The contention that we lack the power to approve a transaction such as this [a purchase under the proviso of section 5(2)(b)] without imposing the condition in question [the auxiliary and supplemental condition] is without merit. The proviso of section 5(2)(b) contains no such limitation; it merely provides that we may approve such a proposed transaction if we find that it "will be consistent with the public interest and will enable (the railroad) to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition. . . . Beginning with [the Barker decision,] a large number of rail-motor acquisition cases were approved, and in none was a condition imposed restricting the operating rights in the manner urged by ATA until Southern Pac. Transp. Co.—
application cases under sections 207 and 209 since only the general policy underlying the restrictive provisions of section 5 need be applied, not the specific restrictions. In any case, the Commission recognizes that its duty

Pur.—Trinity M. Frt. Lines, 40 M.C.C. 215 (1945). . . . Neither the White Line case nor the opinion of the Supreme Court affirming the order therein, United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951), indicates any such lack of power to approve a transaction under section 5 without such a restriction.

Burlington Truck Lines, Inc.—Purchase—Pirie, 85 M.C.C. 363, 365-66 (1960). This position is somewhat precocious as well as being self-justifying. The very purpose of the "auxiliary and supplementary" conditions was to effectuate the language contained in the proviso to section 5(2)(b) that the Commission is required to deny an application for acquisition of operating rights unless it finds that the transaction proposed will be consistent with the public interest by enabling the rail carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition. Additionally, merely because the Commission has failed to impose "auxiliary and supplementary" conditions in a section 5 acquisition case does not mean that the Commission holds such a power and merely because the Court decision is silent on a point does not mean that its silence indicates assent. In fact, a subsequent decision of the Supreme Court makes this very point:

The appellants in Nos. 15 and 16, American Trucking Associations, Inc., and Railway Labor Executives Association, urge us to hold that the Commission was without power to issue unconditioned certificates to appellee because of the requirements of §5(2)(b) and, therefore, the certificates issued to appellee were void. We have not had occasion to rule definitively whether that Section states rigid requirements that operations of rail-affiliated motor carriers be auxiliary or supplementary to train service. Cf. American Trucking Ass’ns v. United States, 355 U.S. 141, 78 S. Ct. 165, 169. As resolution of the question is unnecessary for the present decision, we intimate no position with regard to it.


65. See notes 40 through 42 supra, and the text accompanying them. It can be argued that the language of the proviso "in its operations" coupled with the Commission’s general policy of imposing "auxiliary and supplemental" restrictions in such cases makes the imposition of those restrictions mandatory in acquisition cases. The beleaguered American Trucking Associations, in fact, made this contention in a series of Commission cases decided between 1960 and 1962. See Burlington Truck Lines, Inc.—Purchase—Pirie, 85 M.C.C. 363 (1960); Santa Fe Trail Transp. Co.—Purchase—Meddock Truck Line, 87 M.C.C. 211 (1961); Rio Grande Motor Way, Inc.—Control & Merger, 87 M.C.C. 479 (1961), and 90 M.C.C. 643 (1962). A testy Commission reaffirmed its position for the last time:

At the risk of being redundant, but in the interest of administrative finality, we reiterate that there is nothing in the statute which delimits us, in the proper exercise of our discretion, from approving a transaction such as this one either with or without restrictions, depending upon the particular circumstances involved. This subject was fully discussed in the Pirie case, and a restatement of what was there said would be pointless.

90 M.C.C. at 648. What is the solution? A number of Supreme Court and Federal court decisions appear to provide an answer. Keeping in mind the difference between the provisions of sections 5 versus 207 and 209, a distinction is made between (1) insuring that the operations proposed will enable the railroad to use motor vehicle operations to public advantage in its operation and will, therefore, be "auxiliary and supplemental" of rail service versus (2) imposing the "auxiliary and supplemental" conditions. First, the Supreme Court implies that the provisions of section 5 (and consequently the auxiliary and supplementary conditions) are mandatory:

Section 207, which defines the showing on which issuance of a certificate of public convenience and necessity is predicated, makes no reference to the phrase "service . . . in its operations" used in §5(2)(b), nor is there any language even suggesting a mandatory limitation to service which is auxiliary and supplementary. . . . (Italics added)
VI. SPECIAL CIRCUMSTANCES

As with all principles of general applicability, certain defined exceptions arose. Early on, the Commission recognized that rigid application of its general policy of requiring auxiliary and supplemental operations would result in a number of transportation anomalies: lack of any service whatsoever...

We conclude, therefore, that the Congress did not intend the rigid requirement of §5(2)(b) to be considered as a limitation on certificates issued under §207.

We find no indications that the Commission has permitted the §207 proceedings in this case to be used as a device to evade §5(2)(b) restrictions. American Trucking Ass'ns v. United States, 355 U.S. 141, 149-52 (1957) (emphasis added). Nowhere, however, does the Court specifically say here that the section 5(2)(b) restrictions are mandatory. In a later decision, the Court confirms Commission power to impose "auxiliary and supplementary" restrictions and states that to accomplish the Congressional purpose (to meet the conditions of the proviso to section 5(2)(b)) "the Commission can either state in the certificate the conditions necessary to provide the limitations or reserve the right to impose conditions should the necessity arise." American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 140-41 (1958).

In the latest Supreme Court decision on this point, the distinction is finalized:

[This Court has confirmed the correctness of the Commission's conception of its responsibilities under both §5(2)(b) and §207. The Court has also taken cognizance of the congressional confirmation of the Commission's policy by the 1940 re-enactment in §5(2)(b) of the provisions of §213(a), after some of the pertinent Commission decisions had been specifically called to the Congress' attention.

The key phrase in this summary is obviously "auxiliary to or supplemental of train service." If a trucking service can fairly be so characterized, it is clear enough that there is compliance with the mandate of §5(2)(b) that the carrier should be able "to use service by motor vehicle to public advantage in its operations."

But while the judicial and administrative current has run strongly in favor of auxiliary and supplemental restrictions on motor carrier subsidiaries of railroads, the Commission has determined, and this Court has agreed, that the public interest may sometimes be promoted by not imposing such limitations. A prime example is American Trucking Ass'ns v. United States, supra, where the trucking service was not being performed adequately by independent motor concerns. We there observed that the mandatory provisions of §5(2)(b) do not appear in §207, and approved the Commission's policy of not attaching auxiliary and supplemental restrictions where "special circumstances" prevail.

American Trucking Ass'ns v. United States, 364 U.S. 1, 6-11 (1959) (emphasis added). See also American Trucking Ass'ns, Inc. v. United States, 425 F. Supp. 903, 907 (D.C. Cir. 1975), aff'd, 425 U.S. 955 (1976) where the Commission decision not to impose "auxiliary and supplemental" conditions in a section 5 application was upheld.


[The requirement in section 5(2)(b) that the rail carrier show it can use the motor carrier service to public advantage in its rail operations is outdated by a continental United States. Considering the circumstances here, we do not believe a finding is necessary that the rail carrier involved be able to use the motor carrier service of Propane, Calif., to advantage in its rail operations.

ever, resulting abandonments of rail service, or poor and inefficient service. To forestall any such problems, the Commission began to grant unrestricted authority to railroads to engage in motor vehicle operations.

The first inklings of a possible exception came in *Santa Fe Trail Stages, Inc.*—*Control*—*Central Arizona,* where the Commission granted an application to provide motor service not parallel or adjacent to the railroad. The Commission relied heavily on the fact that the proposed operation penetrated territory not served by other transportation agencies and was equivalent to the building by the railroad of a branch or feeder line into territory without service, and hence was an operation auxiliary and supplementary to its rail operations. In addition, no protest was filed against the application.

In a series of decisions since *Santa Fe,* it has been Commission policy to deny or restrict applications by railroads to conduct motor vehicle operations unless there are special circumstances which justify a grant without the usual "auxiliary and supplemental" restrictions. This principle applies to both acquisition and extension applications.

A specific showing must be made or a burden of proof must be met by applicants in both acquisition and extension cases. For acquisitions, applicant must first show that the proposed transaction would enable the railroad to use motor vehicle service to public advantage in its operations, and would not unduly restrain competition (the section 5(2)(b) proviso requirements). This is a necessary and preliminary inquiry which must be affirmatively resolved before the transaction can qualify for approval with or without restrictions, depending upon the "special or unusual circumstances" demonstrated. For extension applications, applicants must first

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67. 1 M.C.C. 225 (1936).
show that the proposed transaction is or will be required by the requisite public convenience and necessity. This may be accomplished by demonstrating a need for the service through the testimony of public witnesses or by showing that certain operating economies, efficiencies or improvements in existing rail service would result. This must also be demonstrated before the operating authority to be granted can be issued with or without restrictions, depending on the "special or unusual circumstances" presented in the case.

This brings us to the question of what are the special circumstances which may cause the Commission to grant unrestricted authority in such cases. As already indicated, the proviso of section 5(2)(b) is not directly applicable in certificate application cases. Consequently, one would believe that the Commission has handled certificate cases with greater flexibility than acquisition cases. In fact, while the number of certificate applications granted without restriction is undoubtedly larger than the number of acquisition cases granted without restriction, the "unusual" circumstances accepted in application cases are few in number whereas acquisition cases appear to offer a more varied list of factual "special" circumstances.

The special circumstances policy for certificate (and permit) application cases was enumerated in Rock Island Motor Transit Co. Common Carrier Application.\textsuperscript{72} There the Commission said:

The main purpose for the policy of imposing the five [auxiliary and supplemental] restrictions . . . was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except when it suited their convenience.\textsuperscript{73}

Consequently a great number of certificate cases can be found granting applications without the auxiliary and supplemental restrictions where existing service was either non-existent or where the existing carriers who held appropriate authority were failing to render the kind of service for which a public need had been demonstrated.\textsuperscript{74}

On the other hand, acquisition cases possess a more varied rationale. Unrestricted applications under section 5 have been granted where (1) the

\textsuperscript{72} 63 M.C.C. 91, 102 (1954).

\textsuperscript{73} Id. This language has been quoted in Great N. Ry. Extension—Ex Rail Cement, 96 M.C.C. 699, 705 n.71 (1964), and Green Bay & W.R.R. Ext.—Neenah, 91 M.C.C. 363, 365 n.68 (1962).

\textsuperscript{74} Consolidated Freightways Corp. of Del. Ext.—Phoenix, 108 M.C.C. 379 (1969). See also the cases cited in Fulda, supra note 9, at 195 n.196.
vendee is small and, therefore, not a threat to competition in the territory or where discontinuance of vendee's rail operations is threatened; 75 (2) the application is unopposed; 76 (3) no other transportation service is available or the particular type of service needed is unavailable; 77 (4) there were long delays, circuitous routes, or other inefficiencies in existing service; 78 (5) the area to be served is sparsely settled; 79 or (6) the rights to be acquired duplicate, to a certain extent, rights already held but which are not now restricted. 80

Certain other situations have been specifically found not to warrant "special circumstances" treatment: (1) where the Commission granted a permit without restriction, the Supreme Court held the decision to violate the policy of the Act since the Commission reasoned that by imposing the restrictions, it would force applicant into a common carrier status and no other special circumstances were demonstrated 81 and (2) where rail applicants have attempted to show "special circumstances" by showing a financial need to regain or retain the traffic. 82

VII. IS CONGRESSIONAL RE-EXAMINATION JUSTIFIED?

The Commission has charted a middle ground between two extremes: complete prohibition of railroad controlled motor operations versus complete freedom. Rail carriers have been permitted to enter the motor carrier field where the motor service is subordinate to rail service, thereby preventing rail domination of the motor carrier industry and preserving competition of modes within the transportation community.

While it may still be argued that genuine competition between railroads and independent motor carriers would be unlikely to outlive the elimination

77. See Santa Fe Trail Transp. Co.—Purchase—Lang and Givens, 70 M.C.C. 773 (1957), and 75 M.C.C. 385 (1958); Burlington Truck Lines, Inc.—Purchase—Cotley, 70 M.C.C. 385 (1957); Pacific Motor Trucking Co.—Purchase—Lowinel Trucking Co., 60 M.C.C. 373 (1954). But see Canadian Nat'l Transp.—Control—Husband Internat'l, 93 M.C.C. 80 (1963), and Great N. Ry. Extension—Ex Rail Cement, 96 M.C.C. 699 (1964), where authority was denied because there was an abundance of available motor service.
81. American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1 (1960). The Supreme Court there basically said that the Commission's reason for not imposing the restriction was insufficient justification for its action in awarding an unrestricted permit.
of the general policy against mixing the modes (a kind of economic segregation), and that general antitrust policies oppose horizontal integration of similar businesses, these arguments appear to be groundless. There is nothing in the present transportation system of the Nation to support any prediction that railroad monopolies would be the result of liberalizing the general statutory policy. In fact, most railroads are not in good enough financial shape to accomplish such a feat.

The restrictions on rail ownership of motor carriers were originally imposed, in part, to prevent the already established rail industry from inhibiting the development of a competitive mode. Since trucking is now a well established industry, this rationale would no longer appear valid. The trucking industry today has assumed the dominant position in the intercity freight hauling market, which in 1976 amounted to thirty-eight percent of intercity tonnage compared to twenty-nine percent for the rails. It is widely observed that the railroads are hardly in "robust" health.

Additionally, the antitrust policy should be no bar to a liberalizing of the general policy since that policy has both economic goals—efficiency, innovation, fair allocations of resources—and political and social goals—decentralization and non-concentration of economic, social, or political power in a few hands. Under antitrust policy, the marketplace would test whether intermodal ownership produced superior results. Any lessening of competition would be prevented, but those operations which did not lessen competition would be permitted.

Economic predictions of the results of liberalizing the general policy are neither definitive nor convincing. In fact, it is never possible to prove that another course would yield superior results. Unfortunately, economic studies of the matter are rarely flavored with mathematical proofs. To escape that trap, they often cover their tracks with economic rhetoric.83 In fact, the only major observable effect of the debate surrounding the general policy against intermodal ownership appears to be the growing number of words devoted to the topic. Quite probably, a fair judgement of the opera-

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83. Important as they may be, efficiencies claimed for common ownership are not of present interest since unexhausted coordinative economies are still independently available. The central concern is the effect which the basic policy of ownership separation may have on the market feasibility of establishing coordinative arrangements. . . .

Some insights into the coordinative implications of common and separate ownership can be developed from the model of abstract requirements for effective coordination which was established. While some improvements in operating compatibility can be visualized from common ownership, these gains are limited by the fact that such problems arise from technological diversity itself. . . . The greatest promise of common ownership is probably in the realm of carrier behavioral patterns and market conduct which would profit from eliminating frictions arising from intermodal animosities and competitive-cooperative ambivalence.

tional and economic advantages of common ownership cannot be made until it is really tried.

What are those possible advantages? For one, the Supreme Court has recognized the probable gains in operating efficiency from unified management. Absent Commission authority to compel coordinated operations, many observers have recognized the reluctance of competing modes to cooperate, perhaps because of fear of losing revenues or business to the competing mode or perhaps out of a desire to "run their own shop." Consequently, if the only way to advance cooperation is through liberalizing the general restrictive policy, why not try it?

It has also been recognized that the general restrictive policy hampers railroad companies in the use of physical facilities, personnel, and capital in the development of their transportation capabilities to encompass services that the public may desire. Consequently, common ownership might provide investment and management for newer transportation services by using the economic strength of existing transportation companies.

A third point to be made is that the general restrictive policy bars, to a certain degree, another avenue for rail profit opportunities. It may not be in the public interest to bar railroads from this profit opportunity. Observers have noted that:

A true transportation company, making full use of all the tools of transport, can more closely approach a perfect transport system than present transportation companies separated by artificial lines. A true transportation company, combining all forms of transport under one ownership, would have a real opportunity to provide the kind of transport the public desires: economical, swift, and safe.

If such companies are to be developed on a more extensive scale than at present, perhaps removal of the general restrictive policy is necessary. For railroads, obviously, common ownership of trucking companies presents interesting profit opportunities which would enable railroad companies to be financially sounder with a wider range of profitable services to offer. Liberalization of the policy could provide some assistance to railroads experiencing critical cash flow problems. For example, railroads could reduce high fixed costs by substituting short-distance motor carrier service for service now offered over "feeder" or branch lines which may be infrequently used but nonetheless expensive to maintain. Additionally, railroads could offset losses on rail operations under their common carrier duty by utilizing profitable motor operations.

84. ICC v. Parker, 326 U.S. 60, 73 (1945).
85. See Beardsley, supra note 7, at 102; Buland & Fuhrman, supra note 8, at 185.
87. Buland and Fuhrman, supra note 8, at 185.
VIII. CONCLUSION

While some may argue that the question of common ownership is an economic issue,\textsuperscript{88} realistically it must be viewed as essentially a political one. If the economic analysts were to have their way, we would go through another systematic investigation of costs, benefits, and alternatives, including examinations of market structures, and advantages and disadvantages of each alternative, ad infinitum. Perhaps it might be better for Congress to re-examine the question and put railroads on the same footing as other carriers. This would involve dropping the proviso in 49 U.S.C. § 11344(c), and perhaps altering the National Transportation Policy to provide for a greater consideration of energy concerns and operating efficiencies while giving less consideration to preserving the inherent advantages of each mode.\textsuperscript{89}

The future should belong to the multi-modal transportation company, a firm capable of offering the public a variety of services at a variety of prices. It seems that only then could this nation have the type of coordinated transportation system it has been seeking.

\textsuperscript{88} See Pearce, supra note 12, at 103; Common Ownership of Intermodal Transportation—An Appraisal, supra note 10, at 100-01.

\textsuperscript{89} The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), recently made such changes. The new National Transportation Policy stresses competition and efficiency in transportation and eliminates the concept of protecting the inherent advantages of each mode as a regulatory goal as applied to motor carriers of property. 49 U.S.C. § 10101(a)(7).
The Intermodal Movement of LCL Freight: The Problem Areas

GERALD H. ULLMAN*

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I. INTRODUCTION

Two decades ago there burst upon the transportation scene the so-called "container revolution," said to be the most radical change in ocean transportation since the substitution of steam for sail. Instead of individual packages being loaded into a net or sling at the pier, hoisted aboard the vessel and then loaded into a hatch, the packages are loaded away from the pier into a container usually twenty or forty feet long, eight feet high and eight feet wide with a maximum load of 44,000 and 60,000 pounds respectively. The container is loaded into a cellular vessel, called a "container ship." Hundreds of millions of dollars have been expended for such ships, containers and terminal facilities. Because of the ability of the container ship to carry the "wonder boxes" both above and below deck, vessel capacity is increased dramatically. As a result, vessels may now be loaded in a fraction of the time formerly required.

The full container load (FCL) exporter, shipping from an inland point of

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origin, enjoys significant advantages in the movement of his merchandise because of containerization. The steamship lines cater to such an exporter by delivering empty containers to his plant for loading and subsequently moving them via an inland carrier to the port area. The steamship lines have shown no inclination to deal with the less than container load (LCL) exporter at inland points.¹

The LCL shipper is left to his own devices in arranging for the movement of a shipment from an inland origin, through the port to the overseas destination. He must first retain the services of a local trucker to carry his package to the warehouse of a domestic forwarder or an ICC motor carrier. The package is consolidated with those of other LCL shippers, moved to the terminal of the forwarder or motor carrier at the port, broken out, and then carried by truck to the designated pier.

In the course of such handling, responsibility for loss or damage of the LCL package may rest with the inland trucker, the domestic forwarder or motor carrier, the trucker at the port of dispatch, the steamship line, or with the overseas transporter moving the shipment to the consignee's warehouse. Each of these carriers issues its own receipt or bill of lading for its portion of the transportation.

Because of separate transportation documentation, the LCL shipper experiences difficulty in pinpointing liability for loss or damage to his package. It is difficult, if not virtually impossible at times, to determine whether such loss or damage occurred at the point of origin, during the inland haul to the port, while being transported to the pier, during the ocean voyage, at the port of unloading or while being transported to the final destination. In addition, each of those involved in the physical movement of the package operates under different liability limits. This results in higher costs for insuring goods during transit because of the underwriter's difficulty in recouping losses through its subrogation rights.

The LCL shipper has a problem in ascertaining the total transportation costs of moving his goods from the inland origin to the overseas consignee. A computation must be made of the local drayage cost, the freight charges for the haul to the port, the cartage fee from the port warehouse to the pier, the ocean freight charges, the forwarding fees, the port clearance costs at destination and the inland transportation charges to the consignee. Because of the liability question, the tremendous amount of paper work involved, and the problem of assembling the costs figures, many small manufacturers are discouraged from actively selling their products overseas.

It has been estimated that at least twenty-five percent and as much as

¹. Marshall, Impediments to Overseas Shipping of Less-Than-Container Load Cargoes 12 (Center for Marine Studies 1978) [hereinafter cited as Impediments].
fifty percent of the total U.S. ocean cargo moving on container vessels originates as LCL freight. Since LCL freight comprises such an important segment of our foreign trade, an efficient thorough system of transportation for this type of freight is essential. A simplified movement would result in an increase in export sales by the smaller manufacturers of worthwhile products who have heretofore been reluctant to become involved in the intricacies of an overseas movement.

An obvious method of encouraging exports is to allow one person to take charge of the shipment at its origin, assume responsibility for loss or damage en route to the final destination by the issuance of a through bill of lading, and provide for a single-factor (one charge) rate for the entire movement. Such a person could be the non-vessel operating common carrier by water (NVO or NVOCC).

II. THROUGH SERVICE

The Federal Maritime Commission (FMC), which has jurisdiction to regulate "common carriers by water in foreign commerce," has recognized the NVO to be a common carrier by water in our ocean commerce. Under FMC decisions, to be an ocean carrier a person need not own or operate the physical equipment by which the ocean transportation is affected. He is deemed to be a carrier subject to FMC jurisdiction if he (a) holds himself out as providing transportation for hire by water in foreign commerce, (b) assumes responsibility for, or has liability imposed by law, for the safe transportation of the shipment, and (c) arranges with underlying water carriers for the performance of such transportation in his own name. The NVO concept has been codified by the FMC in its general rules.

Assuming that an LCL exporter wishes to ship his product from Chicago to Frankfurt, Germany, and an NVO is permitted to offer, through service under a single factor rate, containerizing the LCL packages of various shippers in Chicago, the following substantial benefits accrue:

1. The LCL shipper receives single carrier responsibility and one charge for the entire movement from Chicago to Frankfurt.
2. Because of maximum space utilization concessions granted by some lines, known as "consolidation allowances," which are billed at a "freight-all-kinds" (FAK) rate, it is possible for the NVO to quote a through

2. IMPEDIMENTS, supra note 1, at 37.
charge to the LCL shipper which is less than the combination of charges
the exporter would ordinarily pay.

3. Time and money are saved by the elimination of inland document-
tation.\textsuperscript{6}

4. The local trucking charge ordinarily expended by the LCL shipper
to transport his package from the inland carrier’s terminal in the port area to
the pier is eliminated.

5. If the letter of credit so provides, the NVO bill of lading may permit
the LCL shipper to receive payment in Chicago upon pick-up rather than
when the shipment is loaded aboard ship, often a week later.

6. The risk to the LCL shipper of pilferage and shut-out at the pier is
minimized.

Allowing the NVO to offer a through service to the LCL shipper from
Chicago also confers the following significant benefits upon the steamship
lines:

1. By consolidating the LCL packages at a Chicago warehouse, the
NVO saves the steamship line the cost of doing this work at the pier at
higher, deep-sea labor rates.

2. Inland consolidation by the NVO materially reduces the ever-pres-
ent problems of congestion at the piers.

3. Issuance by the NVO of its own bill of lading to the LCL shipper
relieves the line of responsibility for loss or damage and saves the line the
cost of issuing individual bills of lading.

4. The NVO saves the underlying carrier the cost of processing and
paying claims, the risk of non-payment of freight by the LCL shippers, and
solicitation expenses.

III. PROBLEMS WITH OVERLAPPING REGULATIONS

Despite these acknowledged benefits, an NVO which plans to offer
through service from Chicago will run afoul of the Interstate Commerce
Commission (ICC). This agency was established by Congress in 1887,
under the Interstate Commerce Act (ICA) to regulate, among other things,
rail and motor carrier, barge operators and Part IV freight forwarders.\textsuperscript{7}

The term “freight forwarder” is defined in section 402(a) of Part IV of
the ICA as any person (other than an ICC certificated rail, motor or water

\textsuperscript{6} The late G. Begnal, Jr., formerly Manager, Facilitation, General Electric Company, com-
puted in 1971 that the elimination of documents for the inland haul would at that time save $17.24
per shipment. This figure would in all probability be more than doubled today. IMPEDMENTS, supra
note 1, at 31.

\textsuperscript{7} 49 U.S.C. § 1 (1970) (current version codified at 49 U.S.C. § 10501 (1978)). The Inter-
state Commerce Act has been recodified, but the original section references are used herein be-
cause they correspond to the references in the decisions.
carrier) who holds himself out to the general public as a common carrier to transport or provide transportation for compensation in interstate commerce, and who (a) assembles and consolidates, or provides for assembling and consolidating, shipments of such property, and who performs break-bulk and distributing operations with respect to such consolidated shipments; (b) assumes responsibility for the transportation of such property from the point of receipt to the point of destination; and (c) utilizes the services of an underlying ICC regulated carrier at any time during the transportation of the property. No person may engage in services as a Part IV forwarder under the ICA without first obtaining a permit which the ICC may issue if it finds that the applicant is ready, able and willing to properly perform the proposed service and that it will be consistent with the public interest and the national transportation policy.

The ICC maintains that NVOs which offer containerized LCL service from Chicago to the port of exit must obtain an authorization certificate from the ICC before engaging in Part IV forwarder services. According to the ICC, the LCL exporter is being offered a complete service from origin to destination without the necessity of intervention by the exporter or consignee at any point in the course of transportation subsequent to turning over the shipment. Thus, transportation responsibility is "presumed" and, consequently, the services bear all of the essential attributes of a Part IV forwarder and may not be performed without a forwarder permit.

The NVO offering an inland consolidation service cannot avoid ICC jurisdiction by disavowing common carrier liability from Chicago to the port area. Nor is it determinative that the break-bulk operation is not performed by the NVO in the United States. It is not necessary that all of the essential operations be performed within this country; it is enough that each is in fact performed. Nor does it make any difference that the actual consolidation work in Chicago may be performed by someone other than the NVO. It is sufficient under the statute that the NVO "provides" for the service. Thus, even though the NVO could offer a valuable and efficient

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through service to the LCL exporter in Chicago, the ICC will consider its activity to be that of an unauthorized Part IV forwarder.

The FMC through rate rule\(^4\) illustrates a more liberal approach to the participation of the NVO in an intermodal movement. The FMC has said, "[t]here is nothing in our statutes or regulations which prohibits NVOs from entering into through route and rate arrangements, and nothing has been advanced herein which required their exclusion from the provisions of our Through Rate and Through Route Rule."

Because of the conflict between the ICC and FMC concerning the ability of the NVO to offer through service from the interior, the LCL exporter in Chicago is placed at a distinct disadvantage when it competes with overseas exporters to sell in a third-country market. Unlike its American counterpart, the International Chamber of Commerce in Paris has, since 1973, recognized the "Combined Transport Operator" (CTO) as a person who can issue a Combined Transport (CT) Document providing for through transportation with single carrier responsibility even though the CTO does not operate the equipment. Because of the CTO, the European shipper of LCL merchandise has access to a transportation system with single-carrier responsibility, whereby his merchandise is moved from origin to destination in the most efficient fashion. On the other hand, the Chicago exporter, denied the services of the NVO by the ICC, must make separate arrangements for each mode of transportation, costing him the time and money which is spared his European competitor.

In an effort to settle the regulatory differences between the ICC and the FMC, the ICC initiated a rulemaking proceeding in 1969 to amend its tariff-filing rules.\(^5\) The objective of the proceeding was to permit the filing of tariffs establishing joint rates for the transportation of goods in international commerce. The proceeding, Ex Parte No. 261, entitled, "Tariffs Containing Joint Rates and Through Routes for Transportation of Property between Points in the United States and Points in Foreign Countries," finally terminated in 1977, after the issuance of six separate reports.

In its first report,\(^6\) the ICC abandoned its long-held view that it could only file joint rate tariffs for transportation from any place in the United States to an adjacent foreign country. It concluded that its jurisdiction restrictions with respect to tariffs to non-adjacent foreign countries was un-


\(^5\) Id.

\(^6\) Id.

founded. The ICC’s expansive view formed the basis for its ultimate rule allowing joint rates between underlying ICC and FMC carriers.

In 1976, the ICC promulgated a final rule which permits the ICC motor carrier, rail carrier and barge operator to enter into a through-route and joint-rate tariff with a vessel-operating common carrier by water which is regulated by the FMC. In an attempt to meet the FMC’s objections regarding possible ICC jurisdiction over the ocean leg, the ICC stated that when its procedures for suspending a rate were invoked, it would be limited to the division accruing to the domestic carrier and relevant governing tariff provisions.

In 1975, the ICC instituted a rulemaking proceeding to consider the inclusion of both the Part IV forwarder and NVO in its joint-rate rule. In 1977, however, the ICC issued its report denying participation in joint rates to both the Part IV forwarder and the NVO.

With respect to the Part IV forwarder, the ICC concluded that there was no statutory authority to allow such forwarder to establish joint rates with ocean common carriers. Having thus concluded, the ICC did not reach the second issue of whether, as a matter of policy, the Part IV forwarder should be allowed to participate in international joint rates.

The ICC took a different approach with the NVO, excluding it from participation in joint rates on the following policy grounds:

1. Since the FMC places no restrictions on whom may become an NVO, the Part IV forwarder could become an NVO, establish joint rates with ICC regulated carriers and thus circumvent the long established rule against such joint rates.

2. Allowing an NVO to establish joint rates with an ICC carrier would enable the NVO to engage in Part IV forwarding in the U.S. without a certificate from the ICC, in competition with ICC regulated forwarders.

3. Because virtually anyone could become an NVO by filing a tariff with the FMC, there would be no way for the ICC to assure the shipping public that the NVO is able to properly perform the service.

4. There is a substantial danger of rebate and discrimination abuses

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18. Id. at 629.
20. 355 I.C.C. 490 (1976). In Ex Parte No. 230 (Sub-No.5), 46 Fed. Reg. 14,348 (1981), the ICC has exempted from regulation trailer-on-flatcar (TOFC/COFC) transportation provided by a rail carrier as part of a continuous intermodal movement. Joint intermodal arrangements involving railroads and ocean carriers may still continue.
21. Id. at 491.
22. Ex Parte No. 261 (Sub-No. 1), Tariffs Containing Joint Rates & Through Routes—Freight Forwarders & Non-Vessel Operating Common Carriers by Water (NVO).
if the NVO, considered a shipper by the ICC, is allowed to enter into joint rates with ICC regulated carriers.

5. Permitting NVO participation in joint rates, while excluding the Part IV forwarder, would result in a diversion of a significant amount of traffic, thus impairing the ability of the Part IV forwarder to perform its domestic services.

On appeal from the ICC decision, ocean forwarder24 and NVO groups urged the U.S. Court of Appeals, D.C. Circuit, to reject the so-called "policy grounds" given by the ICC. In answer to the first reason given by the ICC, it was asserted that if a domestic forwarder chose to become an NVO by filing a tariff with the FMC, his participation in a joint rate would not be as a domestic forwarder but as an FMC carrier. In such a capacity, the domestic forwarder would not be circumventing the ICC's "rule" against a joint rate arrangement with an underlying ICC carrier in domestic transportation. In answer to the second reason, it was urged that the NVO moving goods from inland points would no more be an uncertificated freight forwarder than would the vessel operator who is allowed by the ICC to offer such a service. In response to the third ICC argument, that the NVO should be excluded because its participation would divert traffic from the domestic forwarder, the D.C. Circuit was advised of the United States Supreme Court doctrine that the public should not be deprived of a new and improved service because it may cause a loss of some traffic from other carriers.25 The appellants also advised the court that the record before the ICC indicated that NVOs were rendering competent services from the port and, that the ICC had no reason to believe that the same performance was not available inland. Concerning the fourth charge, which addressed the danger of rebating, appellants urged that the record before the ICC indicated no evidence of such conduct by the NVO, while rebating by vessel operators was rampant.

The D.C. Circuit affirmed the order of the ICC, which excluded the domestic forwarder and NVO from joint rate participation, in New York Foreign Freight Forwarders & Brokers Association v. ICC.26 The reasoning of the court is questionable. In Pennsylvania v. ICC,27 the D.C. Circuit held that the ICC was authorized to permit a joint rate arrangement between Part III water carriers (barge operators) and ocean carriers despite the absence

24. Ocean freight forwarders perform various services at the port to arrange for the exportation. Because they are experts in the movement of freight from inland origin to overseas destination, they seek the authority as NVOs to move goods as common carriers from inland points. See Ullman, The Role of the American Ocean Freight Forwarder in Intermodal, Containerized Transportation, 2 J. Mar. L. & Com. 625 (1971).
27. 561 F.2d 278 (D.C. Cir. 1977).
of any statutory language indicating a congressional intent to allow such rates. Faced with the argument by the domestic forwarders that the lack of specific statutory authority should not militate against them any more than it did against the Part III water carriers, the Court concluded that:

The underlying law that was left unchanged was one that recognized a discretionary role for the ICC in adjusting the "common law" of the Interstate Commerce Act to changes in economic realities. The rules that had evolved to prevent overreaching by the freight forwarders, viewed as shippers, were subject to reconsideration if this danger receded and the carrier quality of forwarders advanced.28

The court acknowledged that changing the rationale behind the ICC's exclusion of the Part IV forwarder from one involving a lack of statutory authority to one involving the exercise of discretion against such forwarder "might ordinarily require a remand to the Commission, for its Report is not cast in these terms."29 The court concluded, however, that "the Commission believed that matters were such that it was not prepared to exercise its administrative discretion, preferring instead to await congressional guidance."30 The Court went on to say that although the ICC denied joint rate authority to the forwarder because of the absence of express authority, its denial "also embodied a policy judgment against assertion of such authority in the face of deliberate congressional restraint."31

In effect, the Court substituted a policy ground for the legal one advanced by the ICC, without giving the agency the opportunity to consider the merits of such a policy determination. For a court to do so has been held incompatible with the orderly function of the process of judicial review.32 If the grounds set forth by the agency are considered inadequate or improper, a court is powerless to affirm the administrative action.33

With respect to the fifth contention urged by the ICC, the Court concluded that the Commission acted within its discretion in requiring the same "rule of law" to be applied to the NVOs as had been applied to Part IV freight forwarders.34 This conclusion is surprising in view of the fact that the Court recast the decision of the ICC with respect to the Part IV forwarder from a rule of law to one of administrative discretion. Nevertheless, the Court felt that "Congress left to the ICC a discretion to put the NVOs on the same basis as freight forwarders in terms of relations to domestic carriers."35

29. Id. at 704.
30. Id.
31. Id.
34. New York Foreign Freight Forwarders & Brokers Ass’n v. I.C.C., 589 F.2d at 704.
35. Id. at 705.
As matters now stand, underlying ICC carriers and vessel operators are permitted to enter into a joint rate arrangement for the through transportation of merchandise under a single bill of lading pursuant to a tariff filed with both the ICC and the FMC.\textsuperscript{36} The tariff must include the names of all participating carriers, a description of the services to be performed by each such carrier, a statement of the joint rate and a clear statement of the division or charge to be received by the domestic carrier for its share of the revenue. In its own joint rate rule, the FMC requires a similar statement of the charge to be paid to the ocean carrier.\textsuperscript{37}

Jurisdiction by two agencies over through movement is unsatisfactory. The agencies operate under two different regulatory schemes. Congress has authorized a dual rate system for ocean carriers.\textsuperscript{38} Recently, the FMC has permitted its carriers to incorporate the inland haul under a dual rate.\textsuperscript{39} The ICC, on the other hand, considers the dual rate system to constitute a destructive competitive practice in violation of the national transportation policy, and to be unjust and unreasonable under the ICA.\textsuperscript{40} The ICC has preserved for itself the right to suspend the inland carrier’s division of the joint rate, claiming that it does not intend to assert jurisdiction or otherwise engage in substantive regulation of the ocean portion of the rates pursuant to the ICA.\textsuperscript{41} It would appear, however, that when the ICC suspends the domestic division, the joint rate necessarily becomes inoperative, and to that extent the ICC action impinges on the ocean haul.

If the exercise of jurisdiction by the two agencies is justified for any reason, it is for the protection of exporters against excessive joint rates. Nevertheless, the provisions of Ex Parte No. 261 for the filing of divisions creates insuperable difficulties for an exporter wishing to test the reasonableness of the charge. If the exporter’s complaint is, for example, against the division of the joint rate paid to the motor carrier on the inland haul, the exporter becomes involved in a proceeding under the ICA regarding the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{36} 49 C.F.R. § 1307.49 (1980).
\item \textsuperscript{37} FMC General Order 13, 46 C.F.R. § 536 (1979).
\item \textsuperscript{38} 46 U.S.C. § 813(a) (1970). Under such a system an exporter receives a lower rate if he commits himself to provide all or a fixed portion of his traffic to the ocean carrier. By Notice of Proposed Rulemaking on December 31, 1980, 45 Fed. Reg. 86,738 (1980) the ICC has reopened Ex Parte No. 261 (Sub-No. 1) proposing to allow the domestic forwarder to enter into a through route and joint rate with either a non-vessel or a vessel-operating common carrier by water. The proposed rule does not, however, suggest any change in 49 C.F.R. § 1307.49 (1980) which permits a motor common carrier to file a joint rate only with a vessel-operating common carrier by water.
\item \textsuperscript{39} Docket No. 76-11, Agreement Nos. DR-7 and 3103 DR-7 (I.C.C. Mimeo. Dec., Dec. 31, 1979).
\item \textsuperscript{40} In re Tariffs Containing Joint Rates & Through Routes for the Transp. of Property Between Points in the United States & Points in Foreign Countries, Ex Parte No. 261, 350 I.C.C. 361, 367 (1975).
\item \textsuperscript{41} 351 I.C.C. 490, 491 (1976).
\end{enumerate}
\end{footnotesize}
"reasonableness" of the carrier's division. If the exporter complains that the ocean division is too high, he has the heavy burden of demonstrating to the FMC that the rate is so unreasonably high as to be detrimental to the commerce of the United States. Indeed, because he is not certain whether each or both of the divisions of the joint rate are too high, it may be necessary for the exporter to start proceedings before both agencies. Because of the time, effort and expense of seeking relief in such a situation, the exporter is, for all practical purposes, without a remedy.

In what areas may the domestic forwarder and NVO offer a through service to the LCL shipper, despite exclusion from joint rate participation? One such area was suggested by the ICC in its 1977 decision excluding the domestic forwarder and the NVO from the joint rate rule. The agency pointed out that a Part IV forwarder could become an NVO by filing a tariff with the FMC, and that by combining the separate tariff rates of the ICC and FMC into a "combination rate," the domestic forwarder could offer a through service, the total charge being indicated in his tariff.

There are currently some transportation entities which offer through service, but not without difficulty. If loss or damage occurs, a determination has to be made as to where this took place in order to ascertain whether the liability is that of a domestic forwarder during the inland haul or an ocean carrier during the sea voyage. Moreover, as the D.C. Circuit noted, a joint through rate is generally lower then the sum of the purely local rates. This means that the combination rates of the domestic forwarder-NVO service are more costly to the LCL shipper than a joint rate.

The NVO may be able to offer a through service from inland origin, although there is a danger that if it engages in unrestricted consolidation of the LCL shipments involved, it will be termed an unauthorized Part IV forwarder. The NVO can move the container of a FCL shipper since no consolidation of LCL shipments is required, and, to a limited extent, the NVO may also consolidate LCL shipments from an inland point and have its container moved to the port by an underlying ICC motor carrier. The limited extent of allowable consolidation is suggested by IML Sea Transit v. United States, in which a container, consolidated by an NVO, was picked up by a Part II motor carrier employed and paid by the steamship line. The ques-

44. Ex Parte No. 261 (Sub-No. 1) (1969).
46. New York Foreign Freight Forwarders & Brokers Ass'n v. I.C.C., 589 F.2d 696 (D.C. Cir. 1979) (aff'd the ICC in Ex Parte No. 261 (Sub-No. 1)).
47. Id. at 698 n.3.
tion was whether the NVO "utilized" the services of an ICC carrier, thus making its operations one of a domestic forwarder.

A three-judge court held in the negative, emphasizing that IML, as an NVO, did not itself employ the Part II motor carrier. The court concluded that as long as the vessel operator offered an all-water service pursuant to a tariff on file with the FMC, it could not be said that IML was operating as an unauthorized Part IV forwarder. But if the water carrier offered a service under a through route tariff on file with the ICC and FMC,50 the question arises as to whether IML, receiving a through bill of lading from the ocean carrier, would then "utilize" a Part II motor carrier operating as a party under the through route tariff. This question was left open by the Court and remains undecided today. Thus, while an NVO may offer a limited inland consolidation service, even when an ICC carrier is involved, should the ICC carrier be part of a through route arrangement with a vessel operator, the risk exists that the NVO might be considered as an unauthorized Part IV forwarder.

Another means of through service has arisen as a result of the decision in Japan Line, Ltd. v. United States.51 In that case a vessel operator offered a through service from Japanese ports to Chicago. The carrier accepted consolidated containers in Japan and issued an ocean bill of lading to Chicago. Under the supervision of the line, the containers were unloaded at Los Angeles and taken by railroad to Chicago, where the rail carrier arranged delivery to the ultimate consignee pursuant to the instructions of the line. The ICC held that the activities with respect to the inland haul to Chicago constituted an unauthorized Part IV forwarder service by the line.52

The ICC was reversed on appeal. The Court reasoned that since a Part IV forwarder was one who offered the services "for compensation," and since the steamship line paid the railroad the exact tariff rate for the inland haul, the line did not act as a Part IV forwarder because it did not arrange the haul "for compensation."

An NVO may be able to take advantage of Japan Line.53 Under the FMC's General Order 13,54 the NVO may file a tariff offering a through service from an inland origin point to an overseas destination. The NVO may assume transportation responsibility for the entire haul. If the NVO col-

50. Ex Parte No. 261 now permits the water carrier to offer a service under a through route tariff. Many steamship lines and ICC motor and rail carriers make such filings to offer FCL shippers a "minibrige" service—e.g., from New York by rail to the West Coast and then by water to a Far East port.
lects the inland freight charge from the LCL shipper and then disburses that precise amount to the ICC carrier, the NVO's operations would appear to be lawful under the rationale of Japan Line because it is not performing the domestic transportation "for compensation" under Part IV of the ICA.

Despite limited breakthroughs in through service operations, such as in Japan Lines, the through service shipper is still regarded as a regulatory stepchild. The few court cases in favor of NVO through service have been encouraging, but without affirmative backing from the ICC, the NVO cannot be expected to make substantial investments in staff and facilities for through service expansion. Our adverse balance of payments makes it essential the we overhaul our regulatory concepts in order to encourage the LCL manufacturer to export.

IV. Conclusion

When the Interstate Commerce Act was passed in 1887, its primary purpose was to protect small shippers from discriminatory treatment by the railroads. Shippers today, however, may utilize the services of railroads, motor carriers, barge operators, airlines, private carriers and their own equipment. The need for the protection originally afforded by the ICA has long since disappeared.

Similarly, the original purpose of the 1916 Shipping Act was to confer anti-trust immunity upon steamship lines in return for equal treatment of shippers. Despite the tremendous changes in the nature of transportation resulting from the container revolution, the ICA and Shipping Act remain unchanged.

Since competition for the sale of goods overseas is more intense, it is time for the American shipper, particularly the smaller one, to have available the same efficient through service currently enjoyed by his foreign competitors. Regulatory schemes devised in the 19th century are no longer relevant to container transportation as we approach the 21st century. It seems clear, therefore, that the two statutes should be thoroughly overhauled at least with respect to intermodal transportation. Because of the variety of services currently available to the shipping public, it is questionable whether there is a need for the detailed regulation of a through movement. Indeed, it would not be an overly bold experiment to deregulate such transportation entirely and allow the marketplace to govern. Congress should act quickly to allow our LCL shippers the intermodal services of the NVO and domestic forwarder.

No longer can we afford the luxury of having two agencies regulate

56. id.
surface transportation. It is time for the overlapping jurisdiction and the inter-agency squabbling of the ICC and FMC to be terminated. Our surface transportation, both land and sea, should be regulated by a single transportation agency.\textsuperscript{58} Our balance of payment deficit, the declining value of our dollar and the stubborn problem of inflation mandate that one agency be given the responsibility to provide the most efficient transportation system possible.

\textsuperscript{58} In affirming the ICC’s order in Ex Parte No. 261 (Sub-No. 1), the D.C. Circuit noted “the lack of a strong showing of interest on the part of the supposed beneficiaries of the proposed rates—the small shippers.” New York Foreign Freight Forwarders & Brokers Ass’n, 589 F.2d at 704.
Judicial Review of Foreign Route Orders Under the Federal Aviation Act

DAVID A. LEVITT*

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I. INTRODUCTION

The Federal Aviation Act\(^1\) empowers the Civil Aeronautics Board (CAB) to determine the operating routes of both foreign and domestic carriers.\(^2\) The Board's determinations as to foreign routes however are not

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final. Under Section 801 of the Act, the Board’s recommendations on awards of foreign routes are submitted to the President who retains final say over the Board’s decisions.

As originally enacted, the Act placed no limits on the authority of the President to substitute his judgment for the recommendation of the Board. Under a recent amendment to the Act, however, the President can now disapprove a Board action only "on the basis of foreign relations or national defense considerations." Under the Act, private rights, determined by an administrative process, may be subordinated to public policy demands as determined by the President. The theory of presidential involvement in foreign route awards is that such awards could involve considerations of foreign policy and national defense. The Act thus raises interesting questions about the best way to reconcile important but divergent public and private interests. The judicial review section in the Act provides that: "Any order, affirmative or negative, issued by the Board or Secretary of Transportation under the Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 1461 of this title, shall be subject to review..." On its face the statute resolves one potential set of conflicts by insulating presidential decisions on routes of foreign carriers from any judicial review. The President’s decision on such routes is final. The Act does not specifically refer to the reviewability of orders involving the foreign routes of U.S. carriers. However, the Act does say that "any order... issued by the Board" (with the stated exception for orders in respect of foreign carriers subject to presidential approval) will be subject to judicial review. This language would lead one to believe that orders involving the foreign routes of U.S. carriers would be reviewable.

The Supreme Court, however, in the celebrated case of Chicago & Southern Air Lines v. Waterman Steamship Corporation, decided that such was not the intent of Congress. By a 5-4 decision, the Court concluded that Section 1006 of the Act did not empower the Court to review Board orders involving the foreign routes of U.S. carriers.

Waterman involved an appeal by a U.S. carrier that had lost a foreign route competition to another U.S. carrier. The losing carrier argued that the

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3. This lack of finality applies both to the routes of foreign carriers and to the foreign routes of U.S. carriers.
8. 333 U.S. 103 (1948).
9. Supra note 7.
Board’s decision granting the route to its competitor was not supported by the evidence in the administrative record. The Fifth Circuit reversed the decision of the Board.\textsuperscript{10} The Supreme Court, however, reinstated the Board’s decision, finding that Section 1006 of the Act did not authorize judicial review of the merits of the Board’s order.

Justice Jackson, writing for the majority, reasoned that the final decision on the route rested with the President, since he had approved the Board’s recommendation under Section 801.\textsuperscript{11} The Court observed that this decision could be based on a multitude of political factors which in the Court’s view would not be susceptible to judicial review.\textsuperscript{12} The decision might also be based on confidential information.\textsuperscript{13} The dissent, written by Justice Douglas, while agreeing that the President’s decision could not be reviewed,\textsuperscript{14} disputed the majority’s contention that the decision on appeal was, in fact, the President’s.\textsuperscript{15} In the dissent’s view, the President, by not disapproving the Board’s decision on which carrier should win the route, had merely confirmed what the Board had done without making an independent determination of the merits of the decision on the route.\textsuperscript{16} Accordingly, the dissent saw no reason not to treat the final order establishing the route as reviewable in the ordinary course.\textsuperscript{17}

Waterman has substantial doctrinal significance since, in the context of foreign air routes, it grants the President plenary authority to override private rights by invoking foreign policy or national defense considerations. However, one could rationally question whether judicial review should be cut off merely because foreign policy or defense is involved. Apart from the fact that the quality of the decision-making process suffers when it is insulated from review,\textsuperscript{18} the right to judicial review should not be summarily cut off, even if foreign policy and defense must eventually supersede private rights on the merits.\textsuperscript{19}

The lower federal courts have been troubled by the Waterman limitation on judicial review. In a series of cases beginning in 1950 and culminating in 1965, the lower courts have moved steadily toward limiting

\begin{itemize}
\item \textsuperscript{10} Waterman Steamship Corp. v. CAB, 159 F.2d 828 (5th Cir. 1947), rev’d, 333 U.S. 103 (1948).
\item \textsuperscript{11} 333 U.S. at 110-11.
\item \textsuperscript{12} Id. at 111-12.
\item \textsuperscript{13} Id. at 111.
\item \textsuperscript{14} Id. at 115.
\item \textsuperscript{15} Id. at 116.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{19} Jaffe, The Right to Judicial Review, 71 HARV. L. REV. 401, 401-10 (1958).
\end{itemize}
In the 1965 decision in American Airlines v. CAB this trend reached fruition. The U.S. Court of Appeals for the District of Columbia held that Section 1006 authorized review of the Board order enabling U.S. carriers to operate "split charters" over the North Atlantic. The court distinguished Waterman on the ground that the basis of the petition for review in that case differed. In Waterman, the petitioner challenged the sufficiency of the evidence underlying the Board's order, whereas in American Airlines the petitioner challenged the statutory authority of the Board to approve "split charters." However, the court did not explain why this distinction should make a difference. In both cases an affirmative ruling for the petitioner would involve the court in foreign affairs. The opinion in American Airlines explicitly opened the door to review of foreign route awards to U.S. carriers in some instances.

The judicial branch has not been alone in the effort to limit Waterman. Both Congress and the Executive have also acted. In the case of the Executive, former President Ford, in 1976, issued an order which, inter alia, directed his foreign policy advisors to tell him when a route award would not affect foreign policy. He would then, under the terms of the order, advise the Board that the award did not have foreign policy or defense importance. The purpose of the disclaimer would be to "assure[e] whatever opportunity is available under the law for judicial review." While the court found that the disclaimer did not affect judicial review, the order was nonetheless an effort to expand its availability.

Congress has also attempted to limit Waterman. In 1978, it amended Section 801 of the Act expressly to limit presidential review to foreign policy and defense. The original Act contained no such express limitation. While this change in itself would not limit Waterman, the amended Act also provides that the President may veto a Board decision, (but not that he need approve it) and that "any . . . Board action not disapproved . . . shall take effect as action of the Board, not the President, and as such, shall be subject to judicial review." While these provisions are not free from ambiguity, they seem to indicate that Congress wants any Board action not

20. These cases are ably discussed in Miller, The Waterman Doctrine Revisited, 54 Geo. L.J. (1965-1966). They are also discussed in this article infra, at 119-26.
22. A "split charter" is one in which an aircraft can be split between two eligible groups. Before enacting a regulation approving "split charters" the Board had limited each aircraft to a single group charter.
23. 348 F.2d at 352.
25. Id. § 3(b).
26. Braniff Airways, Inc. v. CAB, 581 F.2d 846 (D.C. Cir. 1978). This opinion is discussed infra, at 125.
disapproved to be "subject to judicial review.""  

This article contends that judicial review ought to be available for all CAB orders involving foreign routes, whether they are approved or disapproved. While in agreement with judicial and executive attempts to limit Waterman, it argues that Congress did not go far enough when, in 1978, it apparently limited judicial review to non-disapproved orders. Moreover, while the lower courts have demonstrated sound judgment in attempting to limit Waterman, it is suggested here that the present state of the decisional law is unsatisfactory. Under American Airlines, for example, the availability of judicial review for orders involving U.S. carriers turns on the nature of the challenge. If the challenger asserts that the Board's action violated statutory authority, judicial review is available. When the challenge alleges that the Board's order lacks substantial support in the record, judicial review is not available. The nature of the challenge to the Board's order, however, does not indicate the probability that judicial review might interfere with foreign policy. Therefore, determining the availability of review by the nature of the challenge is analytically unsound. Similarly, determining the availability of judicial review by the citizenship of the carrier subject to the order is not analytically defensible. While review of awards for foreign carrier routes is forbidden under the Act, American Airlines permits judicial examination of awards to U.S. carriers, thus making citizenship a factor in determining the availability of judicial review.

The purpose of this article is to examine Waterman and subsequent decisions and to suggest a rational system for handling challenges to Board orders involving foreign routes. First I examine the question raised by Waterman of whether judicial review is necessarily inconsistent with presidential involvement in the review process. While this issue has been addressed before, it will here be examined in greater detail with particular emphasis on CAB decisions involving foreign routes.

The second portion of the paper explores the logic of defining the availability of judicial review in terms of the citizenship of the carrier and the type of challenge made to the Board's action. It concludes that these criteria make no sense in light of the rationale (i.e. the need for a pure foreign policy) for limiting judicial review in the first place.

Next I suggest a new approach to the problem of defining a valid role for judicial review of foreign route awards. I suggest that the law no longer permits the unbridled discretion accorded the President by Waterman.

28. See discussion in section V infra, at 135.
29. If the President does not disapprove the order, it should be reviewable. If he does disapprove it, the President's veto should be reviewable.
30. 348 F.2d 349 (D.C. Cir. 1965).
While I recognize a need to vest substantial discretion in the President over foreign policy and defense, I contend that this is accomplished by the arbitrary and capricious limitation on review embodied in the Administrative Procedure Act.\(^3\)\(^2\)

The final portion of the paper examines the likely effect of the 1978 amendment of Section 801 on the availability of judicial review. It applauds the apparent effort, through the amendment, to authorize judicial review of all foreign route awards not disapproved by the President. However, it criticizes Congress for not authorizing limited judicial review of presidential disapprovals as well.

II. THE REVIEWABILITY OF CAB ORDERS INVOLVING FOREIGN ROUTES—WATERMAN AND THE QUESTION WHETHER AT LEAST SOME AWARDS (THOSE NOT INVOLVING FOREIGN POLICY) SHOULD BE REVIEWABLE

Waterman involved in part a dispute between the majority and dissent concerning the practical effect of presidential approval of a foreign route award to a U.S. carrier. The narrow issue raised by the dispute was whether a court should be permitted to infer from the President's failure to alter the Board's recommendation that the final order did not involve foreign policy and therefore, should be subject to review. However, the more important question is whether judicial review is appropriate when it is clear that the final decision does not involve foreign policy. If it were clear which elements of a Board recommendation involved foreign policy, and which did not, there would be no legitimate objection to judicial review of the latter elements. This, however, was not the conclusion that was reached by the U.S. Court of Appeals for the District of Columbia, in the recent case of Braniff Airways, Inc. v. Civil Aeronautics Board.\(^3\)\(^3\) Because the reasoning in Braniff is potentially quite destructive of legitimate efforts to expand judicial review, the opinion merits extended discussion.

Braniff involved the first test of the procedure established by Executive Order 11920\(^3\)\(^4\) whereby the President, in order to maximize the opportunity for judicial review, would state whether or not the route award involved foreign policy. In Braniff, the Board's recommendation that a foreign route be granted was approved by the President with the comment (issued in a letter to the Board) that: "The issues presented in this proceeding are not affected by any substantial defense or foreign policy considerations, and no defense or foreign policy considerations underlie my decision." Except for the existence of the disclaimer, review would clearly be cut off by Waterman.

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33. 581 F.2d 846 (D.C. Cir. 1978).
34. Exec. Order No. 11,920, supra note 24.
man. The court concluded however, that the disclaimer was not effective to remove the case from Waterman. It found constitutional objections to the disclaimer, and concluded as a practical matter that a presidential decision on a Board recommendation could never be entirely free of foreign policy concerns.

Without addressing the constitutional objections in complete detail, it should be noted that the presidential disclaimer did not, in fact control the application of judicial review. The disclaimer merely informed the court that the President had determined that the route recommendation did not involve foreign policy. It was then up to the court to evaluate the disclaimer and to decide whether or not judicial review would be appropriate. The cases cited in Braniff support the theory that the court may entertain foreign and defense policy advice from the executive. For example, Alfred Dunhill of London, Inc. v. Republic of Cuba and First National City Bank v. Banco Nacional de Cuba, involved adjudications concerning the legality of Cuban government expropriation decrees. The court received advice from the executive concerning the possible impact of a decision on foreign relations and while not feeling necessarily bound by the advice, gave it due consideration. Moreover, in the American Airlines case, the same court that decided Braniff noted that the Justice Department had indicated that the 'split charter' order did not involve foreign policy, and relied on this advice. In reading Braniff one is struck by the summary manner in which these complex constitutional issues are treated. Watergate had just occurred and perhaps the court mirrored a country in no mood to be generous.

35. 581 F.2d at 850-51. The court concluded that the disclaimer, in effect, gave the President the power to determine when judicial review would be available, and when it would not be, and that the court's reviewing the Board's order would thus violate the constitutional prohibition against advisory opinions.


37. These cases examined whether the Court could adjudicate the legality of such decrees in light of the so-called Bernstein exception to the Act of State doctrine, holding that a court can review the legality of an act of a foreign State if it is advised by the executive that foreign policy would not be adversely affected. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). Some members of the Court expressed concern that the Bernstein exception was invalid because it placed substantial control of judicial business in the hands of the Executive. The Court, however, did not disapprove the Bernstein exception, and there is nothing improper about lower court's receiving advise from the Executive in Act of State situations.

38. 348 F.2d 349 (D.C. Cir. 1965).

39. The court’s discussion of the advisory opinion argument, for example, is contained in a single sentence. The court reasoned that a remand of the presidentially reviewed decision to the Board would run the risk of having the President overrule the court's decision. The fallacy in this argument has been pointed out at length. Hochman, Judicial Review of Administrative Processes in Which the President Participates, 74 Harv. L. Rev. 684 (1961). It lies in the fact that the President would not have any right to overrule a decision made by the court. While the President could change the order that was reviewed (and remanded) by the court, he could not alter a binding legal precedent of the court. Id. at 703-07.
to the executive. The Supreme Court has not addressed the effect of the
disclaimer and the discussion in Braniff does not reflect a persuasively rea-
soned result.

Of more interest to the present discussion is the contention that all
foreign route grants necessarily implicate foreign and defense policy. If this
were true, even route awards which the President does not question would
not be reviewable. The court's position however is weak. It argues that
"general foreign policy considerations, including balance of both payments
and competitive opportunity, are at play" whenever the President reviews a
foreign route recommendation. This is undoubtedly true, but arguably irre-
levant.

Of course, the decision to approve or disapprove a route grant could
entail general considerations of U.S. economic policy. For example, in the
Braniff case, it is conceivable that the President approved the grant in part
because he wanted a U.S. carrier to begin service so as to enhance U.S.
competitiveness abroad. Yet, query whether a concern with U.S. competi-
tiveness should take precedence in a particular case over the interests of
the parties in judicial review. Surely it is one thing to premise nonreview on
particular defense or foreign policy interests and quite a different matter to
override the right of review because the U.S. needs to improve its balance
of payments position. Waterman seems to suggest that presidential in-
sulation is justifiable because his decision may have a fairly immediate and
particularized impact on the friendly relations between the U.S. and the for-
eign country, or on the ability of the U.S. to defend itself. This would seem
to be quite different from overriding private rights on the ground that over
the long-term, the U.S. has a substantial interest in well-balanced foreign
trade.

As a matter of practice, it seems evident that there are instances in
which Board recommendations approved by (or not disapproved by) the
President do not involve foreign policy. Braniff, where the route involved a
U.S. carrier, appears to have been one such case. The same could be true
in a case involving a foreign carrier. The foreign government could be en-
tirely neutral as to which one foreign carrier should be selected to serve a
route.

If, except for presidential involvement in the review process, certain
route awards have no foreign policy dimension, then these route awards
should be reviewable by the courts. Waterman would not prevent review
since the basis for the Waterman holding was that there was no way to
conclude that that order did not involve foreign policy.

40. While a consistently adverse balance of payments position could de-stabilize the relations
between the U.S. and foreign countries, the likelihood of a particular route grant doing so is de
minimis.
It should be emphasized that this discussion has addressed the question of whether court review of presidentially approved orders is possible without involving the court in foreign policy. It concludes that such review is possible if the route award (or elements of the award) does not involve foreign policy. A more formidable question however, is whether a court should be able to review cases where the final decision does reflect presidential thinking. The following two sections address this question, first demonstrating that the decisional law under Waterman has not presented a logical solution for differentiating orders that should be reviewed from orders that should not be, and secondly that the underlying constitutional basis of Waterman has been so eroded by subsequent decisions that Waterman has in effect, been overruled.

III. THE DECISIONAL LAW GOVERNING JUDICIAL REVIEW OF FOREIGN ROUTE ORDERS

The decisional law under Section 1006(a) indicates that the courts have been uncomfortable with Waterman, and have attempted to interpret the opinion narrowly so that some form of judicial review would be available for challenges to Board orders involving the foreign routes of U.S. carriers. The development of the law has not been smooth, however. Differences of opinion are evident amongst the circuits as well as among the judges of the same court, and it has been difficult to predict from one case to the next which direction the development would take. Thirty-three years after Waterman there are substantial questions concerning the scope of 1006(a) which have not been answered. Moreover, the decisional mosaic defining the availability of judicial review under 1006(a) does not hold together.

Waterman, which established that 1006(a) does not authorize judicial review even of foreign route awards of U.S. carriers, has been a substantial obstacle for parties seeking review of such Board orders. Much of the case law concerns the proper reach of the implied exemption from judicial review created by Waterman for Section 1006(a) of the Act.

In assessing Waterman, it should be remembered that the Court construed a statute which explicitly precluded judicial review of orders involving foreign carriers, while appearing to authorize judicial review of orders involving U.S. carriers. The operations of foreign carriers inevitably involve foreign countries. Thus it can be presumed that Congress favored according the President broad discretion in rendering the foreign affairs judgments that such operations might involve. The situation with respect to U.S.

41. Without such discretion, it would arguably be difficult for the President to follow through quickly on diplomatic initiatives, and it also might be difficult for him to execute a comprehensive foreign policy plan since the court might refuse to allow a route which the President considered essential to other elements of his foreign policy. See Pan American – Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir.) (Judge Wright concurring), cert. denied, 380 U.S. 931 (1965).
carriers differed, however, in that their operations include both domestic and foreign routes. The statute does not exclude by its terms judicial review of any routes of U.S. carriers. Yet, unless it could be said that the foreign policy and defense impact of foreign route awards to U.S. carriers is less substantial than the impact of route awards to foreign carriers, Congress would have legislated irrationally if it had excluded from judicial review the routes of foreign carriers, but not the foreign routes of U.S. carriers.

The majority opinion in Waterman highlights the fact that the foreign routes of U.S. carriers could have significant impact upon foreign policy and defense decisions. Indeed, this fact is used as justification of the holding of the opinion. While it has been suggested that a distinction should be drawn between the foreign and defense policy importance of foreign route awards to U.S. carriers, and route grants to foreign carriers, it seems impossible empirically to verify this conclusion. It is conceivable that U.S. strategic interests could be affected by selection of a U.S. carrier to fly a particular route. Moreover, it is conceivable that the foreign relations between the United States and a foreign country could be affected by the selection of a particular U.S. carrier. This is not to say that in most cases the selection of the carrier will make a large difference from a foreign policy or a defense point of view. Indeed in most cases it should make little, if any, difference. However, the point is that one cannot predict how often either a route grant to a U.S. carrier or a grant to a foreign carrier affects foreign policy.

Assuming there could be strategic considerations in the grant of foreign routes to U.S. carriers, it is difficult to conclude that the Court was wrong in perceiving that Congress would not have intended the 1006(a) exemption from judicial review to be limited to foreign carriers, had it considered the matter. Accordingly the problem with Waterman was not that it accorded equal treatment to all foreign routes in their reviewability. Rather, the problem with Waterman was that it submerged important private rights to the unbridled discretion of the President by categorically cutting off the availability of judicial review. The judicial decisions that have followed Waterman have had to deal with the fact that it often seems unjust in practice to deny judicial review to a party who has a colorable claim for relief, and who desires to present that claim in court.

Between 1948 when Waterman was decided, and 1965 when the Court of Appeals of the District of Columbia decided American Airlines, courts of appeals addressed the limits of their section 1006(a) jurisdiction in five cases. On each occasion the court declined to entertain the appeal on jurisdictional grounds. Nevertheless, the opinions indicate a basic desire to limit Waterman. However, because the courts have not had a consistent theory of limitation, the opinions do not clarify the law. In the Second Circuit, it appeared that the court would review a presidentially approved order when the President of the Board had allegedly acted beyond their legal powers in issuing the order. In the District of Columbia Circuit, however, it appeared that the court was of two minds. One faction of the court seemed to feel that 1006(a), as construed by Waterman, never permitted review of foreign route orders by courts of appeals. A second faction, however, seemed to agree with the Second Circuit’s view that 1006(a) permitted review when the President’s or the Board’s power was at issue. Thus, in American Airlines when the court was faced with the issue of

45. 333 U.S. 103 (1948). Waterman was foreshadowed by the Second Circuit in Pan American Airways Co. v. CAB, 121 F.2d 810 (2d Cir. 1941).
46. 348 F.2d 349 (D.C. Cir. 1965).
48. See Trans World Airlines v. CAB, 184 F.2d 66 (2d Cir. 1950). The court held in this case that under Waterman it did not have jurisdiction over an appeal challenging Board approval of a merger between Pan Am and another international carrier. The court, however, left open the possibility that the order would have been reviewable if the Board (or the President) had acted “beyond its lawful authority.” Id. at 70, thus refusing to foreclose review entirely.
49. For example, in United States Overseas Airlines v. CAB, 222 F.2d 303 (D.C. Cir. 1965) and British Overseas Airways Corp. v. CAB, 304 F.2d 952 (D.C. Cir. 1962), the court rejected appeals under section 1006(a) on the ground that Waterman precluded jurisdiction. Judge Wright, in a concurring opinion in Pan American Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir. 1964) reiterated this position. While in both cases, Waterman could have been distinguished, the court declined to do so.
50. Alaska Airlines, Inc. v. Pan American World Airways, 321 F.2d 394 (D.C. Cir. 1963). The case involved the question whether the Board could terminate Pan Am’s service to Alaska without finding that it had willfully violated its certificate authority. The court reversed a district court finding that this could not be done. In addressing the Waterman issue, the court noted that:

Whether the President has statutory or constitutional authority to terminate Pan American’s route authorization for reasons of public convenience and necessity is quite a different question from the one which faced the Court in Waterman. That case neither settles nor illuminates more than faintly the issues which would face a court reviewing the authority of the Board or the President in this case to terminate Pan American’s route authorization.

321 F.2d at 396. This language suggests that statutory review of foreign route orders (at least those involving U.S. carriers) would be available where the case involved the issue of the statutory or constitutional authority of the Board or the President to act.
whether Board orders involving presidential approval could ever be reviewed under 1006(a) the precedents seemed to point in opposite directions. Judge Burger, however, resolved the uncertainty boldly. In writing for the court, he ruled that statutory review would be available where the petitioner claimed that "awards made by the Board, with Presidential approval, exceed[ed] the Board's power under the Act."\textsuperscript{51} Because \textit{American Airlines} resolves previously unsettled questions, and because it interprets 1006(a) in a manner arguably inconsistent with \textit{Waterman}, it will be instructive to examine the opinion in some detail.

In \textit{American Airlines}, the court faced a challenge to separate Board orders authorizing two U.S. carriers to conduct transatlantic charters\textsuperscript{52} and permitting them to charter their aircraft to two different groups. Judge (now Chief Justice) Burger, writing for the court, began his analysis of the jurisdictional point by articulating the holding in \textit{Waterman}, a decision he later distinguished, as follows:

In \textit{Chicago & Southern Air Lines v. Waterman Steamship Corp.} . . . the Supreme Court held that orders granting or denying applications of citizen carriers to engage in overseas and foreign air transportation are exempt from Court of Appeals review under Section 1006 of the Civil Aeronautics Act to the same extent as are orders affecting foreign carriers, since both types of orders are subject to Presidential approval.\textsuperscript{53}

This characterization of the holding, fails to capture the notion that it was not presidential approval, \textit{per se}, which caused the \textit{Waterman} court to rule as it did but, rather, that presidential approval infused such orders with foreign policy and defense importance, thus removing them from the purview of the court. Had the opinion been characterized in this way, however, Judge Burger would have had great difficulty concluding what he found to be the underlying assumption of \textit{Waterman}, namely that: "Clearly \textit{Waterman} presupposes lawfully exercised congressional authority in the Board's action, in the first instance, as an indispensable predicate, without which there is nothing a Presidential action can approve."\textsuperscript{54} \textit{Waterman}, however, does not suggest that the order submitted by the Board to the President must be "legal" in order for the President to approve it. Because \textit{Waterman} found that the President had plenary power to distribute routes as he wished, the presumption, if anything, should have been that the \textit{Waterman}

\textsuperscript{51} 348 F.2d at 352.

\textsuperscript{52} Previously, the Board's regulations authorized an aircraft only to be chartered to one eligible group. 40 C.A.B. 233, 264-72 (1964). The petitioners at issue in \textit{American} alleged, \textit{inter alia}, that the Board exceeded its statutory authority when it amended the regulation so as to authorize split charters. Because the orders attacked in court involved foreign routes, the first question the court had to face was whether it had jurisdiction under section 1006(a) to review the order. The court concluded that it could review the order.

\textsuperscript{53} 348 F.2d at 351-52.

\textsuperscript{54} 348 F.2d at 352.
court would not have determined that the President could only approve "legal orders." The meaning of the word "legal" in this context also raises questions not answered by the American Airlines court. For example, in Waterman it was alleged that the order was not "legal", since it lacked evidentiary support in the administrative record. Yet, there was no review of that "illegality". Judge Burger, however, drew a spurious distinction between types of Board transgressions: a transgression involving an order which lacks statutory support is reviewable, while an order which lacks evidentiary support, or which deprives a party of constitutional due process, is not reviewable.

The justification for these distinctions is that the President must be free to consider evidentiary factors outside the record when he makes his decision on the route. Therefore, whether the Board properly weighs or considers the evidence is less important than whether it abides by congressional limitations on the scope of its power as expressed in the Act.

While this argument may seem plausible, it is troubling because it asserts, in effect, that the administrative process has little substantive importance. However, what the argument overlooks is that Congress declared that a particular kind of administrative process should precede presidential action. In placing greater weight upon substantive statutory guidance than upon procedural directives the court is, in effect, engaging in the implied assumption that the process of distributing routes will be damaged less when the Board violates procedural standards than when it violates substantive standards. There is no reason to believe, however, that this assumption would prove viable in the real world.

The rule established by American breaks down the immunity from judicial review that all foreign route awards had previously enjoyed. It authorized court review where a challenge involves a contention that the Board exceeded its statutory authority when it issued the award. Because the case did not involve foreign carrier route awards, however, it could not be considered definitive on the availability of judicial review for challenges to orders involving foreign carriers.

55. See, United States Overseas Airlines v. CAB, 222 F.2d 303 (D.C. Cir. 1955), holding that a challenge based on a constitutional violation was not reviewable.
56. For example, under the Act applicants for certificate authority to operate foreign routes and applicants for permit authority to operate such routes, are entitled to hearings before the Board and other procedural safeguards. 49 U.S.C. §§ 1371, 1372 (1979).
57. Judge Burger purports to find support for his ruling in Alaska Airlines. While he notes that British Overseas Airways Corp., contains language arguably precluding court review, he distinguishes that holding on the ground that American Airlines involved a different kind of challenge. The court is correct in finding support for its judgment in the opinion in the Alaska Airlines case. However, the court's reading of British Overseas Airways Corp. is incorrect. That case held that section 1006(a) of the Act did not authorize statutory review of orders involving foreign routes. Thus, the holding was contrary to the ruling in American Airlines.
After American, the state of the law thus seemed to be as follows: 1006(a), by its terms, made orders of the Board involving the routes of foreign carriers nonreviewable; Waterman read into the statute an implied exemption from review of foreign route awards to U.S. carriers; American Airlines decided that statutory review was available under 1006(a) where the challenge alleged that the Board had exceeded its statutory authority when it issued an order involving U.S. carriers; American Airlines, however, did not authorize review when the challenge alleged that the Board violated procedural requirements or the Constitution.

It is clear from this description of the progress of the law that American Airlines would not be the last word on the availability of judicial review under 1006(a). American Airlines had opened up a crack in Waterman, but the size of the crack would have to be tested. History shows that the law did continue to develop. The decisions after American Airlines concern the applicability of that holding to petitions for review of Board orders involving foreign carriers. As a result of the post-American Airlines cases, a party may never obtain judicial review of Board orders involving foreign carriers irrespective of the nature of the challenge to the order. Thus, under current practice, U.S. carrier route awards are reviewable only when the challenge to the order is based on the Board’s statutory authority, and foreign carrier awards are never reviewable.

The first case to apply American Airlines in the context of a foreign carrier order arose in the D.C. Circuit. The suit involved a decision by the Board to authorize a foreign carrier to operate inclusive charter tours from Germany to the United States. The Board took the position that it was not required to insist that these foreign tour operators be licensed because their organizational activities would all occur abroad.

On the merits of the case the court agreed with the Board, finding that the agency was justified in considering its licensing authority discretionary. On the issue of the court’s jurisdiction to review the Board’s order, the court concluded that it was highly unlikely that jurisdiction extended

58. Pan American World Airways, Inc. v. CAB, 392 F.2d 483 (D.C. Cir. 1969). The court’s discussion of the section 1006(a) issue is dicta. Nevertheless, the discussion of section 1006(a) is lengthy and detailed, and provides a fair hint of how the court would address the issue if it were faced with a need to do so.

59. A previous decision in the Second Circuit, Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1961) also examined section 1006(a), but rested on American Airlines, and did not advance the law past that point.

60. The Board had previously recommended to the President that U.S. carriers be authorized to operate inclusive tour charters across the Atlantic, and felt that the public interest demanded that the same rights be granted to foreign carriers. It thus rejected the recommendation of the hearing examiner, who ruled against the foreign carriers, and granted the applications. 392 F.2d at 486-90.

61. Id. at 496.
over these foreign tour operator orders. The court noted that American Airlines had limited the Waterman bar to direct review by excepting challenges based on lack of statutory power.62

However, "where a foreign air carrier is involved, the issue is not whether the reach of the statute should be extended beyond its apparent coverage because of considerations of national defense and foreign policy; rather it is whether an exception should be carved from the plain language of the statute itself."63

The court noted that American Airlines (and a Second Circuit decision following American Airlines)64 were "not dispositive." The court also noted that in a pre-American decision involving a foreign carrier order,65 it had said that there could be no direct review under 1006(a) "now or later."66

The opinion in Pan Am thus takes a strong position against judicial review of orders involving foreign carriers whether review is sought in the district court or the court of appeals. Whereas the Supreme Court in Waterman had equalized the judicial treatment accorded orders involving foreign carriers with orders involving U.S. carriers, the Pan Am opinion, while not dispositive, began the process of again differentiating these two classes of Board orders.

After a five year hiatus, the same court again addressed the jurisdictional issue as it pertained to orders involving foreign carriers.67 In Dan-Air Services, Ltd. v. CAB,68 two foreign charter carriers challenged a Board order requiring them to file individual applications to operate charter flights on a flight-by-flight basis.69 The carriers challenged the order both in district court and in the court of appeals,70 alleging that the Board had violated their procedural rights,71 and also had discriminated against them in the

62. Id. at 493.
63. Id.
66. 392 F.2d at 493.
67. Previously, a district court in the southern district of New York also had concluded that orders involving foreign carriers were not subject to judicial review. CAB v. Donaldson Line (Air Service) Ltd., 343 F. Supp. 1059 (S.D.N.Y. 1972).
68. 475 F.2d 408 (D.C. Cir. 1973).
69. The Board's charter regulation for foreign charter carriers did not require that each flight be approved individually. 14 C.F.R. § 214.9(a) (1980). However, the Board had inserted in the operating permits of all foreign carriers, including the petitioners in Dan-Air, that it might require the carrier to obtain individual flight approval "if it finds such action to be required in the public interest." 475 F.2d at 411. Individual flight approval was an onerous condition for the charter operator, since it required approval by the Board prior to each flight.
70. The carriers sought an injunction in district court, and then filed a statutory appeal under section 1006(a). The court of appeals consolidated the two separate actions when they reached it. 475 F.2d at 409 n.1.
71. The carriers claimed that they were entitled to a hearing prior to the Board's issuing an order requiring flight-by-flight approval of each charter flight. The carriers also claimed that the
manner of enforcing the permits. The court minced few words on either the jurisdictional issue or the merits. As to the merits, the court found nothing of substance. It noted that the carrier had agreed to the prior approval condition when it accepted the permit, and found no violation of the carrier’s procedural rights in the way the condition was enforced. On the jurisdictional issue, the court held that the statute “clearly precluded” review. This holding applied both to the petition for statutory review and to the district court action, since both were before the court and subject to the single opinion. Thus, the court followed Pan American in declining to extend American Airlines to orders involving foreign carriers.

The next case involving application of 1006(a), Diggs v. CAB also concerned a foreign carrier. Petitioners challenged a presidentially-approved Board order which granted South African Airways a route. Their contention was that South African Airways discriminated against blacks on domestic flights in South Africa and in its facilities in South Africa. They alleged that the order violated the Act and the Constitution.

What was new about Diggs was that the petition seeking review included both constitutional and statutory claims. (Dan-Air had already decided that American Airlines did not apply to the statutory claim). The court, however, did not believe that distinction made any difference. The court did not address the question of whether petitioners could challenge the Board’s order in the district court, but seemed to resolve it by deciding that neither the district court nor the court of appeals had jurisdiction.

The next case involving 1006 is British Airways Board v. CAB. In that case, the Board had ordered British Airways to file its operating schedules and any changes in schedules with the Board. British Airways, however, refused to file its schedules. Thereafter, the Board issued a second order requiring flight-by-flight approval was ineffective since it had not been submitted to the President for his approval.

72. Technically the jurisdictional issue arose only in respect to the challenge to the validity of the condition in the permit authorizing the Board to insist upon flight-by-flight approval of all charter flights. The order requiring the carrier to obtain prior approval for each charter flight did not require presidential approval, and, therefore, was not subject to the review limitation of section 1006(a).

73. 475 F.2d at 413.
74. 516 F.2d 1248 (D.C. Cir. 1975).
75. Id. at 1249.
76. Id. at 1249-50.
77. 563 F.2d 3 (2d Cir. 1977).
78. The Board acted pursuant to Part 213 of its Economic Regulations, 14 C.F.R. § 213.2 (1980) which were incorporated by reference into the permits of all foreign carriers. This regulation empowered the Board in certain circumstances to order foreign carriers to file traffic data and operating schedules to and from the U.S. The Board invoked Part 213 against British Airways because the British government had allegedly violated the terms of its bilateral air transport agreement with the United States, by depriving U.S. carriers of a fair opportunity to compete in the U.S.-Britain market.
order under Part 213, which required British Airways to reduce the number of daily flights made to the United States. The President, however, disapproved this action, finding that the dispute between the United States and the British had been resolved diplomatically. The President instructed the Board to "rescind" the original order which required British Airways to file its schedules.

In response to the President's directive, the Board did "rescind" the filing order, but it only did so prospectively. It noted in its order that the airline would be subject to enforcement liability for not filing the schedules as ordered by the Board. British Airways then appealed, claiming the Board violated the President's directive in not rescinding the order retroactively as well as prospectively.

Because the filing order did not need presidential approval, the court found that it had jurisdiction under 1006. At the same time, however, the court concluded that the President had the power to instruct the Board to rescind the filing order. The court found that a true rescission was retroactive as well as prospective. Accordingly, it set aside the prospective order, concluding that the Board had "improperly ignored a presidential directive." 780

While the decision contains nothing new on the application of 1006, it does illustrate how the review provisions of the Act operate in practice. In the case, there was judicial review of the filing order only because the President and the Board had agreed that individual filing orders would not have to be reviewed. This result was arbitrary in the sense that the President could as easily have demanded to approve each filing order. 81 The availability of review was thus dependent upon a procedural convention, and not something Congress provided in the Act. 82

The final case on the appropriate application of 1006(a), Braniff Airways Inc. v. CAB, 83 is unexceptionable in its discussion and application of 1006(a). 84 However, the opinion highlights the fact, unemphasized in previous opinions, that Waterman was, indeed, intended to apply only to "final

79. Rather than approving each Part 213 filing order the President had previously approved the filing regulation.
80. 563 F.2d at 7.
82. The case was decided properly since the factors that rationally would be determinative, indicated that review was appropriate. Thus, the Board arguably had violated U.S. foreign policy and only the court could steer the Board back to a proper course. By reviewing the order, the court not only did not interrupt foreign policy but, indeed, effectuated the policy by blocking the Board.
83. 581 F.2d 846 (D.C. Cir. 1978). This opinion has been discussed previously supra at 112.
84. The case holds that Waterman precludes judicial review of orders involving the foreign routes of U.S. carriers. See discussion pp. at 114-17 supra.
orders [that] embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.\textsuperscript{85} This would tend to undercut the \textit{American Airlines} holding that the immunity from review enjoyed by foreign route order was premised upon presidential review \textit{per se}.\textsuperscript{86}

The holdings of the post-\textit{American Airlines} opinions thus reflect a curious two-directional movement in the courts. On the one hand, the pre-\textit{American} courts, feeling uncomfortable with the absolutism of \textit{Waterman}, refused to apply it to statutory power challenges to Board orders involving the foreign routes of U.S. carriers.\textsuperscript{87} On the other hand the same courts declined to limit \textit{Waterman} when it comes to Board orders involving foreign carriers.\textsuperscript{88} The result of this development leaves the law in an anomalous state: orders involving U.S. carriers are reviewable in some situations, but not others; and orders involving foreign carriers are never reviewable. Does the law as it stands make sense? This question can be answered only by measuring the law against the foreign and defense standards that were the reason for the insulation from judicial review in the first place.

To justify the current situation, one would have to make the case that foreign policy is more likely to be damaged when courts review orders involving foreign carriers than when they review orders involving U.S. carriers. Also the likelihood of injury to foreign policy must be greater when a substantive violation is involved, than when a procedural violation is alleged.

There is no reason to believe, however, that either case can be made.\textsuperscript{89} No available evidence suggests that the routes of foreign carriers have greater foreign policy importance than the foreign routes of U.S. carriers. Any route award might or might not have foreign policy importance, and one cannot predict in advance which routes will have such importance and which will not. The same can be said for route orders challenged as to statutory power, as compared to route orders challenged as to procedural infirmity. The probability of any particular order having foreign policy importance is equal to the probability of any other having such importance and the nature of the challenge is unrelated to the potential foreign policy importance of the route. On this analysis, the existing regime, which makes distinctions based upon the citizenship of the carrier and the nature of the challenge to the award, would seem to be fundamentally unsound. The next question, therefore, is whether the current regime can effectively be changed and, if so, the appropriate direction for reform.\textsuperscript{90}

\textsuperscript{85} 581 F.2d at 850 (quoting \textit{Waterman}).
\textsuperscript{86} See discussion p. 120 supra.
\textsuperscript{87} See Diggs v. CAB, 516 F.2d 1248 (D.C. Cir. 1975).
\textsuperscript{88} See, e.g., Dan-Air Services Ltd. v. CAB, 475 F.2d 408 (D.C. Cir. 1973).
\textsuperscript{90} The discussion in the text examines the law from the standpoint of whether or not foreign policy is furthered by the distinctions drawn by the courts. However, there are also other interests
IV. IS WATERMAN STILL GOOD LAW?

If the system created by the case law under 1006 is unsound, one must next determine what a workable substitute would be. This article contends that the current hodgepodge should be replaced by a simple rule that judicial review is available for all Board orders involving foreign routes. Since, as argued below, Waterman has been undermined in its constitutional underpinnings by subsequent cases, it should be possible for the courts to begin permitting judicial review under 1006 for all Board orders involving U.S. carriers. Because of the categorical prohibition in the statute against review of Board orders involving foreign carriers, it may take Congress to effectuate review of Board orders affecting foreign carrier routes.\textsuperscript{91} The following two sections address these points, and analyze recent amendments to Section 801 of the Act to assess their potential impact on judicial review.

In attempting to appraise the validity of Waterman in light of the subsequent case law, it is important to begin with a restatement of the basic reasoning of the decision. The Court held that despite the fact that the language in 1006 did not exempt orders involving U.S. carriers from judicial review, such an exemption should be implied from the language in the provision. The Court noted that there was no evidence in the legislative history that Congress considered the problem of judicial review of orders involving the foreign routes of U.S. carriers.\textsuperscript{92} However, the Court inferred that Congress would not have intended to authorize review of U.S. carrier foreign routes had it considered the matter.\textsuperscript{93} The Court thus takes account of constitutional considerations in its interpretation of 1006.\textsuperscript{94}

\textsuperscript{91} Involved in deciding whether and in what instances judicial review should be available. For example, a carrier adversely affected by a Board order involving a foreign route has an interest in gaining review of the order in order to protect its statutory rights. The carrier may be a U.S. carrier or a foreign carrier and the seriousness of the carrier's deprivation resulting from the Board's order is not determined by its citizenship. Thus, it is arbitrary to turn the carrier's right to review on the question of its citizenship. Likewise, it is arbitrary to base judicial review on the nature of the carrier's challenge to the Board's order. Whether the challenge alleges a violation of procedural or substantive rights, the deprivation occasioned by the challenged order could be substantial. Moreover, the extent to which the challenged order gave rise to a genuine deprivation would not be determined by whether the alleged defect was procedural or substantive.

\textsuperscript{92} Theoretically, it would be possible, and arguably consistent with Waterman, to interpret the statutory exemption applicable to foreign carriers non-literally. However, as a practical matter, in light of the strong stand taken previously by the court in Diggins v. CAB, 516 F.2d 1248 (D.C. Cir. 1975), and Pan American World Airways, Inc. v. CAB, 392 F.2d 483 (D.C. Cir. 1968), it seems improbable that change in the manner of construing the exemption can be accomplished without a statutory amendment.


\textsuperscript{94} It is interesting to note that in the first draft of the bill that became the Act, judicial review was provided for any order except those "not properly subject to review by courts of law." See Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives,
The Court's discussion of the constitutional issues does not explicitly address the scope of the powers of the various branches. However, the Court rests its decision on the ground, *inter alia*, that the Constitution committed to the political branches, Congress and the President, the authority to decide and implement foreign policy.\textsuperscript{95} Accordingly, the Court could not have access to the confidential information on which the President based his decision and should not attempt to participate in the decision-making process. In deciding whether or not these views of the proper roles of the branches in foreign affairs are still valid, it will be useful to discuss two recent opinions of *en banc* courts of appeals, *Zweibon v. Mitchell*,\textsuperscript{96} and *United States v. Butenko*.\textsuperscript{97} Both of these opinions analyze the extent to which the various branches have a role to play in the exercise of the foreign affairs power of the central government. In addition, the opinions thoroughly canvass Supreme Court precedent on the appropriate division of powers between the branches of government where the action of any one branch might affect the relationship between the United States and foreign governments.

*Zweibon* was a civil suit for damages against the Attorney General and various officials of the FBI. Plaintiffs, members of the Jewish Defense League (JDL), alleged that they had been the subjects of illegal FBI wiretaps. They claimed that the warrantless taps violated the Fourth Amendment, and Title III of the *Omnibus Crime Control and Safe Street Act of 1968*.\textsuperscript{98} The case raised the question of whether the fact that the "surveillance . . . was authorized by the President of the United States . . . in the exercise of his authority relating to the nation's foreign affairs . . ." insulated the tap from the Constitution and statute, and prevented the court from determining its legality.\textsuperscript{99} Analysis of this question necessitated the

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\textsuperscript{95} 333 U.S. at 111-12.
\textsuperscript{97} 494 F.2d 593 (3d Cir.) (*en banc*), cert. denied sub nom., Ivanov v. United States, 419 U.S. 881 (1974).
\textsuperscript{98} 18 U.S.C. §§ 2510-250 (1979). The Act authorized federal wiretapping in some circumstances, but required appropriate officials to obtain a warrant and follow other prescribed procedures.
\textsuperscript{99} The federal government conceded that it had wiretapped and overheard plaintiffs' conversations.
courts deciding issues similar to those considered by the Court in the Waterman case.

The first question was whether the Fourth Amendment applied to a foreign security wiretap, or whether the fact that the tap was instituted pursuant to the President’s directive insulated it from judicial review. The court determined that the Fourth Amendment did apply and that judicial review was not foreclosed because the President felt the tap was necessary for foreign affairs reasons. The court recognized that the extent of the President’s prerogatives in the authorizing of national security wiretaps had not been addressed by the Supreme Court, but it came down strongly on the side of limited powers.

The reasoning of the court is interesting. Essentially, it concluded that the Fourth Amendment did not say that the President was immune from its reach; therefore, it was up to the proponents of presidential immunity to prove their case. The court then noted that the proponents had not supported their position that the national security demanded that the constitutional system cease to operate when the President needed to place a national security wiretap. The court’s reading of Supreme Court precedent indicated precisely the opposite view, namely that presidential powers were circumscribed, even in situations involving national security.

This analysis of Supreme Court authority dealing with the immunity issue indicates that the President’s power has always been limited. For example, in both United States v. Belmont and United States v. Pink, cases dealing with the validity of an executive agreement in which the U.S.

100. The President did not question his obligation to submit to the court’s process by timely answering the complaint filed by the plaintiffs. Cf. Freund, Forward: On Presidential Privilege. 88 Harv. L. Rev. 1, 18-20 (1974). The government contended that the tap involved foreign security because it needed to stem JDL activities against Soviet officials. It was alleged that if the activities did not stop the Soviet government might take reprisals against U.S. citizens in the Soviet Union.

101. The question was explicitly left open in United States v. United States Dist. Court, 407 U.S. 287 (1971), which concerned the extent to which the President could authorize an internal security wiretap without judicial review. In that case the Court held that the Fourth Amendment (and its warrant requirement) applied to the tap, but noted that the case required “no judgment on the scope of the President’s surveillance powers with respect to the activities of foreign powers, within or without this country.” 407 U.S. at 308. As to the internal security tap, the Court held that the President’s constitutional power to “preserve, protect, and defend the constitution”, was circumscribed by the Fourth Amendment. Id. at 308-14.

102. 516 F.2d at 619-27. In addition to examining the government’s contention that Supreme Court authority supported absolute presidential discretion, the court examined the argument that prior executive practice suggested that the President had absolute freedom to wiretap in the foreign security field. The court held that the executive practice “has never received Supreme Court approval” and that “an unconstitutional practice, no matter how inveterate, cannot be condemned by the judiciary.” Id. at 616. The court found, moreover, that the practice was not what the proponents of presidential immunity made it out to be. Id. at 616-19.

103. 301 U.S. 324 (1937).
104. 315 U.S. 203 (1942).
accepted an assignment of claims from the Russian government for property that had been confiscated after the revolution of 1917, the Court did examine the constitutional validity of the President’s agreement with the Soviet Foreign Minister (Mr. Litvinov). The Court dismissed the argument that the executive’s act infringed on any rights protected by the constitution. In both cases the Court squarely addressed the constitutional issue and did not abstain from reviewing it just because of presidential involvement. United States v. Curtiss Wright Export Corp. was also cited by the government for the contention that the President had unreviewable discretion to institute a foreign security tap, but the court found that Curtiss-Wright did not support the proposition. Curtiss-Wright involved a situation in which Congress had delegated to the Executive branch the power to prohibit American companies from selling arms to any nation engaged in conflict in an area of Bolivia called the Chaco. The delegation was attacked as an unconstitutional delegation of legislative power to the President. The Court sustained the delegation, asserting in the opinion that the federal government possessed inherent powers over foreign affairs, which stemmed directly from the King of England. Much of this inherent power was asserted to lie in the President who possessed “delicate, plenary and exclusive power, as the sole organ of the federal government in the field of international relations. . . .” However, the validity of Justice Sutherland’s contention as to the origin of the federal power over foreign affairs has been vigorously questioned. Whether or not Sutherland was correct in his history, even he, with his sweeping statement about presidential power, hesitated to extend the concept of “inherent power” to its logical conclusion. As Judge Wright notes, Sutherland recognized that the foreign affairs

105. In Belmont, the contention was that the Russian decrees, to the extent they applied to Russian property held by the U.S. nationals, violated the Fifth Amendment. The Court held that: “[O]ur Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens.” 301 U.S. at 332. In Pink, foreign creditors of a nationalized Russian company had received an assignment from a New York state court of assets held by the receiver of the company’s New York branch. The Court was thus asked to find that granting the U.S. priority over these foreign creditors violated their Fifth Amendment rights. The Court held that: “The Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] nationals.” 315 U.S. at 328. The Court further held that the policy of the State of New York, which was to favor these foreign creditors, would have to yield to the policy of the U.S., which was to recognize the Russian government. 315 U.S. at 231-34.

106. The only issue that the court would not address, finding that the executive’s judgment was conclusive, was the validity of the executive’s recognition of the foreign government.

108. 299 U.S. at 316-18.
109. 299 U.S. at 320.
110. Loefgren, United States v. Curtiss-Wright Export Corporation: An Historical Reassessment, 83 Yale L.J. 1 (1973). The Third Circuit in Bulenko, accepted the fact that Sutherland was wrong, and found that the government’s power over foreign affairs was delegated by the people, and was thus subject to constitutional limitations.
power, as every other power "must be exercised in subordination to the applicable provisions of the constitution." 111

What the Zweibon opinion thus concluded about Supreme Court precedent on the foreign affairs power is as follows: first, such powers must be exercised within the constraints of the Constitution; and, second, the judiciary determines whether these constraints have been honored. Because the government contended that the court could not have access to the secret information needed to judge the validity of the tap, the court also went on to determine whether confidential information can be ordered produced if it is necessary for the court to render a rational decision. Quoting United States v. Nixon, 112 Judge Wright noted that the Court had "reiterated the longstanding judicial position that the applicability of any privilege is undeniably a question for the court to decide," thus ruling that the court could order the pertinent material produced. 113 This reading of Nixon is clearly correct, since the opinion explicitly authorized the trial judge to review national security materials in camera to determine the validity of the claims of privilege made for the White House tapes. 114

The remainder of the discussion in Zweibon concerns the scope of the substantive power to the President to order a foreign security wiretap and is not relevant to the question of the proper role of the political branches and the Court in the foreign affairs area. 115 Because the Omnibus Crime Control and Safe Streets Act of 1968 explicitly left undisturbed all the President's constitutional powers over foreign affairs, the opinion did not need to address the limits of Congress's power to legislate over foreign affairs. This issue, however, arises in a situation like Waterman, because there the President may approve a Board order which violates the Act, or may himself order a result which violates the Act. When this happens, the power of Congress, in effect, is being subordinated to the power of the President. In Waterman the Court found that it could not act though the President may be violating a standard set down by Congress. However, the Court's conception of its role under the Constitution is outmoded; two opinions by judges of the Third Circuit in United States v. Butenko sketch a more logical view of the Court's function as an arbiter between the political

111. 299 U.S. at 320 (quoted in 516 F.2d at 621).
113. Id. at 624-25.
115. The court holds that so long as the target of the tap is a domestic organization unaffiliated with a foreign power, the Fourth Amendment's warrant requirement applies, except in unusual circumstances. A plurality of the Court also found that the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 were applicable. 516 F.2d at 628-70.
branches in foreign affairs.\textsuperscript{116}

Butenko involved the question of whether a foreign security wiretap on two suspected Russian spies\textsuperscript{117} violated either the Fourth Amendment or Section 605 of the Federal Communications Act, which prohibited all unconsented-to wiretapping.\textsuperscript{118} The court held that Section 605 was not applicable,\textsuperscript{119} but concluded that the Fourth Amendment was. It found that the test of "reasonableness" under the Amendment was a very relaxed one, and the scope of review was limited to the question of whether, in fact, the tap was for foreign security. (The warrant requirement of the Fourth Amendment was held inapplicable.) The opinions of Chief Judge Seitz (joined in by Judge Van Dusen) and Judge Gibbons review at some length the power of Congress over foreign affairs. The ideas in the opinions are directly relevant to the concept of the separation of powers set forth by Justice Jackson in Waterman.

Judge Seitz disputes the majority's contention that Section 605 of the Communications Act, if it applied to a foreign security wiretap, might be unconstitutional. He notes that the Supreme Court had previously held that Section 605 applied to wiretapping by federal agents. He concedes that the previous case\textsuperscript{120} "concerned executive authority over domestic matters,"\textsuperscript{121} while "the case before us, as cast by the majority, involved Presidential powers over foreign affairs."\textsuperscript{122} However, he notes that:

The only constitutional provision cited by the majority as authority for the executive decision-making that 'foreign intelligence information' supposedly aids is Article II, section 2's declaration that the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . . This provision certainly cannot be said to be any more important that Article II, section 3's charge that the President 'take care that the laws be faithfully exe-

\textsuperscript{116} 494 F.2d 593 (3d Cir.) (en banc), cert. denied sub nom. Ivanov v. United States, 419 U.S. 881 (1974). While these views were not adopted by the court, the opinions of Judges Gibbons (dissenting) and Seitz (concurring in part and dissenting in part) are cited in Zweibon and because they are extensive and cogent, might well guide the Supreme Court when it faces the problem of delineating the proper role of the court in reviewing foreign security wiretaps.

\textsuperscript{117} One, Ivanov, was a Soviet national; the other, Butenko, was an American by birth. 494 F.2d at 596.

\textsuperscript{118} Section 605 provides, in relevant part, that: "[A]ny person not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication, to any person." 47 U.S.C. § 605 (1979).

\textsuperscript{119} The court found no indication in the legislative history of the statute that Congress intended Section 605 to apply in a foreign security case. Since a ruling that it did apply "would have raised constitutional questions", the court inferred from the lack of history that it was not intended to apply. 494 F.2d at 601.

\textsuperscript{120} Nardone v. United States, 302 U.S. 379 (1947).

\textsuperscript{121} 494 F.2d at 610.

\textsuperscript{122} Id.
cuted,' nor can wiretapping be deemed any more crucial to accomplishment of the President's duties as Commander-in-Chief than to his faithful execution of the laws... The President is certainly no 'Lone Ranger' in the foreign affairs field, possessed, as the majority intimates, of vast constitutional powers to be exercised independently of Congress. All of the federal government's power including foreign affairs powers, are subject to constitutional limitations, United States v. Curtiss-Wright Export Corp., supra... and one such limitation of the President's power is the exercise of Congressional power. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.\footnote{123}

This concept boldly equates the President's power over internal affairs with his power over external affairs. One would be hard pressed to dispute the assertion that the President's power to 'take care that the laws be faithfully executed' is at least as important as his powers as Commander-in-Chief of the Army and Navy.

Judge Gibbons, in his opinion, describes the origins of the various foreign affairs powers in the Constitution. He finds that they were all once possessed by the Continental Congress which granted some of them to the President when the Constitution was founded. In light of this origin, 'the provisions transferring some of those powers to the executive in 1787 should it seems to me, be read narrowly rather than expansively.'\footnote{124} As to the question whether Congress could prohibit the President from wiretapping for national security reasons, he concluded that: 'I have no question that Congress could, and did in 605, prohibit anyone, including foreign affairs intelligence agents, from wiretapping.'\footnote{125}

Judge Gibbons' tracing of the foreign affairs powers to their source lends substantial weight to the argument that the President's foreign affairs powers are limited. If all foreign affairs power were once legislative, but some were ceded to the executive, the President's power to act must be circumscribed. Judge Seitz points out that the duty to maintain domestic order is surely as important as the duty to maintain a country safe from external dangers. Since the President's domestic powers are circumscribed by the Constitution, with the Court defining the reach of the powers, they must be equally circumscribed in the foreign realm.

The relevance of Zweibon, and the Gibbons and Seitz opinions in

\footnote{123}{494 F.2d at 610 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J. concurring)).}
\footnote{124}{494 F.2d at 634.}
\footnote{125}{494 F.2d at 635.}
Butenko to the question of whether the current law supports Justice Jackson’s view in Waterman of the proper roles of the branches in foreign affairs, is that it is wrong to suppose the foreign realm is committed exclusively to the political branches. If Congress has legislative powers that may be paramount to the President’s authority in foreign affairs, it will necessarily take action by the judicial branch to mark out the proper confines of the powers of the two branches. Justice Jackson’s notion in Waterman that the Court should stay out of the political arena where the political branches make decisions is inconsistent with the fact that an arbiter is necessary to mediate between the branches.

Before concluding this aspect of the discussion, it is necessary briefly to note a second branch of the political question doctrine, not directly founded on constitutional theory. Under this branch, a court has discretion to decline to resolve a dispute if the nature of the problem, though not necessarily constitutionally committed to another branch, does not lend itself to judicial resolution. This branch differs from the constitutional commitment branch because it vests discretion in the court, based on prudential considerations, to exercise or not exercise jurisdiction as it sees fit.

We have already demonstrated that all matters involving foreign relations are not constitutionally committed to the political branches. Court precedents establish that the judicial branch has a role to play in protecting individual rights and arbitrating between the political branches.

The issue of whether prudential considerations ought to persuade the court to abstain from reviewing presidential decisions on air routes depends more on common sense than on judicial precedent. It seems fair to conclude that the answer to the question of whether court intervention is appropriate depends more upon one’s assumption about the scope of judicial review than about philosophical musings on the nature of foreign affairs. A judicial inquiry, for example, into the question of whether the President was correct in determining that, for foreign policy reasons, a certain route should be given to carrier “X” despite the fact that the economic evidence in the record before the Board indicated that carrier “Y” would perform in a superior fashion, might be said to be impractical. The court, it would be said, does not have the expertise to assess the executive’s judgment concerning the foreign policy requirement of having carrier “X” on the route. While this assessment might be correct if the court were asked to review the President’s substantive judgment as to appropriate carrier, it would not be correct if all the court was asked to do was to examine the basis for the President’s act. If the executive has been guided by rational criteria, the

court would confirm the judgment; if not, the court would reverse the judgment. There would thus be a judicially discoverable standard for testing the executive’s determination: this would be the arbitrary and capricious test set forth in the Administrative Procedure Act, and regularly applied in other areas of administrative law, where agency expertise comes into play. Thus, given a limited standard of review, it does not appear that prudential concerns need keep the judicial branch from overseeing the distribution of foreign route awards, irrespective of the involvement of foreign affairs.

The analysis contained in this section suggests that the Court engaged in an outmoded constitutional view in Waterman. Therefore, the Court’s conclusion that Congress intended to insulate from judicial review presidential decisions on foreign routes for U.S. carriers is unsound. This unsoundness can be remedied by the Court overruling Waterman. But, in order to provide judicial review of Board orders involving foreign carriers, Congress will have to amend the statute. The next section of this article examines a recent amendment to Section 801 of the Act which appears partially, but not fully, to authorize judicial review of orders involving foreign carriers. It suggests that the language of the amendment should be clarified, and concludes that Congress should explicitly provide that judicial review is available for all foreign route orders.

V. The Effect of Recent Amendments to Section 801 of the Act on the Availability of Judicial Review

Congress amended Section 801 of the Act in 1978 as part of its overall reform of the regulatory system governing domestic aviation. The amendments to Section 801 are designed to remedy an open-ended presidential review process by requiring the President to act within sixty days on any Board recommendation and to limit his review to the foreign policy and defense aspects of the Board’s recommendation. Because Sections

128. 5 U.S.C. § 706(e) (1976); Cf. 1 British Airways Bd. v. Civil Aeronautics Board, 563 F.2d 3 (2d Cir. 1977). (arbitrary and capricious test applicable to determine the validity of Board’s schedule filing order to British Airways).

129. While there could be a case in which the executive’s determination as to a foreign policy requirement is overruled by a court this would only occur in instances in which there was absolutely no basis to support the executive’s action. Most foreign governments presumably would not take this as a lack of cohesive foreign policy on the part of the United States.

130. The lower federal courts have developed partial remedies, but the resulting system has given rise to arbitrary distinctions. See pp. 117-26 supra.


132. The presidential review process had been subjected to substantial misuse by carriers and other parties lobbying extensively for presidential favor. See Whitney, Integrity of Agency Judicial Process Under the Federal Aviation Act: The Special Problem Posed by International Airline Route
801 and 1006 closely interact, the changes in Section 801 potentially affect the availability of judicial review under Section 1006 of the Act. Congress, when considering the proposed amendments to Section 801, failed to recognize that any substantial reconstruction of 801 would have ramifications on the proper interpretation of Section 1006. As a result, the impact on the availability of judicial review of the changes made to Section 801 is not as clear as practitioners would ideally like.

Amended Section 801 provides that a Board recommendation not disapproved by the President, "shall take effect as action of the Board, not the President, and as such shall be subject to judicial review as provided in Section 1006 of this Act." Section 1006, which was unchanged, continues to provide that "any order . . . issued by the Board . . . except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 . . . shall be subject to judicial review."

If Section 1006(a) is read literally, it appears that the only orders immune from judicial review are those "subject to the approval of the President" under Section 801. However, under the amended version of Section 801, the President no longer approves any Board orders, whether they involve citizen or foreign carriers. Rather, the President may veto Board orders but if he does not veto them, they go into effect of their own force. The reconstruction of Section 801, thus seems to gut the judicial review exemption contained in 1006 for orders involving foreign carriers. Moreover, inasmuch as Waterman depends upon the exemption for foreign carriers, elimination of the exemption presumably would be taken as a Congressional overruling of Waterman. If Congress intended this significant result to occur, however, one would think it would have altered 1006 as well as 801, since 1006 is materially affected. There is no indication in the legislative history of the amendment, moreover, that Congress intended by indirect means that Congress intended by indirect means to rewrite 1006 as well as 801.

With regard to vetoed Board order Congress seems to have implicitly come out against judicial review. Thus the revisions of Section 801 establish that any Board action disapproved by the President shall be considered "null and void." This language seems to suggest that a party who is aggrieved by a presidential decision to veto a Board action would have no way to question the action since the underlying order is "null and void." This is not to suggest that the President’s decision, which must be reduced to writing, and accompanied by a written explanation, could not be reviewed, at

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Awards, 14 WM & MARY L. REV. 787 (1973); Note, Section 801 of the Federal Aviation Act - The President & the Award of International Air Routes to Domestic Carriers: A Proposal for Change, 45 N.Y.U. L. REV. 517 (1970). One commentator has claimed that the lobbying became so intense that the system harked back to the old "spoils system" under which the Postmaster General handed out lucrative mail contracts to those carriers most in his favor. Id. at 517-27.
least theoretically. Clearly, it is not "null and void." It must be conceded, that one would not expect Congress to authorize judicial review of veto decisions of the President without an explicit statement to that effect, especially since the veto can only be exercised, under revised 801, where foreign policy or defense demands rejection of the Board's recommendation. On the other hand, since Congress appears to have authorized review of Board orders not vetoed by the President, despite the fact that the President's decision not to exercise the veto could arise from considerations relating to foreign policy or defense, it would seem anomalous to conclude that Congress would not have wanted to authorize review of presidential vetoes because judicial review in those instances would involve foreign policy or defense.

The amendments to Section 801 improve the system of presidential review by limiting presidential discretion and shortening the time frame during which the review process must occur. However, it is unfortunate that the amendments do not clarify the extent to which the availability of judicial review is meant to be affected. Based on the analysis contained in this article, Congress should ideally clarify its position by authorizing limited judicial review for all Board orders involving foreign routes and for presidential vetoes of Board recommendations on foreign routes.

VI. CONCLUSION

The lower federal courts have attempted to limit the reach of Waterman by preserving judicial review where possibe. In the attempt to limit Waterman, the courts have utilized meaningless criteria for determining whether or not judicial review is available. Waterman itself was wrongly decided, because it rested on an erroneous conception of the appropriate roles of the various branches in foreign affairs and defense. Rather than continuing with the present system, the Court and Congress should establish a single rule that judicial review is always available for Board recommendations on foreign routes. In its recent amendments to Section 801 of the Act, Congress appears to have accomplished this end in part by authorizing judicial review of Board recommendations not vetoed by the President. However, it does not appear, under the amended version of 801, that presidential vetoes of Board recommendations are reviewable. This anomaly should be corrected if the interests of private parties, as well as the public, in a rationally conducted foreign route distribution system, are to be adequately protected.
The Airline Merger Cases: CAB Application of Clayton § 7 After Deregulation

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I. INTRODUCTION

This article discusses the development of Civil Aeronautics Board merger doctrine as applied in passenger airline merger cases since October 24, 1978, when President Jimmy Carter signed into law the Airline Deregulation Act of 1978 (ADA, or Act).1 The ADA amended the Federal Aviation Act of 1958,2 including section 4083 which governs airline mergers. Since implementation of the ADA, the Civil Aeronautics Board (CAB, or Board) has approved five passenger airline mergers,4 and rejected two proposed


Further, the CAB has approved the merger of Tiger International and Seaboard. CAB Order 80-7-20 (1980). The Tiger-Seaboard merger involved freight carriers only, and will not be considered here.
mergers. The Board is currently considering applications for mergers between Texas International and Continental, and between Air Florida and Air California. In light of the Board's most recent merger ruling in Continental/Western II, it now appears highly unlikely that the CAB will block either the currently pending mergers, or any mergers proposed in the future.

II. STATUTORY FRAMEWORK

The legislative history of the ADA, including the airline merger provisions of section 408, clearly states the intent of Congress to increase competition in the airline industry:

Section 408 standards must now be interpreted in light of the intent of Congress to move the airline industry rapidly toward deregulation. The foundation of the new airline legislation is that it is in the public interest to allow the airline industry to be governed by the forces in the marketplace.

The specific statutory language amending section 408 is found in


6. Texas Int'l-Continental Acquisition Case, CAB Docket 39285 (1981). This case arose when Texas Int'l proposed a tender offer for 48.5% of Continental's outstanding stock just prior to CAB approval of a pending merger between Continental and Western. See, e.g., CAB Clears Continental-Western Merger and Texas Air's Trust Plan to Block It, Wall St. J., Mar. 3, 1981, at 4, col. 3.

7. Air Florida-Air California Acquisition Case, CAB Docket 38863 (1981). The Board has ruled that a full hearing will not be necessary in Air Florida-Air California, and that the case will be conducted as a Show Cause Proceeding. CAB Order 81-1-58 (1981).


Unless, after a hearing the Board finds that the transaction will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall, by order, approve such transaction, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe, except that the Board shall not approve such transaction—

(A) if it would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States; or

(B) the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that
section 26 of the Act. Essentially, Congress in the new section 408 adopted the same merger standard found in section 7 of the Clayton Act,\textsuperscript{11} prohibiting any merger the effect of which "may be\textsuperscript{12} substantially to lessen competition or to tend to create a monopoly" in any region of the United States.

The legislative history of section 408 indicates that Congress intended more liberal standards to be applied in the airline industry in certain limited situations:

even if a merger does not meet the antitrust standards of the Sherman and Clayton Acts, it may nonetheless be approved if it meets "significant transportation needs of the community to be served," and if there is no "reasonably available less anticompetitive alternative" to the merger.\textsuperscript{13}

Additionally, the ADA amended section 414 of the 1958 Act. These provisions permit the CAB to grant antitrust immunity in merger cases by: 1) clarifying that such immunity is specifically limited to antitrust laws; 2) providing that immunity shall be granted only to complete CAB-approved transactions; and 3) specifying that CAB immunity is discretionary, and should be granted only when CAB finds the grant to be in the public interest.\textsuperscript{14}

A final portion of the statute relevant in evaluating airline merger proposals is section 102, the "Declaration of Policy" provisions. Section 102, as amended by section 3 of the ADA, lists various factors deemed by Congress to be in the "public interest." The same "public interest" factors found in section 102 are also used in the "public interest" portion of the airline merger policy set out in section 408.\textsuperscript{15}

\textsuperscript{12} "May be" has been interpreted to express Congress' concern "with probabilities, not certainties [or] ephemeral possibilities." United States v. Brown Shoe, 370 U.S. 294, 323 (1962).
\textsuperscript{13} H.R. Rep. No. 95-1779, supra note 8, at 3789.
\textsuperscript{14} Id. at 3792.
\textsuperscript{15} 49 U.S.C. § 1302(a) (1978). Relevant portions of section 102 are:

in the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions.

(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital.
III. NORTH CENTRAL-SOUTHERN MERGER

The first CAB action taken on a merger application after the ADA became law was the approval of the merger of Southern Airways into North Central Airlines to form Republic Airlines.\(^\text{16}\)

In *North Central-Southern* the CAB considered, but declined to rule upon, whether the section 408 merger standard includes a separate public interest test, or whether a public interest test is included within the section 408 antitrust test.\(^\text{17}\) This issue was important not only in the *North Central-Southern* case, but in subsequent merger cases as well, because adoption of the view that Congress intended both a public interest test and an antitrust test would pose a more difficult standard for merger applicants to meet.

On one side, the merger applicants, the Department of Justice, and the CAB’s Bureau of Pricing and Domestic Aviation\(^\text{18}\) argued that a merger found not to violate the section 408 antitrust standard should be approved without further consideration. On the other side, merger opponents, including the Bureau of Consumer Protection and Frontier Airlines,\(^\text{19}\) argued that the CAB should enforce the plain meaning of the Act that a merger may not be approved if it is inconsistent with either the public interest or the section 408 antitrust standards.\(^\text{20}\)

The CAB found, however, that because “‘no party...offered any convincing evidence or argument that the combination of North Central and Southern would fail under...the alternative interpretations,’”\(^\text{21}\) resolution of this statutory issue of first impression was reserved for subsequent decisions.\(^\text{22}\) The CAB also declined to rule on the “‘convenience and needs’...
defense. The Board’s basic rationale was that because the record did not show that the merger would be anticompetitive, it was “unnecessary to reach the ‘convenience and needs’ issue.”

Despite side-stepping these key issues involved in interpreting the new section 408 merger standards, the Board provided some guidance in determining what is not “anticompetitive” under section 408 by adopting as authority United States Supreme Court interpretations of Section 7 of the Clayton Act. This section of the Clayton Act, like section 408 of the ADA, prohibits mergers the probable effect of which may “substantially lessen competition” or “tend to create a monopoly.”

To evaluate competitive effects of the merger, the Board in North Central-Southern adopted the “functional” approach used by the United States Supreme Court in United States v. Brown Shoe. There, the Court outlined a method for evaluating whether a merger will “substantially lessen” competition. The Brown Shoe test involves defining geographical product markets, and then examining each market so defined for such factors as market share, cross elasticity of demand between the product and substitutes, and barriers to entry.

Employing a similar rationale, the CAB noted that the carrier “resulting from the present merger would not have more than a minimal effect on concentration.” The CAB also specifically rejected a Frontier Airlines argument that the merger would violate merger guidelines promulgated by the Justice Department for Section 7 of the Clayton Act by increasing concentration in certain regional markets. The Board reasoned that the “regional market identified [by Frontier] ignores commercial realities by ex-
cluding key points where routes of the two carriers touch each other, thus exaggerating their market shares. None of the market shares in more reasonably defined markets offend the guidelines.33

Accordingly, the Board ruled that the merger opponents had not demonstrated that reasonably defined markets were highly concentrated.34 Largely because they failed this key test, the merger opponents were not able to meet the statutory burden35 of proving anticompetitive effects of the merger.

In addition to the section 408 antitrust rulings, the CAB also established a clear precedent in a merger-related question by refusing to grant antitrust immunity36 to the merging airlines. Section 414 permits the CAB to grant antitrust immunity only to the extent necessary for the merger to go forward, unless the CAB finds that "such exemption is required by the public interest." (emphasis added)37 The CAB found "insufficient evidence of either of these requirements to form the basis of a grant of immunity."38

The applicants and other proponents of immunity relied principally on the argument that a strong public interest exists in finality of proceeding. They argued that while doctrines of res judicata and collateral estoppel might not preclude a Clayton Section 739 collateral attack, a grant of immunity would guarantee finality and fulfill the public interest.

However, the CAB was persuaded by the arguments of the opponents of immunity that the plain meaning of section 414 allows the CAB to grant immunity only if the public interest requires such grant. The CAB reasoned that finality was not specifically listed among the public interest goals of

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In "less highly concentrated" markets, the standards are:

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34. Id. at 12.
37. Id.
section 102, and further that well-settled doctrine requires deference to administrative holdings absent clear error. Consequently, the CAB held that "in this case, where there are no anticompetitive effects, little or no chance of subsequent litigation, and most importantly, no basis in the record for concluding that immunity is necessary, we believe Congress intended that no immunity be granted."

A third matter the CAB considered in approving North Central-Southern was the inclusion of a labor protective provision. By imposing labor protective provisions, the CAB rejected Bureau of Pricing and Domestic Aviation arguments that ADA deregulation goals also terminate the need for such protective provisions. Still, as with other statutory issues of first impression, the CAB in North Central-Southern reserved judgment "on the question of labor protection as a policy matter."

The CAB rested its decision on the facts that: 1) the record indicated both parties litigated the case as if a labor protective provision would be imposed; 2) elimination of labor protective provisions is inconsistent with the statutory language and legislative history; and 3) the Bureau of Pricing and Domestic Aviation argument was not raised until after the hearing, and therefore the issue was not fully and fairly litigated.

IV. THE STRUGGLE TO CONTROL NATIONAL

A. CAB APPROVAL OF TEXAS INTERNATIONAL-NATIONAL MERGER

Although the CAB approved both the applications of Pan Am and TXI to control National, only the Pan Am-National merger actually took effect. Just before the Board granted official approval of both applications, Pan Am and National agreed between themselves that Pan Am would purchase control of National for $300 million. Nonetheless, the Board’s decision approving TXI’s application provides some guidance for Board merger

40. See, note 15 supra.
41. See, e.g., Udall v. Tallman, 380 U.S. 1 (1965) (great deference was paid to agency interpretation of statute).
43. Id. at 5.
45. The Bureau of Pricing & Domestic Aviation did not argue that CAB authority to issue labor protective provisions was eliminated by the ADA. In fact, labor protective provisions in the Federal Aviation Act of 1958 were left unchanged by the ADA.
47. Id.
48. Although Pan Am ultimately outbid TXI to purchase National, TXI still netted a $47 million pretax profit by selling to Pan AM TXI’s previously acquired 9.2% interest in National’s outstanding stock. See A New Air War: Pancho Lorenzo Flies High, Time, Sept. 22, 1980, at 72, col. 1.
policy under the ADA.

In TXI-National, the CAB reversed an Administrative Law Judge (ALJ) finding that the proposed merger would substantially lessen competition in violation of section 408.\(^{50}\) While the ALJ relied principally on market share statistics in individual city pairs, the Board adopted the broader Brown Shoe analysis used in the previous North Central-Southern decision.\(^{51}\) For example, the ALJ found that the existing competition would be substantially lessened in the Houston-New Orleans market. At the time of the Board's decision, TXI controlled 24% of the market, National held 27% of the market, and Delta maintained 23% of the market. The ALJ reasoned that because a TXI-National merger would produce a 51% market share for the new firm, and a 74% market share for the two top firms (the merged firm and Delta), a TXI-National merger would violate guidelines proscribed by the United States Supreme Court in United States v. Philadelphia National Bank.\(^{52}\) There, the Court found a violation of section 7 of the Clayton Act where the two merged firms would have had a 30% market share and the merged firm plus its second-ranking competitor would have controlled 59% of the market.\(^{53}\)

The Board noted, however, that Philadelphia Bank merely raised a presumption that a 30% merged firm market share and 59% two-firm concentration ratio violated Clayton section 7.\(^{54}\) Moreover, the CAB cited with approval a more recent section 7 case, United States v. General Dynamics.\(^{55}\) There, as in Brown Shoe, the Supreme Court examined all competitive factors in the industry involved, and found no violation of section 7 even though the market shares involved were presumptively illegal under Philadelphia Bank.\(^{56}\)

Summarizing its views, the Board stated: "We believe that we should apply antitrust law functionally, and in light of the recent and ongoing deregulation of the airline industry. The case law just reviewed reveals a reemphasis of the Supreme Court's belief that a thorough review of competitive circumstances is advisable."

The CAB opinion also favorably noted TXI statistics that 84% of the

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52. 374 U.S. 321 (1963); see also, United States v. Aluminum Co. of America, 377 U.S. 271 (1964). In Alcoa, a section 7 violation was found even though the acquiring firm would have increased its market share by only 1.3%.
54. Id. at 367; see also Texas Int'l-National Acquisition Case, CAB Order 79-9-163 at 16 (1979).
57. Id.
top 200 city pairs have two-firm concentrations in excess of 74%. Such markets are therefore as concentrated as Houston-New Orleans would have been after a TXI-National merger. As TXI aptly stated in its brief to the Board: "If a two-firm city pair concentration ratio of 74% is held to imply the likelihood of anticompetitive performance, then it would be necessary to conclude that the entire deregulated industry is likely to be rampant with monopoly power." 58

Thus, the Board concluded that market share data should by only one of several factors in resolving whether an airline merger substantially lessens competition in violation of section 408. 59 The decision lists other factors such as ease of entry and exit under deregulation as examples of competitive factors tending to overcome a presumption of lessened competition under a Philadelphia Bank market share analysis. The board pointed out that by the fourth quarter of 1978, TXI, a relative newcomer, had captured the largest share of the Houston-New Orleans market. 60 More significantly, the decision noted the success of Southwest Airlines, which entered the Houston-New Orleans market in February, 1979, and by August, 1979, accounted for 24% of the nonstop capacity. 61

Further, the CAB opinion asserts that Southwest’s experience demonstrates that TXI’s "hub strength," i.e., its established gates and network center at Houston, does not create a significant entry barrier for new firms lacking such "hub strength." Merger opponents had argued unsuccessfully that lack of "hub strength" creates entry barriers by substantially increasing entry costs. However, prior to entering the Houston-New Orleans market, Southwest had no such gate facilities, and also lacked the feed traffic afforded other carriers with established flight networks. The Board concluded that Southwest’s success reflects a strong competitive environment in the Houston-New Orleans market, despite market share statistics suggesting otherwise. 62

Besides ruling that the loss of National would not substantially reduce actual competition in the Houston-New Orleans market, the Board also reversed an ALJ decision that a National-TXI merger would substantially reduce potential competition in sixteen other city pairs. 63 Specifically, the

58. Id. at 74-75.
59. Id. at 6.
60. Id. at 18.
61. Id.
62. Id. at 19.
Board stated:

a TXI acquisition of National would not substantially reduce the future competitive performance in any of these Southern Tier markets. The doctrine of potential competition, as explained in various federal court cases, has been developed to protect the diminished competitive pressures that are often found in concentrated industries where entry is expensive and not altogether likely.64

Supporting its conclusion that the TXI-National merger would not substantially lessen potential competition, the Board cited United States v. Marine Bancorporation:

The potential competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services. . . .there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive.65

The CAB noted that the Marine Bancorporation decision reiterated the view that concentration statistics may be rebutted by evidence of other competitive factors. Further, the Board cited Federal Trade Commission v. Procter & Gamble66 for the notion that the elimination of one of several potential entrants is insignificant.67 The Board’s decision goes on to note that “the most significant barrier to competitive entry in the domestic system was a regime of restrictive licensing, . . . eliminated by passage of the Deregulation Act.”68

In addition to legal and regulatory constraints, the Board held that commercial factors such as start-up costs do not pose significant entry barriers for the domestic airline industry. “Since November of 1978, multiple permissive entry awards have generated new entry into more than 130 markets throughout the country. . . . Entry on this scale is persuasive of low entry barriers.”69 Finally, the CAB concluded in TXI-National that, besides regulatory or commercial barriers, no other special conditions exist which might result in a loss of potential competition.70

64. Id. at 23.
68. Id. at 27.
69. Id. at 29.
70. Id.
B. CAB Approval of Pan Am-National Merger

The CAB also overturned an ALJ decision in Pan Am-National that such a merger would substantially lessen competition in violation of section 408.\textsuperscript{71} As in TXI-National, the Board held that a presumed violation of section 408 based on a Philadelphia Bank market share analysis was overcome in this case by other procompetitive factors: “the most crucial factors [in determining the anticompetitive effects of a merger] are those which determine the nature of competition—for example ease of entry, traffic density, the number of actual competitors, and the likelihood of new entry.”\textsuperscript{72}

1. The United States-Western European Market

Applying the above standards to the effect of the Pan Am-National merger on the United States-Western European market,\textsuperscript{73} the CAB was unconvinced that the reduction of one scheduled carrier would substantially lessen competition. In particular, the CAB called attention to the large number of scheduled and charter carriers, as well as foreign and domestic carriers now serving and willing to enter, the northern transatlantic market. The Board cited a number of bilateral agreements\textsuperscript{74} between the United States and various nations across the Atlantic, including Germany, Israel and the Benelux countries, as further evidence of strong competitive conditions in the United States-Western European market.\textsuperscript{75}

Additionally, the Board cited ADA provisions: 1) permitting expedited procedures without oral hearing in route application cases;\textsuperscript{76} 2) allowing incumbents more flexibility to exit markets;\textsuperscript{77} and 3) easing the exemption requirement.\textsuperscript{78} Clearly, evaluation of all such competitive factors is consistent with Brown Shoe, and follows the Board precedent set in the original section 408 case, North Central-Southern.

Finally, the CAB noted that discount fares in such markets as New York-Frankfurt the New York-Amsterdam actually declined in the twelve

\textsuperscript{72} Id. at 37.
\textsuperscript{73} Id. at 32-34. The Board adopted the ALJ’s recommended decision that the United States-Western Europe and United States-London be adopted as relevant markets for considering the competitive effects of the merger.
\textsuperscript{74} See, e.g., Air Transport Services Agreement between the United States and Switzerland, Amending the Interim Agreement of August 3, 1945, as amended, and the Agreed Minute of February 6, 1957, signed at Bern, December 9, 1970. See also, Air Transport Services Agreement between the United States and France, March 27, 1946, as amended.
\textsuperscript{77} Id. § 1371(g).
\textsuperscript{78} Id. § 1371(b).
months ending June, 1979.\textsuperscript{79} The CAB questioned whether National was ever a "vigorous price competitor." In the first five years of National’s Miami-London service, National merely followed International Air Travel Association (IATA) fares. After National began serving Paris and Frankfurt, it either followed IATA or matched off-peak fares charged by Air France and Lufthansa. On such evidence, the CAB concluded that the record did not support a finding that National was a vigorous price competitor.\textsuperscript{80} ""We do not feel that by losing National as an independent competitor, we are losing a price innovator in the transatlantic.""\textsuperscript{81}

2. The Miami-London Market

Contrary to its finding in the United States-Western Europe market, the CAB did find that competition in the London-Miami submarket would be ""substantially lessened""\textsuperscript{82} after the merger because Pan Am would be the only scheduled carrier remaining. Further, granting Pan Am the Miami-London market would leave Pan Am with approximately 35% of the United States-London market. Section 408(b) permits the CAB ""to impose such terms and conditions as it shall find to be just and reasonable when approving a merger."" As a result, the CAB was able to approve the National-Pan Am merger on the condition that Pan Am agree to divest itself of National’s Miami-London route authority. However, Pan Am was also required to maintain National’s current gate facilities at London’s Heathrow Airport—facilities which were in short supply and difficult to obtain—until suitable competitive service was approved by the CAB.

Finally, the CAB resolved in Pan Am-National the issue left unresolved in North Central-Southern: it held section 408 does require both a ""public interest"" test and an ""antitrust"" test,\textsuperscript{83} thus rejecting arguments by the Departments of Transportation and Justice that the section 408 ""public interest"" and ""antitrust"" tests were one and the same.

The Board conceded that many of the antitrust factors are included in ""public interest"" considerations, but emphasized that the section 408 ""public interest"" tests include other factors as well.\textsuperscript{84} The Board’s decision thus leaves open the possibility that a proposed merger could meet the antitrust test, yet be rejected for failure to meet somewhat nebulous ""public policy"" considerations. A literal reading of section 408—""Unless...the Board finds that the transaction will not be consistent with the public interest

\textsuperscript{80} Id. at 43.
\textsuperscript{81} Id. at 44.
\textsuperscript{82} Id. at 46.
\textsuperscript{83} Id. at 59.
\textsuperscript{84} Id. at 60.
or that the section 408 antitrust tests will not be fulfilled. ..."—suggests that the CAB decision is correct.

C. CAB REJECTION OF EASTERN-NATIONAL MERGER

In what now appears to be little more than a historical anomaly, a Board majority rejected the Eastern-National merger. The CAB believed a substantial reduction of competition in violation of section 408 was likely, particularly due to capacity restraints at certain airports along the eastern seaboard.

In disapproving Eastern-National, the Board endorsed an ALJ finding that the proposed Eastern-National merger would have caused a substantial lessening of actual competition in the New York-Florida, Washington-Florida, New York-Washington, and intra-Florida markets. The ALJ had earlier held that unavailability of slots (airside space) at Washington’s National Airport and New York’s LaGuardia and JFK Airports may well have posed insurmountable barriers to entry in New York-Washington, New York-Florida, and Washington-Florida markets. Interestingly, with the Board’s recent approval of Continental-Western II, Eastern-National became the only merger proposal since deregulation to be disapproved.

V. THE FIRST SHOW CAUSE PROCEEDING: THE REPUBLIC-HUGHES MERGER

After processing six merger applications, the CAB promulgated a new Part 315 of the Board’s Procedural Regulations, providing that merger applications will be processed by hearing unless the Board states otherwise. Based on its experiences in processing previous mergers under amended section 408, and on approximately 4,000 pages of information filed by Republic to comply with the new part 315 Board merger application procedure, the Board concluded that a Show Cause Order would be the

85. See note 15 supra; see also section 408 excerpt note 10 supra. Besides arguing that the legislative history indicates Congress intended the section 408 and public interest standards to be one and the same, the Justice Department cited Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (1976), for the notion that legislative history should be considered no matter how unambiguous the statutory language might seem. Posthearing Brief of the Department of Justice to Administrative Law Judge Stephen J. Gross at 10-13, Continental/Western I, CAB Order 79-9-185 (1979).
86. Application of Eastern Airlines for Approval of Acquisition of National, CAB Order 79-12-74 (1979).
88. Id., at 43.
90. 14 C.F.R. 315 (1980). See also CAB Regulation PR-221 (1980), which provides additional background for the Board’s Procedural Regulations.
91. Application submitted by Republic Airlines, Inc., for Approval of the Acquisition of Hughes
best method for handling the Republic-Hughes merger.\textsuperscript{92}

On May 16, 1980, pursuant to new Part 315, the CAB issued to the public an Order to Show Cause within sixty days why the CAB should not make final its tentative conclusion to allow Republic to acquire control of Hughes.\textsuperscript{93} Republic’s application and supporting material were sufficient to support a Board conclusion\textsuperscript{94} that: 1) the merger would not be inconsistent with the public interest; 2) the merger would not violate section 408 antitrust standards; and 3) the application presented no issues of material fact. On September 12, 1980, the Board formally adopted the tentative conclusions listed in the Show Cause Order, and approved Republic’s purchase of Hughes.\textsuperscript{95}

The Show Cause Order reflected the Board’s view that “a coherent theoretical framework for analyzing mergers has evolved. . .as a synthesis of our experiences with mergers under the amended Section 408.”\textsuperscript{96}

In its Show Cause Order, the Board outlined the standards which have evolved to date for interpreting the new section 408.\textsuperscript{97} First, it emphasized that the product market has consistently been defined as scheduled air transportation, and the relevant geographic markets have been city pairs, cities, regions, and the nation.\textsuperscript{98} Second, the CAB affirmed applicability of the Brown Shoe “functional” test for each merger’s individually defined markets. The CAB reaffirmed the notion that Brown Shoe requires an examination of a relevant market’s structural characteristics, including entry barriers, potential entrants,\textsuperscript{99} ability of merging firms to increase entry barriers, and the degree of concentration in particular markets.\textsuperscript{100}

Applying the above standards to Republic-Hughes, the CAB found that “Republic and Hughes do not engage in any single-plane competition in any city pair at the present time.”\textsuperscript{101} The Board also found that the two carriers did engage in “a de minimus amount of single carrier competition through connecting service in three markets.”\textsuperscript{102} However, because each carrier’s share was “infinitesimal,” the Board believed it highly unlikely that

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\textsuperscript{93} Id.

\textsuperscript{94} Id. at 2.

\textsuperscript{95} C.A.B. Order 80-9-65 (1980) [hereinafter cited as C.A.B. Order 80-9-65].

\textsuperscript{96} Id. at 6.

\textsuperscript{97} Id. at 7.

\textsuperscript{98} Id.

\textsuperscript{99} Id. For United States Supreme Court potential competition doctrine, see cases cited note 65 supra.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 8.

\textsuperscript{102} Id.
\end{flushleft}
the merger would reduce actual competition to any harmful extent. 103

On a regional basis, the Board found that in the six cities where the two systems met, the merger was not likely to lessen substantially actual competition because of a large number of other carriers and potential entrants. 104

On a national level, the Board ruled that Republic’s application satisfactorily demonstrated that the merger would not violate the Justice Department Merger Guidelines: 105 the proposed merger of Republic (twelfth largest carrier) and Hughes (fourteenth largest carrier) would only result in the nation’s eleventh largest carrier. Therefore, the Board found that a Republic-Hughes merger was unlikely to lessen substantially actual competition in any city pair, city, region, or the nation.

The Board also declared that potential competition was not likely to be substantially lessened in any of the relevant markets (city pairs, cities, regions, the nation). To reach this tentative finding, the Board relied on the assertion in Republic’s application that neither “Republic nor Hughes Airwest has any plans to enter any of the other carrier’s markets absent an acquisition.” 106

As for the separate section 408 “public interest” test required since Pan Am-National, 107 the Board concluded without discussion that the merger was not inconsistent with the public interest. 108

Finally, as in every merger case since the ADA became law, the Board declined to grant antitrust immunity under section 414. “Republic has not requested immunity for the acquisition, and we have decided not to confer it because we do not believe that immunity is required by the public interest.” 109

VI. REVERSAL OF A CAB REJECTION: THE CONTINENTAL/WESTERN MERGER CASES

In Continental/Western I, a Board majority found that the “merger may have resulted in a substantial lessening of competition for several reasons.” 110 Those reasons included findings that “Continental and Western are both aggressive competitors,” 111 that certain pricing inflexibilities still

103. Id.
104. Id.
106. Republic Application, supra note 91, at 10.
107. See text containing notes 83-85 supra, concerning the Board’s holding that section 408 requires both a public interest test and an antitrust test.
109. Id. at 10.
111. Id.
remained from the prederegulation environment, and that airport entry limitations at Denver, San Francisco, and San Diego might substantially delay competitive entry by new and different carriers. The Board was particularly concerned that such airport access problems might prevent other carriers from entering affected routes quickly enough to avoid a duopoly between the merged carrier and United in the region west of Denver. However, when Continental and Western re-submitted their merger application approximately one year later in Continental/Western II, the Board found that post-deregulation circumstances had changed enough that the anticompetitive effects of the merger no longer rose to the level of substantially lessening competition in violation of section 408 of the ADA.

The latest Continental/Western application asserted that deregulation has brought about dramatic changes in entry and pricing behavior. Specifically, the applicants noted that deregulation has already resulted in fourteen new carriers using jet aircraft, in new carrier exits and entries in 67% of the nonstop routes west of Denver, and in extended western route operations by Delta, Eastern, USAir, Republic, Air California, Southwest, and PSA.

Commenting on whether the merger will lead to a duopoly between United and the merged carrier in the routes west of Denver, the application noted that "Denver has been entered by five new carriers since 1977; San Diego, San Francisco, and Los Angeles have been entered by three each." Further, Continental/Western asserted that there is no longer any reason for concern about airport access limitations which might hinder a competitive response to possible duopolistic behavior between United and the merged carrier west of Denver. The application noted:

All of the Continental and Western route overlap cities have had new entrants since deregulation. Most have been entered by three or more new carriers and all have experienced a net increase in carriers. The two airports which had evidenced reservations about new entry when this case was last heard, San Diego and San Francisco, have formally adopted policies to accommodate new entrants. Every carrier wanting to serve these cities has been granted entry. Indeed, the four airports of concern to the Board, namely Denver, San Diego, Los Angeles, and San Francisco, today have as many or more carriers serving them than do other cities which generate the same or even more pas-

112. Id. at 2.
113. Id.
114. Id.
117. Id.
118. Id.
119. Id. at 17.
The application added that Denver has accommodated 37% more departures since deregulation. Furthermore, Continental/Western pointed out in its second application that the potential duopoly between the merged carrier and United is no worse than most markets around the country: "Continental and Western derive only 25.6% of their mainland revenues from routes also served by United. Every other carrier, except Ozark, derives a larger portion of its revenues from routes also served by its primary competitor."122

In approving Continental/Western II, the Board sustained an ALJ finding that the competitive climate has changed sufficiently so that the merger of Continental and Western can now be approved.123 Still, while agreeing with the ALJ's conclusions, the Board in Continental/Western II clarified its views on the importance of market definitions, hub strength, and airport access problems in analyzing mergers.

In defining relevant antitrust analysis markets, the CAB found that aggregating airline traffic into "broad geographic regions ignores the differing service characteristics of the city pairs or clusters of city pairs in a region and the varying capabilities of airlines to serve particular types of routes."124 Consequently, the Board concluded that analyzing mergers through regional markets is no longer consistent with the "functional" analysis, which determines whether a merger will result in excessive economic power in any relevant market.125 Curiously, rejection of "regions" as relevant antitrust analysis markets appears to reverse, at least in Continental/Western II, Board policy in all previous merger cases decided since deregulation, including Republic-Hughes126 which was decided only six months before Continental-Western II.

As in TXI-National,127 the Board discounted the importance of hub strength, standing alone, as an insurmountable barrier to entry. The Board opinion agreed with the ALJ that "feed is a relative efficiency factor and that carriers with other types of economies can successfully compete against feed-rich carriers."128 In so ruling, the Board downplayed possible distinctions between Houston, where Southwest Airlines successfully initiated service without previous hub strength, and Denver, the major hub of a

120. Id.
121. Id. at 19.
122. Id. at 21.
125. Id.
127. See text containing notes 60-62 supra.
merged Continental-Western. In Denver, United, the merged carrier, and Frontier would control sixty-five of eighty-four available gates. Such hub strength is not altogether unlike the situation in Atlanta, where the "super hubs" of Delta and Eastern were reportedly significant factors in United's decision to abandon Atlanta.\textsuperscript{129}

By downplaying the importance of feed and hub strength, the Board was also able to discount the relative significance of airport access problems at Denver. "Feed at Denver is not that essential to sustain a potential competitor and so the ability to bank a substantial number of flights is not required."\textsuperscript{130} The Board thereby effectively circumvented arguments raised by merger opponents that the Director of Aviation at Denver's Stapleton International Airport has stated publicly that eight or ten airlines that would like to operate at Stapleton cannot, due to lack of space.\textsuperscript{131}

Still, the immediate dearth of gates at Stapleton is quite severe. Because most existing gates at Denver are leased to incumbent carriers until 1993, two established Denver carriers, Frontier and Continental, are investing approximately $10 million apiece to build remote gate facilities at Denver, and approximately $1 million per year to maintain such facilities (as against $150,000 per year to maintain an ordinary airport gate).\textsuperscript{132} It seems highly unlikely that new entrants would risk such outlay for remote gates, and no new gates are expected to be added for at least two or three years.\textsuperscript{133} Consequently, potential entrants at Denver would appear to be, at least in the short term, precluded from entering and disciplining Denver markets.

However, because of mitigating factors such as a commitment by the City of Denver to foster new entry and expand existing services,\textsuperscript{134} plus the merger opponents' failure to convince the Board that a fourth carrier capable of substantial hubbing at Denver is needed to preserve competition,\textsuperscript{135} the CAB concluded that physical constraints at Denver will not cause the merger to result in a substantial lessening of competition.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{129} See, e.g., \textit{The Airlines Are Flying in a Fog}, Fortune, Oct. 20, 1980, at 50, col. 1.
\item \textsuperscript{130} Continental/Western II, CAB Order 81-3-\textsuperscript{1} (1981), at 14.
\item \textsuperscript{132} See, e.g., Frontier Exhibits in Continental/Western II, CAB Order 81-3-\textsuperscript{1} (1981).
\item \textsuperscript{133} See Peat, Marwick, Mitchell & Co., Airport Master Plan, Stapleton International Airport (July, 1980).
\item \textsuperscript{134} Continental/Western II, CAB Order 81-3-\textsuperscript{1} (1981), at 16.
\item \textsuperscript{135} \textit{id}.\textsuperscript{16}
\item \textsuperscript{136} \textit{id}.\textsuperscript{16}
\end{itemize}
VII. Conclusions

In analyzing merger cases, it is interesting to note the relative profitability of the parties involved. Pan Am, despite its successful acquisition of National, reported record losses of $66.3 million for the second quarter of 1980. These extensive losses compare to a $37.1 million profit for the same period in 1979.\textsuperscript{137} Similarly, TWA, outbid for National by Pan Am, reported net income of $645,000 for the second quarter of 1980, as against net income of $1.58 million for the same period in 1979.\textsuperscript{138} Ironically, Eastern, whose bid to acquire National was dismissed as anticompetitive, was one of only two profitable passenger airlines (the other was Delta) in the first quarter of 1980.\textsuperscript{139} While some analysts believe deregulation has been an overwhelming success,\textsuperscript{140} others have argued that the airlines' successes and failures are more a result of general economic conditions than deregulation.\textsuperscript{141} Virtually the entire passenger airline industry, whether or not involved in mergers, suffered substantial losses during the 1980 recession.

The seven passenger airline merger cases decided under the amended section 408 clearly indicate the Board has adopted a policy of examining all competitive factors which might affect competition in any relevant markets.

In \textit{North Central-Southern},\textsuperscript{142} the CAB approved a merger involving two relatively small regional carriers whose routes met in a few common points, but did not overlap to any significant extent. The Board also found that without a merger, there was very little chance that either North Central or Southern would enter the other's territory. Arguably, the union of North Central and Southern actually increased passenger airline competition by affording the merged carrier, Republic, the economies of scale necessary to enter markets neither carrier would have entered alone. Similar reasoning applies to Republic's subsequent purchase of Hughes,\textsuperscript{143} although there, the argument that Republic was an unlikely entrant into Hughes' route network becomes more tenuous because of Republic's strengthened route system acquired in the merger which created it. Still, no party in Re-

\textsuperscript{137} Wall Street J., July 25, 1980, at 5, col. 2.
\textsuperscript{138} Wall Street J., July 30, 1980, at 24, col. 7.
\textsuperscript{139} \textit{Airline Layoffs and Flight Cuts Spread}, Wall Street J., June 19, 1980, at 4, col. 1.
\textsuperscript{141} See, e.g., Willard, \textit{Airlines and the Economy}, Wall Street J., Apr. 7, 1980, at 19, col. 1. Willard argued that 11.2\% of increased passenger travel in 1978 was due to income distribution alone, and that only 5\% was due to fare cuts. Willard also predicted that after the economy headed into a recession in 1980, most airlines would lose money, regardless of deregulation.
\textsuperscript{142} North Cent.-Southern Merger Case, CAB Order 79-6-7 (1979).
\textsuperscript{143} Republic-Hughes Airwest Acquisition, CAB Order 80-9-65 (1980).
public-Hughes challenged Republic's assertion that absent a merger, Republic had no plans to enter Hughes' markets.

By contrast, both Continental/Western \(^{144}\) and Eastern-National\(^{145}\) would have consolidated airline companies with substantial actual and potential route overlaps. Both applications were rejected as anticompetitive. The potential route overlap problem in Continental/Western I, coupled with airport access and price inflexibility problems, caused particular Board concern about the possible creation of a duopoly between United Airlines and the merged carrier in the region west of Denver.

TXI-National\(^{146}\) and Pan Am-National\(^{147}\) both strengthened and refined the trend begun in North Central-Southern toward antitrust law being applied functionally, and toward a thorough review of the industry characteristics in each case. Additionally, both the TXI and Pan Am cases emphasized that market shares are only one of many factors to be considered in determining whether the effect of a merger "may be substantially to lessen competition or to tend to create a monopoly." Although both TXI and Pan Am engaged in some direct competition with National, analysis of other competitive factors led the Board to conclude that neither merger would have violated Section 408. In the TXI case, existing competition and likely new entrants in actual and potential markets outweighed the loss of one independent competitor, National. In the Pan Am case, the Board found that bilateral agreements between the United States and Britain impede competitive entry into the Miami-London route. Still, the Board exercised its statutory power to "impose terms and conditions" and approved Pan Am-National on the condition that Pan Am divest itself of Miami-London route authority. The Board's questioning whether "National was ever a vigorous price competitor,"\(^{148}\) further supports the finding that Pan Am-National and TXI-National did not substantially lessen competition.

Finally, in Continental/Western II,\(^{149}\) the Board reversed its eighteen month-old finding in Continental/Western I that a merger of Continental and Western would substantially lessen competition in violation of section 408. The Board held that regional market definitions were not relevant in analyzing Continental/Western II, and downplayed the importance of "feed" traffic and airport congestion at Denver in approving Continental's and Western's second merger application. In light of the CAB's strong laissez-faire approach in approving the merger of Continental and Western, it seems highly unlikely that the Board will disapprove any future mergers,

\(^{144}\) Continental/Western I, supra note 5.


\(^{148}\) Id. at 43.

\(^{149}\) CAB Order 81-3-3- (1981).
including those now pending between Continental and Texas International, and between Air Florida and Air California. Perhaps merger opponents, including the United States Department of Justice,\textsuperscript{150} will now attempt to circumvent Board merger policy by challenging airline mergers in the courts. Such collateral attacks are indeed possible, because the CAB has not once granted antitrust immunity since deregulation.

\textit{Robert A. Grantham}

\footnote{150. See, e.g., Brief of the Dept. of Justice at 4, Continental/Western II, CAB Order 81-3-\_\_ (1981).}
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Clear Track for Deregulation
American Railroads, 1970-1980

WILLIAM E. THOMS*

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I. INTRODUCTION

The railroads have been the most intensely regulated of the major transportation modes in the United States. The first major industrial corporations to wield great power, they alternately sought and avoided regulation. Regulation was generally conceived as being necessary to correct abuses of monopoly power, and the Interstate Commerce Commission (ICC) is the oldest of the independent federal regulatory agencies.

The history of ICC regulation has been well documented elsewhere. The scope of this paper is the decade between the Rail Passenger Service Act of 1970\(^1\) and the Staggers Rail Act of 1980.\(^2\) In between, there is a development of a legislative and regulatory consensus that relaxation of regulation is what was needed to save the ailing railroads from bankruptcy, liquidation, or nationalization. During this period, Amtrak relieved the railroads of intercity passenger service, Conrail relieved the railroad industry of the problems involved in operating the bankrupt Northeastern lines, state and local operating authorities relieved railroads of commuter service, bankruptcy courts were given the authority to overrule the ICC on abandonment cases, and the railroads themselves were given self-help to compete more favorably with barges, planes, and trucks.

All these legislative changes involved, to some extent, loosening of regulatory constraints on railroads. The government’s financial assistance

to rail operations has increased, but the current administration is planning to curtail or terminate many of these subventions. Exercise of rail deregulation may show us whether or not a freer market can deal with the problems of a declining industry while at the same time preserving that industry’s traditional role of providing service to the public.

II. The American Railroad System

Although virtually all the railroads in the world were originally built with private capital, American railroads are unique in that they stayed in private hands. Only the Canadian Pacific Railway shares this unique status. Elsewhere in the world, railroads are run by the state and are administered for public or social benefits very much like highway departments. In the year 1982, America’s railroads are facing a regrouping and may emerge from the decade in six major systems, but they are still operated as for-profit entities. The railroads of this country are overwhelmingly dedicated to the carriage of freight. Virtually all intercity passenger service is operated by Amtrak, while commuter trains are the responsibility of state and local governments. Railroads have been prevented from diversifying except for grandfather rights they held before the passage of the Motor Carrier Act of 1935, and few operate any transportation properties other than railroads. Within the freight business, railroads have a captive market in bulk, low-grade commodities; most of the high-rated traffic goes by truck.

A half century ago, railroads had what amounted to a monopoly on passenger and freight traffic. The airline and motor bus had not yet developed as competitors for the long distance market and the interurban electric railway was moribund as a competitor. Trucks were limited by the state of roads in that era and the resurgence of towboating on the navigable waterways awaited the development of the marine diesel engine. For the preceding century, railroads had shaped the transportation pattern and much of the law and politics of the nation.

Railroads were the first large corporations to arise from the Civil War years. Railroads were, and still are, the largest industrial employers in agricultural states. Railroads are tremendous instruments of power, and the men who controlled them in the 19th Century seemed larger than life to

8. See generally P. Lyon, To Hell in a Day Coach (1968).
their supporters, detractors, and especially to themselves. "Railroad magnate" became synonymous with "robber baron" in the popular press—from lord of creation and captain of industry the railroad presidents became known as the scourge of the farmer, the blight of small towns, the oppressor of labor, and the foe of passenger and shipper alike.9

A. Why Regulation Began

The call for regulation of railroads, like that for most utilities, arose because the public perceived that competition was imperfect. Many believed that railroads, like gas and electric companies, were natural monopolies, where the market in a given area could best be served by one supplier. But, in the absence of competition, that supplier had to be regulated.

Railroad regulation is older than antitrust regulation, and, in fact, all modern administrative law flows from the ICC model for regulation of railroads. Regulation of the rail lines began in the states, principally the Granger areas where the local elevator and the farmers served by it were dependent upon rail freight service.10 The ICC arrived on the scene in 1887 as a creature of limited powers. It did not receive authority to control entry, exist and rates until the Twentieth Century.

Slowly, the ICC's authority increased until it encompassed railroads, water carriers, freight forwarders, motor carriers, and for a while, telegraph companies and even Standard Time.11 But the states always retained some authority. Under the partial abandonment doctrine, although abandonment, even of an intrastate line, was the concern of the ICC, states had jurisdiction of downgrading service or discontinuing some portion of the service, such as passenger trains.12 The authority of the states continued, although drastically curtailed by Section 13a, added by the Transportation Act of 1958.13 State authority over railroads was further curtailed by passage of the Staggers Act of 1980.14 Still, even today, each state has a public utilities or public service commission, or, as it is called in more traditional states, a Railroad Commission, with authority over intrastate rates and services at stations within the state.

Most analysts will tell you that the American railroad system is terribly overbuilt. Much of this stems from the fact that railroads were the only

11. Much of the ICC's authority has been spun off to other agencies, such as the FCC or the Department of Transportation. See generally J. Burby, The Great American Motion Sickness (1970).
method of practical transportation at the times that the lines were built. Five miles was about the maximum that a farmer could drive to a grain elevator or railroad station and return home with time to do anything else. Without all-weather roads connecting isolated localities, there was no choice but to get a railroad to serve your town. Whole communities went into hock because they were convinced to buy stock in a line which would convert their sleepy burg to another Omaha or Kansas City.

When the Pacific railroad was authorized in Lincoln’s administration, Congress specified that the eastern terminus would be on the Missouri, rather than the Mississippi River. Thus, the lone Union Pacific mainline to the west was matched by more than a half dozen lines running from Omaha to Chicago. The financial repercussion from this excess of transportation facilities is being felt to this day.

Yet when a rail line is abandoned, it is gone. In this day and age no one is going to come back and build another one. Therefore, it behooves the body politic to insist upon regulation that at least insures a second look before vital transportation segments are ruptured because one particular management could not make a go of it. This is important because of the nature of the easement that many railroads are built upon. Once the line is abandoned, the land may revert to the underlying farmer. If anyone would want to resume operations, he would have to reacquire the land.

B. Diesel Freight Development

The railroads that did make a go of it handled long-distance freight in great quantities. This was the traffic that caused the erection of giant steam engines—the largest the world has ever seen—and brought even larger electric locomotives to crest the Alleghenies on the Pennsylvania, the Bitterroots on the Milwaukee, the Cascades on the Great Northern. All these fell to the diesel-electric locomotive which, freed of the need for water or wire, could operate in all climates and topography with a minimal crew. Even better, the diesel could be multiplied so that one crew could control the equivalent of five or six engines. Freight trains grew to the hundred-car mark or more. The diesel of course used the same oil that the trucks and barges used, but the virtue of railroads from an energy standpoint is that they can be run with many different fuel sources. The iron horse did without petroleum for one hundred years, and he could do it again if the need pressed us. 15

The success in moving bulk freight and in operating long-distance freight trains has not been matched in other areas. The United States has

15. American Coal Enterprises, Inc., a research organization for the coal industry, has recently unveiled plans for the ACE 3000, a coal-powered steam turbine locomotive, which it feels will be a replacement for the diesel-electric. TRAINS, May 1982, at 10.
experienced a near-total decline in rail passenger service and virtually all such trains are now operated by Amtrak. Even these may not continue if current Reagan administration proposals are followed.\textsuperscript{16} In such a case, the U.S. would be the first major industrialized nation to abandon rail service as a means of intercity passenger transportation.

Hostility toward passenger trains has been a concomitant of railroad policy during the latter half of the Twentieth Century, largely due to the losses which they inflicted on private management. Since 1971, the private railroads have been relieved of the passenger obligation, but they are still the operators of most Amtrak trains (Amtrak owns little track and employs few operating crews and relies on contracts with private lines for operations) and would be glad to see the passenger trains off the line, where they allegedly interfere with freight operations. Passenger trains, being labor-intensive and demand-sensitive, have been a difficult area to operate profitably, as Amtrak has found during its decade of existence.

\textbf{C. Branch and Short Haul Trains}

Other areas which have been problematic for railroads are branch lines and short haul trains. Branch lines handle a low density of freight but still require full train crews and incur maintenance costs. Other casualties of the past two decades have been less-than-carload lot shipments, stock shipments, and railway express. Small parcels, if they do travel by rail, do so in trailers riding on flat cars.

But one of the biggest cleavages in profitability is between the Eastern and Western lines. Western lines have the long haul, few branches, and few congested terminal areas. Eastern lines, which have all of the above, are presently clustered around the government-subsidized Conrail system, which also faces an uncertain future.\textsuperscript{17}

The traffic which the railroads can most count on is that where there is no viable alternative. This captive traffic includes coal, trap rock, cement, and other low-rated commodities. There are not enough trucks to move the coal in this country which must move to generating plants, even if the roads could take their weight. Water carriage is an alternative, but the rivers don't run where the coal is. Coal slurry pipelines have been proposed, and they have less offensive externalities than noisy coal trains. But pipelines would be single-purpose operations, which yet might threaten the solvency of multi-purpose carriers like railroads. Also, coal slurry lines require a great deal of water, which is usually absent where coal is mined. Wheat, barley and other grains are also dependent upon the rails for movement to market.

\textsuperscript{16} Trains, April 1982, at 13.

\textsuperscript{17} Phillip's Success has Sneaked in, Trains, Feb. 1982, at 6.
at least for shipments over 200 miles. Past that distance, agricultural truckers are hard-pressed to cover costs, even with backhauls.

D. Labor Costs

No discussion of the railroad industry today would be complete without mentioning the labor costs of the business. Labor productivity soared after invention of the diesel-electric locomotive with multiple-unit capacity. Longer trains, operated on a less frequent basis, were the watchword of most railroads (with a few notable exceptions like Rio Grande). But some anomalies still remain. Diesel and electric locomotives required a fireman from the signing of the National Diesel Agreement in 1934 until the compulsory arbitration decreed by Congress in 1963.\(^{18}\) Railroads still maintain such century-old features as the 100-mile day and division between yard and road crews, and carry the burden for labor protection agreements in case of mergers or consolidation when railway workers lose their jobs.\(^{19}\)

Our railroads have remained in private hands. Even Amtrak and Conrail are technically for-profit corporations, subsidized by the Federal government.\(^{20}\) The competition is also private, but benefits from public provision of an infrastructure. Buses and trucks operate on public highways and benefit from a regulatory scheme, which, until recently, protected them from excess competition. Barges operate on federally-maintained waterways which were, until 1978, free from user charges. Privately-owned airways utilize the airports and air traffic control systems provided by the public. It has been estimated that the average airline passenger pays about one-quarter of the cost of maintaining such a system on a fully-allocated basis.

Railroads and pipelines are the only forms of transportation that build, own, maintain, and pay taxes on their own right-of-way. Accordingly, railroads incur substantially higher costs for access to markets than the other modes.\(^{21}\) These higher costs inhibit the industry’s ability to implement technological advances.\(^{22}\)

Thus, there has been a move to shrinkage of rail’s fixed plant in this country. Two-thirds of all the rail traffic moves over only 20% of the rail system, while ten percent of the system accounts for less than one-half of one percent of the traffic.\(^{23}\) Railroads have had to proceed before the ICC before abandoning trackage; no such exit requirements are placed on mo-

tor carriers. For a while, the system remained intact, with only redundant branch lines and monstrosities like the Colorado Midland and New York, Ontario & Western (which probably never should have been built in the first place) being abandoned.24 Suddenly, in the 1980s, we have lost the Rock Island. The Milwaukee Road’s transcontinental line now ends in a place called Miles City, Montana.25 Conrail is to be sold off to the highest bidder.

III. Regulation by the ICC

Washingtonians like to speak of the three great museums along Constitution Avenue: the Smithsonian Institution, the National Archives, and the Interstate Commerce Commission. Approaching its centenary, the ICC, the first of the Federal regulatory agencies, is the model after which most state and Federal agencies have been formed to administer monopolies and oligopolies, control entry and exit, and protect the public against rates that are too high and carriers against rates that are too low.

The original Act to Regulate Commerce of 188726 set up the Interstate Commerce Commission as the body to regulate railroads—but in a half-hearted way. Its powers were limited to rate discrimination. Focus was directed at the type of situation wherein John D. Rockefeller conspired with the railroads to give him a lower rate than his competitors and to pay him a rebate on each barrel his competitors shipped on the railroads. Common law tradition held that just and reasonable rates should be charged by bargemen and other common carriers. However, by the Naughty Nineties, the judicial philosophy was clear that whatever rate had been agreed upon by the parties was the best rate. Professor Richard Saunders takes the story from there:

The Hepburn Act of 1906 plugged the loopholes of the original act and gave the commission the power to approve maximum rates. The Mann-Elkins Act of 1910 plugged a loophole in the Hepburn Act. The ICC flexed its new muscles over rate-making by denying the railroads’ requests for general rate increases in 1911 and again in 1912: . . . The clamor for regulation could not be denied.27

On December 29, 1917, President Wilson seized the railroads. It was our first and only experiment with nationalization (except for the Alaska and Panama Railroads). Ownership remained in private hands, but operations were hence to be conducted by the United States Railroad Administration (USRA) for the duration. Under the new administration, the railroads re-

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25. The State of South Dakota has now purchased the Milwaukee Road’s main line and hired the Burlington Northern to operate it. TRANS., May 1982, at 13.
27. SAUNDERS, supra note 10, at 34.
tained their own identities, but through routes and co-ordination were imposed regardless of whether the co-operating routes were former rivals. Wilson's son-in-law, William Gibbs McAdoo, was named chief administrator. Trains were operated as solid units through to their destinations, and many shorter routes were fashioned from once-competing lines. By 1920 the lines had been returned to private hands. The idea of consolidating the railroads stayed alive. USRA, though excoriated for government inefficiency, was often extolled as an example of what consolidated operation could do.

A. GROWTH OF ICC REGULATION

The thrust of the 1920 Transportation Act was to put together a plan for consolidation of the railroads of the United States. We were not to follow the European countries into nationalization, but we were interested in forming a few major systems. The ICC hired Professor William Z. Ripley of Harvard University to draw up a plan for consolidation of all systems into no more than thirty systems of equal size and power, which would preserve competition, existing routes and channels of trade. Ripley's 24-system model was used as a basis for ICC discussion and was later abandoned.

The Transportation Act of 1920 established entry controls for railroad construction. Subsequently, the Motor Carrier Act of 1935 placed similar controls on railroading's growing rival, the truck. Five years later, the Transportation Act of 1940 brought water carriers under ICC regulation.

The Transportation Act of 1940 did away once and for all with the Ripley plan, or any other type of compulsory coordination of railroads. The Act, however, gave the ICC power to approve mergers, consolidations and control of railroads, immunizing these combinations from prosecution under the antitrust laws.

The Transportation Act of 1958 completed the regulatory scheme by ending the partial abandonment doctrine and transferring to the ICC jurisdiction over discontinuance of passenger trains. Section 13a of the Act allowed the ICC to take jurisdiction if a railroad had received an unfavorable decision on a train discontinuance from a State regulatory commission and to take original jurisdiction if the train operated in two or more states. Under the provisions of this law, over 1000 passenger trains were discontinued with ICC's approval between 1958 and 1970. Upon Amtrak's inception, a

28. Id. at 37.
29. The Transportation Act of 1940 put an end to the mandatory planning responsibilities of the ICC, at the same time facilitating ICC approval of voluntary mergers. 49 U.S.C. § 11341 (1980).
moratorium imposed by the Rail Passenger Service Act put an end to ICC discontinuance proceedings.

The Transportation Act of 1958, which also provided for low-interest loans for railroads in financial difficulty, represented the high-water mark of ICC railroad regulation. All the reform bills passed after 1958 moved in the direction of deregulation, rather than further ICC regulation of railroad service.33

B. PATTERN OF ICC REGULATION

1. REGULATION OF ENTRY

A railroad company must have a certificate of public convenience and necessity before building a line, or taking over and operating an existing line.34 In addition, if a railroad which is already in operation desires to extend its current line, it must seek a certificate for the extension. Proof of the adequacy of existing service, traffic to be generated, and support of the shipper are necessary for a certificate to be granted. An extension certificate is not, however, required when the line to be built is a mere spur or industrial track.35 Determining what is a spur and what is an extension has taken up a good deal of the ICC’s time. Until passage of the Staggers Act, it was considered to be an extension if a line tapped territory that was currently served by a competitive railroad.36

The reason behind such a restriction is to prevent the construction of “nuisance” railroads serving the same area as a parallel line. A good example of such a line was the West Shore Railroad, built parallel to the New York Central from New York City to Buffalo for the very purpose of embarrassing the Vanderbilt interests and persuading them to buy out investors of the competing line. There might be enough traffic in a certain area for one or two railroads, but no more. The oversupply would be a waste of resources. Worse, the traffic might be so diluted that no railroad could make money and all might be abandoned. The newest line to be constructed in this country is the Powder Basin line in Wyoming, built by the Burlington Northern in connection with the Chicago & North Western.37 Otherwise, this section of the Act has seen very little use in the past decade.

37. This line opened in 1980 and is the longest new trackage since the 1920s. It is presently under litigation, with the BN charging that partner C&NW is actually a stalking horse for the rival Union Pacific. Presently, only Burlington Northern is operating this spur. See Sierra Club v. ICC (D.C. Cir.), vacated without explanation, (1978).
2. REGULATION OF EXIT

A railroad may not abandon a line without permission of the ICC, which has to determine that the public convenience and necessity permit the abandonment.\textsuperscript{38} The term "abandonment" means ending of all train service over a particular route, after which the railroad is free to rip up the tracks and sell them for scrap or to another buyer; that makes abandonment a very drastic procedure. Current policy is to insure a waiting period during which other railroads or local authorities may bid on the right of way. Meanwhile, the rails remain in place. Usually, it is the railroad which petitions to abandon the line, but a petition may be brought by another party, i.e., a highway department which might want an unused line removed or relocated so it may commence construction.

Discontinuance of service is a much less drastic matter. Although Section 13a of the Act\textsuperscript{39} refers to discontinuance or change of schedule of "trains", as a matter of fact, the section has only been used for withdrawal of passenger services.\textsuperscript{40} As this field has generally been pre-empted by Amtrak or commuter operating authorities, the ICC has had very little regulation of discontinuance of trains in the last decade.\textsuperscript{41}

3. REGULATION OF RATES

The principle of ICC control of rates is that "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable."\textsuperscript{42} Rates are proposed by the carrier and unless the Commission finds them to be unjust or unreasonable, they go into effect with the binding effect of law.

The Transportation Act of 1920 required the ICC to "give due consideration to the effect of rates on the movement of traffic and to the need of revenues sufficient to enable the carriers...to provide service." But this was amended in 1933 to require that the Commission also consider the need for rail transportation "at the lowest cost."\textsuperscript{43} Since the enactment of the National Transportation Policy in 1940, it has been the task of the ICC to reconcile these inconsistent directions. In the Transportation Act of

\textsuperscript{38} 49 U.S.C. § 10903 (1980).
\textsuperscript{39} 49 U.S.C. §§ 10908, 10909 (1980).
\textsuperscript{40} THOMS, supra note 12, at 103.
\textsuperscript{41} See D. & R.G.W.R. Co.-Discontinuance of Passenger Trains, 360 I.C.C. 216 (1979), to date the last case handled under Section 10908 (former 13a).
\textsuperscript{42} Louisville and Nashville R.R. v. Maxwell, 237 U.S. 95, 97 (1915).
\textsuperscript{43} DEPARTMENT OF TRANSPORTATION, A PROSPECTUS FOR CHANGE IN THE FREIGHT RAILROAD INDUSTRY 118 (1978).
1958, Congress addressed the problem of "umbrella ratemaking," requiring that "the rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode . . . giving due consideration to the objectives of the national transportation policy."  

ICC rate regulation for the railroads was very similar to the way states regulated utilities. Rates were limited in the fact that a short haul could not cost more than a long haul on the same track. Volume discounts for large shippers were discouraged. If a rate moved the traffic, there was a rebuttable presumption that it was just and reasonable. Costs were not ipso facto an element in ratemaking; rather, rates were based upon value of service.

Rail rate regulation adversely affected the railroads in competing with exempt motor carriers. It was not uncommon for exempt rates to vary from 300% of the rail rate during peak demand to 50-60% during slack periods. The exempt truckers could change their rates seasonally; railroads could not. Rail rate regulation was also used to implement a policy of port and product equalization. Raising rates on competitive traffic to make up for the losses of this subsidized freight would merely have resulted in less traffic. The only real choice was to raise the rates for captive shippers.

The Transportation Act of 1920 first gave the ICC authority to raise intrastate rates that were so low as to constitute a burden upon interstate commerce. The Transportation Act of 1958 directed the ICC not to consider the totality of intrastate operations; the ICC could look at one particular rate to find if it burdened interstate commerce. If the rate is not burdensome on interstate commerce, state public service commissions have jurisdiction over rates within that state. Since 1958, state jurisdiction over intrastate rates and operations has steadily been whittled away.

4. **Oversight of Services by the ICC**

In addition to entry, exit and rates, the ICC has power to determine a minimal level of acceptable service to the public. Generally, this means

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44. "Umbrella ratemaking" was a device to protect the market share of each mode. Under the ICC umbrella, a certain symmetry prevailed with trucks being the highest rate, rail next highest, and water carriage the lowest. The scheme could not totally succeed because of the existence of private and exempt carriage. Nonetheless, fears were strong that railroads, with their large market power, might cut rates to put truckers out of business.

45. Department of Transportation, supra note 43, at 119.

46. Id.


assuring access to cars on a nondiscriminatory basis. There has been a severe shortage of boxcars (or an inefficient use of them) until recently, and many critics blame the ICC for lax enforcement or inadequate per diem charges.\textsuperscript{51} The victim of this shortage is usually the small grain or lumber shippers.\textsuperscript{52}

Oversight functions also include sanitation standards for cars hauling grain and other foodstuffs and protection of the safety of livestock shipped by rail and truck. Safety regulation of railroad equipment has been transferred to the Department of Transportation.\textsuperscript{53}

Thirty years ago, Robert R. Young said "A hog can cross the country without changing trains, but you can't."\textsuperscript{54} Although maintaining sanitary standards and minimum conditions for livestock, the Commission denied it had authority to demand minimum comfort standards for rail passengers.\textsuperscript{55} Later given such authority in the Amtrak law,\textsuperscript{56} its oversight functions were unfortunately removed in another amendment to the Rail Passenger Service Act.\textsuperscript{57}

\section*{C. RESULTS OF ICC REGULATION}

By 1970, the effect of utility-type regulation upon the railroads had been amply documented. The industry everywhere was in decline, with higher fixed costs leading to a rate of return much lower than the cost of capital.\textsuperscript{58} Some railroads had disappeared, others were seeking salvation through merger with parallel lines: \textit{by} 1970, the Burlington Northern, Seaboard Coast Line and Penn Central systems were realities.

There had been some savings in labor cost through dieselization and consolidation of trains, but increased labor costs were still passed on to the public in general rate increases.

The New Haven Railroad had gone bankrupt in the 1960s. In 1969 the bankruptcy problem was settled by forbidding the hapless New Haven on the Pennsylvania and New York Central, as a condition of their merger.\textsuperscript{59}

\begin{thebibliography}{99}
\bibitem{52} Many individuals invested in private box cars to take advantage of higher per diem rates, and also to obtain a tax shelter for investment. Now, with traffic having slowed down and railroads having a substantial inventory of their own, these investors are stuck. \textit{See} \textit{TRAFFIC WORLD}, Jan. 5, 1981, at 48.
\bibitem{58} The rate of return on net worth for American railroads for the calendar year 1979 was 5.5%. \textit{See} F. WILNER, \textit{COMPETITIVE EQUITY} at 6-7 (1981).
\bibitem{59} SAUNDERS, supra note 10, at 182-85; 198-200.
\end{thebibliography}
On June 21, 1970, the Penn Central (as the three merged partners were then called) filed for reorganization under Section 77 of the Bankruptcy Act—the largest business debacle to date. During the decade to come, most of the Eastern railroads would soon follow Penn Central into bankruptcy.

Passenger service was on the verge of disappearing by 1970. The industry seemed to be fulfilling the predictions made fifteen years earlier by Howard Hosmer, an ICC hearing examiner.\(^{60}\) The bankrupt Penn Central filed for discontinuance of all its long-distance passenger trains, an act which was the proximate cause of the legislation which led to Amtrak.\(^{61}\)

Railroads were still prevented from diversifying into other forms of transportation. Despite the bad luck which had fallen the nation's rails, critics were still talking of the ICC's capture by the industry it was supposed to regulate.\(^{62}\) If this was regulation, the public was seeing few of its benefits. George Hilton published a scholarly article in the popular publication, *Trains*, subtitled, "The ICC Must Go."\(^{63}\)

**IV. THE RAIL PASSENGER SERVICE ACT OF 1970**

**A. THE PASSENGER PROBLEM**

With the exception of the heavily-travelled Boston-Washington corridor, service levels on American passenger trains are the worst in the world. Largely, this decline has been the result of government emphasis on highways and private automobiles for movement of people between cities. Other modes of transit have filled the gap previously met by passenger trains; airlines have developed an internal system much more rapidly in the United States than elsewhere and the intercity bus system developed on a relatively untrammelled private basis.

Passenger trains are labor-intensive, due to the necessity for on-train services, fare collection, and because of agreements between the railroads and the operating brotherhoods. The railroads, which devote most of their interest to freight traffic, found it more profitable to discontinue the trains rather than to renegotiate the labor agreements. Now, as a result, diesel engines on passenger trains still carry a fireman, though that functionary has been eliminated on freight trains.\(^{64}\) The pricing of rail travel is somewhat between bus and air fares, but on a fully-allocated basis, the rail fare

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would have to be higher than air. If that were done however, virtually no one
would ride the trains.

For this and other reasons (obsolescence of equipment and need for
replacement, freight train interference, wish to be free of bad public rela-
tions, etc.) the major railroads moved to discontinue passenger service on a
piecemeal basis during the 1950s and 1960s. Sometimes this was done
through downgrading service on trains so as to reduce patronage. The
train would show a greater loss and impress regulators with the urgent need
for relief.65

The ICC had supplanted the state regulatory agencies in permitting exit
from the passenger train business in 1958. Less influenced by hometown
considerations, the ICC was more lenient about allowing exit than the states
had ever been. During this time, most of the major passenger routes were
down to one train a day and even these were being posted for discontinu-
ance. The Commission attempted a sort of moratorium while Congress was
deliberating what type of bill to pass.

Assuming the political necessity of passenger trains, and seeing that
traditional regulation could not preserve the last trains on many routes, Con-
gress wrestled with the need for government subvention. Proposals took
two forms: subsidies or nationalization. Subsidies proved to be politically
unpopular, since the beneficiaries would be the same railroads which had
done their best to discourage the few remaining passengers, and national-
ization sounded much too left-leaning for the Nixon administration.66 The
result was that Congress rejected both alternatives in favor of an ostensibly
private National Railroad Passenger Corporation, first known as Railpax,
but which soon emerged as Amtrak.67

B. THE AMTRAK APPROACH

On paper, the National Railroad Passenger Corporation is a for-profit
private entity and not a part of the United States Government.68 Its owners
are private railroads which bought into the corporation as a consequence of
discontinuing passenger trains of their own: Burlington Northern, Grand
Trunk Western, Milwaukee and Penn Central. The latter two railroads are in
bankruptcy proceedings. Even though Amtrak is considered private (and

see also Fellmeth, supra note 51, at 300-304.

330 (1971).

67. Amtrak, standing for “American track”, was thought up by image-makers Lippincott &
Margulies in 1971 for what had tentatively been known as “Railpax” since the passage of the Rail
Passenger Service Act of 1970. In 1979, amendments to the Rail Passenger Service Act made the

obligated to pay property tax to the local communities through which it runs) over fifty percent of its budget comes from government largesse.

How, then, was Amtrak, as a private concern, supposed to succeed where other private lines had failed? The theory was that a streamlined system could reduce deficits by consolidating traffic on the stronger lines and consolidating terminals and other duplicating facilities. By ordering equipment on a nation-wide scale and operating on a country-wide basis, economies of scale could be attained in marketing, purchases, and operations.

But, it also seems possible that the Amtrak scheme was never expected to be a money-maker. The first effort of the Congress at government support of rail operations, it merely seemed to be an effort to get the passenger monkey off the railroads' backs. In this way, Amtrak was a pro-railroad rather than a pro-passenger law. Its first president, Roger Lewis, and his initial cautious moves seemed to betray the fact that Amtrak was meant to be a passenger euthanasia scheme. Every secretary of transportation since Volpe has come up with some variant of the slow withering-away of passenger service as his department's philosophy for Amtrak. However, Congress comes to the rescue of Amtrak again and again.

Amtrak, outside the Northeast Corridor (which it owns), functions through the mechanism of contracts with operating railroads. The railroads supply the tracks and crews to operate the trains and are reimbursed their costs plus a small profit. With any cost-plus arrangement there is room for a great deal of manipulation of apportionment of costs between passenger and freight service. There is room for excess padding of costs to Amtrak, which are thus folded into the cost base for Amtrak. The result is an Amtrak deficit; this of course, is picked up by the general taxpayer.

C. AMTRAK AND REGULATION

Since Amtrak is thought of as a proprietary program, it is a bit unusual to think of the Rail Passenger Service Act as a deregulation law. But inasmuch as it took passenger trains out from under ICC regulation, it can be seen as the first of the transportation deregulatory bills of the 1970s.

Upon passage, the Rail Passenger Service Act established a moratorium on abandonments, along with a delegation to the Secretary of Transportation to draw up a system for long-haul passenger trains. From

69. Southern Pacific president B.F. Biaggini predicted at the time that Amtrak's mission should be to "preside over the orderly dissolution of railroad passenger service," and Burlington Northern's president Lou Menk (also a director of Amtrak) urged the corporation to allow the long-distance train to follow the stagecoach into oblivion. On the long-term hostility of rail presidents to rail passengers see generally P. LYON, TO HELL IN A DAY COACH (1968).
October 1970 to May 1971, no passenger train could be discontinued.

Upon a railroad’s contracting with Amtrak to provide service, the carrier was relieved of the responsibility for operating its own passenger trains. But if a railroad did not contract with Amtrak at its inception, it could not discontinue service until 1975. Most carriers were quick to take advantage of this provision, although some hung on for quite a while. Even Amtrak was subject to the ICC if it wanted to eliminate trains in the “basic system”, but that provision was later removed by amendment of the Amtrak law. Presently, the ICC has no role in Amtrak and the passenger corporation is limited only by its own internal criteria (and whims of Congress) in discontinuing service. As far as exit from the market is concerned, Amtrak is a deregulator’s dream. The route structure of the system is deregulated, and Amtrak can (theoretically) spend its resources as it sees fit.

Actually, Congress has not been content to let Amtrak pick and choose routes. Several times it has intervened to protect or institute certain politically-sensitive routes. Congressmen are reluctant to let a service which benefits their district disappear. The only substantial cuts to date have been those which were implemented by Congressional directive in 1979 and 1981. The Secretary of Transportation was mandated to draw up a revised system, which is the slimmed-down Amtrak network which is operated today. Even then, Congress set some standards to insure “regional balance” into the criteria for discontinuance.

The ICC has never had any jurisdiction over Amtrak’s fares, and the passenger corporation has tried all sorts of promotional schemes, excursion fares, and even one year giving children rides in exchange for Kellogg’s box tops! This presents a problem because Amtrak is heavily subsidized and competes for traffic with carriers receiving no direct subsidy. As a result in 1978, Congress enacted a section giving some rudimentary control to the ICC if it discovers that Amtrak’s rate-cutting is destructive or predatory as to its effect on a motor carrier. The ICC has not yet seen fit to exercise these powers. Amtrak, however, is directed to recover more of its costs from passenger fares. The options open to the company are bleak: raise fares, cut service, or attempt to renegotiate contracts with labor or the railroads. Fares have risen considerably, but so have operating costs.

74. The Rock Island lasted until 1978, the Southern until 1979, and the Rio Grande is still operating independent passenger service today. These railroads, when they did discontinue service, were subject to ICC jurisdiction.
The ICC had oversight functions over Amtrak at the beginning. Section 801 of the original Act gave the ICC the power to require certain standards (sleeping cars on overnight runs, diners at mealtimes, stations open for service before the train arrives, etc.) which the Commission had denied it possessed in the Sunset Limited Adequacies case.\(^79\) These functions were not desired by either the ICC or Amtrak, and as part of general deregulation fervor, they were removed with the Amtrak Improvement Act of 1978.\(^80\)

The ICC's sole responsibility now is an annual report to Congress on the state of passenger train service in the United States.

Amtrak's achievements include replacing and upgrading the passenger train equipment in the United States, improving and coordinating service, and reversing the secular decline in railroad passengers. Although there is less service today, what remains is of higher quality than was operated in the 1960s under private management. Its inability to control costs, however, may be its undoing, and the Reagan administration is not favorable to its continuation, on a subsidized basis.

D. **AMTRAK AS A HARBINGER OF DEREGULATION**

Rail passenger service—in 1970 handling less than five percent of intercity traffic—was considered a small, discrete area where one could see if deregulation would work. It was a pilot for the railroad industry, inasmuch as one segment of the industry operated without ICC supervision.

Amtrak is not the best example of deregulation because there is only one provider of service, the service is heavily subsidized, and politics have played a big part in operations of the system. As a matter of fact, Amtrak supervision in ten years has gone from the Interstate Commerce Commission to the Department of Transportation to Congress.

The Amtrak experience emphasizes one factor in deregulation: If Congress does not like the results, it can always recapture the power and attempt to regulate transportation itself. Since Amtrak is such a large recipient of Federal funds, it seems natural that Congressmen would want to direct what service is offered their constituents.

Amtrak represents an attempt to aid a regulated industry by unloading an unwanted and unremunerative service on the general public. The same has occurred with commuter rail transportation, the whole concept of Conrail has been to isolate the money-losing Eastern lines from the nationwide rail system. The same has occurred with programs to unload branch lines on the states.

This may be delaying the inevitable. In 1981, budget proposals fa-

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vored a slash in Amtrak subsidies, phasing-out of Conrail assistance and an end to branch-line assistance altogether.\textsuperscript{81} Congress managed to save those programs last year, yet many rail projects may be dropped completely. The traditional coalition of constituencies which have supported rail programs in the past may be unable to save these projects.

The experience of deregulation for Amtrak revealed that ICC regulation of an industry was in certain cases inappropriate or irrelevant. A similar formula of deregulation was applied in Conrail, and during the 1970s the conventional wisdom was that subsidy and merger solutions had failed to save the railroads. Maybe freedom from regulation would allow them to put their house in order the best that they could.

V. THE REGIONAL RAIL REORGANIZATION ACT OF 1973

A. THE NORTHEAST RAILROAD PROBLEM

The so-called Northeastern Problem area actually runs as far west as Chicago, in what used to be called Official Territory (north of the Potomac and Ohio; east of the Mississippi). With the bankruptcy of the Milwaukee and Rock Island, one could technically say that the Northeastern Problem area includes Seattle and Tucumcari, New Mexico. But the carriers between Chicago and the eastern seaboard, at one time the major trunk lines of the country, were the most distressed financially:

1. Jersey Central succumbed in 1967 to the paralysis of labor-intensive terminal operations in high-tax territory, without the benefit of a long rail haul.

2. Boston & Maine defaulted an interest installment of its five percent first mortgage bonds, and in March 1970, was dragged forcibly to court by four nervous creditors.


4. Lehigh Valley, dependent on Penn Central for advances that were no longer forthcoming, fell in July 1970.

5. Reading fell in November 1971, thanks largely to environmental concerns over high-sulphur coal that slashed coal tonnage 66 percent between 1967 and 1972, with the most severe decline beginning in the spring of 1971.

6. Erie-Lackwanna fell in June 1972 after all its troubles, done in at last by Hurricane Agnes, which tore out 135 miles of the mainline between Elmira and Salamanca, New York, including 11 bridges. The N & W, which controlled it through the Dereco holding company, did nothing.\textsuperscript{82}

In addition, the Ann Arbor Railroad, the Lehigh & Hudson River, the Pennsylvania-Reading Seashore Lines and even the tiny New Hope & Ivyland clamored at the federal courts for protection from their creditors under section 77.

\textsuperscript{81} TRAFFIC WORLD, March 30, 1981, at 16, 33.

The causes of decline of the eastern railroads have been widely commented upon. They include: a shrinking industrial base in eastern territory as the nation moves from a heavy-industry to a service economy, the heavy terminal costs of serving the major old cities of the country, passenger deficits brought on by heavy commuter travel and intercity operations, the decline of anthracite coal as a fuel, and the improved superhighways built in the region as part of the interstate system.

Proposals for the easing of this problem called for varied remedies: breaking up Penn Central into its original components, selling parts of the system to Amtrak, nationalization of the entire mess, turning over the profitable parts of the system to private railroads, and constructing a "firewall" line between Albany and Harrisburg. East of this, the government would operate a terminal company, west of the firewall, profitable railroads would be able to operate on a private basis.

A threatened strike over work rules on Penn Central would have disrupted lines of distribution for both the automobile and steel industries. As a result of this crisis (possibly brought upon by Penn Central itself, which moved to unilaterally change the agreed-upon rules) the Shoup-Adams bill moved to the floor of the House. The bill was drafted far from the action, in the front office of the Union Pacific Railroad in Omaha. The UP, mindful of the fact that twenty-five percent of its traffic was sent to or received from the Northeast, looked upon this as an opportunity to protect its connections, and at the same time possibly containing the Northeastern virus to its present location.83

The United States Railway Association, established by the Act, is not an "association" at all. Rather, it is one of those off-budget federally chartered non-profit corporations, like Fannie Mae. It is a buffer agency which stands between the railroads and the government, and its main role was to supervise the planning of a slimmed-down system for the Northeast.84 It fulfills the same function that the Secretary of Transportation did in the early days of planning Amtrak. Similarities between the Amtrak concept and Conrail are rife throughout this legislation. USRA also is the overseer of Conrail and sends periodic reports to Congress on the adequacy of Conrail's efforts. It can authorize loans to Conrail, interim assistance to localities wishing to acquire lines and to Amtrak (for the Northeast Corridor), and other financially-stressed railroads.85

Conrail itself, more properly termed the Consolidated Rail Corporation, is an ostensibly for-profit corporation, headquartered in Philadelphia.86 It is owned by the creditors of the old bankrupt railroads and a majority of its

83. Id. at 307-08.
directors are appointed by the President with the advice and consent of the Senate. The bill provided for labor protection for life for former employees of the old corporations who had five years or more seniority, but the corporation could move labor around wherever it desired. As Professor Saunders comments on the deliberations:

As major bills go, Congress did not put a lot of work into this one. Union Pacific supplied the bill. First National City Bank supplied the financial data. The United Transportation Union supplied the labor contracts. Committee work was minimal. So was floor debate. Support from the South and West was whipped into line with a tart reminder that x thousands of freight cars a day rolled into the Northeast with products from other regions. A largely disinterested House passed the bill in November 1973... The administration put on a blustery show of defiance... but Nixon signed it early in January. Such was the Regional Rail Reorganization Act of 1973.

B. THE EMERGENCE OF CONRAIL

Most of the 3-R Act, as the legislation setting up Conrail is known, is concerned with preserving the Penn Central and other Eastern bankrupt lines for freight service. Provision was also made for grants and loans for Amtrak to acquire certain lines, especially in the Boston-Washington corridor.

The preliminary report of the Secretary of Transportation, required under the Act, called for such drastic pruning of freight traffic that it was attacked in Congress as wasteful of energy. The USRA plan was less draconian in its approach, especially since views of consumers were heard through the newly-mandated advocacy role of the Rail Services Planning office of the ICC. During the time of planning by USRA there was a moratorium on railroad abandonments within what was to be Conrail. Meanwhile, the bankrupt railroads kept running with loan guarantees from USRA.

Many similarities exist between the Amtrak and Conrail schemes. Both owe their origin to the ideas of the late Dr. Paul Cherington of M.I.T. It was Cherington's idea that, although direct subsidies to railroad corporations were unpalatable, railroad deficits could be reduced by the process of "unloading" unwanted services, such as passenger trains, commuter lines and Northeastern freight service upon the government, as well as the cost of labor protection agreements.

Both Amtrak and Conrail laws involve government-sponsored 'private,
for profit' corporations, whose stockholders are the 'unloading' railroads.93 Both laws mandated moratoria on discontinuance of service,94 followed by massive cutbacks by the new corporations.95 Both aim at savings and eventual productivity through rationalization of routes and centralized operation,96 and both contain 'put up or shut up' sections by which localities which otherwise would be stranded can subsidize the cost of continued operation of routes within their areas.97

USRA considered several options: a big Conrail system with neutral terminal companies at New York and Philadelphia, a breakup of Penn Central, and a fixed-plant scheme under which the government would acquire track and fix it up, and then lease it to a privately financed Conrail.98 It opted at last for a single Conrail, hoping that the Chessie System and Southern Railways would acquire some of the unwanted properties to provide a semblance of competition. On April Fool's Day, 1976, the first Conrail trains began operation on the merged system. At age six, Conrail is just starting to show signs of emerging profitability. But Conrail's 1976 optimism and smugness seem to have been at least premature.99

The proposed extensions of either the Norfolk & Western or Chessie to balance Conrail in the east never came to fruition. Instead, the small Delaware & Hudson Railroad was given trackage rights over Conrail to Buffalo, Baltimore, Newark, Philadelphia and Potomac Yard, Virginia, in an attempt to provide competition for the Conrail monolith.100 The additional lines proved to be more than the D&H could swallow, and now the Albany-based road is heavily subsidized itself through loan guarantees from the USRA. The D&H was not included in the recently approved Norfolk & Western—Southern Railway merger101 (interestingly enough, the Norfolk road actually controls the D&H, but is more than willing to wash its hands of any responsibility for railroading east of Buffalo.)

All the lines of the bankrupts which entered Conrail are now either operated by Conrail itself, abandoned (with no need for ICC approval) or run by 'designated operators'. The latter are short-line railroads which operate over lines not picked up by Conrail. Usually they operate over trackage acquired by states and receive state subsidies for operations.

Conrail itself is a designated operator on many marginal lines, and operated commuter service in the New York, Philadelphia and Washington

95. 45 U.S.C. §§ 564, 744(b) (1976).
96. 45 U.S.C. §§ 545(e), 742 (1976).
100. Id. at 319.
areas as well. As a matter of fact, through its commuter operations, until 1982 Conrail actually operated more passenger trains than Amtrak. Lines between Boston and Washington, Springfield and New Haven, and Philadelphia and Harrisburg were transferred to Amtrak ownership. Amtrak charges Conrail and commuter authorities for trackage rights within the Northeast Corridor.

The United States Railway Association still functions as Conrail’s banker and planner. The Department of Transportation, citing duplication of efforts, has tried to eliminate USRA and concentrate Conrail’s planning in DOT, but so far to no avail. USRA’s 1981 report called for further cutbacks in Conrail’s service and more deregulation if the blue giant was ever to get out from the public trough.

Conrail has successfully rehabilitated hundreds of miles of trackage and has placed the former New York Central and Pennsylvania mainlines in pre-bankruptcy condition. It has negotiated an attrition settlement with rail labor which should eventually reduce crew costs. Reliability of service has improved and the system is still a vital adjunct to the auto industry in Detroit and the steel industry around Pittsburgh.

On the other hand, it has reduced service in many areas, increased charges so as to virtually embargo traffic, and is considering closing once-vital main lines like the Erie-Lackawanna and Lehigh Valley. It has consumed virtually all of its authorization and it is problematic how long the entire nation is willing to be taxed to bail out a regional railroad.

The Reagan administration drastically cut back Conrail’s authorization and plans to terminate its subsidy in the near future. However, Conrail seems to have turned the corner toward profitability. The USRA, in its April 1, 1981 report, for the first time zeroed in on “obsolete work rules that are costing the railroad more than $300,000,000 per year,” and called for a renegotiation package similar to that demanded of Chrysler Corp. employees as a condition of state aid.

In 1981, Congress amended the Conrail law to provide for a special USRA Board to determine whether or not Conrail is likely to be profitable. If so, it cannot be sold piecemeal until mid-1984. The railroad must first be offered to its employees if they develop a “financially responsible” plan. If it is determined not to be profitable, it may be parcelled out and sold at any time. Four years ago, Professor Saunders viewed the DOT’s insistence on profitability as misplaced:

Applying just a single test, whether a line could earn a profit all by itself, raised the deepest questions about the new panacea. If the concept were carried to its logical conclusion, there would be no excess capacity on the northeastern main lines.

railroads. But excess capacity was essential. It allowed for business expansion and national emergencies (of which Hurricane Agnes should have been a visible reminder). A lack of it was cited as one of the great economic bottlenecks of the Soviet Union. It also permitted "down time" so maintenance crews could do their work; lack of provision for this had made a bottleneck of PC's River Division.

Was profit and loss all that mattered? Once abandoned, a right-of-way was likely to be gone forever. At least, some thought, a "rail-bank" ought to be created to insure preservation of the right-of-way, even if the lines were abandoned. . . . 105

C. CONRAIL AND Deregulation

Like the Rail Passenger Service Act, the 3-R Act was a harbinger of the deregulation to come. Many of the features of the Act involved bypassing of the ICC; first the moratorium on discontinuances, then the planning process, and finally the discontinuance of lines which were to be abandoned (or in the euphemism of USRA, "available for subsidy").

Once a line was slated for abandonment, its continuance depended upon the state's willingness to put its money where its mouth was. Lines were subsidized by states to continue commuter service to major cities or to preserve a branch lines to rural areas. No regulatory agency was called upon to determine public needs. Oversight functions for Conrail and the other eastern roads recipient of loan guarantees are handled not by the ICC, but by USRA.

Outside of these unique factors stemming from the startup of Conrail, the big blue railroad is treated like an ordinary carrier by the ICC. It still must submit to ICC jurisdiction concerning rates and further abandonment, now that the planning process is over.

Conrail has insisted that it is sui generis, and that it will never break loose from Federal funding without complete freedom to set its own rates. What this would mean is freedom to pick and choose the traffic it will carry as well, since one Conrail estimate is limited to some two dozen commodities. Conrail is now shifting the commuter traffic burden (even though subsidized by local authorities) over to Amtrak or to the states, 106 or to the newly-established Amtrak Commuter Corporation. 107

105. Saunders, supra note 10, at 311.
106. After one year of operation under contract with Conrail, the Massachusetts Bay Transit Authority declined to continue operations. Instead, MBTA contracted with the Boston & Maine Railroad to replace Conrail for Boston commutation service, which has operated since 1977. See Passenger Train J., March 1981, at 7. See also, Conrail's Desire to Unload Commuter Service, Traffic World, March 30, 1981, at 16-18.
107. Phillips, supra, n.104. See also Business Week, April 5, 1982 at 75.
VI. THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

The 3-R Act was meant to benefit the Northeast. Now there would be a 4-R Act for the rest of the country. The "Revitalization" part was to help railroads in the states outside the Conrail area; the "Reform" was an attempt to bring a measure of deregulation to the troubled industry. Bankruptcies were looming; the Rock Island had gone under and the Milwaukee was soon to follow.

There were early cries for deregulation from academicians. But now, pressure came mostly from the industry. Railroad experts were citing the sorry state of the industry and since subsidy and mergers had not proved to be panaceas, sentiment began to grow for letting the railroads compete in pricing. The real enemy was not the common-carrier truck or barge; it was the unregulated competing carriage which was driving the railroads to the wall.

The 4-R Act was not a piecemeal solution to a particular problem as were Amtrak and Conrail. Rather, it was the first comprehensive attempt in years to reexamine the need for economic regulation of the railroad industry. Although it did not change the fundamental nature of regulation, it did make some changes in the regulatory system: minimum and maximum rate regulation, establishment of demand sensitive (seasonal) rates, separate rates for distinct rail services, operations of rate bureaus, merger, abandonment procedures and accounting and costing methods.\(^\text{108}\)

The 4-R Act provided money for the states to apply to rail planning, and a branch-line acquisition assistance program which the current Administration is seeking to eliminate. It provided for loans for rehabilitating rail lines outside the Conrail areas. These loans were secured by the issuance of "preference shares" which the government obtained in the railroad. The biggest beneficiary of this 4-R program was the Milwaukee Road, which managed to rehabilitate its Chicago-St. Paul main line, used by Amtrak and by a new fleet of "Sprint" piggyback trains used in a government demonstration program to see if they could be highway competitive. Although the Milwaukee is now bankrupt, the main line "Sprint" trains are doing well.\(^\text{109}\) The Rock Island was not so fortunate; it could not qualify for any 4R loans and was operating through 1979 by a process of deferred maintenance. Then-secretary of transportation Neil Goldschmidt commented that the Rock Island's trustee "took a railroad that was on its knees and drove it to its ankles."\(^\text{110}\)

The major contribution to deregulation by the 4-R Act was in rate regu-

\(^{108}\) Department of Transportation, A Prospectus for Change in the Freight Railroad Industry at 114 (1978).

\(^{109}\) Dolzall, The Train They Call Sprint, TRAINS, April — 1981 at 26.

lation. The 4-R Act modified significantly the standards which the ICC used in determining the reasonableness of rates so as to assure greater flexibility in ratemaking by rail management. Section 202 of the Act establishes new standards and procedures for determining when rail rates are just and reasonable on traffic for which effective competition exists. A proposed rate that contributes to the "going concern value" of the carrier cannot be found unjustly or unreasonably low. The ICC was also directed to promulgate standards for establishment of seasonal, regional or peak-period rates. A seven percent no-suspend zone was created for an experimental two year period (now elapsed) and time limits were tightened for the ICC to suspend rates. The burden of proof in suspension cases was reallocated to protestants.\footnote{111} The 4R Act also introduced into ratemaking the concept of market dominance. Market dominance exists when there is a lack of competition from other carriers or modes for that particular shipment. The ICC must first find that market dominance exists before it has jurisdiction to conclude that the proposed rates are unreasonably high. The 4R Act did not limit the Commission's jurisdiction over minimum rates, but it gave railroads the freedom to raise rates when traffic was competitive.\footnote{112}

Other provisions of the 4R Act required the ICC to establish procedures assuring the railroads adequate revenue levels, modified the provisions governing collective ratemaking, set new procedures and standards (expedited) for abandonment and merger proceedings, and authorized the ICC to exempt from regulation those persons and transportation services that are found not to be necessary to effectuate the national transportation policy.\footnote{113} With regard to abandonments, the legislation made it easier to abandon trackage, yet required railroads to state their intention to consider a line for abandonment far in advance so that states could plan to take over the lines and lease them to designated operators.

The Conference Report on the 4R Act states that the changes in rate regulation "are intended to inaugurate a new era of competitive pricing." Very little of this came to pass. The railroads said that the 4-R Act did not go far enough. Despite the policy in favor of innovative ratemaking, railroads still relied on the general rate increase to boost revenues. There was very little competitive ratemaking, and the ICC was reluctant to find market dominance in situations where any traffic went by truck. The 4-R Act was just a way station en route to deregulation of rail traffic.

\footnote{111. \textit{Department of Transportation}, supra note 108, at 115.}
\footnote{113. \textit{Department of Transportation}, supra note 108, at 115.}
VII. THE BANKRUPTCY ACT OF 1978

In November 1978, President Carter signed the "'Act to Establish a Uniform Law on the Subject of Bankruptcies'"114 and eighty years of jurisprudence on the old law became obsolete. But the Act did not take effect until October 1, 1979, and railroads then in reorganization continued under the old law—unless the trustees had failed to file a plan of reorganization before the enactment of the new bankruptcy code. Milwaukee Road and Rock Island began and continue their reorganizations under Section 77, but with new requirements for labor, leased lines, and the public interest because various extensions carried these proceedings into Chapter 11 of the new bankruptcy law.

Subchapter IV of Chapter 11 deals with the reorganization of railroads. One of the first changes is that the Department of Transportation, rather than the ICC, selects a panel of five people, from which the court chooses only one to be a trustee. An essential difference between railroad reorganization and other corporate bankruptcies is that the court and trustee must take into account the public interest as well as that of the railroad, its creditors, and stockholders.115

Except for abandonment cases a railroad in reorganization is still subject to the ICC and other Federal and state regulators. The ICC now only has advisory authority over the abandonment of railroad lines. The trustee, if he decides to abandon a portion or all of the railroad, must file an application for abandonment, but the court will tell the ICC when the deadline is to report, and the Commission's report is merely a recommendation to the reorganization court.116

A trustee in bankruptcy takes possession of all property of the railroad, and protects it from the creditors at the same time that he is supposed to be operating it for the public. If he chooses to file a petition for abandonment, all the court must find is that abandonment is 1) in the best interest of the estate, 2) is essential to the reorganization plan, and 3) is consistent with the public interest. However, actual abandonment may not take place until the time for filing appeals has been exhausted.117 This is because of the drastic nature of abandonment. Congress believed that the courts should go easy on approving abandonments which involve the actual removal of track.

Except for the public interest and abandonment provisions, railroad bankruptcies are treated very much as any corporate reorganization. The

trustee must come up with a reorganization plan, which might involve some abandonments. Otherwise, he must recommend that the line be liquidated.

Old Section 77 did not authorize liquidation of a railroad under reorganization proceedings. The court would dismiss the petition for reorganization and a state court receivership would generally follow. Now, if the line cannot be successfully reorganized, the railroad must be liquidated within five years, and its assets sold or otherwise disposed of, with the proceeds going to the secured creditors. The court may confirm a reorganization plan: if the creditors will get something of value equivalent to what they would get if the line were sold for scrap, if it is probably that income from the reorganized railroad will cover fixed charges, and if the plan is compatible with the public interest.\(^{118}\)

The reduced involvement by the ICC and the streamlined court proceedings in the new Bankruptcy Code are but yet another sign of Congress’s current enchantment with partial deregulation of rail transportation.

**VIII. SELF-DEREGULATION BY THE ICC**

If it is true that the Supreme Court follows the election returns, it is equally true that regulatory agencies see the cold breath of the sunset laws facing them unless they mend their ways. A definite philosophy change ranged at the ICC during the 1970s. With the Ford and Carter administrations enthusiasts for deregulation, and with air deregulation approaching, the ICC began to change its attitude. The Commission has applied in motor carrier cases a less protectionist policy, and this began to occur with railroads as well.

There was also an increased willingness to let competition flourish at the ICC. Of course, with motor carriers each day brought new applicants trying to get into the business. Even the airline industry, cartelized since 1938, was trying to open up to new entrants. But there was no Freddie Laker or Ed Daly beating at the door to get into the railroad business. Regulatory freedom for railroads meant freedom to merge, freedom to abandon trackage, and freedom to change (usually raise) rates.

Mergers were allowed more easily after the passage of the 4R Act. At this writing, the ICC has approved the merger of the Frisco into the Burlington Northern, and the Chessie System (B&O, C&O, WM, etc.) with the Family Lines (L&N, SCL AWP, GA, etc.) into the new CSX corporation. Approval of a Southern-N&W merger and a Missouri Pacific-Union Pacific combine (called MOP-UP by the irreverent) is expected.\(^{119}\)

These merger approvals were in swift contrast to past ICC behavior.

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The Rock Island merger had languished for ten years before the ICC, until everyone lost interest and the Rock itself was liquidated. The ICC kept the Rock Island trackage going by means of directed service orders, having the Kansas City Terminal operate the railway until it was finally parcelled up among connecting railroads.120

In the merger arrangements, there were labor protection conditions, but they were not as rigorous as in the Conrail or Amtrak cases, nor as strict as in previous merger cases. Employees from the merged railroads were to be protected, not those of affected railroads.

On its own, the ICC has deregulated some commodities. In 1980, fruits and vegetables (except potatoes) were deregulated by a rulemaking proceeding. The Commission believed that would allow the railroads to compete with the truckers of these agriculturally exempt commodities. In 1981, the ICC moved to deregulate piggyback traffic, allowing the railroads to solicit business and compete with truckers on their own terms.121

In these situations, the ICC was cognizant of the energy shortage, and that trains are more energy-efficient than trucks for long-haul traffic. The ICC has been aware of the financial plight of the railroads and has moved toward competitiveness and moved away from umbrella ratemaking. The ICC also hears the voices of those who call for the agency’s abolition and wants to eliminate, as in trucking, the ludicrous forms of regulation that make the Commission trivial or silly. And the ICC has always been cognizant of the sniping from across the Mall:

... Rivalry between the two government loci of transportation power was coming to a head. When DOT was created in 1966, it absorbed some 31 agencies, including the Coast Guard and the Panama Canal Company, but not the ICC. It was a burgeoning bureaucracy with an insatiable appetite for money and space...122

IX. THE STAGGERS RAIL ACT OF 1980

The Staggers Rail Act was the logical progression of the anti-regulatory climate of the Carter Administration. Having deregulated air freight, airlines, and trucks, the Administration wanted to conclude the session with a final coup: deregulation of the rails. The influence of Alfred Kahn, then Carter’s inflation czar, and Ted Kennedy, then Carter’s bitter rival for the presidency, were apparent in the drive for deregulation.

Congressional climate was not as favorable as that of the administra-

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120. THOMS, supra note 110. The operative provision allowing the KCT takeover of the Rock Island was 49 U.S.C. § 11125 (1980).
122. SAUNDERS, supra note 82, at 306.
tion. Agricultural interests had always distrusted the railroads and saw few benefits emerging from any deregulation for grain traffic. The railroads were finding a renaissance of coal traffic, thanks to energy policies which favored replacement of oil-fired power plants with coal-burning ones. But the rates on coal were increasingly disproportionate to any other traffic and contrary to the interests of our energy policy. The city of San Antonio managed to get a low rate for coal shipments written into the Staggers law.\textsuperscript{123} Congress's main concern was balancing the interests of captive shippers against those of the railroads.

The main concern for Congress in passing the Staggers Act was the financial condition of the railroads. This Congress was faced with the specter of more bankruptcies. We had seen railroad bankruptcies before, but it always seemed a healthy part of the financial process. The railroads kept operating, and they were now free of debt. The old creditors were the new stockholders. But new operating income was not enough to fund fixed costs.\textsuperscript{124} The Milwaukee and the Rock Island—major transcontinental lines, were disappearing from the official guide and salvage men were actually tearing up the track.

At one time every nation had faced this problem, and had opted for nationalization—or the Canadian solution, whereby the government took all the losers and the Canadian Pacific wound up with the moneymaking lines. But this time Congress faced an electorate worried about government spending. The idea of paying for another Conrail, much less buying up independent, solvent lines was too vexing. Congress would give the railroads anything they wanted to avoid nationalization.

What emerged, of course, was compromise. Reregulation rather than deregulation was the order of the day.\textsuperscript{125} It was hardly a consumer bill—it was addressed to the real problem of flagging rail revenues. There were no immediate short-term payoffs to the public as were promised under the Airline and Motor Carrier Acts.\textsuperscript{126}

The Staggers Act was signed into law in September 1980; and President Carter described the legislation as "the capstone of my efforts to get rid of needless and burdensome federal regulations which benefit nobody and harm all of us." Congress, having found that modernization of economic regulation of the rail industry by placing a greater reliance on the market place is essential, now created a new declaration of regulation policy which stressed competition to the maximum extent possible.\textsuperscript{127} In other

\textsuperscript{124} Shrew, Rail Reorganization: The Panacea that Passed, TRANS, February 1973, at 28.
\textsuperscript{125} Wilner, Is Deregulation Really Reregulation?, TRANS, Jan. 1980 at 22-25.
\textsuperscript{126} See Thoms, A Bronx Cheer for Deregulation, PASSENGER TRAIN J., December 1980, at 18.
words, Congress directs the Commission to rely on competition wherever possible and to continue regulation where competition is not possible.

A. ENTRY REGULATION

The Staggers Act has a relaxed entry standard, by which the public convenience and necessity need only permit (not require) construction or acquisition and operation of a rail line.\(^{128}\)

This section will facilitate the operation of short line railroads carved from defunct lines like the Rock Island. It also facilitates the building of spur lines across town to serve an industrial area served presently by another road. The prior law made it difficult to obtain extension certificates for serving another railroad’s territory.

Another section prohibits a railroad from preventing another line from crossing its tracks, and grants procedures for the ICC to arbitrate a dispute which would arise from a crossing of one line by another.\(^{129}\)

B. ABANDONMENTS

The new act speeds up the abandonment or discontinuance process; if the carrier meets the burden of proof that public convenience and necessity permit the abandonment, the effective date of abandonment may be no longer than 330 days from the date the application is filed.\(^{130}\) Interested parties may make offers of financial assistance to avoid abandonment by paying a subsidy or purchasing the line. If the ICC finds the buyer to be a financially responsible person and the assistance is equal to the acquisition cost of the line or the loss, the ICC will stay the application until purchase and then dismiss the abandonment.\(^{131}\)

C. RATE REGULATION

The Staggers Act makes its main changes in rate regulation. Competition will be fostered by increased rate flexibility. Rail carriers, within certain bounds, may establish whatever rates they choose. Note that the tariff principle is not abandoned; there may still be only one legal rate for a shipment. A rate which is noncompensatory is presumed unreasonable while rates which contribute to the going concern value of the carrier are conclusively presumed reasonable. Rates may be challenged as being too low, and then the burden is on the protestant to show that the proposed rate would not contribute to the going concern value of the carrier.\(^{132}\)

\(^{128}\) Id. § 221(a), 49 U.S.C. § 10901(d)(e) (1980).

\(^{129}\) Id.

\(^{130}\) Id. § 402, 49 U.S.C. § 10904 (1980).

\(^{131}\) Id. § 402(a), 49 U.S.C. § 10905 (1980).

\(^{132}\) Id. § 201. 49 U.S.C. § 10701(a) (1980).
There is no maximum rate regulation unless the carrier has market dominance over that particular class of freight. Absent market dominance, competition should keep rates in line. Where market dominance exists, rates must be reasonable. An increasing scale of revenue/variable cost percentage running from 1980 to 1984 at rates from 160% to 175% will be in effect. If the revenue/variable cost percentage is less than this figure, market dominance conclusively does not exist. A finding that the rate exceeds this percentage does not raise a presumption of market dominance.133

Once market dominance exists, then the reasonableness of rates comes into question. To this effect, the Act creates "zones of reasonableness" within which rates can be adjusted without the necessity of going to the ICC. The Commission cannot suspend rates within this zone, or investigate on its own rate increases not exceeding 190% of costs.134 A rate set above this no-suspend zone may be investigated by the Commission on its own or after complaint.

Under the Staggers Act, investigations must be completed within five months unless the ICC reports to Congress reasons for the delay. The burden is on protestors to show: they are likely prevail on the merits; that without suspension, the new rate will cause substantial injury to the protestant; and the procedures for post-determination reimbursement do not protect the protestant.135 If the ICC holds the rate unreasonable, the carrier must return the rate increase with interest.

Shortly before passage of the Staggers Act, the ICC approved rail contract rates on its own, despite a past history which implied that railroads could not act as contract carriers.136 The ICC in 1979 decided that its policy would change: in order to obtain and hold long-term traffic commitments, the ICC would allow railroads to contract with shippers for guaranteed rates over long terms.137 This is codified in the new Staggers Act, which states that railroads may now enter into contracts with purchasers of transportation, subject to ICC approval. Within thirty days of filing the contract, it will become effective unless the ICC commences an investigation or a complaint is filed by an individual shipper (who alleges he will be harmed because the contract impairs the carrier's ability to perform its common carrier responsibilities) or a port (on the grounds that the contract discriminates against the port).138 The major change in the Staggers Act is that

134. Id. § 201. 49 U.S.C. § 10701(a) (1980).
135. Id. § 207. 49 U.S.C. § 10707 (1980).
railroads, like trucks and barges, can become contract carriers as well as common carriers. Once a contract goes into effect, the contract is exempt from ICC regulation. During peak periods, the contractual shippers can get first call on the railroad's services before it serves the common carriers. Thus, big shippers are rewarded by the new law, as they will be able to take advantage of their contracting power.

Not only are antidiscrimination provisions of the common carrier obligations going by the boards, but common carrier liability may also be contracted away, as it is in air freight and trucking. Rail carriers may now establish rates which limit their liability for loss and damage in transit.\textsuperscript{139} This accords with a general trend in the industry to shift the insurance burden to the shipper. Interestingly enough, railroads are not required to maintain rates which do not limit their liability.

Carriers who do not earn adequate revenues under existing joint rates may surcharge their rates, adding it to the through charge. Any carrier not earning 110% of its variable costs may apply a surcharge if it has gone along with all the general rate increases for the preceding year. Other carriers may cancel the application of the surcharge by showing that it is unreasonable.\textsuperscript{140} Connall has used this provision to surcharge a great deal of freight arriving from Western railroads; it had always claimed that it got a bad deal on the rate divisions.

The seasonal or off-peak demand-responsive rates sanctioned by the 4R Act have been repealed by the new law. The role of rate bureaus, as with motor carriers, has been severely restricted. Carriers may not discuss agreements affecting single-line rates except for general rate increases. A railroad can only discuss a joint rate which it practically participates in. Transcripts of all meetings must go to the ICC. After 1984, the rate bureaus may not discuss general rate increases on single-line rates.\textsuperscript{141}

The Commission's jurisdiction to order emergency car service has been restricted to only grave emergency situations which have a substantial effect on service in the United States or a substantial region thereof.\textsuperscript{142}

X. EVALUATION AND PROSPECTS

We have been through a decade of deregulation. Yet in only one industry, aviation, has the logical result of economic deregulation—sunset provisions—been reached. With the railroads, there has been a move toward letting the carriers have their own way in the hope that they will thus

\textsuperscript{139} Id. § 211. 49 U.S.C. § 10730(c) (1980).
\textsuperscript{140} Id. § 217. 49 U.S.C. § 10705a (1980).
\textsuperscript{141} Id. § 219. 49 U.S.C. § 10706 (1980).
\textsuperscript{142} Id. § 226. 49 U.S.C. § 11123 (1980).
be able to compete with the other modes, and that nationalization or massive abandonments will be avoided.

Since the Staggers Act was enacted, it should now be easier for rail carriers to enter a market, but it is doubtful that, except for short lines and some branches to tap coal, that new routes will be constructed. Access to capital is not that easy. It will be easier, however, to get out of the business. Although the standards for abandonment have not been changed, the time frame has. Branch line subsidies to forstall abandonment may be harder to come by since the Federal government is moving toward a policy of disinvestment in rail lines.

The creation of contract rates will allow the rail industry to offer better service to contract shippers. Certain favored shippers may be able to get guaranteed rates and guaranteed service. It may allow a means to compete in agriculture, since contract rates on a long-term basis might compete favorably with exempt carriers. This would allow the carrier to arrange service to be spread out beyond peak demand periods. Common carrier shippers, however, may find service to be even worse than it is now. Long-term contracts may well be a better deal for shippers than hoping to get a good rate out of the ICC. Lawyers are advising shippers to concentrate their legal talent on contract law rather than administrative law in maximizing their interest in low rates. But railroads today seem loath to enter into contracts, when they feel that rates can only increase in the future.

Rate flexibility means ability to compete on traffic that has been lost. It will take more than rates, however, to win traffic back to the rails. Shippers are willing to pay more for guaranteed service, or at least for some reasonable idea where their shipment is and how long it should take to get to its destination. But the Staggers Act has allowed railroads to get out from under noncompensatory rates because of the necessity of equalizing ports or products. It does, moreover, allow the railroads to pick and choose traffic and price themselves out of some undesirable business. It may be that a system is more efficient when it concentrates on a few commodities, but the whole idea of a railroad is to have a transportation system that serves all types of traffic.

With attention paid to rail revenues and rates of return, some fundamental questions are yet unanswered. With deregulation, what is the role of oversight by a regulatory agency? The rails are not yet so deregulated that antitrust is the answer, yet the ICC has been moving away from standards of service. Is it not valuable to have an expert body that is a forum for shippers’ and communities’ complaints rather than have after-the-fact litigation? Even assuming that freedom of entry, exit, and ratesetting are all

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143. Remarks of ICC Chairman Marcus Alexis, reported in TRAFFIC WORLD, Mar. 23, 1981, at 33.
good things, there still is room for supervision of a business charged with a public interest to see that the public has some control or oversight of practices when the railroads are the only ones using their rights of way. When a railroad is abandoned, it is gone. No one is coming to build another one. We should make sure the ones we have are used to their best possibilities.

And here we have a basic problem. The railroads in the United States are privately owned. They may or may not make money for their owners. The public cannot travel on them. They cannot ship LCL, milk, livestock or other commodities that have been declared unprofitable or too much trouble. Now, we could say that whatever the free market produces is the best and highest use. But that is defining the problem away.

The railroads will find it harder and harder to compete with other modes of transport which are directly or indirectly subsidized by the government. Highway, airway and waterway cutbacks are nowhere near as severe as the Amtrak/Conrail/Mass Transit/Branchline subsidies proposed to be cut by the current administration. We can see more cutbacks in service by the private railroads, more mergers and more diverting of funds from the railroad to other subsidiaries. Railroad property will continue to be taxed by localities.

It may be that supply-side economics will work, that a free and unfettered railroad system will be able to compete with the now deregulated air and truck services. But if not, what then? What happens to the properties now included in Conrail? The government has assisted the massive railroad but has no equity in it. It all belongs to the creditors. Amtrak belongs to four railroads (one owned by the Canadian government) who were disenchanted with the passenger business at the creation of the system. Even the mighty Union Pacific does not earn the return on capital necessary to compete effectively with other carriers which have right-of-way provided.

Obviously this administration or any other within the next decade is not going to want to spend billions of dollars to acquire a railroad system. Railroads should do better financially if gasoline prices cut into long-distance trucking and the rails remain adaptable to electrification or even a return to steam power. Our railroads are considerably more profitable than the nationalized systems in Europe but their rail lines provide services that our own lines do not.

One plan that was voiced about a decade ago and hasn't been heard for a while would be to have the government acquire certain rights of way and upgrade them to Interstate Highway standards. Then, operating railroads could, for user fees, use this railed highway. Competition would be preserved; free-enterprise efficiency could go into operations, and the railroads would be free of the maintenance and tax burden on the lines. And the government would receive user charges from each of the operators. In some refinements of the scheme, a completely deregulated environment
would allow use not only by traditional railroad companies, but truckers, shippers, small-package firms like United Parcel, freight forwarders, anyone who could invest in trains and be able to use the rail system.

But for the time being railroads are doing relatively well financially. And the railroads probably couldn’t do worse under the Staggers Act and partial deregulation than they did when every rate and schedule was subject to ICC scrutiny.
Ploughshares into Swords from Buffalo Forge?

HENRY H. PERRITT, JR.*

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I. INTRODUCTION

The two major statutes that regulate private sector labor relations in the
United States provide for arbitration, conciliation, mediation and fact-finding
as alternatives to strikes over labor disputes. The Railway Labor Act¹ re-
quires that statutory procedures be exhausted before a strike can occur.
The National Labor Relations Act establishes mediation, conciliation and
fact-finding procedures, and has been construed as favoring arbitration.²

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Supreme Court of the United States, Associate Professor of Law, Villanova University Law School.
2. See notes 72-154 infra and accompanying text.
but leaves to the labor and management parties the decision whether to avail themselves of such alternatives to the strike.\(^3\)

The two statutory schemes are distinct, although the courts have been willing to refer to the Railway Labor Act in interpreting the National Labor Relations Act\(^4\) and vice versa.\(^5\) Recently, a conflict has developed among the United States Courts of Appeals in different judicial circuits as to how far principles developed under the National Labor Relations Act should influence interpretations of the Railway Labor Act regarding resort to arbitration and other peaceful procedures as an alternative to a strike. One line of cases would significantly limit the effectiveness of the Railway Labor Act approach.\(^6\)

This article reviews the separate policies embodied in the two statutory schemes, analyzes the main Supreme Court and Court of Appeals cases, and concludes that the law limiting the availability of peaceful procedures under the National Labor Relations Act should not be imported into the Railway Labor Act.

II. BASIC POLICIES—RAILWAY LABOR ACT AND NATIONAL LABOR RELATIONS ACT

The starting point for sound development of principles of construction of labor statutes is an understanding of the basic concepts embodied in the statutes.\(^7\) The overriding policy of the Railway Labor Act\(^8\) is different from the policy of the National Labor Relations Act\(^9\) regarding the appropriateness of strikes. In addition, the role of arbitration, mediation, conciliation and fact-finding in these two statutes is different in historical origin. From these differences should grow different legal principles as to the availability of strike action as an alternative to peaceful procedures.

A. THE RAILWAY LABOR ACT

The first of several enumerated purposes of the Railway Labor Act is "'[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein...']"\(^10\) Nowhere in the Act is the right to strike expressly established, although the Supreme Court has implied such a

\(^3\) See notes 127-134 infra and accompanying text.
\(^6\) See notes 165-189 infra and accompanying text.
\(^7\) See generally F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 169 (1930).
right. In contrast, section 13 of the National Labor Relations Act contains a limitation that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."  

From the beginning Congress perceived railroad labor legislation as aimed at reducing strikes by providing alternative mechanisms for resolving disputes. On April 22, 1886, President Cleveland sent a message to Congress proposing federal legislation:

Something may be done under Federal authority to prevent the disturbances which so often arise from disputes between employers and the employed, and which at times seriously threaten the business interests of the country; and, in my opinion, the proper theory upon which to proceed is that of voluntary arbitration as the means of settling these difficulties.

Ultimately, Congress enacted a measure similar to that proposed by the President. The legislation provided for the federally funded arbitration of disputes if both parties consented. It also provided for the establishment of a temporary fact-finding commission by the President to examine the causes of a controversy, the conditions accompanying it, and the best means for adjusting it. Such commission was to report its findings to the President and the Congress.

The legislative history makes it clear that the theory of the legislation was to provide a mechanism for focusing public opinion on railroad labor disputes; compulsion was rejected. Opponents criticized the legislation as illusory unless it provided for compulsory arbitration, and possibly government operation of a struck carrier. Its supporters insisted that compulsion would require resort to military force, and that the incidence of strikes would be reduced if there existed a fact-finding mechanism.

The fact-finding provisions of the 1888 legislation were used only once, and its arbitration provisions not at all. Nevertheless, its basic principles have been continued in all subsequent railroad legislation, with one unsuccessful exception.

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13. 17 Cong. Rec. 3761 (1886).
16. Id. § 6, 25 Stat. 503.
17. 19 Cong. Rec. 3098 (1888).
18. 19 Cong. Rec. 3100 (1888) (remarks of Mr. Tillman).
21. Fact finding or mediation or both was provided for in the Erdman Act of 1898, the New-
tinction and mediation and conciliation. It expressly provided that an arbitration award was to be judicially enforceable, and limited the right of employers or employees to engage in economic action during the pendency of arbitration proceedings, or for a fixed period of time after an award was entered.

The Newlands Act of 1913 followed the same approach as the Erdman Act, while establishing a Board of Mediation and Conciliation to conduct the mediation and conciliation stages. The Board’s express mandate was to attempt to induce the parties to submit their dispute to arbitration if mediation was unsuccessful. However, the 1913 Act contained no express provision limiting resort to economic action while the arbitration machinery was in use.

The Transportation Act of 1920, which provided for the return of the railroads to private control after operation by the Federal Government during World War I, contained comprehensive provisions to deal with labor disputes. The statute built upon previous legislation by imposing an express duty on labor and management to avoid interruptions to commerce by bargaining. Unlike earlier statutes, it distinguished between disputes over grievances and disputes over rates of pay. Grievances were to be submitted to adjustment boards for arbitration. A railroad Labor Board was established to consider grievances not decided by an adjustment board, and to decide “just or reasonable” rates of pay. The Board also was empowered to suspend agreed-upon increases in rates of pay if the increases were such as to necessitate a substantial readjustment in the rates of any carrier.

The 1920 Act departed from previous legislation in two important ways. First, it established a distinction between disputes over the applica-
tion of existing agreements, and disputes over the establishment of new terms and conditions of employment. This innovation was accepted and continues to the present.34 Second, it provided for compulsory determination by the government of appropriate wage levels.35 This feature, and a determination by the United States Supreme Court that the Board’s decisions were not enforceable, led to a breakdown of the Act’s machinery.36

In 1926, the Congress enacted, virtually without changes, legislation agreed upon between Rail Labor and Rail Management to replace the 1920 statute.37 The Railway Labor Act of 1926 continued the distinction between “major” and “minor” disputes. Minor disputes were to be arbitrated by adjustment boards voluntarily established by the parties.38 The Railroad Labor Board was abolished.39 A permanent Board of Mediation was established, with jurisdiction over minor disputes not resolved by an adjustment board, disputes over changes in rates of pay, rules, or working conditions, and “any other dispute(s).”40 The pattern established by the Newlands Act was followed, in that the Mediation Board was to attempt to induce the parties to submit disputes not resolved by mediation to arbitration.41 The pattern of the Arbitration Act was followed, in that disputes not resolved by agreement, or by mediation, and not submitted to arbitration could be subject to fact-finding by an Emergency Board to be created by the President of the United States.42 Congress rejected proposals by non-railroad business interests that the legislation provide for suspension of wage increases that might lead to large rate increases.43 It considered proposals by the same interests that amendments to the labor-management draft were necessary to make it clear that strikes were prohibited until all of the procedures under the Act, including the Emergency Board procedure, had been exhausted.44 Railroad and Rail labor spokesmen had assured House and Senate committees that the agreed-upon draft sufficiently precluded such strikes, and the committees accepted those assurances.45 The tone of the

35. Ch. 91 § 307(b), 41 Stat. 471 (1920) (current version at 45 U.S.C. §§ 131-146 (1976)).
40. Id. §§ 4-5, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 155 & 156 (1976)).
41. Id. § 5 (c), 44 Stat. 580 (1926) (current version at 45 U.S.C. § 155 (1926)).
42. Id. § 10, 44 Stat. 586 (1926) (current version at 45 U.S.C. § 160 (1976)).
43. See 1926 Senate Hearings, supra note 39, at 50-51.
44. Id. at 54-56.
45. Id.
hearings and the committee reports make it clear that the purpose of the
legislation was to put an end to railroad strikes.46

In 1934, the Railway Labor Act was amended to protect employees’
rights to organize and to strengthen the mechanisms for resolving minor
disputes.47 A National Railroad Adjustment Board was established to adju-
dicate minor disputes not determinable by adjustment boards voluntarily es-
tablished by the parties.48 The provisions of the 1926 Act regarding
mediation, voluntary arbitration, and Emergency Board fact-finding were left
substantially unchanged, except that the Board of Mediation was renamed
the "National Mediation Board" and divested of jurisdiction over minor
disputes.49

During the hearings on the original Railway Labor Act, testimony by the
drafters indicated that the Act was to be judicially enforceable.50 However,
a number of judicial decisions, spanning forty-five years, were necessary to
clarify the scope of this enforcement.51

During the first thirty years of the Act’s history, the courts suggested
that an accommodation between the Act’s policies against work stoppages
and the Norris-LaGuardia Act’s protection of work stoppages was appro-
priate. Nevertheless, work stoppages over grievances were not uncommon.52
However, in 1957, the Supreme Court, in Brotherhood of Railroad Train-
men v. Chicago River & Indiana Railroad Co.,53 expressly held that the
Norris-LaGuardia Act must yield to the Railway Labor Act where minor dis-
putes are involved.54 The Court rejected the union’s contention that arbi-
tration was meant to be an optional remedy and that a union could strike
over a minor dispute pending before the Adjustment Board if it wished. The
Court reasoned that specific provisions of the Railway Labor Act must take
precedence over more general provisions of the Norris-LaGuardia Act.55 In
a footnote, it distinguished major and minor disputes by pointing out that
the Railway Labor Act does not provide a process for finally deciding major
disputes like that of the Adjustment Board in a minor dispute case.56

The Chicago River Court addressed the accommodation question in the
factual framework of a minor dispute pending before an Adjustment

46. Id. at 16-17, 35.
47. Ch. 691, 48 Stat. 1185 (1934) (current version at 45 U.S.C. §§ 151-161 (1976)).
49. See id. at 11-12.
50. See id.
51. See id.
54. Id. at 40.
55. Id. at 42.
56. Id.
Board. Six years later, in Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.,\(^\text{57}\) the Supreme Court addressed the question of whether a union could strike to enforce the award of an Adjustment Board. The union argued that once an award had been rendered by the Adjustment Board, the union should be free to enforce the award as it wished—by invoking judicial enforcement procedures of the Railway Labor Act or by resorting to economic force.\(^\text{58}\) The Supreme Court disagreed, over dissents by Justices Black, Goldberg, and Douglas. It reasoned that a strike in the circumstances of the post-award situation would be no less disruptive of the statutory grievance procedure than was the strike enjoined in the Chicago River.\(^\text{59}\) Earlier, the Supreme Court had rejected, in dictum, a strike to protest an Adjustment Board award in Union Pacific Railroad Company v. Price.\(^\text{60}\) The courts of appeals have applied the basic principles of Chicago River to bar a strike over a minor dispute before it is submitted to an adjustment board.\(^\text{61}\) These cases would appear to block every avenue of lawful economic action over a minor dispute, establishing arbitration as the exclusive remedy.

Judicial elucidation of the right to strike over major disputes took longer. In Brotherhood of Railroad Trainmen, Enterprise Lodge v. Toledo, Peoria & Western Railroad Co.,\(^\text{62}\) the Supreme Court refused to enjoin a strike because the railroad had rejected arbitration of the major dispute.\(^\text{63}\) The Court held that the Norris-LaGuardia Act barred an injunction because the railroad had not agreed to final and binding arbitration of the dispute under Section 7 of the Railway Labor Act, thereby violating the requirement under Section 8 of the Norris-LaGuardia Act that every reasonable effort to settle the dispute be made.\(^\text{64}\)

Later, the Supreme Court held that strikes over major disputes are permissible once the Railway Labor Act mechanisms have been exhausted. The court held that the major dispute processes are mandatory and must be exhausted before a strike is permitted. In Detroit & Toledo Shore Line R.R. v. United Transportation Union,\(^\text{65}\) the carrier sued to enjoin a strike over its unilateral changes in work assignments. The Supreme Court held

\(^{57}\) 373 U.S. 33 (1963).

\(^{58}\) Id. at 40.

\(^{59}\) Id. at 42.

\(^{60}\) 360 U.S. 601, 611 n.10 (1959).


\(^{62}\) 321 U.S. 50 (1944).

\(^{63}\) Id. at 65.

\(^{64}\) Id.

\(^{65}\) 396 U.S. 142 (1969).
that, because the railroad had violated the obligations imposed on it by changing the status quo, the union "cannot be expected to hold back its own economic weapons, including the strike." Narrowly read, Shore Line holds that the carrier is required to exhaust the processes of the Act before resorting to self-help—in this case, unilateral promulgation of new terms and conditions of employment—and that the union is permitted to strike when this obligation is violated. But, Shore Line generally is understood to stand for the proposition that the Act's processes must be exhausted by both sides, in order to promote industrial peace.67

In 1969, the Court, in Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,68 found implicit in the Act's statutory scheme the ultimate right of the disputants to resort to self-help.69 Not until 1971, in Chicago & North Western Railroad Company v. United Transportation Union70 did the Supreme Court directly decide that a strike could be enjoined until the Act's major dispute mechanisms had been exhausted.71

In summary, railroad labor legislation was intended from the outset to prevent disruptions to the continued operation of carriers covered by the legislation. Congress considered an outright prohibition against strikes to be impracticable, and perhaps unconstitutional.72 Instead, it adopted a compulsory set of processes which were required to be exhausted before the right to strike would exist. These processes included mandatory arbitration of "minor" disputes, and mandatory negotiation, mediation, and fact-finding with respect to major disputes.73

B. THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act74 evolved in a climate that should have focused Congressional attention on dispute prevention even more strongly than when the Railway Labor Act of 192675 was enacted. The number of employee days lost to strikes in 1933 was the greatest in any year since 1921.76 In 1934 a threatened steel strike,77 and violent con-

66. Id. at 155.
67. See, e.g., Carbone v. Meserve, 645 F.2d 96, 98 (1st Cir. 1981).
69. Id. at 378.
70. 402 U.S. 570 (1971).
72. See 1926 Senate Hearings, supra note 37, at 89-90.
74. The National Labor Relations Act of 1935 was amended by the Labor Management Relations Act of 1947.
76. Id. at 173.
77. See id. at 198-99, 202.
frontations involving Auto Lite employees in Toledo,\textsuperscript{78} teamsters in Minneapolis,\textsuperscript{79} longshoremen in San Francisco,\textsuperscript{80} and textile workers in the South and New England\textsuperscript{81} required Presidential intervention and the use of military force.\textsuperscript{82} In each of the major confrontations, mediation and voluntary arbitration occurred on an ad-hoc basis.\textsuperscript{83} It is notable that the National Labor Relations Act\textsuperscript{84} emerged in so different a form from the Railway Labor Act. As in the railroad industry, the burning public policy issues in the 1920's and 1930's involved the right of independent trade unions to represent employees who favored such representation by a majority vote.\textsuperscript{85} The National Labor Relations Act\textsuperscript{86} established legal machinery almost exclusively concerned with selection of the bargaining representative and establishment of the bargaining relationship, with little regard to dispute settlement.\textsuperscript{87} It was perceived that legal protection of the right to organize, without more in the way of government intervention, would reduce industrial unrest.\textsuperscript{88}

Before the enactment of the National Industrial Recovery Act in 1933,\textsuperscript{89} federal labor legislation applicable to commerce and industry generally had focused on restricting the power of federal courts to limit labor disputes. The Clayton Act of 1914\textsuperscript{90} and the Norris-LaGuardia Act of 1932\textsuperscript{91} both contained precatory language endorsing the right to organize. However, their remedial provisions were limited to defining narrowly the jurisdiction of federal courts to grant injunctions against strikes or other con-

\textsuperscript{78} See id. at 222-27.
\textsuperscript{79} See id. at 242-50.
\textsuperscript{80} See id. at 272-90.
\textsuperscript{81} See id. at 305-10.
\textsuperscript{82} Id.
\textsuperscript{83} On June 14, 1934, AFL President Green promised the rank and file of the Association of Iron, Steel and Tin Workers that President Roosevelt would establish a special board to investigate, mediate and propose voluntary arbitration. This promise abated a threat to launch a steel strike. Id. at 202. The AutoLite strike was settled by negotiation in June, 1934, after ad-hoc mediation and a proposal for arbitration. Id. at 222-27. The Minneapolis truckers strike was settled through White House directed mediation on August 21, 1934. Id. at 250. Labor Secretary Frances Perkins believes that the refusal of employees to arbitrate worsened the San Francisco strike. Id. at 289-90.
\textsuperscript{84} 29 U.S.C. § 153.
\textsuperscript{86} Supra, note 84.
\textsuperscript{88} Id.
\textsuperscript{89} Ch. 90, 48 Stat. 195 (1933).
\textsuperscript{91} Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)).
certed activity.92

Section 7 of the National Industrial Recovery Act93 required codes established under the Act to contain provisions protecting the right of employees to organize and bargain collectively.94 After the National Recovery Administration experienced difficulty in interpreting Section 7, a National Labor Board was created.95 The Board engaged in mediation and arbitration activities aimed at dispute adjustment.96 However, the Board’s effectiveness was limited by employers, refusals to cooperate97 and by Presidential settlement of a threatened automobile strike in 1933 that rejected the Board’s position on exclusive representation.98

On March 1, 1934, Senator Wagner introduced legislation to place the National Labor Board on firmer footing. His bill defined a number of “unfair labor practices” which could be prevented by the Board, acting if necessary through federal district courts.99 Other sections of the bill authorized the Board to proffer mediation and conciliation and to engage in arbitration if consented to by the parties.100 The existing Conciliation Service in the Department of Labor was to remain, although the respective responsibilities of the Board and the Service were not clearly defined.101

After hearings in March and April, 1934, the Senate Labor Committee reported a substitute bill sponsored by Senator Walsh. That bill created a National Industrial Adjustment Board within the Department of Labor.102 The Board would have authority to adjudicate unfair labor practice charges, but only after mediation and conciliation had failed.103

President Roosevelt preferred an ad-hoc approach to the establishment of formal machinery and was sensitive to management pressure against the Wagner and Walsh bills.104 On June 12, 1934, he proposed a measure that became Public Resolution No. 44,105 enacted by the Con-

95. I. Bernstein, supra note 75, at 173.
96. Exec. Order No. 5611 (December 16, 1933).
98. I. Bernstein, supra note 75, at 185.
100. S. 2926, 73d Cong., 2d Sess., §§ 204 (mediation) & 206 (arbitration) (1934).
101. S. 2926, 73d Cong., 2d Sess., § 301 (1934).
102. Id. § 4.
104. I. Bernstein, supra note 75, at 190-91.
105. Id. at 200.
gress on June 15. This legislation authorized the President to establish "Boards" to investigate issues in labor disputes, to hold representation elections where appropriate, and to petition circuit courts for enforcement of their procedures. Under authority of the resolution, the President established a National Steel Labor Relations Board on June 28, and a National Labor Relations Board on June 29.

The Steel Board was involved almost immediately in settling the threatened steel strike. The National Labor Relations Board was involved more-or-less informally in the Toledo, Minneapolis, San Francisco, and Textile confrontations mentioned supra. In each of these cases, the disputes were resolved by a process of mediation and sometimes voluntary arbitration. Nevertheless, the Board's first two chairmen, Lloyd Garrison and Francis Biddle, emphasized the Board's quasi-judicial functions. Both were prominent members of the bar and sought to defuse management opposition to the Board by stressing impartiality and reliance on traditional legal procedures. However, the Board's effectiveness was limited by its inability to enforce its decisions.

After overwhelming Democratic Party successes in the 1934 elections, Senator Wagner again introduced legislation. This time the legislation was more limited in scope, and aimed at strengthening the National Labor Relations Board as a quasi-judicial agency. Although the Railway Labor Act was cited favorably as precedent, supporters of the Wagner bill emphasized the need to keep the Board's quasi-judicial functions separate from conciliation, mediation and arbitration. The resulting statute, unlike Senator Wagner's 1934 bill, did not authorize the Board to engage in dispute settlement through mediation or arbitration nor did it require resort to such procedures.

In 1947, the Congress undertook to overhaul the National Labor Rela-

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106. 78 Cong. Rec. 12237 (1934).
110. See I. BERNSTEIN, supra note 73, at 200-205.
111. See id. at 227-28, 241-51, 271-93.
112. See id. at 228, 249-50, 294-95.
113. Id. at 319.
114. Id. at 337.
115. Id. at 322.
117. I. BERNSTEIN, supra note 75 at 323.
118. See Hearings on S. 1958 Before the Committee on Education and Labor, 74th Cong., 1st Sess. 86-87 (testimony of Francis Biddle); 1462-63 (undesirable for Labor Board to be involved in conciliation and mediation); 103; (experience under the Railway Labor Act) (1936).
119. The final legislation deleted section 12 of Senator Wagner's original S. 1958, which provided for the Labor Board to engage in arbitration.
tions Act.\textsuperscript{120} Responding to a wave of strikes during the later years of World War II and immediately afterward, attention was given specifically to strengthening dispute settlement.\textsuperscript{121} The result was a modest move in the direction of mandatory negotiation and the opportunity for mediation before a strike could be called. Section 8(d) of the resulting legislation\textsuperscript{122} required 60 days advance notice of a desire by either party to modify or terminate a collective bargaining agreement, and prohibited strikes during such period.\textsuperscript{123} Notice of disputes not resolved in negotiation was to be given to the Federal Mediation and Conciliation Service, a new agency established by the legislation.\textsuperscript{124} This provision is similar in some respects to Section 6 of the Railway Labor Act, in that it prohibits economic action during a statutorily defined period of negotiation.\textsuperscript{125} However, Section 8(d), unlike Section 6, does not continue the prohibition against economic action during mediation.\textsuperscript{126} The Mediation Service under the new legislation is authorized to seek to induce the parties to submit their dispute to arbitration, like the Mediation Board under the Railway Labor Act.\textsuperscript{127} Thus, after the 1947 amendments, the National Labor Relations Act recognized the appropriateness of mediation and arbitration of disputes over new agreements but did not require resort to the processes.

The 1947 amendments to the National Labor Relations Act also added a terminal fact-finding stage similar to the Emergency Board procedure under the Railway Labor Act. Section 206 permits the President to appoint a "board of inquiry" to inquire into the issues involved in a threatened or actual strike and make a written report. Section 207 authorizes the President to direct the Attorney General to seek an injunction against a strike for a period of 60 days.\textsuperscript{128}

The effect of both the Railway Labor Act and the National Labor Relations Act terminal stages is to provide for a judicially enforceable 60-day "cooling-off" period and for a public report on the facts of the dispute. The rationale of the mechanism is to bring public opinion to bear on the parties, but both provisions have been criticized as ineffective and inhibitive of the

\begin{itemize}
\item \textsuperscript{120} See S. Rep. No. 105 on S.1126 at 1-3, 80th Cong., 1st Sess. (1947).
\item \textsuperscript{121} See S. Rep. No. 105 on S.1126 at 13, 80th Cong., 1st Sess.
\item \textsuperscript{122} 29 U.S.C. § 148(d) (1976).
\item \textsuperscript{124} See note 123 supra.
\item \textsuperscript{125} 45 U.S.C. § 148(d) (1976).
\item \textsuperscript{126} 29 U.S.C. § 148(d) (1976).
\item \textsuperscript{128} Id.
\end{itemize}
bargaining process.\textsuperscript{129}

Theoretically, the obligations of Section 8(d) of the National Labor Relations Act\textsuperscript{130} can be enforced in the same manner as requirements of Section 6 of the Railway Labor Act.\textsuperscript{131} A strike occurring before the statutory notice periods and the opportunity for mediation and conciliation have been satisfied can be enjoined. The Railway Labor Act provisions are enforceable judicially at the insistence of the employer.\textsuperscript{132} The National Labor Relations Act provisions are judicially enforceable by the National Labor Relations Board, which is empowered by Section 10 to seek injunctive relief against unfair labor practices.\textsuperscript{133}

Practically, however, injunctive relief under Section 10 rarely is necessary because Section 8(d)(4) of the National Labor Relations Act provides that employees who engage in a strike in violation of the provisions of 8(d) lose their protected status under the Act.\textsuperscript{134} Thus, the employer can discharge them and hire replacements, with no obligation to re-employ the strikers. Usually, this is a sufficient deterrent against strikes in violation of the section.

Injunctions have been granted under the emergency fact-finding provisions of Section 206.\textsuperscript{135} In this respect the deferral of the right to strike under the terminal stage of both statutes is similar; the strike must be postponed until public opinion can be focused on the dispute by a neutral panel appointed in each case.

The treatment of grievance arbitration under the two statutes is strikingly different. Specific machinery for the adjustment of grievances had been included in rail labor legislation since the 1920 Act.\textsuperscript{136} In contrast, the 1935 National Labor Relations Act contained no reference to such adjustment.\textsuperscript{137} In the 1947 amendments a precatory provision was added declaring that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."\textsuperscript{138} However, no machinery or compulsion to arbitrate grievances was included.

\textsuperscript{130} 29 U.S.C. § 148(d) (1976).
\textsuperscript{133} 29 U.S.C. § 151(e) (1976).
\textsuperscript{136} See text accompanying notes 34-38, supra.
As noted supra, arbitration of grievances in the railroad industry has been required since 1920.\textsuperscript{139} In industry generally, little use was made of grievance arbitration until the Second World War.\textsuperscript{140}

During the War, the War Labor Board\textsuperscript{141} strongly encouraged the use of grievance arbitration.\textsuperscript{142} After the war, grievance arbitration spread rapidly. According to one commentator, by 1952 98\% of all collective bargaining agreements provided for arbitration.\textsuperscript{143} Today, the International Labor Organization estimates that more than 90\% of American agreements provide for arbitration.\textsuperscript{144}

Nevertheless, grievance arbitration, despite its prevalence, remains voluntary under the Labor Management Relations Act. This fact is crucial to an understanding of the differing legal principles that govern the relationship between rights, arbitration and strikes under the Labor Management Relations Act as compared with the Railway Labor Act.\textsuperscript{145}

In 1960, the Supreme Court expressed a national labor policy in favor of arbitration as a substitute for industrial strife. In United Steelworkers of America v. Warrior & Gulf Navigation Co.,\textsuperscript{146} the court said, "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."\textsuperscript{147} In addition, the Court broadly construed this contractual duty to arbitrate.\textsuperscript{148}

Ten years later, in Boys Markets, Inc. v. Retail Clerks,\textsuperscript{149} the Supreme Court held that a strike in violation of a collective agreement that contained an arbitration provision could be enjoined notwithstanding the Norris-LaGuardia Act.\textsuperscript{150} Crucial to the Court's reasoning was the proposition that "any incentive for employers to enter into [arbitration arrangements] is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated."\textsuperscript{151}

In 1976, the Supreme Court decided Buffalo Forge Co. v. Steelworkers,\textsuperscript{152} which limited the application of Boys Markets to strikes over arbitrable grievances. The Court reasoned that the purpose of Boys Markets was

\begin{itemize}
  \item \textsuperscript{139} See notes 34-38, supra.
  \item \textsuperscript{140} See A. Cox & D. Bok, supra note 129, at 519.
  \item \textsuperscript{141} See id. at 519.
  \item \textsuperscript{142} See id.
  \item \textsuperscript{143} See id.
  \item \textsuperscript{144} See International Labour Office, Conciliation and Arbitration Procedures in Labour Disputes 65 (1980).
  \item \textsuperscript{145} See Boys Markets v. Retail Clerks, 398 U.S. 235 (1970) (arbitration is voluntary).
  \item \textsuperscript{146} 363 U.S. 574 (1960).
  \item \textsuperscript{147} Id. at 578.
  \item \textsuperscript{148} Id. at 584-85.
  \item \textsuperscript{149} 398 U.S. 235 (1970).
  \item \textsuperscript{150} Id. at 253.
  \item \textsuperscript{151} Id. at 248.
  \item \textsuperscript{152} 428 U.S. 397 (1976).
\end{itemize}
to encourage arbitration, and that this purpose could not be furthered by enjoining strikes over disputes that were not clearly subject to arbitration. Thus, the Court established the principle that the parties themselves should decide the scope of the arbitration remedy,\(^{153}\) and that a strike over disputes not covered by that remedy was permissible under the national labor policy.\(^{154}\)

The core of these Supreme Court decisions is that arbitration, being desirable but voluntary, should be enforced by injunction only where the parties have provided for it. This is the balance struck between the express policy favoring arbitration and the right to strike. This logic is applicable only to the scheme of the Labor Management Relations Act, not to the Railway Labor Act where there is no express policy in favor of the right to strike but there is statutorily mandated arbitration. Under the Railway Labor Act, the purpose of an injunction against a strike is to enforce the statute, not to provide an incentive for the parties to agree to arbitration, since arbitration is required no matter what the parties wish.

III. RECENT CASES CREATING A PRE-EXHAUSTION RIGHT TO STRIKE FOR THE RAILWAY LABOR ACT.

The courts in three judicial circuits have considered the scope of permissible strike activity under the Railway Labor Act in the situation where the right to strike had not been gained because ‘‘major dispute’’ procedures of the Act had not been exhausted. Out of these cases, three quite different conceptual approaches have arisen to accommodate the Railway Labor Act and the Norris-LaGuardia Act, which divest the federal courts from jurisdiction to issue injunctions against strikes except under certain circumstances. One approach is to permit an injunction only where the dispute giving rise to the strike is arbitrable; which is the equivalent of applying *Buffalo Forge*\(^{155}\) to the Railway Labor Act. Another approach is to apply the *policy* against disruption of the Railway Labor Act to permit injunctions, except in the context of an impasse in negotiations which has been pursued through all of the Act’s major dispute steps. An intermediate approach is to interpret the jurisdiction of the agencies established by the Act broadly so as to permit injunctions only to protect the Act’s procedures rather than its policies, but to make injunctions available in most cases. This section reviews these decisions and seeks to extract from the courts’ opinions the main elements of the conflicting approach to accommodation.

*Wien Air Alaska v. Teamsters,*\(^{156}\) involved a refusal to perform struck

\(^{153}\) Id. at 411-12.

\(^{154}\) Id. at 407.

\(^{155}\) 428 U.S. 397 (1976).

work by employees of Wien. Wien had been granted authority by the Civil Aeronautics Board to serve routes normally served by Alaska Airlines, which was on strike. Certain Wien employees refused to work on these routes on the basis that to do so would cast them in the role of strike breakers.\textsuperscript{157} The employees argued that the Norris-LaGuardia Act, and the analysis suggested by \textit{Buffalo Forge},\textsuperscript{158} deprived the court of jurisdiction to enjoin their sympathetic action.

The district court disagreed and granted an injunction. It expressed doubt that \textit{Buffalo Forge} had any application to Railway Labor cases because of the unique policy considerations of the Act.\textsuperscript{159} However, on the facts before it, the court concluded that the applicability of \textit{Buffalo Forge} was not a crucial issue and that the dispute was not a sympathy strike but a protest against work assignments made by Wien. Accordingly, the dispute arguably was an arbitrable grievance and \textit{Buffalo Forge} would not prohibit an injunction.\textsuperscript{160}

\textit{Summit Airlines v. Teamsters}\textsuperscript{161} involved organizational picketing by a Teamsters local seeking the right to represent cargo handlers at JFK Airport.\textsuperscript{162} The court noted that the Railway Labor Act did not refer explicitly to the resolution of disputes over the recognition of a union as a bargaining representative.\textsuperscript{163} However, it also observed that the Railway Labor Act, unlike the National Labor Relations Act, was specifically designed to avoid interruptions to the operation of any carrier.\textsuperscript{164} Thus, it concluded that the mechanism for resolving recognition disputes under Section 2 of the Act, combined with the grant of jurisdiction in Section 5(d) to the National Mediation Board in cases involving "any other dispute not decided in conference between the parties," provided sufficient positive command to avoid the bar of the Norris-LaGuardia Act.\textsuperscript{165} The availability of a specific procedure under the Act under the court's interpretation thus did not make it necessary to decide whether the Act's policies, by themselves, would permit an injunction.

\textit{Federal Express Corp. v. Teamsters}\textsuperscript{166} involved similar facts, but the Court of Appeals for the Ninth Circuit reached a result opposite to the result in the \textit{Summit Airlines} case. Federal Express facilities in South San Francisco were picketed by Teamsters, members protesting wages and labor

\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 2935.
\textsuperscript{160} Id.
\textsuperscript{161} 628 F.2d 787 (2d Cir. 1980).
\textsuperscript{162} Id. at 788.
\textsuperscript{163} Id. at 790.
\textsuperscript{164} Id. at 794.
\textsuperscript{165} Id. at 794-95.
\textsuperscript{166} 617 F.2d 524 (9th Cir. 1980).
standards in effect for Federal Express employees. Although the court did not explicitly find that the picketing was intended to force recognition of the Teamsters, that undoubtedly was its purpose.167 The starting point for the court’s analysis was the proposition that, "when no specific legal command of the Railway Labor Act is violated . . . the Norris-LaGuardia Act generally deprives the courts of jurisdiction to enter injunctions."168 Failing to find any procedure under the Act applicable to the dispute between Federal Express and the Teamsters, it concluded that an injunction could not issue.169

Wien, Summit Airlines, and Federal Express all involved facts which could have supported a conclusion that the dispute should have been handled under procedures provided by the Railway Labor Act, thus addressing Norris-LaGuardia Act accommodation in a procedural context. Two other cases presented a different accommodation question: whether the Norris-LaGuardia Act should be accommodated to the policies of the Railway Labor Act.

Seaboard World Airlines, Inc. v. Transport Workers170 involved an effort by the Transport Workers Union (TWU) to force Seaboard to modify a collective bargaining agreement to extend security benefits to navigators hired after the agreement was entered into. Seaboard refused to bargain on the ground that the original agreement prohibited modification until a later date.171 TWU threatened to strike and the district court issued an injunction. The district judge believed that the provision prohibiting renegotiation contained some ambiguity, thus requiring determination by an Adjustment Board under Section 3 of the Railway Labor Act.172 Thus, his reasoning was similar to that employed by the Wien court. The Court of Appeals determined that an injunction was proper, but for a different and much more sweeping reason. This court was unable to find any relevant question of interpretation of the collectively bargained provision.173 Rather, the relevant dispute involved determination of the legality of an unambiguous bar to renegotiation.174 The question of legality was a question for the district court, not a Railway Labor Act arbitrator.175 Thus, the basis for an injunction to protect the Railway Labor Act processes—the basis in Wien, and arguably in Summit Airlines—was not available. However, the court went on to find a basis for the injunction in the general duty, imposed by

167. Id. at 526.
168. Id.
169. Id.
170. 425 F.2d 1086 (2d Cir. 1970), aff’d, 443 F.2d 437 (2d Cir. 1971).
171. Id. at 1088.
172. Id. at 1089.
173. Id. at 1090.
174. Id. at 1091.
175. Id.
Section 2 of the Act, to make every reasonable effort to settle disputes in order to avoid disruptions to commerce.176 Thus, an injunction against a strike pending further consideration by the district court was proper.177

On remand, the district court found the prohibition against renegotiation of the navigator security agreement to be legal and granted a permanent injunction.178 The Court of Appeals affirmed.179 The affirmance was based more on a review of the finding that the provision of the collective agreement was legal, than on any question of whether a legal provision would support an injunction against a strike.180 The court concluded, however, that the prohibition against renegotiation of the agreement was consistent with the policy of the Railway Labor Act. To find otherwise "'means that any agreement must be subject to reopening every thirty days [which] would convert an Act intended as an instrument for achieving industrial peace into a potent weapon for perpetual warfare.'"181

Trans International Airlines v. Teamsters182 involved facts nearly identical to Seaboard, but produced a different result. Trans International flight attendants had entered into a collective agreement that prohibited strikes against military operations even after the expiration of the agreement.183 After the agreement expired, an impasse was reached in negotiations and the flight attendants struck.184 An injunction against the strike, insofar as it extended to military flights, was issued.185 The Court of Appeals reversed, concluding that the strike violated the agreement, but that the injunction violated the Norris-LaGuardia Act.186 It found the no-strike provision unambiguous, thus presenting no question for arbitration under Section 3 of the Railway Labor Act.187 It concluded that "'absent a substantial nexus with statutory dispute settlement mechanisms or an agreement to arbitrate, an injunction may not issue to prevent a plain breach of a no-strike clause by a union.'"188 Conceding statutory policies in favor of private activity to prevent strikes, it found other statutory policies in favor of the ultimate right to strike to be more forceful.189

The cases reviewed in the preceding section present three conceptual
questions, the answers to which will profoundly affect how the Norris-LaGuardia Act should be accommodated with the Railway Labor Act in judicial actions to prevent strikes. First, how broadly should specific procedural and jurisdictional provisions of the Railway Labor Act be construed so as to permit injunctions under the view that accommodation is appropriate only to protect Railway Labor Act processes? Second, should the duty under Section 2, first "to . . . maintain agreements" 190 be construed to permit injunctions against violation of explicit unambiguous agreement provisions, even when recourse to one of the administrative agencies established by the Act is not appropriate? Third, should the policy against disruption be applied to permit injunctions in other cases, e.g. where no bargaining relationship exists and therefore the duty to maintain agreements is not applicable. Each of these questions must be addressed separately.

The first question relates to the scope of the procedures of the Railway Labor Act. The Ninth Circuit views accommodation of the Act with the Norris-LaGuardia Act as appropriate only to protect those procedures. 191 Accordingly, the availability of anti-strike injunctions will be determined by the scope of the Railway Labor Act processes. Respectable arguments exist for viewing the Railway Labor Act as providing comprehensive machinery for virtually any type of dispute that may arise.

The Railway Labor Act provides procedures for handling two types of disputes: "major disputes" and "minor disputes." 192 Major disputes relate to the negotiation of new terms and conditions of employment (interest disputes), while minor disputes involve disagreements over the interpretation or application of existing terms and conditions of employments (rights disputes). 193 Additionally, as the Summit Airlines court noted, Section 5(c) of the Act invests the National Mediation Board with jurisdiction over "any other dispute not decided in conference between the parties." 194 The legislative history of this provision, reviewed by the court, focuses on representation disputes as the "other" type of dispute within NMB jurisdiction. However, the language is broad enough to exclude the possibility that the Congress intended any class of disputes to be beyond the Act's ken. Similarly, the Supreme Court, in the Elgin case, noted that the jurisdiction of an adjustment board was not intended to be limited to interpretation of explicit provisions in formal collective bargaining agreements. It defined minor disputes, within the jurisdiction of an adjustment board, to include disputes over "omitted" cases. "In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those

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191. See notes 166-169 & 182-189 and accompanying text, supra.
193. Id. at 723.
194. 628 F.2d at 790.
covered by the collective agreement . . . ."\textsuperscript{195} Certainly the statutory language of Section 5(c), combined with the interpretative language of the \textit{Elgin} courts, is sufficient to support an approach that virtually any dispute under the Railway Labor Act is referable either to the National Mediation Board, thus delaying the right to strike, or to an adjustment board, thus eliminating a right to strike.

No judicial decision has been found that excludes the possibility of a dispute being outside the coverage of Railway Labor Act procedures. Nevertheless, strong support appears to exist for the expansive reading of the \textit{Wien} and \textit{Summit Airlines} courts. Moreover, this interpretation of the Act's procedural and jurisdictional provisions would have permitted an injunction to be issued in all five cases. An injunction was issued in \textit{Wien} because the court found the dispute to be arbitrable and thus within the minor dispute jurisdiction of an adjustment board. It equally well could have concluded that the dispute was a sympathy strike, not covered by any statutory procedure. The injunction in \textit{Seaboard} could have been justified on the basis that the application of the restriction against renegotiation should have been addressed by an adjustment board. Even if no interpretation was called for, how the agreement should be applied in light of industrial relations considerations was surely a question within the competence of an adjustment board. In \textit{Summit Airlines}, the approach to statutory construction suggested here was utilized to support the issuance of an injunction. Similarly, the \textit{Federal Express} court could have recognized the picketing for what it was—an effort to organize Federal Express—and granted an injunction under the same reasoning employed by the \textit{Summit Airlines} court. Finally, the \textit{Trans International} court could have concluded that the no-strike clause, while unambiguous, necessitated resolution of questions of application, properly referable to an adjustment board. All that is necessary to reach these conclusions is the acceptance of the principle that Congress intended the dispute resolution machinery of the Railway Labor Act to be expansive.

The second question—whether contractual obligations can be enforced by injunction when resort to statutory processes is inappropriate—presupposes that a class of disputes exists which are outside the jurisdiction of the Act's agencies. Such a class of disputes would include those over provisions in collective agreements which are so unambiguous as not to need interpretation by an adjustment board. An obvious example is the type of no-strike clause at issue in the \textit{Trans International} case, or the limitation on renegotiation at issue in the \textit{Seaboard} case. Both of these provisions limited the availability of certain rights under the Act: the right to

\textsuperscript{195} 325 U.S. at 723.
strike after the exhaustion of major dispute procedures and the right to compel bargaining. The Second Circuit would make such provisions enforceable by injunction under the duty of Section 2 to "make and maintain agreements." The Ninth Circuit would not. Basic to these differing applications of Section 2 is a conflicting interpretation of the basic policy preference of the Railway Labor Act. The Seaboard opinion emphasizes the Congressional policy against disruptions. The Trans International opinion emphasizes the policy in favor of the ultimate right to strike. The Trans International opinion also seems to import concepts borrowed from the National Labor Relations Act while acknowledging that such importation is inappropriate in some cases. The Seaboard approach is preferable, and consistent with the recognition of a limited right to strike when a negotiating impasse survives the delay envisioned by the Act's major dispute processes.

The problem with the Trans International approach is not so much that it is wrong logically, but that it will prove to be unworkable in practice. If the parties to a Railway Labor Act agreement draft the agreement clearly, and then one party violates an unambiguous provision, the reasoning of Trans International would permit a strike to occur; not only a strike in violation of a clear no-strike clause as under the facts of the case, but also a strike in protest of a clear violation by the employer under the logic of the opinion. Such strikes could result from day-to-day administration of collective agreements; a result obviously inconsistent with the policy of the Railway Labor Act to promote the maintenance of agreements and to avoid strikes.

The Seaboard approach, while construing the jurisdictional provisions of the Act narrowly, avoids this problem, but concludes that a strike in violation of a collective agreement can be enjoined even if it appears that no real dispute over the interpretation of the agreement exists. In addition, by making voluntary undertakings by management and labor practically enforceable by injunction, the Seaboard holding encourages the parties to resolve their differences privately. This procedure is more in line with the Act's policies.

The third question, whether the Act's policies against strikes should be applied by themselves to support injunctions against strikes or picketing, presents more difficult legal and policy questions. Yet the question is presented directly by the facts in Federal Express as the Court of Appeals understood them. The picketing complained of by Federal Express was
conducted by persons neither employed by Federal Express nor representative of its employees. Obviously, therefore, no question of the Section 2 duty to maintain agreements could be involved. Similarly, absent a purpose to organize Federal Express employees, it is difficult to find jurisdiction for a Railway Labor Act administrative agency, even under the expansive reading of the Act's procedural coverage advocated supra.

However, it should be remembered that the question of whether an injunction is available requires application of two statutes: the Railway Labor Act and the Norris-LaGuardia Act. The latter Act is not necessarily infinite in its reach, protecting as it does only disputes "arising or growing out of labor disputes." Thus, the question in a factual setting like that in Federal Express involves a determination whether the "involving or growing out of a labor dispute" language in the Norris-LaGuardia Act should be given a restrictive interpretation when disruption to a Railway Labor Act carrier will result absent an injunction.

Commentators and courts have noted that the Norris-LaGuardia Act was intended especially to protect union organizing efforts. Thus, it may be less consistent with the Norris-LaGuardia Act for injunctions to issue against area standards picketing as in Federal Express or other types of activity intended to protect or enhance the representational status of a labor organization than it is for injunctions to issue against secondary picketing.

However, a type of pressure against a Railway Labor Act carrier can be conceived of that is unrelated to the interests specifically sought to be protected by the Norris-LaGuardia Act, which nevertheless could not be enjoined under either the process-accommodation theory or any of the Railway Labor Act section 2 theories set forth supra. For example, a Railway Labor Act carrier might be picketed in order to force it to change its position on a public policy issue. For example, the carrier might be picketed by trucking employees concerned about loss of market share from the motor carrier mode to the rail mode, or, as has happened recently in the ocean shipping industry, Railway Labor Act carriers could be picketed to prevent the transportation of goods destined for a particular country.

204. See note 203, supra.
205. In New Orleans Steamship Assoc. v. Longshore Workers, 626 F.2d 455 (5th Cir. 1980), and Baldwin v. Longshoremen's Assoc., 626 F.2d 445 (5th Cir. 1980), cert. granted, 49 U.S.L.W. 3725 (1981), the court considered the legality of a boycott of cargo destined for the Soviet Union. In New Orleans Steamship, the court concluded that a strike called to further political objectives does "involving or growing out of a labor dispute" for purposes of the Norris-LaGuardia Act. Accordingly, it reversed the grant of an injunction against the strike before the question of its per-
Surely in such circumstances, the underlying purpose of the Railway Labor Act to permit the uninterrupted operation of railroads and airlines could only be served by permitting injunctions to be issued. The only legal justification for such injunctions would be the policy against disruption taken by itself.

IV. APPLICATIONS TO A CONFLICT INVOLVING PUBLIC EMPLOYEES AS “STRANGER PICKETS”

These situations may be illustrated by reviewing the positions of the various parties in the 1981 subway and bus strike in Philadelphia. The Southeastern Pennsylvania Transportation Authority (SEPTA) provides mass transportation service in the Philadelphia metropolitan area. Some services are provided directly, and some services through contract. Subway and bus service within the city of Philadelphia is provided directly, through SEPTA’s City Transit Division. Certain other services are provided through SEPTA’s Red Arrow and Frontier Divisions, and by contract with Consolidated Rail Corporation (Conrail).

At 12:01 A.M. on March 15, 1981, Local 234 of the Transport Workers Union (TWU) began a legal strike against SEPTA after negotiations covering employees in the City Transit Division had reached an impasse. Shortly thereafter, picket lines were set up at City Transit facilities. On March 16, and subsequently, Local 234 also set up picket lines at Red Arrow Division, Frontier Division, and Conrail facilities. The legality of the extended picketing was determined in state court under state law.

Local 234’s attempt to exert pressure on Conrail provides an interesting example in which the legal principles reviewed in this section could have been applied. Local 234 and the City Transit Division were covered by Pennsylvania’s Public Employee Relations Act. Neither was covered by the National Labor Relations Act because SEPTA is not an “employer” and Local 234 is not a “labor organization” under the definitions of

missibility had been arbitrated, 626 F.2d at 469, and affirmed an injunction enforcing an arbitration award under the rationale of Boys Markets v. Retail Clerks, 398 U.S. 235 (1970), 626 F.2d at 445. In Baldovin, the court affirmed the district court’s denial of an injunction requested by the NLRB against the “secondary picketing” on the grounds that the dispute between the Longshoremen and the Soviet Union was not “in commerce” and thus was not within the NLRB’s jurisdiction. 626 F.2d at 454.

207. See SEPTA Complaint at para. 1,6,7.
208. See SEPTA Preliminary Injunction at 1.
209. See SEPTA Plaintiff’s Memorandum of Law at 1-2.
210. See id. at 2.
211. See SEPTA Preliminary Injunction at 2.
212. See generally SEPTA, March 6, 1981 transcript.
that Act. Conrail and its employees were covered by the Railway Labor Act. The National Labor Relations Act did not apply to Conrail or its employees for the same reason that Act did not apply to SEPTA.

While the Local 234 pickets were present at Conrail facilities, virtually no Conrail employees crossed the picket lines. These Conrail employees will be referred to as the "non-crossers." Certain groups of Conrail employees also refused to work regardless of whether it would have been necessary for them to cross a picket line in order to work. These Conrail employees will be referred to as the "sympathy strikers." The picketing members of Local 234 were not Conrail employees. They will be referred to as the "stranger pickets."

If Conrail had filed an action in federal court to seek relief from the disruption to its commuter activities caused by the picketing, it could have sought injunctions against three types of defendants: the non-crossers, the sympathy strikers, and the stranger pickets. The conflicting principles of Federal Express, Summit and Seaboard World Airways would have led to different results, depending on the type of defendant.

An injunction against the sympathy strikers should have been available on a minor dispute theory. Since the sympathy strikers were employees of Conrail, both parties were subject to the Railway Labor Act. If Conrail had framed the issues as a dispute over whether express provisions of its collective bargaining agreements, or past practice, prohibited sympathy strikes, and the facts arguably supported its position, a federal court should have issued an injunction under the rationale of Chicago River, Trans International and Federal Express.

Similarly, an injunction against the non-crossers should have been available on the same minor dispute theory. The non-crossers also were

215. Section 2 of the National Labor Relations Act, 29 U.S.C. § 152 (1976), excluded "any state or political subdivision thereof" from the definition of employer and defines labor organization as an organization which "exists for the purpose . . . of dealing with 'employers' . . . ."


217. See note 215, supra.

218. See notes 166-169 and accompanying text, supra.

219. See notes 161-165 and accompanying text, supra.

220. See notes 170-181 and accompanying text, supra. The carrier would argue that the conduct by its employees is a "minor dispute" requiring the interpretation of a collective bargaining agreement (or the rights flowing from an unwritten "practice"), or that it is an "omitted case," i.e. a dispute that has arisen incidentally in the course of employment. Such disputes also are minor disputes under the Railway Labor Act and are subject to compulsory adjustment according to the Act's procedures under section 3. Elgin, J. & E. Ry. v. Burley, 325 U.S. at 722-24. Airline Flight Attendants v. Texas Intl. Airways, 411 F. Supp. 954, 961 (S.D. Tex. 1976), aff'd, 566 F.2d 104 (5th Cir. 1978).

221. See notes 53-56 supra and accompanying text.

222. See notes 170-181 supra and accompanying text.

223. See notes 166-169 supra and accompanying text.
Conrail employees, and if Conrail could have offered facts supporting a colorable position that past practice required its employees to cross stranger picket lines, the same cases would have permitted an injunction.224

A much harder case would have been presented if Conrail had sought an injunction against the stranger pickets—the most practicable course of action. The stranger pickets were not employees of Conrail, and thus no minor dispute existed. Under Federal Express225 no injunction would have been permitted. However, the stranger pickets also did not seek to organize Conrail employees, and the rationale of Summit would not have supported an injunction either. Only Seaboard World Airways226 could have articulated a basis for an injunction against the stranger pickets, and the principle of that case would have had to be extended considerably beyond the facts before the Seaboard World Airways court. An injunction against the stranger pickets could have been supported only if the policy of the Railway Labor Act227 against disruption were strong enough to preclude interference by any third party in the functioning of the employer-employee relationship.

While Virginian Railway,228 Chicago River229 and Seaboard World Airways230 justified injunctive relief in part because of the policy of the Railway Labor Act231 against disruption of services, the facts of all three cases involved disputes between a Railway Labor Act carrier and its own employees. Only in Summit was an injunction available against strangers to the employment relation, and there, the organizational objective meant that specific Railway Labor Act procedures under Section 2232 were available to those strangers.233 Therefore, reference to legal principles beyond those associated with the particular labor statutes covered by this article is necessary to resolve the issue.

Before moving to an examination of those principles, it should be noted that an injunction against the stranger pickets probably would have been available under Ashley, Drew and Northern v. Transportation

224. See Chicago & Ill. Midland Ry. v. Railroad Trainmen, 315 F.2d 771, 774 (7th Cir. 1963), vacated as moot, 375 U.S. 18 (1963) (refusal to cross picket line violates RLA duty to confer); see also Lakefront Dock & R.R. Term. v. Longshoremen, 333 F.2d 549 (6th Cir. 1962) (injunction against honoring picketing line).
225. See notes 166-169 supra and accompanying text.
226. See notes 170-181 supra and accompanying text.
228. 300 U.S. 515 (1938).
230. 425 F.2d 1086, aff'd, 443 F.2d 439 (2d Cir. 1971).
233. 628 F.2d 787 (2d Cir. 1980).
Union. There, the Eighth Circuit found an affirmative basis for jurisdiction to enjoin stranger picketing under the Interstate Commerce Act. However, the subject of inquiry here is limited to whether an affirmative basis can be found in the Railway Labor Act itself, a question which the Ashley-Drew court did not reach.

The question might be framed this way: When relations established by a federal statute are interfered with by a person not covered by the statute, does a federal court have jurisdiction to enjoin the interference? In a number of specific areas not involving labor law, the answer is "yes." For example, an injunction may issue to prevent interference by a third party with the performance of the statutory duty owed by a common carrier to a shipper or consignee under the Interstate Commerce Act. It is also true under general equitable principles that a person may be enjoined against interfering with performance of a contract of employment.

The same answer should obtain when the interference is with the employment relationship established by the Railway Labor Act. That employment relationship closely resembles a common law contract relationship, except that the statute limits the rights of the parties to terminate or modify the contract. There is no logical reason why these limitations, which are intended to prevent disruption of service, should make it legally easier for a third person to cause disruption than under common law.

The reasoning of the courts that made third-party interference with Interstate Commerce Act duties enjoing also should lead to the conclusion that third-party interference with Railway Labor Act duties should be enjoined. In the case of the Interstate Commerce Act, the defendants are interfering with performance of a statutory duty by the plaintiff: the common carrier obligation. In the case of the Railway Labor Act, the defendants are interfering with realization by the plaintiff of statutory rights: continuity of service by plaintiff’s employees. The relationship between the plaintiff and the statutory burdens and benefits of the two statutes would seem to make

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234. 625 F.2d 1357 (8th Cir. 1980). In the case of services provided by Conrail to SEPTA, it was not clear that common carrier obligations under the Interstate Commerce Act were applicable.
235. id. at 1370.
236. id.
237. id.
241. See Ashley, Drew & Northern Ry. v. Transportation Union, 625 F.2d 1357, 1370 (8th Cir. 1980), Chicago & Ill. Midland Ry. v. Railroad Trainmen, 315 F.2d 771, 774 (7th Cir. 1963); Lakefront Dock & R.R. Term v. Longshoremen, 333 F.2d 549, 552 (6th Cir. 1962); Railroad Trainmen v. New York Central R.R., 246 F.2d 114, 122 (6th Cir. 1957), cert. denied, 355 U.S. 877 (1967).
the case for an injunction against third-party interference stronger under the Railway Labor Act than under the Interstate Commerce Act.

In *Tunstall v. Locomotive Enginemen & Firemen*, the Supreme Court held that federal courts have jurisdiction to enjoin acts which violate Railway Labor Act duties, even though the conduct (racial discrimination by a labor organization) is not subject to regulation by the major or minor dispute procedures or by the representation procedures of the Act. This precedent also supports the availability of an injunction against stranger pickets. Conrail, like the individual negro employees in *Tunstall*, is protected by the Act. The defendants, stranger pickets in the Conrail case, and a labor organization in *Tunstall*, are causing violation of a goal of the Act: uninterrupted rail service in Conrail, fair representation in *Tunstall*. Indeed, the only important distinction between the stranger picket case (Conrail) and *Tunstall* would seem to be that in *Tunstall* the defendant was a person directly regulated by the Railway Labor Act whereas the stranger pickets are not directly regulated by the Act.

Finally, an injunction against the stranger pickets would appear to be warranted under the Supreme Court’s analysis in *Cort v. Ash*. *Cort v. Ash* identified four factors to be considered by a federal court in determining whether a remedy for violation of a statutory right should be implied:

1. Whether the plaintiff is a member of a class protected by the statute;
2. Whether there is indication of explicit or implicit legislative intent to create the remedy or to deny it;
3. Whether it is consistent with the underlying purposes of the legislative scheme to imply the remedy sought by the plaintiff; and
4. Whether plaintiff’s cause of action is one traditionally relegated to state law, so as to make it inappropriate to infer a cause of action based on federal law.

Each of these factors would seem to militate in favor of granting an injunction against the secondary pickets. Conrail, as a carrier, is a member of the class protected by the Railway Labor Act. The Railway Labor Act contains no express jurisdictional or remedial provisions, and all of the cases, beginning with *Virginian Railway*, support the proposition that the legislature intended injunctive relief to be available to protect rights created by the Act. It is consistent with the underlying scheme of the Act—the prevention of disruptions to rail service—to permit third parties disrupting such service to be enjoined. Finally, *Andrews v. L & N Railroad Co.* supports the con-

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244. Id. at 78. The implication of remedies under the Railway Labor Act has been considered in a recent article: Aronca, *Damages for Unlawful Strikes Under the Railway Labor Act*, 32 Hastings L.J. 779 (1981).
245. 300 U.S. 515 (1938).
clusion that an action against stranger pickets is more closely associated with federal law than with state law because the right interfered with—the Conrail employment relation—is a creature of federal law, thus resolving the fourth Cort factor of granting an injunction.

Accordingly, it would seem that the best reasoning in the hypothetical federal action for an injunction against the stranger pickets would be the following: (1) The purpose of the stranger picketing is to cause Conrail employees not to perform service under collective bargaining agreements entered into under the Railway Labor Act. (2) Failure to perform service under the agreements could be enjoined if the Conrail employees themselves were the actors.\textsuperscript{247} (3) An injunction against third party interference with legal relationships is permitted under general equity principles.\textsuperscript{248} (4) Injunctions have been determined to be the appropriate means of protecting other Railway Labor Act rights. (5) Implying an injunctive remedy against third party interference with Railway Labor Act duties meets the tests articulated by the Supreme Court for implied remedies. (6) The Norris-LaGuardia Act does not preclude an injunction against the stranger pickets.\textsuperscript{249} (7) Therefore, an injunction should issue.

This result is different from the result which would be reached with respect to stranger picketing of an employer covered by the National Labor Relations Act.\textsuperscript{250} Under that act, the affirmative basis for an injunction would have to be based on specific performance of a contract under the authority of section 301.\textsuperscript{251} The Boys Markets\textsuperscript{252} doctrine as interpreted by Buffalo Forge\textsuperscript{253} permits jurisdiction only to the extent necessary to vindicate an agreement to arbitrate.\textsuperscript{254} The Norris-LaGuardia Act\textsuperscript{255} would be accommodated only to the extent necessary to further consensual arbitration.\textsuperscript{256} Thus, the stranger picketing, being covered by the Norris-LaGuardia Act, could be enjoined.

\textsuperscript{247} See notes 53-61, supra.


\textsuperscript{249} See Perritt, supra note 203, which considers the question whether the Norris-LaGuardia Act precludes federal jurisdiction to enjoin secondary action. The issue addressed here is whether the Railway Labor Act provides an affirmative basis for such jurisdiction.

\textsuperscript{250} See New Orleans Steam Ship Assoc. v. Longshore Workers, 626 F.2d 455 (5th Cir. 1980). "Stranger picketing" involves picketing by persons not covered by the collective agreement in force at the picketed workplace. Hence, an injunction against such picketing cannot be supported logically as intended to enforce that collective agreement against a party thereto.

\textsuperscript{251} 29 U.S.C. § 185(a) (1976); see New Orleans Steam Ship Assoc. v. Longshore Workers, 626 F.2d 455, 465 (5th Cir. 1980).


\textsuperscript{254} See notes 152-154 and accompanying text, supra.


\textsuperscript{256} See New Orleans Steam Ship Assoc. v. Longshore Workers, 626 F.2d 455 (5th Cir. 1980).
dia Act—at least in the Fifth Circuit 257—and not being within the contractual arbitration clause would not be enjoinable. 258

But, the Congressional purpose of the Railway Labor Act, being distinguishable from the purpose of the National Labor Relations Act 259 would provide an affirmative basis for an injunction, and the Norris-LaGuardia Act would not preclude an injunction. 260

The history of the Railway Labor Act, reviewed in this article, shows that the Act is intended to eliminate the disruption caused by strikes and other economic action except by the immediate parties after they have exhausted the procedures of the Act. Its primary aim is to promote peaceful resolution of disputes. The article also shows that the National Labor Relations Act envisions a greater role for economic action. The policy of the latter Act should not be applied to distort realization of the policy goals of the former Act. Buffalo Forge 261 should not permit “ploughshares to be beaten into swords.”

257. See id.
258. See note 250, supra.
259. See text accompanying notes 7-154, supra.
260. See Ashley, Drew & Northern R. v. Transportation Union, 625 F.2d 1357 (8th Cir. 1980); Perrott, supra note 203.
Limitation of Liability and Pleasure Boats: 65 Years of Judicial Misinterpretation of the Intent of Congress

DAVID W. TIFFANY*

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I. INTRODUCTION

The Courts and the commentators unanimously agree¹ that the benefits of the Limitation of Liability Act² apply to pleasure boats.³ Both also

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³ 46 U.S.C. § 183 (1976 & Supp. Ill 1979). Pertinent sections to this article are as follows:
agree that unjust results are reached by applying the act to pleasure boats. Additionally there is universal agreement that there is no legislative history supporting the argument that Congress did not intend to exclude pleasure boats from the act. The position taken in this article is that there is enough legislative history to support the conclusion that Congress clearly did not intend the act to apply to pleasure boats. After reviewing this legislative history, I will examine the case law and illustrate how the courts can overrule prior decisions.

II. LEGISLATIVE HISTORY 1851

In the landmark case of Norwich Co. v. Wright, the Supreme Court in interpreting the Limitation of Liability Act for the first time stated the purpose of the Act.

The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of

§ 183(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner’s liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel’s tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(f) As used in subsection (b), (c), (d), and (e) of this section and in section 183b of this title, the terms “seagoing vessel” shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-vessels, canal-boats, scows, car floats, barges, lights, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title, as amended.

§ 188 Except as otherwise specifically provided therein, the provisions of §§ 175, 182, 183, 183b, 187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.


4. See Gibbon v. Wright, 517 F.2d 1054, 1057 (5th Cir. 1975); Petition of Porter, 272 F. Supp. 282, 283-84 (S.D. Tex. 1967); The Muriel, 25 F.2d 505, 506 (W.D. Wash. 1928); Stolz, supra note 1 at 708; Harolds, supra note 1 at 427; Comment, Proposal for Reform, supra note 1 at 575 n. 125.

5. 80 U.S. (13 Wall.) 104 (1871).
the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises. And if there exist good reasons for exempting innocent shipowners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case as in the other, their property is in the hands of agents whom they are obliged to employ.\

The Supreme Court's interpretation has support in the Congressional history of the Act. Debate concerning the limitation act started after a favorable report to the Senate by the Committee on Commerce. Following the introduction of the report to the Congress, some question was raised to the fact that it was not examined by the Judicial Committee. Portions of this debate illustrate the commercial intentions of Congress:

Mr. HALE. I have looked at this bill and examined it, and it will be found that it cuts up the whole common law in regard to common carriers in this country. I will not say that it is not right; but I think a bill making such fundamental changes in the common law ought to have the sanction of the Judicial Committee. . . .

Mr. HAMLIN. A single word in reply to what has fallen from the Senator from New Hampshire. I have the ipse dixit of no judge in any court to offer in favor of the provisions of this bill. I am inclined to believe that our intelligent merchants and commercial men in this country understand quite as well what are the true wants and interests of commerce as any judicial officer in this country. I would rely on those men who are practical merchants, and who are engaged practically in commerce, for better information on this point than you can get from any of your judicial tribunals.\

The bill was subsequently laid on the table and more extensive debate did not occur until later in the session.

When the bill was addressed again much of the debate centered around the taking up of the bill for consideration. The debate raged, in

6. Id. at 121-22. In Md. Cas. Co. v. Cushing, 347 U.S. 409 (1954), Justice Clark in a tie breaking concurring opinion interpreted Norwich and stated:

The basis of the decision was that Congress intended the Act to protect the investment of ship owners, and if the latter were prevented from indemnifying themselves from loss of their investment in the ship it would be contrary to the purpose of Congress as well as to the spirit of commercial jurisprudence.

347 U.S. at 423-24. As can readily be seen the "commercial" purpose has never been understated by the Supreme Court.


8. Id. It was not sent to the judicial committee.

9. Id. at 713-715.
part, as follows:

Mr. DAVIS, of Massachusetts. I concur with the Senator from Maine that this is a measure of considerable importance, touching a very large interest, and touching it somewhat vitally. My friend from North Carolina says that it proposes to change a system which has existed for a great period of time. I wish only to say in reply to that, that it is by a decision, some two or three years since, that the owners of ships have comprehended their liabilities. It is by an interpretation and construction given to them by courts below that they now understand that if a ship lying at the wharf in New York takes fire and burns up without fault on the part of the owners, they are liable as common carriers. This becomes a very serious question—one that affects that interest very deeply; and therefore it is that it is necessary that the law should be changed. Now, I would be very much gratified if the question could be decided this session; and if the Senator from Maine presses the consideration of this measure, I, for one, will sustain him. I am not allowed, upon the question of taking up the bill, to go into the merits of the law that is proposed in the bill. I will only say, that it is the adoption of a system which has been several years in operation in England, with certain alternations merely, as I understand it, to adapt it to the affairs of this country, and nothing more. It is simply placing our mercantile marine upon the same footing as that of Great Britain. We are carriers side by side with that nation, in competition with them, and we cannot afford very well to give them any great advantage over us without affecting our interest very seriously.

Mr. CASS. I will detain the Senate but a moment. I was simply going to remark; that, as I understand this matter, the liabilities of ship-owners in foreign countries have been reduced, while those of our own ship-owners, if not actually increased, have been effectively so by the decision of the Supreme Court. Now, how are we to continue our commercial interest on a firm foundation unless we put our ship-owners on the same footing with those of other countries? Is there a more important matter than one like this, in which the interest of our whole commercial marine is at stake? 

Subsequently the bill was taken up and the merits of the bill were discussed. Senator Underwood of Kentucky asked several questions concerning the effect of the bill on the costs of the transportation of goods on the central states, specifically on their inland waterborne transportation.

10. Id. at 714.
11. Id. at 715. Ayes 23, nos 13.
12. Id. at 716.

Mr. UNDERWOOD. . . . The people of Kentucky are an agricultural people mainly. We cultivate tobacco, and we raise hogs. We raise a great many articles that enter into the commerce of the world. But we are not the carriers of those articles. Now, sir, whom will this measure affect? Will it reduce freights if we pass this bill? Will it make such a reduction, that my constituents will feel it upon the enhanced price of their pork, tobacco, and other articles which they send to market? Will Tennessee—will Alabama feel it in the enhanced price of their cotton? Will freights come down in proportion as you relieve the shipowners, or those that are interested in the navigation of the ocean? Have they not fixed their tariff of freights heretofore, taking into view all the liabilities which the law imposes upon them? And have we not been paying to this most prosperous interest, per-
In response to his objections to the bill the following amendment was introduced, and commented upon:

Mr. PEARCE. It might perhaps obviate some of the objections to this bill, if amendments were made to the last section, and I propose to submit one without a speech. In the last section of the bill we find that—

"The preceding sections shall not apply to the owner or owners of any canal boat, nor to the owner or owners of any lighter or lighters, employed in discharging and loading vessels, or in transporting goods or other property inland from place to place."

I move to strike out all from the ninth to the thirteenth line of the seventh section, inclusive, and substitute the following in its place:

"This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or any vessel of any description, which may be used for river or inland navigation."

Mr. HAMLIN. I will say but a single word upon that amendment. I am going to interpose no objection to it. There is a class of Senators here who perhaps should understand that matter. If those who represent the interior waters of the country desire such an amendment, I am perfectly willing that it should be made.  

The debate, pro and con, concerning the impact on inland commercial waterborne transportation continued and although the amendment was
adopted. Senator Seward astutely and correctly predicted:

Mr. SEWARD. I hope that the amendment will not prevail. I am very sure that it cannot be the desire or the intention of Congress to have one system of liability for ship-owners and general navigation, and another system for the lakes and rivers. We shall have a conflict of principles—a conflict of policy—a conflict in every way producing uncertainty as to what is the law, and producing conflicting adjudication in regard to it.\textsuperscript{15}

The importance of the debate as it concerns pleasure vessels is clearly evident. Had the amendment failed and the act been extended to inland navigation then the intent of Congress would have clearly been to protect commercial navigation on inland waterways as well as on the oceans of the world. However, the amendment did pass. It passed because of a suspicion that the act would increase the risks of losses to inland farmers and merchants. So the act passed, presumably to assist American shipping immediately, and they lay dormant for 21 years.

III. EARLY CASE LAW

In\textit{Norwich Co. v. Wright},\textsuperscript{16} the Supreme Court announced that a ship-owner's liability may be discharged by the surrender of his vessel and freight, and, if the vessel was totally lost, that the owners could be discharged without producing anything. After this decision the shipping interests in this country awoke to their new found insurance policy. As we shall soon see inland shipping interest would soon lobby Congress for the benefit

\textsuperscript{15} Id. at 717-718 [emphasis supplied].
\textsuperscript{16} 80 U.S. (13 Wall.) 104 (1871).
of this "free insurance."\textsuperscript{17} However, before discussing the amendment which accomplished this change, the application of the original law to pleasure vessels should be addressed.

In \textit{The Mamie},\textsuperscript{18} the steam pleasure yacht, \textit{Mamie}, a vessel enrolled and licensed for the coast wise trade, collided on the Detroit River and sank, drowning seventeen passengers.\textsuperscript{19} The owners filed for limitation of liability and the single issue which was litigated was whether the \textit{Mamie} belonged to the class of vessels protected by the act. Interestingly, this issue was one of the first impression for the court.\textsuperscript{20} After announcing that "limitation of liability is entirely a creature of statute,"\textsuperscript{21} the court traced the jurisprudence of the rest of the world's sea powers and noted the application of their statutes to commercial vessels, and specifically not to non-commercial vessels.\textsuperscript{22}

After discussing the application of foreign jurisprudence the court directly confronted the application of America's statute:

The act itself extends in terms to all vessels, and contains no restrictions except such as are specified in the last section. Rev. St. § 4289. This act "shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." Hence, any vessel not specially named in this exception, is, \textit{prima facie} at least, entitled to the benefit of the act. At the same time, as Mr. Justice Swayne observed in \textit{Jones v. The Guaranty & Ind. Co.}, 101 U.S. 626, "a thing may be within a statute, but not within its letter, or within the letter, yet not within the statute. The intent of the law-maker is the law." It is perfectly obvious that there must be classes of vessels to which the statute is not applicable, though they are not

\begin{footnotes}
\item[17] This policy increased in value when the Supreme Court excluded the procedures of the hull insurance policy from the concursus. The City of Norwich, 118 U.S. 466 (1886).
\item[18] 5 F. 813 (E.D. Mich. 1881); aff'd, 8 F. 367 (E.D. Mich. 1881).
\item[19] "Upon the day of her loss she was chartered for $20, by the parish priest of Trinity parish, to carry his acolytes, about 20 in number, upon an excursion to Monroe and back." 5 F. at 815.
\item[20] Id. at 815. The Court stated: "There are no authorities directly, and but very few remotely, bearing upon the question, and I am compelled to ascertain by analogy, and by an historical reference to this class of legislation, what was the intention of congress."
\item[21] Id.
\item[22] By the commercial code of France, (art. 210) "every owner of a vessel is civilly responsible for the acts of the master, and bound, as regards the engagements entered into by the latter, in whatever relates to the vessel and the voyage. He can in any case free himself from the above-named obligations by the abandonment of the vessel and freight." All the other commercial codes are constructed after the same model (Spain, art. 622; Holland, art. 321; Italy, art. 311; Chile, art. 870). . . . In 1844 it was held by the court of cassation that fishing vessels were not the subject of bottomry bonds, and that by "sea going vessels," as used in the Code, were to be understood all those, whatever their dimensions and denomination, which, with an equipment and a crew proper to them, formed a special service, or engaged in a particular industry. 1 Dufour 118.
\end{footnotes}
The Court discussed the intention of Congress in enacting the law and observed that it, "was to encourage commerce and to enable American vessels to compete with those of other maritime nations whose law extended a like protection to shipowners." This observation led to the conclusion that, "if the vessel be not engaged in what is ordinarily understood as maritime commerce, she is not entitled to the benefit of the act, though she may be an enrolled and licensed vessel, and subject to the navigation laws of the United States." Following this holding the court analyzed the class of vessels specifically excepted from the act: "canal-boats," ordinarily used intra-state on artificial waters; "barges," although defined by Webster as both (1) pleasure boats and (2) flat-bottom vessels used to load and unload ships, was used in the latter sense by Congress; "lighters," a vessel used to load and unload other vessels.

Lastly the Court discussed "vessels, of whatever description, used in rivers or inland navigation," and apparently defined them as vessels engaged in purely local trade. Consequently, following this point-by-point discussion, the court held:

Now it seems to me clear, from the above exceptions, that congress did not intend the act should apply to vessels engaged in purely local trade, and a fortiori to a vessel not built for the purpose of trade, but of pleasure; not run upon any regular route, not engaged in the business of carrying freight or passengers. I do not undertake to say that pleasure yachts, making long voyages upon the lakes or ocean, may not be within the act, but I think pleasure boats, whether propelled by steam or sail, engaged in purely local navigation, running in and out of the same port, though sometimes carrying passengers for hire, fall within the exception.

23. Id. at 818.
24. Id. at 819.
26. Id.
27. Id. The Court went on to astutely observe:
In later years the word has been used to designate a class of large vessels, sometimes costing from $15,000 to $50,000 carrying large cargoes, and depending for their motive power wholly or in part upon steamers, to which they are attached by tow-lines, and employed to a very large extent in interstate commerce upon the lakes. Whether the owners of such barges would not be entitled to the benefit of the limited liability act, is an open question. Undoubtedly they are within the letter of the exception, but as they are a class of vessels which was unknown at the time the act was passed, it would seem they are not within its spirit. I see no reason in principle why they are not as much within the act as the propellers which furnish them their motive power.
Id. at 819-820.
28. Id. at 820.
29. Id.
30. Id. Additionally, and importantly, the Court also observed: "Neither do the facts that a court of admiralty would have jurisdiction over the vessel, nor that she is subject to the navigation
In the Marnie the Court essentially analyzes the Limitation of Liability statute twice in the decision. First the court looked to the overall purpose of the act and held that it was limited to commercial vessels. Secondly, the Court analyzed the specific exceptions and held that a pleasure vessel involved in purely local navigation was excepted from the benefits of the act. They, however, did not express an opinion on the statutes of transoceanic pleasure yachts under the act.\textsuperscript{31} Five years following this decision, Congress amended the act and eliminated the specific exceptions.

IV. Legislative History 1886

Actually, the legislative history of the amendment to the act eliminating the stated exceptions begins in 1885 when a bill to amend the act was introduced and referred to the House Committee on Commerce.\textsuperscript{32} Although this bill varied from the ultimate amendment which passed in 1886, the House Committee report [hereinafter committee report] is very enlightening. The proposed bill read:

The provisions of the seven preceding sections relating to the limitation of the liability of the owners of vessels shall apply to all sea-going vessels, as well as all steam vessels used in rivers or inland navigation, but shall not apply to any canal-boat, barge, or lighter.\textsuperscript{33}

The committee reported that the object of the proposed amendment was "to include all steam-vessels, except canal-boats, barges, or lighters, under the same rule of liability."\textsuperscript{34} The committee urged the adoption of this amendment, reasoning that "there is no reason in equity or justice why that internal navigation should not have the same protection and encouragement as upon the high seas or the great lakes."\textsuperscript{35} After a lengthy discussion concerning the discrimination between vessels involved in

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\textsuperscript{31} Local travel by pleasure yachts on the ocean would have been excluded by the Court. \textit{id.} at 820.

\textsuperscript{32} 16 CONG. REC. 1756 (1885).

\textsuperscript{33} H.R. REP. No. 2639, 48th CONG., 2d SESS. 1 (1885).

\textsuperscript{34} \textit{id.} [emphasis added].

\textsuperscript{35} \textit{id.} at 2 [emphasis added]. The committee gave the following illustration to show the difference location of an accident had in regards to the then applicable law:

The law in its application is thus illustrated: Two vessels meet with a like disaster, from a similar cause, and with the same results. Say one vessel is plying between New Orleans and Galveston; the other from New Orleans to Vicksburg, on the Mississippi River. Suits for losses are brought, and both cases submitted to the same court for settlement. Under the law the judge must decide in the one case that the owners of the Galveston steamer can be held only for the proportion of any or all liabilities that their individual share in the vessel bears to the whole; while in the other case he must hold the owners of the Vicksburg steamer liable to the full extent of the losses proved. In other words, the owners of the Galveston steamer cannot be held beyond her value at or after the time of accident, while in the other case there is no limit, and the judgment may be enforced beyond the value of the vessel itself, and extend to other vessels, and even to property on shore.
commerce on the high seas and those involved in commerce on the inland waterways, the committee outlined the following objectives of the proposed amendment:

We think that by the amendment proposed, the following important objects will be attained: (1) Retaining the ownership of steamers in responsible hands; (2) placing the steam navigation of the country on the same footing with other commercial nations; (3) by thus limiting liability and fixing a mode of ascertaining it, encouraging the investment of capital by responsible parties in this class of property; (4) it will tend to encourage and sustain the carrying trade in the hands of our own capitalists.36

It must be born in mind that the only difference between this bill and the amendment which finally passed, is that the latter included canal-boats, barges and lighters. There is no other difference! Thus, the stated objective of the bill introduced in 1885, as it related to vessels other than canal-boats, barges and lighters, is extremely relevant because it must be assumed to be the same unless it was refuted. I have found no such refutation.

The reported-upon bill simply extended the benefits of the limitation act to seagoing vessels involved in accidents on the inland waters. The same commercial purpose which was espoused in 1851 was being argued in 1885.

In 1886 four bills were introduced to the Congress to amend the Limitation of Liability Act.37 Eventually the amendment passed as an add-on to a bill dealing with various other shipping laws.38 Of the four bills introduced, one was debated.39 After amendment on the floor of the House, the debated bill read in part:

[The act] relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal-boats, barges, and lighters.40

This bill was immediately opposed on the floor of the House:

Mr. DINGLEY. Mr. Chairman, with reference to the amendment moved by the gentleman from Pennsylvania (Mr. O'NEILL), the Shipping Committee has maintained the exception which has always been observed in our limited-liability law. The exception now embraced in the Revised Statutes as to canal-boats, barges, or lighters is an exception which was placed in the first limited-liability act passed in 1851, and I wish merely to restate the reasons which then governed the action of Congress.

The limited liability was granted to vessels mainly on these grounds: First,

36. Id. at 3.
38. The bill was H.R. Rep. No. 4838, 49th Cong., 2nd Sess. (1886).
40. Id. at 1146.
that the vessel goes beyond the control of its immediate owner, and can not be under his immediate care; secondly, that it encounters peculiar and exceptional perils of navigation; and, thirdly, that it is in the interest of public policy to grant this exceptional privilege to the owners of shipping property. It was argued that these exceptions did not apply, at least in their ordinary force, to canal-boats, barges and lighters—first, because these vessels are usually employed in a harbor or on a canal, and do not meet the ordinary perils of navigation; secondly, that they are always, when moved, attachments of other vessels; and, thirdly, that as the limited-liability act provided that the aggregate measure of liability should be the value of the vessel and pending freight, these vessels afforded a small measure of aggregate liability.41

The supporters of the amendment countered with the argument that the shipping industry on the inland waters had increased substantially since 1877 and that the shipping interests on the inland waters deserved the same protections of the act as ocean-going vessels.42 A debate followed

41. Id. at 1148-1147.

42. [Mr. O'NEILL, of Pennsylvania]. . . . We are seeking to do the best we can for American shipping; and we now have an opportunity to include these vessels in the provisions of the general law on this subject. No sufficient reason is presented in favor of continuing the exception which was made years ago. I ask this Committee of the Whole to adopt this amendment. It can certainly do no wrong to any one. It can not affect adversely the shipping interests. It does not impose any additional fee upon any one. It simply gives to the owners of these smaller vessels the same rights that are accorded to the owners of larger vessels.

Mr. BURLEIGH. I certainly hope the amendment of the gentleman from Pennsylvania will be adopted. In 1852 the tonnage of a canal-boat was from 60 to 80 tons. Now they carry from 200 to 300. In 1852 they simply navigated canals. Now a canal-boat takes a load at Quebec or Ottawa and delivers it at New York, Philadelphia, or Baltimore. The whole system of transportation has changed, and it is as important to accommodate shipper on the lakes, rivers, and canals as any others. Therefore I sincerely hope the amendment of the gentleman from Pennsylvania will be adopted.

Mr. BOYLE. Mr. Chairman, I understand the effect of this section, if adopted, will be to extend to vessels engaged in lake and other inland navigation the same exemption from liability which the owners of vessels engaged in ocean navigation enjoy under the act of 1851. The gentleman from Arkansas [Mr. DUNN] says that the legislation already upon the statute-book extends to lake navigation. If so, the effect of this section will be to extend it to carriers on rivers.

A MEMBER. And canals.

Id. at 1147. It should be noted that Congress may have associated "commerce" and "navigation" synonymously.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824).
concerning the merits of the bill. The commercial navigation connotations of the bill were stressed, and, as a matter of fact, pleasure vessels could not have been further from the minds of the congressmen debating the effect of the bill.

Mr. BOYLE. What I complain of is that the law you are enacting here for the carriers by water is not the law that governs other classes of common carriers.

Mr. DUNN. You should have made that argument in 1851.

Mr. BOYLE. I was not here to make the argument at that time, but I make it at the earliest possible opportunity.

Mr. O'NEILL, of Pennsylvania. Mr. Chairman, a word in response to what my colleague from Pennsylvania has said. I do not think my colleague has any objection to including canal-boats, barges, or lighters, because the provisions of the limited-liability law apply to all vessels, whether on the lakes or rivers or engaged in any inland navigation. This would perfect the section by including all vessels, whether canal-boats, barges, or lighters. His objection appears to be to the limited-liability clause generally, and I do not suppose he makes that objection to the amendment which I have offered.

Mr. BOYLE. I will say, Mr. Chairman, that I can see no reason for discriminating between canal-boats or lighters and steamboats and other vessels employed in commerce.

Mr. HENDERSON, of Iowa. I do not understand the argument of the gentleman from Pennsylvania reaches to the point of refusing to relieve inland navigation of these burdens which do not rest on our coastwise trade?

Mr. BOYLE. I would not discriminate against inland navigation. But I wish to say that if I had been here in 1851 I should have voted against relieving ocean vessels from these liabilities, and I will go no further in that direction.43

Although the amendment failed in the House it later passed as an add-on in the Senate and was agreed to by joint committee.44 The purpose of the amendment was simply stated by the committee as:

[extending] the limited-liability rule to canal-boats, barges, and lighters, thus making the rule apply to all vessels on inland waters as on the ocean and lakes.45

It is clear from the above-discussed legislative history that the intent of Congress was to extend the act to all commercial vessels on inland waters. The intent expressed by Congress in 1851 to aid American commercial shipping was the foundation of the proponents of the amendment in 1886 to give the same benefit to inland shipping. Considering the objections expressed concerning the extension of this act to inland commercial vessels, had the act also been intended to extend protection to pleasure vessels,46 a howl would have surely risen from the floor of the Congress driving the proposal to cover.

43. id. at 1147-1148 [emphasis added].
44. id. at 4991-4992.
45. id. at 4992.
46. Pleasure vessels were not covered by the 1851 act. The Mamie, 5 F. 813 (E.D. Mich. 1881), aff'd, 8 F. 367 (C.C.E.D. Mich. 1881).
If the legislative history is as clear as I proposed it is, why have the courts extended the act to include pleasure boats? Although no definite answer can be given, a study of the cases raises some possible conclusions.

V. THE CASES: A STATUTE READ IN A VACUUM

The first case to examine the amended act was the 1905 decision of In re Eastern Dredging Co., The Scow No. 34. In that case a scow carrying mud from Boston Harbor to a dumping ground collided with a ferryboat and sought limitation of liability. The court found that the mud scow, which measured 110 feet by 34 feet, was the same kind of vessel as a barge or lighter, hence, a vessel covered by the act. Another issue decided by the court was whether Congress intended the act to extend to vessels not engaged in "the business of carrying merchandise or passengers or both, nor to those engaged in purely local trade." The "reasoning" of the Court is very important to the growth of the misinterpretation of the amended act:

[The Mamie] derived [its] chief support from section 4280 as it then stood. The change since made in that section requires a different view of the intent of Congress. . . . There is no expression in the act, as it now stands, to indicate that the nature of the employment in which a vessel is engaged is to be considered in determining whether or not the act is to apply to her. That question is made to depend entirely upon the waters whereon she is used. The waters whereon the petition alleges this scow to have been used are unquestionably waters within the admiralty jurisdiction, and, having held her to be a vessel within the meaning of the act, I am unable to regard the nature of her employment as in any way material.

It is clear that the Court interprets the intent of Congress solely by the change in the statute. The only source used by the Court to reach this conclusion was the four corners of the statute. However, as we have already seen, the legislative history of the amendment and of the original act contemplated an application of the act only to commercial activities. The fallacy in interpreting the act without considering the intent of Congress in both 1851 and 1886 is clear when one reads the original act which on its face does not exclude pleasure craft. Thus, attempts to distinguish The Mamie by the Court in Eastern Dredging fail, because the Court in The Mamie did examine the intent of Congress in detail and correctly held that

48. Id. at 944.
49. Id. at 944-945 [citing The Mamie].
50. Id. at 945 [emphasis added].
51. If there had been no objection to the act applying to inland waters in 1851 it is probable that no stated exception concerning the application of the act would have been proposed. Would the primary intent of Congress to aid American shipping interests have been less? No, I don’t believe so.
Congress desired to extend the act to commercial vessels on the high seas, not to pleasure vessels.

Following Eastern Dredging the application of the limitation act to pleasure vessels was first reported in the case of The Alola.52 Absolutely no discussion concerning the intent of Congress is made by the Court in this case.53 Another typical decision which "discusses" the intention of Congress in the amendment of the act in 1886 is The Muriel.54 Treating the issue, the Court simply states, "In the amendment of 1886 it appears to have been the intention of Congress to grant the privilege of limiting liability to all water craft . . . ."55 The most recent case which attempts to interpret the intention of Congress in the context of extending the limitation act to include pleasure vessels is The Yacht Julaine.56 There, the Court traced the judicial history concerning the Court's interpretation of the intention of Congress and reluctantly found that the act applied to pleasure boats.57 A similar result was reached in Armour v. Gradler58 which agreed that the statutory purpose of the Act was to encourage shipbuilding and commercial shipping,59 but was reluctant to overrule the long judicial history interpreting the act.60

VI. CONCLUSION: THE COURTS SHOULD OVERRULE PRIOR DECISIONS

The application of the limitation act to pleasure vessels has not been squarely addressed by the Supreme Court.61 Also, modern judicial interpretations concerning admiralty jurisdiction,62 as well as good old-fashioned common sense,63 do not favor application of limitation of liability to pleasure vessels.

Additionally, liberal application of the act is no longer the express in-
tent of the courts.\textsuperscript{64} In Petition of the Diesel Tanker A.C. Dodge, Inc.,\textsuperscript{65} the Court was faced with the issue whether a tanker was a seagoing vessel, hence liable to contribute $60 per ton to the limitation fund as per the requirements of 46 U.S.C. § 183(f). The Court held:

Only as to a "seagoing vessel" may the owner be required so to increase a limitation fund in order to satisfy death and personal injury claims. 46 U.S.C. § 183(f) states that the term "seagoing vessel" is not to include "tank vessels." This is hardly a felicitous expression, since it is by no means clear that "tank vessels" and "tankers" are synonymous. \ldots The correct interpretation of 46 U.S.C.A. § 183(f) is not free from doubt. However, we think that ambiguous language in statutory provisions relating to limitation of liability should be resolved in favor of interpretations increasing the instances where full recoveries from the limiting vessel are possible.\textsuperscript{66}

I encourage the courts to examine the legislative history of this act, and apply the above-stated purpose to the application of the act to pleasure vessels. Why? Because the purpose of the act was clearly not to limit the liability of pleasure vessels. The act was not intended to be an offensive weapon for pleasure boat owners who would not be discouraged from buying a small pleasure boat if the act did not apply to them.\textsuperscript{67} Since no rational reason has been given to allow this harsh rule to apply to pleasure boats the Marnie should be salvaged, refloated and launched upon the maritime waters which constitute American admiralty jurisprudence.

\textsuperscript{64} Donovan, The Origins and Development of Limitation of Shipowners' Liability, 53 Tulane L.Rev. 999, 1035-1036 (1979).
\textsuperscript{65} 282 F.2d 86 (2d Cir. 1960).
\textsuperscript{66} Id. at 89.
The Need for Limitations on Federal Mass Transit Operating Subsidies: The Chicago Example

Henry Lowenstein*

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I. INTRODUCTION

The Reagan Administration, in its efforts to reduce the size of the Federal budget, has proposed limitations and eventual curtailment of Federal operating subsidies to the nation’s urban mass transportation systems. The operating subsidies (also known as the "Section 5 Program") at this time cost the Federal government in excess of $1 billion per year. As of 1978, total subsidies at all levels of government were $2.2 billion per year. The U.S. General Accounting Office estimates that if present trends continue, the amount needed by 1985 would be $6.5 billion.

The Federal government has long been involved in various aspects of mass transportation. However, it was not until 1964 that Congress formally initiated a program of Federal mass transit subsidies with the enactment of the Urban Mass Transportation Act (UMTA). This act authorized grants which would cover up to two-thirds of the cost of mass transit capital equipment and facilities.

The National Transportation Assistance Act of 1974 added Section 5 to the 1964 Act, further expanding subsidies and for the first time providing for operating subsidies. Congress authorized $3.9 billion over a six-year period to be used by local authorities at their option for either capital or operating needs.

It is important to note that Section 5 subsidies were not allocated based on rigid criteria of local transit needs, nor on the efficiency of a given area’s urban transportation system. Instead, the funds provided to public transit agencies were allocated based on population and population density. The legislation enacted in 1974 stipulated that Federal monies could not be used to replace already existing state and local subsidies. However, this provision was modified by the Surface Transportation Act of 1978 which allowed state and local subsidies to be replaced by farebox revenues.

The proposals of the current Administration which would abolish the Section 5 program have stimulated considerable debate among practitioners and policy makers in the transportation field as to the potential impact

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2. Id.
on mass transit systems. Some argue that there would be an initial negative impact as transit agencies went through the process of transforming their systems to operate without Federal funds. It is also argued that the resultant economies which would have to be made by transit managers would, in the long-run, insure the survival of urban transit systems and at the same time decrease local dependence on Washington.

Others argue that the loss of Federal monies would cause great financial hardship to localities. These individuals contend that transit systems in the large cities would collapse and that state and local governments would be forced to impose massive fare hikes, to enact increased taxes, and to reduce services in order to maintain their mass transit systems. Small transit systems, now heavily dependent on the Federal assistance, would likely go out of business without alternative financing.

It is unclear as to which side of the debate over the reduction in Federal subsidies is correct, and the effects of such a policy will not be determined for some time. However, a broader question needs to be addressed and that is how have the Federal monies been spent. Have the Federal monies contributed to the efficiency of mass transit systems by providing the public with the best possible services at the lowest cost (as Congress intended) or have the monies been misallocated by local political managers, using their mass transit systems to serve parochial political interests?

This paper will briefly investigate the critical issue of "how the money is spent" by examining mass transportation in the Chicago, Illinois metropolitan area. The Chicago area mass transit network is the second largest system in the United States, carrying almost a million passengers a day. The Regional Transportation Authority (RTA) was established in 1974 to govern mass transportation in the six-county area ("collar counties") surrounding and including the City of Chicago. This system is composed of seven commuter railroads, bus and rapid rail operations of the massive Chicago Transit Authority (CTA), and twenty-five suburban bus companies.

The Chicago area has been involved in mass transportation since the turn of the century. While differences exist between the Chicago system and other transit systems, many of the Chicago area’s problems are not unique. Therefore, an examination of the Chicago system can provide insight into the problems of mass transportation in other cities. In order to later discuss cost problems in the Chicago system it is necessary for the reader to understand the historical background of the RTA.

II. THE REGIONAL TRANSPORTATION AUTHORITY (RTA)

The RTA was formed in 1974 as the result of an extreme financial

5. The RTA region includes the Illinois counties of Cook (including the City of Chicago), DuPage, Lake, Kane, McHenry, and Will.
crisis which was experienced by Chicago area transit operators in late 1973. The Chicago Transit Authority (CTA), formed out of a similar fiscal crisis in 1945, was threatening to raise fares and reduce services. Suburban bus companies were on the verge of collapse, and commuter railroads had filed for massive fare increases with the Illinois Commerce Commission.\(^6\)

Coinciding with the 1973 Chicago area transit crisis was the development by Congress of new Federal capital and operating subsidies which later became provisions of the Section 5 program enacted in 1974. However, the proposed Federal legislation mandated a regional approach to mass transportation.\(^7\) This Federal requirement bolstered arguments by Chicago politicians who favored the establishment of a regional system which would be able to tap suburban resources to "bail out" the ailing CTA system.

As a result of Federal requirements and pressure from Chicago politicians, the Illinois General Assembly was forced to form an entity to govern mass transit in Chicago and its six "collar" counties. Federal money thus helped contribute to forcing bitter rivals (i.e. the city and the suburbs) into a single governing body.

The proposed RTA Act was structured so that the majority of the Board of Directors would be appointed by the Mayor of Chicago and by the Cook County Commissioners. Many citizens perceived that the RTA would control the entire regional system at the expense of the suburbs and that most benefits would accrue to the City. The RTA concept was hence unpopular and barely passed in a public referendum. A shift of less than .5% of the votes cast would have defeated the RTA.\(^8\)

With the establishment of the Regional Transportation Authority Act of 1974,\(^9\) the thirteen member RTA Board was given broad powers to oversee the area's mass transit system. The Board was given the power to set fares, and to distribute tax monies and subsidies derived from Federal, state, and local sources. The Board would also be allowed to issue bonds, and impose a gasoline and parking tax.\(^10\) The gasoline tax was replaced in 1979 by a 1% sales tax in Cook County and a .25% sales tax in the "collar counties."

In addition, the Board was required to plan and coordinate mass transit, improve the level and quality of service, and to improve facilities and equipment. The Board was granted broad powers to audit member carriers.

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7. Id. at 15.
8. Id. at 18.
and to stimulate innovation in transit management and cost control techniques.\textsuperscript{11}

The RTA presently operates with a budget of $834.4 million.\textsuperscript{12} Of that amount, approximately 39% is derived from farebox revenues.\textsuperscript{13} Section 5 federal subsidies amount to $80.7 million or 9% of the total budget. Recent reductions have brought the federal operating subsidy to 7% of the total RTA budget.\textsuperscript{14} The Federal subsidy appears relatively low, yet it is a substantial amount of money — an amount equal to the RTA’s projected short-term deficit in early 1981.

Carrier costs within the RTA are broken down as follows: 70% - Chicago Transit Authority (CTA); 25% - commuter railroads; and 5% - suburban bus systems.\textsuperscript{15} The commuter railroads are the most efficient carriers, recovering 60% of their costs from the farebox.\textsuperscript{16} Cost recovery from the farebox is 51% in the CTA and 42% in the suburban bus system.\textsuperscript{17} (Recent fare increases have forced the commuter railroads into recovering nearly 100% of their costs from the farebox.)

III. RTA AND THE COST PROBLEM

We now come back to our original question. Have Federal operating subsidies stimulated efficient and improved transit services at the lowest cost? In the Chicago area it appears that these funds have contributed to inefficient, rather than efficient, operations. Since 1970, costs in the RTA have risen 17.8% (91% greater than the rise in inflation for the same time period).\textsuperscript{18} Vehicle miles for the same time period actually declined .8%. However, from 1974 to 1979, alone, the RTA operating deficit rose a whopping 205.9%\textsuperscript{19}

Many of the cost increases can be explained by needed improvements in the system and by inflation. However, the bulk of the cost problems occurred because the RTA Board was incapable or unwilling (primarily for political reasons) to control expenses.

\textsuperscript{13} Id.
\textsuperscript{14} See CHI., ILL. ORDINANCE NO. 79-123 (June 29, 1979), as amended by CHI., ILL. ORDINANCE NO. 80-44 (Feb. 25, 1980) [Regional Transp. Auth. Budget for Fiscal Year 1980].
\textsuperscript{15} 1980 RTA Report at 30.
\textsuperscript{16} Id. at 10 [Fiscal Year 1979].
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 7.
\textsuperscript{19} Id. at 8.
A. Labor Costs

Cost problems occur throughout the RTA system, but the system's overwhelming cost problem is that of labor, particularly within the Chicago Transit Authority (CTA). For fiscal year 1981 labor costs amount to 77% ($436 million) of the CTA's total operating costs.\textsuperscript{20} Furthermore, CTA labor costs are so massive that they, alone, account for 52% of the total Regional Transportation Authority budget.\textsuperscript{21}

The City of Chicago currently has the highest paid transit workers in the continental United States. The typical CTA worker earns an average $24,336 per year in salary alone, and when benefits and overtime are added this figure rises to over $30,000 per year.\textsuperscript{22} This includes two bus drivers who currently receive wages of over $50,000 annually.\textsuperscript{23} Prior to December 1979, CTA workers were awarded quarterly pay increases (cost of living adjustments) which, because of the contact allocation formula, actually exceeded 100% of the increase in the Consumer Price Index.\textsuperscript{24} The cost of living adjustments have now been reduced to 35% of the CPI.

A national comparison of transit wages reveals that transit workers in Chicago earn far more than their counterparts in other large cities with similar cost of living levels. For example, the $11.87 average hourly pay of a CTA bus driver exceeds the wages paid in other cities by the following amounts:\textsuperscript{25}

<table>
<thead>
<tr>
<th>City</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philadelphia</td>
<td>46%</td>
</tr>
<tr>
<td>New York</td>
<td>35%</td>
</tr>
<tr>
<td>Detroit</td>
<td>29%</td>
</tr>
<tr>
<td>St. Louis</td>
<td>24%</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>9%</td>
</tr>
<tr>
<td>Boston</td>
<td>8%</td>
</tr>
</tbody>
</table>

If the CTA paid the same wages as the New York City transit system, it could save an estimated $100-150 million. This amount is equivalent to nearly twice the amount of the Federal operating subsidy to the RTA and is equal to the RTA’s fiscal year 1981 deficit.\textsuperscript{26}

CTA wages may also be considered high when compared to the compensation paid to other public and private sector employees in the Chicago

\textsuperscript{22} Strong, Inflation Nails City Workers, Chi. Tribune, Nov. 23, 1980 § 1, at 5, col. 1.
\textsuperscript{23} Chi. Transit Auth., Salary Range of Union Employees (Dec. 20, 1980) (internal document).
\textsuperscript{24} Local 241 and Local 308 Amalgamated Transit Worker’s Union Contract with the Chi. Transit Authority, Nov. 1979.
\textsuperscript{26} 1980 RTA Report at 30.
area. For example, Chicago transit workers earn 13% more than police and firefighters and 12% more than suburban transit workers. The CTA wage is only slightly less than that of skilled craft workers employed by the City of Chicago. Ironically, CTA operating employees earn more than most staff workers in the RTA itself. In fact, CTA wages are 80% higher than the average private sector industrial wage in the area and higher than salaries paid to many mid-level managers and professional workers.

The labor cost problem is not simply a matter of the high levels of compensation paid. Rather, it is exacerbated by a precipitous decline in productivity experienced over the last decade. Since 1970, the workforce of the CTA has increased by only 3.7%, yet labor costs have increased 127% (40% greater than inflation). In addition, for the same time period, total vehicle miles have decreased 13%, miles per employee have decreased 16%, and miles serviced per hour have dropped 10%. Attempts by the system to hire large numbers of part-time workers which would reduce transit costs and improve productivity have been thwarted by the transit unions. An amount equal to half the RTA’s Section 5 subsidy could be saved with a mere 10% increase in CTA productivity. Unfortunately, the CTA is projecting an additional reduction in output for fiscal year 1981 of 5.2%.

Why have labor costs not been controlled? The answer can be found in an examination of area politics, Federal subsidy programs and Federal legislation. Looking at the political aspect, Chicago is a city where labor unions have always played a major role in local politics. Throughout the years, transit unions have been closely allied with the powerful Chicago (Cook County) Democratic Party and with Democratic Mayors. As a result of this alliance, transit managers, who were political appointees themselves, were under great pressure from the political establishment to acquiesce to union demands in labor negotiations. In fact, in recent testimony the President of the labor union representing bus drivers in the CTA testified that many costly provisions of the union’s contract were not requested by the union. Rather, these items were voluntarily offered by the CTA.

The Section 5 Federal subsidy program also appears to have been a

30. Id.
stimulus to local political leaders in accommodating union demands. Such funds could be used to appease transit labor unions without imposing a financial burden on commuters or local taxpayers. The use of Federal funds for satisfying local political interests was successful in the short run, but with the acceleration of inflation in the 1970's and 1980's, labor costs rapidly outstripped the growth of government subsidies. The resulting cost burden has been the number one cause of the current mass transit fiscal crisis in the Chicago area. In fiscal year 1981, the increase in labor costs in the Chicago transit system ($37 million) alone will exceed 50% of the total Federal subsidy provided to the entire regional transit system.\textsuperscript{33}

The Federal government itself has contributed directly to local transit labor cost problems through legal restrictions such as Section 13(c) of the Urban Mass Transportation Act of 1964, as amended.\textsuperscript{34} This section imposed regulations which protected organized labor in transit agencies receiving Federal funds. The protections included:

1. the preservation of rights...under existing collective bargaining elements...;
2. the continuation of collective bargaining rights;
3. protection of individual employees against a worsening of their position with regard to their employment;
4. assurance of employment to employees of acquired mass transit systems...; and
5. paid training or retraining programs.\textsuperscript{35}

Furthermore, all grant applications submitted by local transit agencies to the U.S. Department of Transportation had to be "cosigned" by the appropriate transit union. This provision had the potential to be abused as a bargaining tool by the transit unions to pressure transit agencies for contract concessions.\textsuperscript{36}

Section 13(c) had been established primarily to protect the employees of private transit companies which were being purchased by State and local governments. Since many states prohibited public employee collective bargaining, the Congress wanted to ensure that employee rights previously held under private ownership were maintained under public ownership.\textsuperscript{37}

The language of Section 13(c), however, contains no restrictions which prohibit hard bargaining between a transit system and its union. Furthermore, there is nothing in the law which prohibits the subsequent removal, reduction, modification by negotiation or state statute, or limitation enacted

\textsuperscript{33} Proposed 1981 Budget at 20.
\textsuperscript{35} Id.
\textsuperscript{37} Id. at 128-29.
by the state legislature on permissible contract provisions or compensation levels.

The language of Section 13(c) was incorporated into the Regional Transportation Authority Act which was passed in 1974.\textsuperscript{38} Unfortunately, many Chicago area transit managers and Illinois state officials, even today, believe that this law prohibits them from demanding substantive contract concessions from their unions. Such interpretations, encouraged by the transit unions themselves, have served to dampen the resolve of Illinois legislators to further define the permissible scope of public transit labor contracts and of transit managers to demand major changes in such contracts.

Another factor contributing to excessive labor costs in local transit systems has been the expense of commuter railroad labor, exacerbated by Federal railway labor laws. In recent years, commuter railroad services have been, for the most part, relegated to that of a public or quasi-public service under the auspices of regional public transit agencies. Yet Federal railway labor law has not been modified to reflect changes in the nature of the rail industry nor to relieve the burden placed on public transit systems. Railroad corporations have been unwilling to jeopardize labor relations in their profitable freight systems to accommodate local commuter services which operated at the break-even point or at a loss.

The RTA contracts for service with seven privately-owned commuter railroads. These railroads also operate a substantial freight transportation system. The RTA is not a party to the contract negotiations of its member railroads and is thus forced to pay whatever costs accrue from national rail labor contracts. Without locally negotiated labor contracts the RTA, like other transit agencies, is powerless to control the bulk of commuter railroad costs.\textsuperscript{39}

In the Chicago Transit Authority only one major labor cost change has occurred in the past five years, i.e. a reduction in the cost of living adjustment clause and a provision for the hiring of approximately 600 part-time workers.\textsuperscript{40} This change occurred following contract negotiations in December 1979, and precipitated an illegal strike by Chicago transit workers. The dispute was sent to binding arbitration for resolution.

The arbitrator reduced the cost of living adjustment from 100% of the change in the Consumer Price Index (CPI) to 35% and allowed for the use by the CTA of approximately 600 part-time workers.\textsuperscript{41} The CTA has esti-

\textsuperscript{39} Letter from Mr. Lewis Hill, Chairman of the Regional Transp. Auth., to Henry Lowenstein (July 1, 1981).
\textsuperscript{40} In the Matter of Chicago Transit Authority and Local 241 and Local 308 Amalgamated Transit Workers Union, May 16, 1980, (Dworkin, Chief Arb.) (modification to the Wage and Working Contract, Dec. 1, 1974).
\textsuperscript{41} Lowenstein Report at 2-4.
mated that this change would save about $20 million per year (4% of total annual labor costs). However, transit workers hired prior to 1978 (over 95% of the 14,000 member work force) won a "No layoff" guarantee which has the potential for exacerbating future labor costs far beyond the initial cost savings.\(^\text{42}\)

**B. MANAGEMENT COSTS**

We now turn to the question of how Chicago area mass transit management controls its own costs. Does the RTA management play a leading role in promoting the mass transit system, in stimulating high system performance, and in controlling costs? Management costs constitute only a small percentage of the total RTA budget. By examining the process by which management conducts its own affairs, however, one can gain some insight into the way public monies are utilized in the mass transit system as a whole. Furthermore, the example set by top management in its operations strongly influences the degree of dedication to fiscal control exerted by other transit employees and departments.

**C. RTA**

The RTA spends nearly $14 million annually on its own administration. This represents nearly 2% of the total RTA budget and is equivalent to 17% of the Federal subsidy provided to the RTA. Almost $2 million of the total administrative expense is expended on the RTA Board alone.\(^\text{43}\)

With the exception of the Chairman, membership on the RTA Board (a part-time job) pays $25,000 per year.\(^\text{44}\) The Chairman receives $72,500 per year.\(^\text{45}\) These salaries exceed those of most other State of Illinois employees. For example, the Governor of the State of Illinois earns only $58,000 annually and Illinois legislators are paid only $28,000.\(^\text{46}\) No member of the present RTA Board has any training in or experience from the transportation industry.

Members of the RTA Board openly display little confidence in the mass transit system. Only one board member actively utilizes the RTA system. Other members use private automobiles while the RTA Chairman maintains a chauffeur-driven limousine at public expense. Last year the RTA spent $129,300 for local travel, most of which was by automobile.\(^\text{47}\) This situa-


\(^{43}\) Id.


\(^{45}\) Id.

\(^{46}\) WORLD ALMANAC AND BOOK OF FACTS 1982 at 322 (1982).

\(^{47}\) CHI., ILL. ORDINANCE NO. 79-123 (June 29, 1979) as amended by CHI. ILL. ORDINANCE NO. 80-44 (Feb. 25, 1980).
tion exists despite the fact that all RTA employees are allowed to ride free in the transit system.

The RTA’s financial controls have been quite lax. A recent investigation by the Auditor General of the State of Illinois revealed that documentation of travel and entertainment expenses were either inadequate or nonexistent. The report also revealed that there was a lack of security in regards to blank agency checks, along with inadequate controls over fixed assets, payroll, and information systems. Inadequate accounting systems resulted in instances of overpayments of invoices and carrier subsidies.\footnote{Egler Lochin, Report Rips RTA Financial Management Practices, Chi. Tribune, June 9, 1981, \S 1, at 3, col. 1.} In addition, some RTA Board members were actually paid in excess of the statutory limit on their compensation.\footnote{Young, No Cuts for RTA Expense Accounts, Chi. Tribune, Jan. 11, 1981, \S 1, at 10, col. 3. Young, Transit Board Costs Up 170% in 7 years, Chi. Tribune, Feb. 17, 1981, \S 1, at 3, col. 1.}

The RTA has been successful in saving money by consolidating some of its administrative functions such as fuel, insurance, and equipment purchases. However, the RTA has been unsuccessful in getting its carriers to eliminate personnel which was required to handle such functions for each of the individual carriers prior to the consolidation. Costly administrative duplication, therefore, continues to exist.

\textit{D. CTA}

The Chicago Transit Authority presents an even more blatant example of excessive costs and administrative waste. No one knows for sure what are the total costs of the CTA’s administration. The agency refuses to disclose, even to the Governor or Illinois General Assembly, consistent or accurate figures on its costs. Estimates place the CTA’s administrative expenses between $11 million and $15 million annually.\footnote{This estimate is made by applying to the CTA’s budget the same administrative overhead percentage that exists for RTA.} This amount represents approximately 14\% to 18\% of the total Federal operating subsidy received by the RTA. Although it is ostensibly an independent, quasi-state agency, the CTA, with its seven member board, has long been controlled by the Mayor of Chicago (only three members are appointed by the Governor).

No member of the CTA Board (as in the case of the RTA) has had training or experience in the transportation industry (a possible exception being the Chairman, Eugene Barnes, who is a former bus driver). CTA Board members receive salaries of $15,000 a year with the Chairman re-
ceiving $75,000 annually.51 The CTA Board of Directors has resisted most attempts to establish internal cost controls. This deficiency has been receiving growing attention in the Chicago media as the current transit crisis has worsened.52

All CTA employees are permitted to ride the system free of charge, yet approximately 100 individuals are provided with free agency automobiles for their personal use. These individuals also receive free parking in downtown Chicago and fuel. The estimated cost of providing these perquisites is $1 million. Included in this group are two automobiles provided to the CTA Chairman and an additional automobile for his $36,000 per year personal secretary.53 In the midst of a severe financial crunch, the CTA this year purchased $151,000 worth of new full-size automobiles and has refused to disclose the reasons for this purchase.54

The CTA has long been accused of harboring a substantial number of political patronage workers. It is difficult to ascertain which positions are legitimate and which are unnecessary, however, recent CTA documents have revealed some interesting items.

The CTA currently employs twenty-two "management interns" at an average salary of $28,000 per year, ten individuals listed as "unassigned" who earn an average $28,000 annually, and sixty-four "assistant supervisors" with undesignated areas of supervision who earn an average $30,200 a year.55 Furthermore, the CTA employs eighteen "executive secretaries" who earn an average of $27,450 and seven "confidential office assistants" who earn an average of $21,600.56

Total CTA expenditures (excluding benefits) for these questionable employment categories exceeds $3.5 million a year.57 The amount of these expenditures exceeds the total annual mass transit subsidy paid by the RTA to a typical collar county such as McHenry County, Illinois. The expenditure also is equivalent to the cost of a monthly commute for over 77,000 CTA riders.58

Other employment and management practices of the CTA have come

56. Id.
57. Id.
58. Id.
under increased public criticism, such as the amount of travel and entertainment expenses. A scandal developed recently when inadequate security at the CTA fare counting facilities was revealed. Hundreds of thousands of dollar bills were found in disarray and uncounted on the facility's floors while the building's entry doors were found to be unsecured.\(^{59}\)

### E. System Costs

The Chicago area mass transit system was constructed at the turn of the century by private entrepreneurs. Commuter railroads, the rapid rail system, and later, bus companies competed with each other for passengers. However, with the advent of public ownership under the CTA in 1945 and the RTA in 1974, the necessity to maintain redundant, formally competitive routes ended for the most part. In addition, many of the routes which exist to this day service areas long abandoned by the bulk of industry and population.

In 1974, the State of Illinois contracted with a group of consultants to develop a logical, efficient route system for the metropolitan area. The $282,000 study documented over eighty-three instances of duplicative or competing transportation services, primarily between the CTA and other carriers. While the RTA recognizes the existence of this duplication, they have refused to fundamentally reform the present system's route structure. Privately, RTA insiders have conceded that the duplication is maintained primarily for political considerations such as maintaining service in the wards of powerful politicians and/or interest groups.\(^{60}\)

Suburban bus operations have proven to be an especially costly and growing problem for the RTA system. Overall, suburban bus services have the poorest ridership and farebox recovery rates of all RTA carriers. The RTA continues to expand suburban operations despite this poor record and the fact that the commuter railroads remain the primary mass transportation mode of suburban commuters. As a gross example of this point a recent study revealed that there was a RTA suburban bus route which operated from 1977 to 1980, yet never recorded a single passenger during the time period.\(^{61}\)

Service economies in the CTA, commuter railroads and suburban bus systems, have only recently received strong public attention and have proven to be elusive. Savings have been difficult to achieve, either for political reasons or due to the restrictive labor work rules of transit unions. The tragedy of the situation is that Federal and state subsidies continue to pay

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for and encourage such inefficiencies and misallocations in the system. Operating subsidy programs have not encouraged nor stimulated the economies needed by mass transit systems such as those of the Chicago area.

IV. THE PRESENT SITUATION IN CHICAGO

Beginning early in 1980, the RTA began to experience mounting financial problems. Costs were exceeding revenues, which led to a short-term deficit of $80 million while the projected deficit for the fiscal year was estimated to be $150 million. The RTA requested a fare increase, but later postponed that action and the legislature tabled pending transit legislation until after the November 1980 elections.

In December 1980, the RTA proposed a massive 66% increase in fares and 29% reduction in service. Studies and evidence submitted during public hearings revealed that at least two-thirds, or $100 million, of the anticipated deficit could be recovered by reductions in operating costs and by improvements in the RTA's management techniques. Despite overwhelming public evidence for reform, the RTA Board proceeded to implement a 33% fare increase, no service cuts, and no cuts in operating costs. The balance of the fare increases were deferred pending possible actions by the Illinois General Assembly.

When the Legislature convened in January, the mass transportation issue was a major order of business. A Select Committee of the Illinois House of Representatives held hearings to investigate the RTA situation for the Legislature. The Committee received overwhelming evidence of the need for system reform and cost control. This was also confirmed by an independent audit by a leading accounting firm completed under a contract with the Committee.

Many legislative proposals for increasing revenue to the transit system were offered in the session, including a 5% gross receipts tax on oil companies, an increase in the state sales tax, an increase in liquor and cigarette taxes, and an increase in the state income tax. All of these measures eventually failed to pass. Governor James Thompson as well as suburban and downstate legislators demanded reform of the transit system, including changes in its structure and increased managerial accountability as a condition for any mass transit funding package.

City of Chicago Democratic legislators resisted any attempts to weaken their political control over the mass transit system and, therefore, defeated all House proposals which came before the State Senate. Near

62. This section is a summary of events in the Chicago area mass transit crisis. The summary was compiled by the author from numerous articles appearing in the Chi. Tribune, the Chi. Sun-Times, and the Daily Herald newspapers from November 1980 to July 1981.

63. Lowenstein Report at 1-2.
the end of the session the Mayor of Chicago publically announced that she would take over and run the CTA, a statement which impeded any further efforts by the Legislature to resolve the situation. The Legislature adjourned at midnight on June 30 without a solution to the mass transit crisis.

Meanwhile, the Chicago area transit system found itself in a deepening financial crisis which was far more severe than that experienced in 1973. On at least three separate occasions the RTA was on the verge of a complete shutdown of its operations. Service was sustained only by the advancement of state sales tax monies by the governor and by the RTA's deferral of debts owed to vendors.

By May 1981, the RTA was facing numerous crisis situations. The lack of contract payments to the Chicago and Northwestern Railroad forced the RTA to assume direct operation of the bankrupt Rock Island Railroad commuter line (which the Chicago and Northwestern had operated for the RTA). Later that summer, the Chairman of the RTA secretly paid excess sales tax monies, which were normally designated by law for suburban operations, to the CTA. As a result of that action, four suburban bus lines immediately shut down and others severely curtailed their operations. A Federal judge gave the bankrupt Milwaukee Railroad authority to halt operations if it was not paid its subsidy. Such a move would have been followed by a suspension of service by all commuter railroads in the area due to their inability to handle the overflow of passengers from the Milwaukee Road.

Finally, in July 1981, the RTA Board raised fares 12.5% for the CTA and from 57% to 75% on the commuter railroads and suburban buses. In addition, $26 million in service cuts were proposed for later enactment.

With the approval of City Council, the Mayor of Chicago (now forced to support the CTA) immediately levied three new taxes: a 1% tax on professional services (such as those provided by lawyers and doctors), a 1% increase in the sales tax, and an increased cigarette tax. The legality of these taxes has been challenged in the courts, and as of this writing the City has been unable to arrange sale of the tax anticipation notes needed in order to borrow funds for the transit system. The Mayor has also begun the process of appointing her own thirteen-member transit board which will effectively usurp control of the CTA as a condition for financing.

At no time during the present crisis has the RTA or the CTA made any major effort to curb expenses. The RTA and the CTA have steadfastly refused to ask their unions for even temporary wage reductions. There were no layoffs despite service cuts and administrative costs (including purchasing) have not been substantially reduced.

Recent fare increases have resulted in negative consequences to the transit system. There has been a reversal in the recent trend towards increasing ridership with the system suffering an average 20% to 30% reduction in ridership. Where parallel lines to the CTA exist, railroad commuters
have flocked to the relatively less expensive CTA service, thus taxing the capacity of CTA’s system. The loss of commuter support has prompted RTA officials to belatedly concede that they are in danger of pricing themselves out of the market.

Dissatisfaction with the results of the RTA’s management of the transit system has stimulated the search for alternative methods of transportation by commuters. Private charter bus services to the City have begun from western suburbs and private employers are increasingly supplying employee shuttle bus (feeder service) between key commuter railroad stations and downtown Chicago. These private, non-subsidized carriers operate only premium rush hour service, yet charge a fare 20% to 50% below that of the RTA. Ironically, at this lower fare level these carriers are able to provide high quality service while being able to break-even or show a profit.

Additionally, car-pooling has increased and the transit situation is fostering an on-going trend away from the City by employers and employees. For the suburban worker incentives now exist to seek employment closer to home and for employers to relocate away from the City of Chicago in order to save money.

Those individuals who depend heavily on the public transit system have no alternative and must, therefore, pay an increasing percentage of their incomes for transportation costs. Commuters in the Chicago area must now wait until October 1981 for the Illinois General Assembly to reconvene and once again attempt to develop a solution to the mass transportation crisis.

V. THE FATE OF THE FEDERAL SUBSIDY PROGRAM

This brief summary of the events in Chicago presents us with compelling evidence of why the Reagan Administration has chosen to gradually phase out mass transportation subsidy programs. Too often, as in Chicago and other areas of the nation, Federal transit monies have not been used to fundamentally improve transit services to the public. Rather, government subsidies at all levels have been spent to cover unreasonable labor costs, excessive administrative overhead, the maintenance of artificially low fares, and costly, inefficient route systems. Federal monies have helped to insulate local political managers from the hard decisions which must be made to substantially improve the quality of service and cost effectiveness of their urban mass transportation systems. Rather than make needed reforms, more money has been demanded by these local systems.

A recent U.S. General Accounting Office report concluded that mass transit systems must do more to control costs and improve productivity. It also stated that the Federal government needs to do more to assist in this
effort.\textsuperscript{64}

The Reagan Administration, with its avowed commitment to reducing the Federal budget, is faced with basically two courses of action in the mass transit area: a significant restructuring of the Federal subsidy program or eventual elimination of the program.

A. Reforming Operating Subsidies

The "bottom line" on maintaining a program of operating subsidies is the assurance to the public that the funds are being properly used. In this regard any allocation formula adopted by Washington would have to be changed to reflect the actual needs of local communities and the degree of transit system operating efficiency and fiscal discipline. There would have to be a relationship, therefore, between system performance and funding.

Restructuring the Section 5 program could improve the way funds are used, however, it would also pose problems to the government. A restructured program would require a substantial increase in Federal administrative procedures, oversight mechanisms and rule-making. This would necessitate an increase in the staff and budget of the U.S. Department of Transportation and commensurate increases in state and local government agencies.

Secondly, stricter Federal controls to transit subsidy use would put the Federal government in a position of further dictating local policy to the states. Local decision making and local control would be impeded. Such a move would be contrary to the current Administration's philosophy of reducing the size and obtrusiveness of the Federal government. It is pursuing a policy of transferring the decisions of government as much as possible to local control. Therefore, in the present political environment any Federal program restructure of this nature would not be feasible.

B. Gradual Elimination of Federal Subsidies

The alternative means by which the Federal government can stimulate transit efficiency is by gradually phasing out the mass transit operating subsidy program. At the Federal level this plan has the advantage of saving not only budget funds which would be directly spent on subsidies, but also the bureaucracy which would be needed to administer the program.

At the local level, an elimination of Federal funds would force local transit managers and political leaders to make hard, difficult choices regarding the operation of their systems. No longer would localities be insulated from the consequences of poor transit system management. Local governments would be thereby forced to eliminate waste and to stimulate

\textsuperscript{64}. Comptroller General Report at 25.
efficiency or to raise both taxes and fares. (The latter, because of the present “tax revolt” mood of the public, would have significant negative political repercussions throughout local communities if mass transit systems were not reformed.)

In reducing Federal operating subsidies, though, the Administration would have to be sensitive to the needs of smaller communities in which Federal monies represent a large share of operating revenue. In these cases, however, such monies could be handled through revenue-sharing or block grants. Local governmental bodies could then determine what percentage of Federal monies would go to mass transit versus other governmental services.

A reduction of Federal funding would cause short-run conflicts as are now occurring in Chicago. Reform of transit systems, while necessary, is not painless. As governments resist increasing demands made by labor unions, strikes will no doubt occur and battles will inevitably ensue over fare level, tax, system structure, and operating policies. In the long-run, however, such changes in mass transit systems will be for the better.

In the long-term we can expect to see accountability at the local level resulting in reform of mass transit services. Systems will, by necessity, stimulate more efficiency, cost control, and innovations in transit management. In fact, local governments may reassess their role as operators of urban mass transit systems, choosing instead to explore alternatives such as the “contracting-out” of transit operations to private entrepreneurs on a competitive bidding basis. While not operating the system directly, governments could continue to play a role in the regulatory oversight and planning of transit operations.

VI. FURTHER FEDERAL DEREGERATION EFFORTS ARE NEEDED

Whether the Federal government chooses to reduce or to restructure the Section 5 program, it will also need to make major reforms in the rigid Federal regulations which currently add substantially to local transit costs. If the President and Congress wish to implement a policy of turning over the funding, operation, and accountability of mass transportation to local control, then it must also eliminate the Federal impediments on such control. A sample of such costly Federal rules will follow.

A. SECTION 13(c) UMTA

As was discussed previously, Section 13(c) has been a primary culprit in increasing labor costs and inhibiting productivity improvements in mass transit systems. While the protection of employee rights is an important

issue, the present labor cost structure impairs the survival of virtually every transit system in the United States. The Federal government must address this issue by reformulating Section 13(c) so that it gives labor reasonable protections, but protects mass transit systems as well. Indeed, the issues of government subsidies and labor-management relations should be treated separately.

B. **Railway Labor Act of 1926**\(^{66}\)

Regional mass transit systems will need to reduce costs on the commuter railroad systems they subsidize and this will, of course, mean a change in the labor cost structure. However, it is at present virtually impossible for local mass transit agencies to deal with this issue because railway labor contracts are negotiated at a national level. Railroads with profitable freight operations are simply not willing to demand major labor concessions to save the relatively small and unprofitable commuter rail services.

The Federal government needs to revise the Railway Labor Act to mandate separate labor contracts for local commuter railroad services. Local transit authorities should be allowed to participate in the negotiations of commuter railroad collective bargaining agreements.

C. **Handicapped Access Rules**\(^{67}\)

In the past Federal regulations have been enacted which would require all mass transit systems to retrofit their facilities and equipment to accommodate the handicapped. The costs of this policy are prohibitive (especially to older systems such as Chicago) and would benefit relatively few members of society. These rules must be relaxed.

Many alternatives are available by which mass transit systems could provide the same, if not improved, services to the elderly and handicapped at a significantly lower cost. These include para-transit services, “dial-a-ride” services, and contractual agreements with private taxi companies. The principle of accommodation of the handicapped should be retained, but the means should be left to local control.

D. **Federal Equipment and Facility Specifications and Purchasing Rules**\(^{68}\)

The Federal government has for many years placed itself in the position of dictating the design specifications for transit equipment (and capital expenditures) which would be purchased by local mass transit agencies.

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Federal funding has been contingent on compliance with these design specifications and procurement rules.

Federal specifications have added extensively to the cost of equipment and vehicle maintenance. Yet, the bus that works well for Atlanta may not be best for Chicago and vice versa. Furthermore, such requirements have had the effect of lessening competition in the domestic transit equipment industry. Foreign producers have effectively been kept out of the market by overly strict “Buy American” purchasing and manufacturing rules.

The cost burden of Federal regulations is so great that San Diego, California recently refused to accept Federal monies in constructing its new light rail transit system, choosing instead to raise money locally and to maintain local control. Local governments must be given the freedom to decide which facility and vehicle designs best meet their needs. In addition, local agencies should have the freedom to search throughout the general marketplace for suppliers who could best produce equipment which would be consistent with the desires and budget constraints of localities.

VII. SUMMARY AND CONCLUSIONS

The record of American cities in the efficient and effective use of Federal operating subsidies has not been exemplary. The case of Chicago illustrates that too often Federal monies have been used to cater to local political interests, resulting in higher than normal costs. Subsidy payments have been used to fund high administrative overhead, lucrative labor contracts, inefficient route systems and artificially low fare structures.

President Reagan was recently elected with a public mandate to reduce the Federal budget, to cut government waste, and to return government to local control. In accordance with this mandate, the Administration has been faced with the choice of either radically restructuring or eliminating the Federal operating subsidy program.

A restructured program would run contrary to administration goals. It would require substantial Congressional legislation, administrative rule-making, and oversight by Federal agencies. Increased bureaucracy and Federal intervention in local affairs would result.

A gradual phase-out of the Federal subsidy program would stimulate efficiencies which are critically needed for mass transit systems to survive in the future. Local control would be maximized if local governments were able to make their own decisions on whether or not to eliminate waste, increase fares or taxes, or reduce services. In the short-run there would be painful conflict in these systems, but such conflict would result in constructive system reforms.

In order to fully return control of mass transit to a local level, the Federal government would have to do more than merely end subsidy pay-
ments. Burdensome Federal transit rules which add significantly to local costs must be reformed and reduced. Such rules include restrictive labor regulations, handicapped requirements, equipment specifications and procurement rules.

Mass transportation in the United States is now entering a new era. The next few years will be a period of strain and readjustment for local transit systems. The resulting short-term conflict, however, will eventually lead to a rebirth of American urban mass transportation. In the future we can expect to witness mass transit systems which operate more efficiently, and which provide superior, cost-effective service to the public. An elimination of Federal obtrusiveness in the functioning of the nation’s urban mass transportation systems is a prerequisite to attaining that goal.
The Future of Urban Public Transportation: The Problems and Opportunities of a Changing Federal Role

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I. INTRODUCTION

The decade of the 1970’s was considered by many transit officials as the turning point in recent history of transit in U.S. urban areas. Not only was the declining ridership trend of the previous two decades reversed, but in many cities transit service was expanded, the quality of service improved, and new mass transit systems were constructed. The Federal gov-

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ernment, through policy support and funding subsidies, played an important role in achieving much of this growth. However, the Reagan administration has proposed significant changes in this Federal role which will significantly impact the future of public transit in the U.S. in terms of the costs for service, the type of service provided, and the ability of local governments to meet the needs of its citizens.

This paper will examine the past characteristics of the Federal role in urban transit, the current proposals for changing this role, the likely implications of these changes, and the opportunities these changes present to local officials for restructuring the provision of public transit in urban areas. Although the legislation for changing the Federal transit program has yet to pass Congress, the general characteristic of the eventual program modifications are sufficiently well known to serve as the basis of analysis.

II. The Federal Role in Public Transportation: History of Active Involvement

Since 1964, when Congress passed the Urban Mass Transportation Act,¹ the Federal government has steadily increased its participation in the finance and planning support of public transportation services. In fiscal 1970, for example, Federal transit obligations totalled $108 million, whereas by fiscal 1978, this obligation had reached $3.2 billion.² Since 1964, the total Federal outlay for capital and operating costs of local transit systems has climbed beyond $18 billion.³ Surprisingly, this tremendous growth in the Federal transit program received its greatest boost during the Republican administrations of Presidents Nixon and Ford.⁴ Although many of the social programs of their Democratic predecessors were an anathema to the Republicans, the transit program was embraced by both Republican administrations as the cornerstone of their urban policies.⁵ Thus, during the decade of the 1970’s, with both Republican and Democratic administrations, the Federal transit program flourished.

From a local perspective, this Federal role has become an important component of transit funding and planning activities. On the average, the Federal government provides about twenty-two percent of local operating

³. Id. at 707. Fiscal Year 1978 was estimated.
subsidy needs in the nation’s largest cities. Even more significant, the Federal government covers eighty percent of the cost for new vehicles and transit system construction.

Federal regulations relating to the planning of the urban transportation systems have also influenced local decision-making. Two regulations in particular have had considerable impact on transit planning activities. The first states that each urbanized area must have a programming document that outlines its transportation investment strategy. This requirement was an outgrowth of the 1962 Congressional mandate in the Federal-Aid Highway Act that each urban area be required to have a regional transportation planning process that provided a comprehensive, continuing, and coordinated approach to transportation investment decision-making. Although first aimed at highways, a similar concern spread to transit. The second regulation requires each major transit investment (that will require Federal funds) under consideration by local officials to undergo an “alternatives analysis.” Such analysis must use Federally determined guidelines that will result in the selection of the most cost-effective investment strategy.

Most of the Federal funding support and related planning regulations have come from the U.S. Department of Transportation, the Cabinet department created by Congress in 1967 to coordinate the transportation policies and programs of the U.S. government. In recent years, however, other Federal agencies have begun to view the Federal transit program as a means of meeting their mandates. For example, both the U.S. Environmental Protection Agency and the U.S. Department of Energy have been active in encouraging local officials to consider transit investment as a way of improving air quality and conserving energy, respectively.

The Federal presence in public transit over the past two decades has thus evolved from pre-1964 minimal participation, to a Federal transit program in 1981 where a major portion of the capital and operating funds of local transit are provided by the Federal government, where much of the Federally-sponsored transportation planning activities in urban areas are devoted to transit investment, and where other Federal agencies are viewing transit as a means of attaining goals other than the mobility-related objectives usually associated with transit investment. Currently, the major program areas which form the basis of Federal transit support include:

Capital Funds ("Section 3"): Part of the original Urban Mass Trans-

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portation Act of 1964, Section 3 authorizes Federal grants (eighty percent of the costs) for the construction of new fixed guideways and the acquisition and/or improvement of mass transit facilities including rolling stock.\textsuperscript{11} These funds are allocated at the discretion of the Secretary of Transportation. At the end of fiscal year 1980, approximately $11.3 billion had been obligated from this fund.

Operating and Capital Funds ("Section 5"): This formula grant program was created in 1974 to provide funds that could be used for capital (eighty percent cost coverage) or operating assistance (fifty percent cost coverage).\textsuperscript{12} The grant program consisted of four major components:

Tier I—Grants apportioned to all urban areas on the basis of population and population density. The most recent authorization levels were $900 million a year for fiscal years 1979 through 1982.\textsuperscript{13}

Tier II—Similar to Tier I except eighty-five percent of the funds go to urbanized areas with populations greater than 750,000. Authorization levels were $250 million a year for fiscal years (FY) 1979-1982.\textsuperscript{14}

Commuter Rail-Fixed Guideways—Grants apportioned on the basis of fixed guideways and commuter rail route mileage and commuter train mileage. Authorization levels were $115 million for FY 1979, $130 million for FY 1980, $145 million for FY 1981, and $160 million for 1982.\textsuperscript{15}

Bus Purchase—Grants for the purchase of buses or construction of bus-related facilities apportioned on the basis of population and population density. Authorization levels were $300 million each for FY's 1979, 1980, $370 million in FY 1981 and $455 million in FY 1982.\textsuperscript{16}

Although these grants can be used to cover capital or operating costs of transit service, since the inception of Section 5, over eighty percent of its funds have been used by local officials for operating assistance.\textsuperscript{17}

Interstate Transfer and Urban Systems: Other major program areas for transit are the Urban Systems Highway program\textsuperscript{18} and the Interstate Transfer program.\textsuperscript{19} In the first program, $3.2 billion was authorized for funding up to seventy-five percent of the local cost for small-scale highway or transit projects, whereas the second program allowed state and local officials (until 1983) to transfer funds for non-essential urban segments of Interstate high-

\textsuperscript{14} Id. § 304(a)(2)(c).
\textsuperscript{15} Id. § 304(a)(3)(B).
\textsuperscript{16} Id. § 304(a)(4)(B).
\textsuperscript{17} Calculated from: APTA TRANSIT FACT BOOK 67-8 (1981).
ways either to transit or highway projects. Of the $5 billion worth of projects that have been withdrawn in this fashion, approximately $2.9 billion have been obligated to transit projects.

A substantial amount of Federal funding has gone into the support of local transit operations (see Table 1). In the next section, we will briefly review the Federal role in the transit program as it will likely evolve during the next three years, and then explore the implications of this role on urban areas.

III. Changing Perspectives on the Federal Role in Public Transit

Although recent proposals from the Reagan administration to change the Federal transit program have drawn attention to the "crisis" in public transit, other political and economic trends have contributed to the problems of transit finance. Even without the Reagan proposals, it is likely that these other trends would have forced a re-examination of transit investment and the appropriate Federal role.

The first trend is a growing political pressure on local officials to reduce government expenditures. This pressure has decreased the willingness of local officials to advocate increased transit investment. The most visible manifestation of this changing attitude of local public officials has been the large number of strikes and transit system shutdowns that have recently occurred throughout the country.20 During the mid-1970's, local officials were hesitant to accept a strike because disruption of service was considered politically unacceptable. Now, however, with public tax cutting referenda such as Proposition 13 in California and 2½ in Massachusetts, local officials can accept a strike and create an image of holding down public spending.

Second, rapidly increasing costs combined with high inflation, made transit operation an extremely expensive undertaking. Between 1972 and 1978, the price of diesel fuel increased four times more quickly than inflation while the cost of a bus increased at 2½ times the inflation rate.21 The cost of operating a transit vehicle a single mile increased sixty-three percent in constant 1978 dollars (from $1.42 to $2.32), while the average fare decreased from 40.7¢ to 38.1¢.22

These two trends have considerably reduced demands from local constituencies for Federal transit programs. When the Reagan administration took office and proposed major cutbacks in the Federal transit program, it was apparent to many local officials that some changes were needed in the

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20. During the past 18 months transit strikes and/or shutdowns have occurred in Birmingham (Alabama), Boston, Chicago, Dallas, Madison (Wisconsin), New York, and Philadelphia.
22. Id. at 33.
program. The most important area of debate was what aspects of the program needed to be changed. Three major program alternatives have been proposed for changing the Federal transit program:

1) Phase out Section 5 operating assistance and transfer the responsibility for operating support entirely to the local level, (major proponent: the Reagan administration).

2) Create a unified block grant that could be applied to capital or operating assistance, (major proponents: the American Public Transit Association and the U.S. Conference of Mayors).

3) Modify current programs to increase productivity and reduce bureaucratic procedures (major proponent: the U.S. General Accounting Office).

In that these proposals reflect the basic characteristics of any future Federal role in public transit, each will be discussed below. The first two will receive greater attention because they appear to be the most serious proposals at this time.

Phase Out Federal Operating Assistance—The Reagan administration has produced a bill, the Transit Assistance Act of 1981, that clearly reflects its philosophy toward government, in general, and transit specifically. As stated in the transferral letter,

Primary responsibility for the operation of mass transportation should rest with state and local governments. Accordingly, the Department is proposing a gradual phase-out of Federal operating subsidies. In addition, Federal assistance for new rail construction (other than that currently underway) will be postponed until the national economy and the condition of the Federal budget improve. Federal emphasis will be concentrated on capital expenditures which maintain existing transit systems that have proved effective and are an essential part of a large urban transportation network.23

The main provisions of the bill are:

• the phasing-out of Section 5 operating assistance as outlined in Table 2. The phasing-out of sections authorizing operating assistance, Sections 5(a)(1) to 5(a)(3), would occur from FY 1982 through FY 1984. Section 5(a)(4), which does not authorize operating assistance and can be used only to purchase buses or to build facilities, would gradually be increased.

• the elimination of several existing regulations. Specifically, this bill would:

—eliminate the required half-fare for elderly and handicapped persons at off-peak hours.

—eliminate federally dictated procedures for public review and allow a locally determined process for public comment on transit-related decisions.

—allow a local option for transit service to the handicapped, as opposed to

23. U.S. Secretary of Transportation to the President of the U.S. Senate and the Speaker of the House of Representatives, a proposed bill entitled The Transit Assistance Act of 1981, submitted March 17, 1981.
the currently required approach of fully accessible bus service to meet Section 504 requirements.\(^{24}\)

—eliminate federally mandated criteria governing the basis of contracts awarded for rolling stock.

- a minor increase in discretionary Section 3 funds for system modernization. Concurrent with this increase and the phasing-out of Section 5 assistance, steps would be taken to ensure that vehicle and facility maintenance is properly performed and not deferred so that operating costs are not quickly turned into capital costs.

Overall, the administration's proposal represents a radical departure from the existing Federal role in transit and, if adopted, would create significant problems for local officials who would have to fund transit operations.

**Create A Unified Block Grant**—This proposal would maintain an important Federal role in transit by continuing local use of Federal funds for operation assistance. The major change in this proposal is the combination of the current Section 3 and Section 5 programs into one unified program allocated to local jurisdictions as a block, which could then be used for whatever transit-related purposes as deemed necessary by local officials. Such a position was advocated by several speakers at recent hearings held by the House Committee on Public Works and Transportation examining the financial crisis of public transportation. As stated by one participant:

Instead of having separate discretionary programs and separate programs for capital and operating assistance, I would urge instead that the Congress establish a flexible Block Grant Program which would provide some local autonomy. A general Block Grant Program would give us an opportunity to make our own decisions as to whether or not we would want the bulk of those monies going to capital costs or to operating costs, or to a combination of both.\(^ {25}\)

The purpose of this approach is to increase the simplicity of the Federal transit program, and to increase local flexibility and responsibility, while avoiding some of the harsh implications for transit with elimination of Federal operating assistance. These implications were described by another speaker before the House Committee,

—46 percent of U.S. cities with transit would face substantial fare increases;
—20 percent of U.S. cities with transit would face moderate fare increases;
—65 percent of U.S. cities with transit would suffer significant ridership decrease;
—57 percent of U.S. cities with transit would reduce services.\(^ {26}\)


The unified grant approach is favored quite strongly by mayors and transit managers over the Administration's proposal. In August 1980, the U.S. Conference of Mayors surveyed 132 cities concerning a variety of issues relating to transit funding.\textsuperscript{27} At that time, prior to the Reagan election and prior to the proposed phasing-out of Federal operating assistance, already sixty-three percent of the respondents supported a unified grant program. Because opposition to the idea stemmed mainly from a fear of losing funds (compared to then existing appropriations), it can be assumed that the percentage of supporters would be much greater today in view of proposed cutbacks.

Whatever the eventual form of a block grant program, local officials seem to agree that local responsibility for transit should be expanded. However, these officials are equally convinced that the Federal government has an important role to play in transit, even with decreasing funding levels.

Modification of Current Programs—This proposal is based on recommendations made by the U.S. General Accounting Office (GAO) to the U.S. Department of Transportation (DOT) that would result in only minor modifications to the current Federal transit program.\textsuperscript{28} The GAO recommendations included:

—Improving transit productivity. Actions should be taken to improve transit productivity, such as requiring management evaluations of all major systems and monitoring steps taken as a result of these evaluations, requiring preventive maintenance programs, actively encouraging the use of part-time labor, and helping transit systems assess the cost effectiveness of service expansion into suburban areas.

—Placing more emphasis on passenger fares. In general, the GAO felt that not only were fares too low (a policy that should be reversed), but that they were highly inequitable, with long distance and peak riders being very heavily subsidized relative to other passengers. The DOT should require transit agencies to establish fare policies and to examine alternative fare structures that might better reflect equity and cost.

—Improving administration of the Federal operating assistance program. Various recommendations were made to improve the efficiency of UMTA's handling of operating assistance grants, including better guidelines, formal training for regional staff, timely processing of grants, and improved automation of grant processing.

The GAO approach envisions a high level of Federal involvement in the provision of transit, equivalent to the current role since it would be trading


\textsuperscript{28} Comptroller General of the United States, Soaring Transit Subsidies Must be Controlled, Report to the Congress CED-81-28, (February 26, 1981).
off some regulations now considered inefficient for new ones mandating certain actions (preventive maintenance, cost-effectiveness criteria, fare policies, fare rationalization).

In summary, the current proposals for changing the Federal transit program represent a wide range of consequences for local officials. The two most serious proposals—the phase out of Section 5 operating assistance and the creation of a unified grant program—recognize that there will be less money in the future for transit. However, they differ in how that money may be used at the local level, and also in the fundamental question of what is the role of the Federal government in supporting local transit.

In the next section, we will examine the implications of reduced Federal transit support on local transit services. Although an elimination of Federal operating assistance would represent a more immediate threat to transit, it is obvious that no matter which legislative program is finally enacted, the Federal funding support for transit is to be reduced.

IV. IMPACTS OF CUTBACKS IN THE FEDERAL TRANSIT PROGRAM ON LOCAL COMMUNITIES

The immediate impact of cutbacks in Federal operating assistance will vary from region to region, depending on the extent that local communities have provided alternative funding sources for covering transit costs. In many cities, sales, gas and employee taxes have been dedicated to fund public transit, whereas other cities rely on operating assistance from state or local governments. However, only twelve states have established such an assistance program, and only one-third to one-half of U.S. transit systems have local dedicated taxes. Thus, a large number of transit systems are vulnerable to cutbacks in Federal operating assistance.

A recent survey of the general managers of 30 U.S. transit systems provided the first indication of how most transit systems will respond to Federal cutbacks. Raising transit fares was suggested most often as the first step in responding to financial pressures. Not only did the general managers feel that transit fares were too low, but they felt that in today’s fiscally conservative political environment raising fares was more acceptable to local officials than cutting service. The significance of this response is found in the fact that seventeen of the thirty transit systems surveyed had already increased their fares in the first seven months of 1981. Of these seventeen, eleven had also raised fares in 1980. There was little doubt from

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30. Id. at 22.
31. Id. at 23.
those interviewed that much of the burden on increased local funding support for transit was being shifted to transit riders.

The second, most often, cited strategy for responding to financial pressure in the short-term was reducing service. From August, 1980 to August, 1981 ten transit systems of those contacted had significantly reduced service, and another five had made minor cutbacks. In one instance, the transit system was facing a twenty-five percent reduction in service by the end of 1981. An interesting characteristic of these cutbacks is the pattern that most cities are following—first, elimination of night service, then Sunday service, and finally Saturday service. In short, service cuts were designed to preserve the service offered during the peak weekday hours.

The third option available to local officials was seeking revenues from new sources, for example, state governments. Nine of the thirty systems surveyed had recently lost referenda or legislative battles to change their sources of income. Six transit systems were hoping for increased state aid, three others were hopeful about changes in state gas taxes, and four others were counting either on new state operating assistance or on a local option tax.

The results of this survey provide some ominous indications of how transit systems will respond to cutbacks in Federal operating assistance.

First, the impact of major Federal cutbacks will exacerbate the differences in relative financial positions that exist today. Large disparities already exist between those systems that are financially stable and those that are already severely constrained. The properties that are in the healthiest situation, often because of large revenues from a sales tax, tend to depend the least on Federal aid, and will have the most flexibility to survive Federal cutbacks without much change.

Second, it is apparent that few local officials have examined the longer term implications of Federal cutbacks. Even in those cities where state revenues or local dedicated taxes will “cushion” transit service from declining Federal assistance, the long-term future of transit finance is still in doubt.

Third, all of the actions recently taken, which would be accelerated in the event of major Federal cutbacks, directly harm those who can least afford it. Fare increases, increases in taxes, and cuts in off-peak service fall disproportionately on the poor. Service cutbacks most significantly affect those not having an automobile, or those unable to drive, i.e., the poor, elderly, or handicapped. From an equity perspective, Federal cutbacks are likely to produce a local response that is highly inequitable.

Finally, the other benefits that could possibly come from transit, e.g., reduced highway congestion, improved air quality, decreased fuel consumption, and improved land accessibility, have not been seriously considered in the debate surrounding transit finance. If these benefits are not considered, the calculus of cost effectiveness might be heavily biased against maintaining even a basic public transit system.

V. PUBLIC TRANSIT IN THE 1980'S: SOME CONCLUDING REMARKS

The next few years will likely be most significant for the future of public transit in the U.S. No matter what changes to the existing Federal transit program are adopted by Congress or made by the U.S. Department of Transportation, the characteristics of the program seem clear—decreased Federal operating assistance, increased local funding responsibility, reduced Federal regulations, and few opportunities for major new construction starts. From the local perspective, these changes produce pressures for key decisions on the future of transit in urban areas. These pressures provide opportunities for local officials to improve transit system productivity and service effectiveness. Specifically, the following characteristics of a local response seem most appropriate:

1. Transit service must be considered as just one component of the urban transportation system. All too often, the debate on transit funding is conducted as an “either-or” situation: either transit is funded and you have service, or it is not funded and there is no service. There are many alternative transportation services that can supplement or complement transit, for example, car pools, van pools, subscription bus service, jitneys, and demand-responsive transportation services. These alternatives must be considered when discussing the types of public funded services that should be provided, and the most effective structure of the public transit system.

2. The focus of the debate on local transit financing must be on the equity implications of each alternative. All of the funding alternatives being considered by local officials have significant impacts on the poor, elderly, and handicapped, the groups in an urban area often having the least access to the political process. It thus becomes the responsibility of local officials to raise these issues, and to provide a forum for their resolution.

3. The community benefits that come from transit service must also be clearly articulated, and considered in the possible actions to fund the service. For example, transit investment, when combined with private development funds, have provided an important catalyst for developing new and older areas of U.S. cities. Many city officials have also used transit investment and the resulting commuter shift to transit services as a means of reducing street congestion and improving air quality.

These benefits, and to whom they accrue, have increasingly become
an important consideration in identifying possible funding support for transit service. For example, in many cities, the business community has become more active in supporting the local transit service because of the important role transit plays in its economic survival.33 It thus becomes necessary for local officials and transit management to point out to local groups the importance the survival of a transit service has for their own future.

4. Local officials should view the current problems with transit finance as an opportunity to improve service productivity and internal management efficiency. The financial pressures on transit systems should provide an incentive for local officials, transit management, and labor representatives to reach agreement on cost-saving measures such as limiting Cost of Living Adjustment (COLA) escalators or using part-time labor. Other actions that could be considered to improve efficiency of operations include: management information systems, preventive maintenance programs, improved driver participation, employee incentive structures, increased control of absenteeism, and closer monitoring of costs and revenues. Finally, network structures and route performance could be evaluated in light of financial pressures to ensure that service is efficient and effective in obtaining stated goals.

5. Although the immediate concerns of maintaining a viable transit system in the face of cutbacks in Federal operating assistance will occupy much of the time of local officials concerned with public transportation, the longer-term considerations of what role transit should play in their communities, the type of stable funding source necessary to support this role, and the equitable distribution of costs must also be addressed. Ideally, such an image of the future role of transit should influence the more immediate steps taken to support the transit system. At the very least, the longer term options that become available, and those foreclosed by adopting specific actions to support transit in the short term must be understood.

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I.  INTRODUCTION

A new climate has swept the body politic of contemporary America. Cries for indiscriminate deregulation ring from every sector of society. This shift in attitudes has not gone unnoticed by the federal government or the
agencies it has created. Government responses have been many and more can be expected from the new Administration. Given what the future holds, consideration of recent deregulatory legislation is both timely and necessary. This paper will examine one recent act of deregulation: The Staggers Rail Act of 1980.¹

The purpose of selecting this legislation for review is twofold. First, as energy supplies dwindle, railroads should play an increasingly central role in providing the nation’s transportation. The rail industry’s continued existence is necessary for a healthy national economy. Consequently, government deregulation in this area presents issues of importance in and of itself. Second, neither the general public nor their elected representatives have distinguished railroad regulation from other regulatory schemes. Railroad regulation was created in response to the view that free market controls are insufficient to protect both the industry and the shipping public. Since 1920,² the legislative purpose of rail regulation has been to ensure the economic viability of this mode of transportation. This type of economic regulation must be distinguished from regulation designed to achieve other social goals. The consequences of abandoning economic regulation may differ dramatically from the consequences of abandoning non-economic regulation. The Staggers Rail Act will be used to highlight what these differing consequences.

Promulgated in October of 1980, the Staggers Rail Act is an extensive piece of legislation which is too broad to be comprehensively examined in one paper. Instead, examination of this Act will be confined to those measures which directly reduce government control and increase managerial flexibility to compete in the marketplace. After an exposition of the prior economic and regulatory conditions of the rail industry, relevant sections of the Act will be discussed including the changes brought about by deregulation and the probable effects on railroads and the transportation industry in general. Finally, a concluding section will discuss the implications of economic deregulation.

II. PRIOR ECONOMIC AND REGULATORY CONDITIONS

A. OVERVIEW

American railroads lost their dominant position in the transportation industry long ago. Since the end of the second World War, the rail industry has experienced dramatic declines in both freight and passenger demand.³ Between 1947 and 1977, intercity tonnage almost doubled, while railroad

². Transportation Act of 1920, Ch. 91, 41 Stat. 456 (1920).
tonnage decreased by 9 percent. During the same period, the rail industry’s market share of total revenue dropped from 70 percent to 30 percent. In every region of the nation, more than half of all industrial goods are, today, transported by non-rail modes. Thus, railroads which used to be the dominant carrier of agricultural products carried only 43 percent of the total in 1977.

The primary cause of the rail industry’s decline has been its inability to compete with alternate modes of transportation. For example, in terms of ton-miles, truck traffic increased 450 percent, pipeline 433 percent, and barge traffic by more than 700 percent, but railroad traffic increased by only 25 percent in the post-war markets. Part of the railroads’ inability to compete can be attributed to changed market conditions. The movement toward service-oriented and light industry has created new demands for transportation, which non-rail modes are equally capable of providing. No longer is the nation’s freight dominated by bulk and heavy commodities for which rail transportation is inherently suited. Instead, the industry must now compete directly with other modes for the same freight. Furthermore, industry itself has moved away from areas traditionally served by rail transportation.

Competition alone did not cause the decline of the railroads. The industry’s decline is more directly related to artificial competitive disadvantages which the railroads have faced because indirect government subsidies have aided other modes of transportation. The completion of the national highway system coupled with the construction of navigable waterways has increased the number of alternate modes of access to new markets at minimal costs. Furthermore, the government provided right-of-way has allowed non-rail carriers to implement technological advances. For example, the construction of better highways allowed motor carriers to utilize larger trailers. These same conditions did not exist for rail carriers.

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5. Id.
6. Id.
7. Id.
8. Id.
10. Id.
12. Supra note 3, at 214.
13. Supra note 4, at 2986, 3019.
The railroads industry is the only mode of transportation that builds, owns and maintains its own rights-of-way. Accordingly, railroads incur substantially higher costs for access to markets. These higher costs have inhibited the industry’s ability to implement technological advances. The net result has been that even in areas where the railroads have traditionally served bulk shippers, the government’s indirect subsidies to other modes of transportation have adversely affected the rail’s competitive position. Grain, a bulk commodity for which rail transportation is inherently suited, has been increasingly diverted to motor carriage because better roads and increased trailer size have made the motor carrier a viable alternative while the cost of upgrading the trackage to handle the new, larger, covered hopper cars has prohibited the rail industry from implementing this technological advancement to its competitive detriment.

The unique position of the railroads in owning their own rights-of-way along with the government’s regulation of abandonment have both adversely affected the competitive position of the rail carriers. Two-thirds of all rail traffic moves over only 20 percent of the rail system, while 10 percent of the total trackage accounts for only one-half of one percent of the traffic. The cost of maintaining unprofitable track has adversely affected the industry’s earnings and ability to attract capital. Abandonment proceedings before the Interstate Commerce Commission (ICC) have been slow and costly. This procedure has inhibited managerial flexibility to cut losses and consolidate services. On the other hand, exempt motor carriers with whom the rail industry competes have had unrestricted entry and exit. Even regulated non-rail carriers are in a better competitive position because their costs for operating over marginal rights-of-way are more directly related to use.

Government regulation of rates has also adversely affected the rail industry’s competitive position. The original grant of jurisdiction to the ICC to determine the reasonableness of rates included the power to consider the carrier’s need for adequate revenues. But, legislative amendments and ICC policy have strayed from this objective to the extent that the ratemaking standard originally intended to assure the railroads a fair rate of return has become the basis of protecting motor and water carriers from rail competition. The use of umbrella ratemaking to protect the traffic of alternate

14. Supra note 12.
15. Supra note 11, at 3019.
16. Supra note 11, at 3010.
18. Supra note 3.
19. DOT STUDY, supra note 9, at 118.
20. Id. at 119.
modes by keeping the rail rates higher prevented the rail carriers from competing for the same traffic on equal footing.

Umbrella ratemaking not only adversely affects the rail carrier’s competitive position against other regulated carriers, but also has a particularly damaging effect on competition with exempt motor carriers. For example, raw agricultural products carried by motor transportation are exempt from regulation.\(^1\) The price flexibility afforded by exempt status allows motor carriers to raise prices as demand increases and reduce rates as demand falls. Thus, it is not uncommon for exempt rates to vary from 300 percent of the rail rate during peak demand to 50 to 60 percent during slack times.\(^2\) In other words, exempt carriers price against the fixed rail rate according to demand and are able to react to changing market conditions while railroad management is stifled by the lengthy regulatory process.

Rail rate regulation was also used to implement a policy of port and product equalization.\(^3\) The industry was forced to transport commodities at a loss so the subsidized freight would be competitive with products of other locations. Equalization of places and products meant rail carriers had to recoup the losses of transporting subsidized freight on other traffic. This presented no small problem for the industry. A rail carrier could not lower rates for competitive traffic due to umbrella ratemaking so increasing volume in that traffic was not an option. Raising rates on competitive traffic could only have resulted in less traffic.\(^4\) Therefore, the only real choice for the railroads was to raise the rates for captive shippers. At this point it is appropriate to discuss the many changes made by the 4R Act of 1976.

**B. THE 4R ACT OF 1976**

The 4R Act made many changes in rail rate regulation. It attempted to return to the adequacies of revenue standard and deter umbrella ratemaking.\(^5\) More importantly, it introduced the concept of market dominance.\(^6\) Essentially, market dominance exists where there is a lack of competition from other carriers or modes of transportation for the product shipped. In employing this theory the ICC must first find that market dominance exists before it has jurisdiction to conclude that the proposed rates are unreasonably high. The 4R Act did not, however, limit the ICC’s jurisdiction over minimum rates. It only gave railroads the freedom to raise rates for competitive

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22. Supra note 4 (statement of Hays T. Watkins, Chairman and President, Chessie System Inc.)
23. Supra note 11, at 3020.
24. Id. at 3022.
26. Id. § 202(l).
traffic. As might be expected, the railroads did not extensively exercise this new freedom because the market conditions dictated a lowering of rates for competitive freight rather than an increase in these rates.

Another advantage in not using this new maximum rate freedom was that the market dominance test was not a test for the reasonableness of the rate, but was only employed to establish the ICC’s jurisdiction. Only where market dominance was deemed to exist did the carrier’s need for adequate revenues become relevant. By not raising rates for competitive traffic, a rail carrier’s case for the need for adequate revenues was strengthened. This allowed the rail carrier to justify a higher rate for the captive shipper. Since, by definition, there was a lack of competition for the freight, the carrier could increase rates without a loss in traffic. This was the strategy used by the industry and it was successful.27

The 4R Act also created the concept of demand sensitive pricing28 which attempted to solve the problem of seasonal car shortages associated with peak grain shipments. It was thought that by allowing rail carriers to enjoy pricing flexibility, the demand curve for grain service would even out.29 A carrier could raise the rate during peak demand and lower it during slack time, thereby inducing shippers to alter their shipping schedules. However, this objective was not realized.30

Demand sensitive pricing was premised on the assumption that transportation costs would be a primary factor in determining when grain would be shipped. However, that assumption was incorrect. Had Congress examined motor carrier price fluctuations, it would have realized the ineffectiveness of demand sensitive pricing. More importantly, the remedy did not address the underlying problem of competition with exempt motor carriers. During slack demand, grain transportation was provided by exempt motor carriers who effectively priced against the rail rate. The demand for rail service developed only after the supply of motor carriers had been depleted. Shortages of rail cars occurred because the cars were committed to service in locations other than where the demand existed. The railroads did not opt to lower rates during periods of slack demand. But even if they had, it would not have made a substantial impact because rail regulations still required 30 days notice to effect a rate change, while exempt carriers had no such requirement. Thus, exempt carriers were still able to react faster and, unless a rail carrier reduced the rate substantially, the exempt carrier could still price against the rail rate. Consequently, no incentive ex-

29. DOT Study, supra note 9, at 121.
30. Supra note 11.
isted for rail carriers to slash rates to any degree while demand in other locations existed. What the rail carriers did do was raise the rate for peak demand.\textsuperscript{31} This increase did not alleviate car shortages, but did have the effect of generating more revenue for the railroads. Demand sensitive pricing was repealed by the Staggers Rail Act.

\subsection{Service}

Another area where rail carriers were unable to compete on an equal basis with other modes was service. As noted above, railroad management was inhibited from implementing new technology to improve service because of the cost of upgrading the right-of-way. Another disadvantage was the industry's inability to match service with demand through long-term commitments.\textsuperscript{32} Prior to the issuance of a general policy statement by the ICC in 1979,\textsuperscript{33} it was thought that railroads were prohibited from entering into contracts for rates and service. Early ICC decisions had held that such contracts were invalid as an anti-competitive practice.\textsuperscript{34} One case went so far as to state, as dicta, that "[c]ontract rates and agreed charges are deemed unlawful per se."\textsuperscript{35} Rail carriers were left to their own managerial resources to maximize asset utilization while competing motor contract carriers could guarantee service to shippers and better plan the use of their equipment. The flexibility afforded by contract rates and their aid in predicting future demand were competitive advantages the rail industry did not possess. However, in 1979 the ICC announced that its policy on rail contracts had changed.\textsuperscript{36} Contract rates would be approved where the potential benefits outweighed the possible adverse affects.\textsuperscript{37}

\subsection{Financial State}

As the foregoing discussion has implied, the rail industry is not in good economic health. In fact, it is in serious financial straits. In Ex Parte No. 353,\textsuperscript{38} the ICC determined that a rate of return on net worth of 10.6 percent was needed by the industry in order to cover its capital costs. In Ex Parte No. 363\textsuperscript{39} and No. 381,\textsuperscript{40} that figure was revised to 11 percent and

\begin{itemize}
\item \textsuperscript{31} Id.
\item \textsuperscript{32} DOT Study, \textit{supra} note 9, at 121.
\item \textsuperscript{33} Change of Policy, Railroad Contract Rates (General Policy Statement) 361 I.C.C. 205 (1979).
\item \textsuperscript{36} \textit{Supra} note 33.
\item \textsuperscript{37} Id. at 205.
\item \textsuperscript{38} Adequacy of Railroad Revenue (1978 Determination), 361 I.C.C. 79 (1978).
\item \textsuperscript{39} Adequacy of Railroad Revenue (1979 Determination), 362 I.C.C. 344 (1980).
\item \textsuperscript{40} Adequacy of Railroad Revenue (1980 Determination), 364 I.C.C. 311 (1980).
\end{itemize}
then to 11.22 percent. This rate of return has not been achieved by the industry or any one carrier. In 1978, the average rate of return was just over 1 percent with the highest rate for any individual carrier not exceeding 7 percent.\(^{41}\) In comparison, during the same year, the average for motor carriers was 18 percent, manufacturers 16 percent, and just over 11 percent for gas and electric utilities.\(^{42}\) The railroad industry’s low rate of return has impaired its ability to obtain capital and it is predicted that the industry will experience a capital shortfall between 16 billion and 20 billion dollars by 1985.\(^{43}\) Thus, the industry was in dramatic need for revitalization. The Staggers Rail Act of 1980 was designed to effect that objective.

III. Staggers Rail Act of 1980

The Staggers Rail Act\(^{44}\) was promulgated in October of 1980. The overall purpose of this legislation was the revitalization of the rail industry through the removal of unnecessary regulation and the increase of competition. Congress, after determining that a greater reliance on the marketplace was essential, created a new Congressional declaration of railroad regulation policy.\(^{45}\) The ICC is now directed to allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for rail transportation.\(^{46}\) Embodied in this first of fifteen new policy statements is the concern which permeates and complicates the Act. On one hand, Congress has decided regulation has distorted the transportation market and only competition will ensure the continued existence of a private rail system. On the other hand, the ICC is directed to continue regulation where competition is not possible. Congress, recognizing not all freight is competitive, did not intend to subject captive shippers to the pressures of the market system. To that end, the ICC is now directed to foster those economic conditions which produce a competitive environment, avoid undue concentrations of market power, and maintain reasonable rates where there is an absence of effective competition.

A. Entry Regulation

In creating a new regulatory policy, the Act amended many provisions of the Interstate Commerce Act. For example, the requirements for a certificate authorizing the construction of new lines have been lessened. The ICC is no longer required to find that public convenience and necessity re-

\(^{41}\) Supra note 4.

\(^{42}\) Id.


\(^{45}\) Id. § 101(a) (to be codified as 49 U.S.C. § 10101a (1980)).

\(^{46}\) Id. (to be codified as 49 U.S.C. § 10101a(1) (1980)).
quire or will be enhanced by the construction, or acquisition and operation of a railroad line. The new standard allows the ICC to grant authority on a finding that public convenience and necessity require or permit entry.\footnote{47}

The Act also creates a new section prohibiting a rail carrier from blocking another certificated rail carrier from constructing a line across its property if:

A) The construction does not unreasonably interfere with the operation of the crossed line;
B) The operation does not materially interfere with the operation of the crossed line; and
C) The owner of the crossing line compensates the owner of the crossed line.\footnote{48}

Should the carriers be unable to agree on those matters involving terms of operation or compensation, either party may ask for an ICC determination of the problem.\footnote{49}

\section*{B. \textit{Exit Regulation}}

Abandonment and discontinuance procedures were streamlined in the Staggers Rail Act to reduce processing time. The Act requires the ICC to find that public convenience and necessity requires or permits the proposed termination of service if no protests are received within 30 days after the application for authority is filed.\footnote{50} If a protest is filed, the ICC must determine within 45 days whether to conduct an investigation.\footnote{51} Should the Commission decide not to conduct an investigation, a deposition must be rendered within 25 days after the application is filed.\footnote{52} When an investigation is ordered, it must be completed within 135 days and an initial decision entered by the 165th day. When an initial decision is appealed, the ICC must render a final order within 255 days.\footnote{53} Assuming a carrier can meet its burden of showing public convenience and necessity, the effective date of the abandonment or discontinuance can be no later than 330 days from the date the application is filed. The effective date may, however, be stayed by the ICC pursuant to a new section.\footnote{54}

The Staggers Rail Act also created a new section whereby interested parties may make offers of financial assistance to avoid abandonment or discontinuance.\footnote{55} Within 10 days after the ICC has published notice of

\begin{footnotes}
\footnote{47} Id. § 221(a) (amending 49 U.S.C. § 10901(a) (1976)).
\footnote{48} Id. (to be codified as 49 U.S.C. § 10901(d) (1980)).
\footnote{49} Id. (to be codified as 49 U.S.C. § 10901(e) (1980)).
\footnote{50} Id. § 402(b)(2) (amending 49 U.S.C. § 10904(b) (1976)).
\footnote{51} Id. § 402(b)(3) (amending 49 U.S.C. § 10904(c)(1) (1976)).
\footnote{52} Id. (amending 49 U.S.C. § 10904(c)(2) (1976)).
\footnote{53} Id. (amending 49 U.S.C. § 10904(c)(3) (1976)).
\footnote{54} Id. (amending 49 U.S.C. § 10904(c)(4) (1976)).
\footnote{55} Id. § 402(c) (amending 49 U.S.C. § 10905 (1976)).
\end{footnotes}
approval of an application for discontinuance, any person may offer to pay the carrier a subsidy or to purchase the line.\textsuperscript{56} If within 15 days after publication of approval, the Commission determines that:

A) a financially responsible person has offered financial assistance; and
B) the assistance offered is likely to be equal to either:
   1) the acquisition cost of the line or
   2) the difference between the revenues attributable to the service being provided and the cost of such service plus a reasonable rate of return.\textsuperscript{57}

then the ICC shall postpone the issuance of the certificate of authority. Where a subsidy agreement is actually reached, the ICC will stay the issuance of authority for the duration of the agreement. When a line is sold, and the sales agreement provides for continued rail service, the application for discontinuance will be dismissed.\textsuperscript{58} However, if the parties fail to reach an agreement, either party may then submit the dispute to binding arbitration before the ICC. After arbitration, the person offering assistance has 10 days either to accept the ICC’s determination or withdraw the offer, at which point the certificate will be issued. If neither party has requested ICC arbitration of an impasse within 30 days after an offer has been made, the ICC must issue the certificate of authority to abandon or discontinue service.\textsuperscript{59} It must be emphasized that this section does not come into effect until after approval for termination of service is granted, and that the Act did not alter the standards for obtaining such approval.

C. \textit{Rate Regulation}

The main thrust of the new legislation is the alteration of rate regulation. Competition is to be fostered by increased rate flexibility. For example, rail carrier may now establish any rate for transportation it chooses within boundaries. In addition, the Act changes both minimum and maximum rates and amends procedures for determining the reasonableness of the rate. Thus, a rate increase can now become effective upon 20 days notice, while decreases now require only 10 days notice.\textsuperscript{60}

1. \textit{Minimum Rates}

Rail carriers subject to ICC jurisdiction may not establish rates below a reasonable minimum.\textsuperscript{61} A rate which is non-compensatory is presumed unreasonable while rates which contribute to the going concern value of the

\begin{itemize}
\item \textsuperscript{56} Id. (amending 49 U.S.C. § 10905(c) (1976)).
\item \textsuperscript{57} Id. (amending 49 U.S.C. § 10905(d) (1976)).
\item \textsuperscript{58} Id. (amending 49 U.S.C. § 10905(e) (1976)).
\item \textsuperscript{59} Id. (amending 49 U.S.C. § 10905(l) (1980)).
\item \textsuperscript{60} Id. § 216(a) (amending 49 U.S.C. § 10762(c)(3) (1976)).
\item \textsuperscript{61} Id. § 201(a) (to be codified as 49 U.S.C. § 10701a (c)(1) (1980)).
\end{itemize}
carrier are conclusively presumed reasonable. The ICC may not require rates conclusively presumed reasonable to be raised. But, rates may be challenged as being too low. The burden is on the party challenging the rate to show that the proposed rate would not contribute to the going concern value of the carrier. Once the presumption of unreasonability is established, the burden shifts to the carrier to show that the rate is reasonable. Upon finding that the rate is too low and that the carrier is in a worse position than it would have been had the rate been higher, the ICC may increase the rate to the minimum level at which the rate will benefit the carrier.

Congress enacted this new freedom to ensure that carriers, whose pricing meets rational economic standards, will not be prevented from improving their economic position by reducing rates. The drafters did not foresee many instances where rates would be found to be unreasonably low because a carrier has no reason to keep a rate below the most beneficial level. Thus, there is no reason to believe that rates will ever be held down below the most beneficial level except by oversight. Presumably, predatory rates would be held unreasonable.

2. **Maximum Rates**

As has been indicated, there is no maximum rate limitation for rail transportation unless the rail carrier has market dominance over the freight to which the rate applies. Congress intended that the forces of the market should regulate transportation and that competition should be used to hold rates down. However, where market dominance exists, the rates must be reasonable. The Act does not alter the definition of market dominance, but does create a formula for conclusively determining when it does not exist. The formula created by the Act is:

\[
\text{Revenue—variable cost percentage} = \frac{\text{Total Revenues}}{\text{Total Variable Cost}}
\]

Market dominance conclusively does not exist where the revenue variable cost percentage is less than:

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63. Staggers Rail Act § 201 (to be codified as 49 U.S.C. § 10701a(c)(3)(A) (1980)).
64. Id. (to be codified as 49 U.S.C. § 10701a(c)(3)(B) (1980)).
65. Joint Explanatory, supra note 62 at 90.
66. Id.
67. Staggers Rail Act § 101(a) (to be codified as 49 U.S.C. § 10101(a)(13)) directs the ICC to "prohibit predatory pricing...."
68. Id. § 201(a) (to be codified as 49 U.S.C. § 10701a(a) (1980)).
69. Joint Explanatory, supra note 62, at 89.
70. Staggers Rail Act § 201(a) (to be codified as 49 U.S.C. § 10701a(b)(1) (1980)).
71. Id. § 202 (to be codified as 49 U.S.C. § 10709(d)(1) (1980)).
160 percent between October 14, 1980 and September 30, 1981,
165 percent between October 1, 1981 and September 30, 1982,
170 percent between October 1, 1982 and September 30, 1983, and
175 percent between October 1, 1983 and September 30, 1984.\textsuperscript{72}

After October 1, 1984, the formula becomes the cost recovery percentage during the preceding year. A finding that the rate meets or exceeds the applicable revenue-variable cost percentage does not raise a presumption of market dominance or a presumption of an unreasonably high rate.\textsuperscript{73} The burden is on the carrier to show that the rate is below the ICC’s jurisdictional threshold.

When the ICC determines that market dominance exists, then the reasonableness of the rate becomes an issue. The reasonableness of a rate must be considered in light of the policy that rail carriers shall earn adequate revenues.\textsuperscript{74} To aid in this determination, the Act creates three zones of reasonableness for rate increases.\textsuperscript{75}

The first zone of reasonableness incorporates the concept of a base rate (the rate existing at the promulgation of the Act) and an adjusted rate base (the base rate multiplied by the latest cost adjustment factor determined by the ICC.).\textsuperscript{76} A rail carrier may increase its rate to conform to the adjusted rate base so long as the carrier has not recovered inflation increases through a general rate increase pursuant to section 10706 or an inflation-based increase under section 10712.\textsuperscript{77} Rate increases which conform to the adjusted base rate may not be held to be unreasonable.\textsuperscript{78}

The second zone of reasonable rate increases allows a carrier to increase the rate up to 6 percent annually over the adjusted base rate.\textsuperscript{79} There are carry-over provisions for unused percentages, but in no event may the total increase exceed 18 percent of the adjusted base rate.

Finally, a third zone of reasonable rate increases allows a carrier an additional 4 percent over the 6 percent increase included in the second zone.\textsuperscript{80} This rate does not apply to single-line rates where the carrier already earns adequate revenues. The Commission is directed to promulgate regulations regarding the application of the 4 percent increase to joint rates.

Neither the 6 percent zone nor the 4 percent rate increases are immune from being held unreasonable. In fact, the Congress intended that

\textsuperscript{72} Id. (to be codified as 49 U.S.C. § 10709(d)(2) (1980)).
\textsuperscript{73} Id. (to be codified as 49 U.S.C. § 10709(d)(4) (1980)).
\textsuperscript{74} Id. § 201(a) (to be codified as 49 U.S.C. § 10701a(b)(3) (1980)).
\textsuperscript{75} Id. § 203(a) (to be codified as 49 U.S.C. § 10707a (1980)).
\textsuperscript{76} Id. (to be codified as 49 U.S.C. § 10707a(a) (1980)).
\textsuperscript{77} Id. (to be codified as 49 U.S.C. § 10707a(b)(1) (1980)).
\textsuperscript{78} Id. (to be codified as 49 U.S.C. § 10707a(b)(2) (1980)).
\textsuperscript{79} Id. (to be codified as 49 U.S.C. § 10707a(c)(1) (1980)).
\textsuperscript{80} Id. (to be codified as 49 U.S.C. § 10707a(d) (1980)).
"the same standards of maximum reasonableness applicable to any other rate or rate increase" should apply here also. Even rates found to exceed these zones may be held reasonable while rates below the zones may not. The Act does, however, provide direction to the ICC when reviewing certain increases within the 6 percent zone. For example, if the proposed increase sets the rate at a level which results in a revenue-variable cost percentage less than 20 percentage points above the jurisdictional level or a revenue-variable cost percentage of 190 percent, then the Commission's determination of the reasonableness of the rate shall reflect due consideration of the carrier's overall need for adequate revenues. A carrier already earning total adequate revenues is to be prevented from reaping excessive profits on the traffic involved. This section does not imply that excessive profits will be permitted for carriers who do not have adequate revenues.

The purpose of creating the 6 percent and 4 percent zones of increase is to establish a procedural mechanism for carriers to change rates without undue regulatory interference. The Commission cannot suspend a rate increase in either zone pending final Commission action. Furthermore, the Commission may not investigate, by its own motion, rate increases which do not set a rate level above 20 percentage points over the jurisdictional threshold or a total-variable cost percentage of 190 percent. A rate set above these levels may be investigated by the Commission on its own initiative or upon receiving a complaint.

3. Investigations and Suspensions

If the Commission decides to conduct an investigation into a proposed rate, it must be completed within five months unless the ICC reports to Congress its reasons for the delay. The Commission may not suspend a proposed rate during an investigation unless the protestant shows:

1) It is substantially likely that the protestant will prevail on the merits;
2) without suspension, the proposed rate change will cause substantial injury to the protestant; and
3) because of the peculiar economic circumstances of the protestant, the provisions for post determination reimbursement do not protect the protestant.

If the Commission does not suspend a proposed rate increase, the carrier is required to keep an accounting of all amounts received under the increase.

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81. Joint Explanation, supra note 62 at 93.
82. Staggers Rail Act § 203(a) (to be codified as 49 U.S.C. § 10707a(e)(1) (1980)).
84. Staggers Rail Act § 203(a) (to be codified as 49 U.S.C. § 10707a(e)(1) (1980)).
85. Id.
86. Id. § 207(a) (amending 49 U.S.C. § 10707(b)(1) (1976)).
87. Id. § 207(b) (amending 49 U.S.C. § 10707(c)(1) (1976)).
until final action is taken. Should the Commission hold the rate increase to be unreasonable, the carrier must return the excess amount collected with interest. Similarly, when a suspended rate is later determined valid, the carrier is entitled to collect the suspended amount plus interest.

4. **Contract Rates**

The Act clarifies the status of the contract rate and service agreements. Rail carriers may now enter into contracts with purchasers of rail transportation, subject to ICC approval. Within 30 days after a proposed contract is filed, the Commission must decide whether or not to initiate proceedings to review the contract. If the Commission does not make this decision within the allotted time, the contract will become effective 60 days from the filing date. The ICC may commence an investigation on its own initiative or by acting on a complaint filed by either:

1. an individual shipper who alleges he will be harmed because the proposed contract unduly impairs the carrier’s ability to meet its common carrier obligation to the complainant; or
2. by a port on the grounds that the port will be harmed because the proposed contract will result in unreasonable discrimination against the port.

A carrier may delegate up to 40 percent of the utilization of carrier-owned or leased equipment through contractual arrangements but the Commission may limit the right of a carrier to enter into future contracts if it is found that the carrier’s ability to fulfill its common carrier obligation would be impaired by these delegations. The Commission is further empowered to require the carrier to provide services at rates similar to those of agricultural shippers in the same position as the contracting shipper.

The Act creates a new class of rail carriers, thereby making carriers entering into such rate contracts both common and contract carriers. Once a contract goes into effect, the contract is exempt from all regulations and requirements of the Interstate Commerce Act. During peak demand, rail carriers may fulfill their contractual obligations before responding to reasonable requests for service without violating the common carrier obligation. The exclusive remedy for breach of a contract is the appropriate state or

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88. Id. § 207(c) (amending 49 U.S.C. § 10707(d)(1) (1976)).
89. Id. (amending 49 U.S.C. § 10707(d)(2) (1976)).
90. Id. § 208(a) (to be codified as 49 U.S.C. § 10713 (1980)).
91. Id. (to be codified as 49 U.S.C. § 10713(d)(1) (1980)).
92. Id. (to be codified as 49 U.S.C. § 10713(d)(2) (1980)).
93. Id. (to be codified as 49 U.S.C. § 10713(k)(1) (1980)).
94. Id. (to be codified as 49 U.S.C. § 10713(k)(2) (1980)).
95. Id. (to be codified as 49 U.S.C. § 10713(d)(2)(B) (1980)).
96. Id. § 222 (amending 49 U.S.C. § 11101(a) (1976)).
federal court, unless the parties agree otherwise.\textsuperscript{97}

5. \textit{Permissive Limited Liability Rates}

Rail carriers may now establish rates which limit their liability for loss and damage in transit.\textsuperscript{98} For such a rate, liability is limited to the value established by written declaration of the shipper or written agreement by the shipper and carrier. Carriers may also provide for amounts to be deducted from any claim against the carrier. Interestingly enough, rail carriers are not required to maintain any rates which do not limit their liability.

The Act does not change the common law grounds of carrier liability codified in the Carmack Amendment.\textsuperscript{99} Instead, the Attorney General and the ICC are directed to study and make recommendations as to whether a no fault system of liability should be established.\textsuperscript{100} Venue has been changed to: point of origin for actions against the originating carrier, destination or principle place of business of the plaintiff against the delivering carrier, or the point where the loss or change occurred in actions against the carrier alleged to have caused the loss or damage.\textsuperscript{101}

6. \textit{Joint Rates: Surcharges and Cancellations}

The Act establishes procedures whereby a rail carrier, not earning adequate revenues under existing joint rates and divisions, may add a surcharge to the through charge between points subject to a joint rate without the concurrence of other carriers. Any carrier not earning 110 percent of its variable costs of providing service over a line which carries more than 3 million gross ton-miles of traffic per year may apply a surcharge increasing or decreasing the rate if it has concurred with all of the rate increases of general applicability agreed to by all other carriers that are party to such joint rate for the preceding year.\textsuperscript{102} Such a surcharge must be applied in equal dollar amounts over all routes between the points designated by the surcharging carrier and any increases must be applied to the surcharging carrier’s single-line rates between the same points.\textsuperscript{103}

Other carriers to the joint rate may cancel the application of the surcharge by showing that the surcharging carrier would earn at least 110 percent of its variable cost under either the existing rate, a new rate division, a higher lawful rate published by the cancelling carrier, or a lesser

\textsuperscript{97} Id. § 208(a) (to be codified as 49 U.S.C. § 10713(i)(2) (1980)).
\textsuperscript{98} Id. § 211(b) (amending 49 U.S.C. § 10730(c) (1976)).
\textsuperscript{99} Id. § 211(c) (amending 49 U.S.C. § 11707 (1976)).
\textsuperscript{100} Id. (amending 49 U.S.C. § 11707(d) (1976)).
\textsuperscript{101} Id. (amending 49 U.S.C. § 11707(c) (1976)).
\textsuperscript{102} Id. § 217(a)(1) (to be codified as 49 U.S.C. § 10705a(a) (1980)).
\textsuperscript{103} Id. (to be codified as 49 U.S.C. § 10705a(a)(1)(C) (1980)).
surcharge. A shipper may cancel the application of the surcharge on a showing that there is no competitive alternative route and that the surcharging carrier is already earning 110 percent of its variable cost under existing joint rate and division.\textsuperscript{105}

A carrier not earning adequate revenues may apply surcharges in differing amounts to lines which carried less than 3 million gross ton-miles of traffic if the existing revenue does not cover 110 percent of its variable costs of providing service plus 100 percent of the carrier’s reasonably expected costs of continuing service.\textsuperscript{106} Carriers earning adequate revenues may apply this surcharge to lines which carried less than 1 million ton-miles.\textsuperscript{107} However, no surcharge may be applied which results in any shipper being required to bear more than a reasonable proportion of the costs of continuing the service.\textsuperscript{108} Special provisions are made to protect class III carriers from anti-competitive surcharges and for the sharing of the revenues created by another carrier’s surcharge.\textsuperscript{109}

7. \textbf{Rate Bureaus}

The role of rate bureaus has been severely restricted by the new legislation. Carriers may no longer discuss or participate in agreements affecting single-line rates except for general rate increases and broad tariff charges.\textsuperscript{110} Carriers may only discuss and enter into joint rate agreements which the carrier “practically participates in.”\textsuperscript{111} Transcripts of all meetings must be submitted to the ICC.\textsuperscript{112} Anti-trust protection is provided for agreements which merely provide for the publication of tariffs\textsuperscript{113} and anti-trust violations may not be inferred if a carrier, after participating in a lawful joint rate agreement, takes similar action on another route or traffic.\textsuperscript{114} After 1984, however, rate bureaus will no longer be able to discuss general rate increases or broad tariff changes for single-line rates.

\section{D. Car Service Orders}

The Commission’s jurisdiction to order emergency car service has been restricted only to those emergency situations of such a magnitude as to have substantial adverse effects on rail service in the United States or a

\begin{itemize}
\item \textsuperscript{104} Id. (to be codified as 49 U.S.C. § 10705a(2)(B) (1980)).
\item \textsuperscript{105} Id. (to be codified as 49 U.S.C. § 10705a(3)(A) (1980)).
\item \textsuperscript{106} Id. (to be codified as 49 U.S.C. § 10705a(4)(1)(A) (1980)).
\item \textsuperscript{107} Id. (to be codified as 49 U.S.C. § 10705a(4)(1)(B) (1980)).
\item \textsuperscript{108} Id. (to be codified as 49 U.S.C. § 10705a(4)(4)(A) (1980)).
\item \textsuperscript{109} Id. (to be codified as 49 U.S.C. § 10705a(d) (1980)).
\item \textsuperscript{110} Id. § 219(c)(1) (to be codified as 49 U.S.C. § 10706(a)(3)(A)(i) (1980)).
\item \textsuperscript{111} Id. § 219(c)(3) (to be codified as 49 U.S.C. § 10706(a)(3)(A)(ii), (iii) (1980)).
\item \textsuperscript{112} Id. § 219(c)(3) (to be codified as 49 U.S.C. § 10706(a)(3)(D) (1980)).
\item \textsuperscript{113} Id. § 219(d) (to be codified as 49 U.S.C. § 10706(a)(4) (1980)).
\item \textsuperscript{114} Id. § 219(c)(3) (to be codified as 49 U.S.C. § 10706(a)(C)(3) (1980)).
\end{itemize}
substantial region thereof.\textsuperscript{115} Such orders may not exceed 30 days unless the Commission, after a hearing, certifies that a transportation emergency exists. It is the Congressional intent that these extraordinary powers be exercised only in genuine emergencies.\textsuperscript{116}

IV. ANALYSIS OF THE ACT’S EFFECTS

Given that the Staggers Rail Act is designed to revitalize the rail industry through increased competition and the fact that the railroads’ decline has been fostered by the industry’s inability to compete with alternate modes of transportation, the analysis of the new legislation will be presented in terms of how the Act affects the rail industry’s competitive disadvantages and what advantages are created.

A. RIGHT-OF-WAY

It should now be easier for rail carriers to obtain authority to construct new lines, thereby allowing carriers to enter into markets not traditionally served by rail transportation. Provisions allowing a rail carrier to cross another rail carrier’s right-of-way will further increase the industry’s flexibility to enter new markets. All this assumes, however, that the carriers will have the capital to make the investment required to construct new lines. At the same time, it should be understood that the Staggers Rail Act does not alter the competitive advantages enjoyed by other modes of transportation which receive indirect subsidies for their rights-of-way. Provisions for subsidized construction of rail lines do not exist. Therefore, rail carriers will still have to shoulder this extra burden. Whether or not the industry will be able to earn adequate revenues to take advantage of the new entry flexibility will be discussed below. Suffice it to say, the prospects are doubtful.

Streamlined abandonment proceedings created by the new legislation will reduce a carrier’s administrative costs. The reduction of notice of abandonment from 60 days to 30 days will also increase the carrier’s ability to react more expeditiously to changing market conditions. Furthermore, provisions allowing financial assistance to maintain service where approval for abandonment has been granted are the equivalent of the indirect subsidies enjoyed by other modes of transportation. However, these subsidies can be obtained only after it has been determined that the line is so marginal that public convenience and necessity require or permit discontinuance of service. Thus, the standards for abandonment have not been changed and the effect of the subsidies will be limited.

Exit has not been made any easier for rail carriers, while exempt motor carriers still enjoy no exit restrictions. Even regulated motor carriers enjoy a

\textsuperscript{115} Id. § 226 (amending 49 U.S.C. § 11123(a) (1976)).
\textsuperscript{116} Joint Explanation, supra note 62, at 119.
competitive advantage over rail carriers because if they are forced to continue marginal service their costs are limited to providing only the service, while a rail carrier in the same position must also bear the additional expense of maintaining right-of-ways.

In summation, the Staggers Rail Act does not significantly alter the competitive right-of-way advantages enjoyed by alternate modes of transportation. While rail entry authority is now easier to obtain, the cost to the rail carrier of constructing the right-of-way has not changed. While rail carriers may now obtain exit authority more quickly, the process has not been made any easier. The bottom line still remains the same: other modes of transportation receive indirect subsidies for right-of-way, while rail carriers do not.

B. Service

The creation of contract rail carriers will allow the rail industry to offer better service to contract shippers. A railroad, through contractual agreements, may now guarantee service to a shipper without fear of violating his common carrier obligation. The ability to be certain of rail service and transportation deadlines should attract more traffic to the rail industry. Reduced rates, stemming from the carriers' new ability to rationalize the use of its physical plant and the possibility of limited liability provisions, should further enhance railroad service. Although a rail carrier is also obligated to provide contract conditions to agricultural shippers of the same commodity similarly situated, its competitive position for transportation of agricultural products should still be enhanced. In as much as rail carriers generally do not have market dominance over light density lines over which grain is transported, the use of contract rates and service may prove to be the competitive advantage the industry needs to recapture this market. The possible scenario would roughly be as follows:

1) A rail carrier sets the single car rate for agricultural products excessively high. Since there is no market dominance, the rate need not be reasonable.

2) Then the carrier offers contractual service to agricultural shippers at competitive prices. A carrier may wish to employ its authority to use limited liability rates to further reduce the rate. In any event, the carrier would want to attempt to arrange service to be spread out beyond peak demand periods. This would allow the carrier to rationalize the use of its physical plant and to obtain off-peak traffic currently transported by motor carriers.

3) If the carrier is able to reach contractual agreements with some shippers, it will have created a competitive advantage for those shippers against other shippers similarly situated.

4) Assuming the carrier can still meet its common carrier obligation to those shippers which did not agree to the contract services offered, those shippers can either suffer their competitive disadvantage or agree to enter into
contract service with the rail carrier. Those same shippers cannot file a complaint on the ground that they have been unreasonably discriminated against because a shipper must also be able to allege in any complaint that they were ready, willing and able to enter into a similar contract.

5) A carrier, in this manner may even be able to generate sufficient traffic to warrant upgrading the line so that the new giant hopper cars may be used, thereby increasing the carrier’s ability to compete with the service of motor carriers.

6) Should the carrier be unable to attract contract shippers, it will still benefit because presumably few, if any, shippers will pay the excessively high single car rate. In this situation, the carrier simply applies for a certificate of authority to abandon the trackage, arguing that public convenience and necessity require or permit it.

Whether or not the above strategy will be employed remains to be seen, but the use of contract rates in this manner has applicability beyond agricultural products. In any event, the Staggers Rail Act does increase the rail industry’s competitive position to provide better service by giving railroad management more flexibility to order their operations. The restriction of the ICC’s jurisdiction to order emergency car service and the exemption of cars delegated to contract service from regulation will further allow the rail industry to rationalize the use of its physical plant to provide better service.

C. Rates

Managerial flexibility to react to changing market conditions was increased by reducing the notice required for increases and decreases in rates to 20 and 10 days, respectively. One of the competitive disadvantages the industry faced was the inability to react quickly to changes in demand. Whether or not the industry will be able to make changes in rates so as to be competitive with other carriers remains to be seen.

The Staggers Rail Act relieved rail carriers from the obligation to carry freight at noncompensatory levels. The consequence of this change should be the end of the policy of equalization of the competitive posture of ports and products. No longer must rail carriers subsidize the transportation of some freight with the revenue from other traffic. This will relieve the industry from the burden of having to hold other rates artificially high to cover losses incurred on subsidized freight. By allowing a rail carrier to charge any rate it chooses, the Act also ended the policy of umbrella pricing. Carriers now have the authority to price competitively against other modes on a cost-of-service basis rather than being forced to price on the value of the service.

Taken in isolation, it would appear that these changes give the rail industry the ability to compete with other modes of transportation. In the past, other carriers were pricing against the fixed rail rate, so the industry had to lower its rates to be competitive. Now that a railroad no longer has
to subsidize freight and has the authority to establish limited liability and contract rates, the new rate freedom would appear to place the rail industry back in a competitive position for competitive freight. However, two factors suggest this may not be true. First, if motor carriers could charge rates for agricultural products transportation during non-peak demand that were half of the posted rail rate, which they have done, it must be because they have lower costs.\textsuperscript{117} In the competitive environment envisioned by the Act, railroads may never be able to reduce rates to a level which motor carriers cannot undercut. The rate structure for alternate modes of transportation may have been held artificially high precisely because they priced against the rail rates. Thus, the introduction of rail price competition may drive the rate structure to levels below which the rail industry can earn adequate revenues. While the Act does allow rail carriers to charge rates that do not contribute to the going concern value of the line, such rates are presumptively unreasonable and carriers were envisioned to be able to rebut this presumption only in a few exceptional cases.\textsuperscript{118}

The second factor which suggests that the rail industry does not have the ability to be competitive is the recent deregulation of motor carriers.\textsuperscript{119} This legislation exempted more motor carrier traffic from regulation, and eased the standards for the granting of certificates of operating authority for motor carriers.\textsuperscript{120} The purpose of these changes was to foster more competition between motor carriers. Given relaxed entry standards and low entry costs, a substantial increase in the number of motor carriers can reasonably be expected. As a result supply could well exceed demand causing the return of distraction competition which was previously prevented by economic regulation. The impact on railroads could be disastrous. With an over-supply of motor carriage, backhaul rates may be set at levels which would not even cover the motor carrier’s cost. All this may serve the shipping public’s best interest in the short run, but it certainly will not allow the railroads to earn adequate revenues. Given the current meager earnings of the rail industry and its predicted capital shortfall, the combined effect of the Staggers Rail Act and motor carrier deregulation may not result in the objective of maintaining a private sector rail industry.

D. \textit{Need for Adequate Revenues}

Further analysis of the Staggers Act suggests that this new legislation not only fails to provide the rail industry with the ability to compete, but further inhibits the railroads’ ability to generate sufficient revenues. For ex-

\textsuperscript{117} Supra note 3 at 214.
ample, the joint rate provisions of the Staggers Rail Act are essentially the 
product of a compromise struck between Conrail and other rail carriers.\textsuperscript{121} 
Basically, Conrail needed to increase its share of the joint rates by claiming 
that such increases penalized them for being efficient.\textsuperscript{122} As a conse-
quence the joint rate surcharge provision now allows Conrail to cover costs 
by independently increasing the through rates over its portion of the line. 
Other carriers will have two options. One option a carrier has is to file a 
protest. But, if the carrier cannot demonstrate that Conrail is already earn-
ing adequate revenues, then the only alternative which does not increase 
the joint rate is to propose a new division of the joint rate. In effect, other 
carriers can opt to subsidize Conrail. The second option carriers have is to 
do nothing and allow the surcharge to increase. In a market which is be-
coming more competitive, a raise in the joint rate is exactly the opposite of 
what is needed to maintain existing traffic, let alone attract more. Regard-
less of what option the carriers choose to attack Conrail surcharges, their 
revenue will be reduced.

The revenue earning capability of the rail industry is also going to be 
reduced by the introduction of another type of competition: rate competi-
tion between rail carriers. The Staggers Rail Act, in emasculating the role of 
the rate bureaus, places railroads in direct price competition with each 
other for the first time since the creation of the ICC in 1896. Prior to Octo-
ber of 1980, rail carriers were able to participate in single-line rate agree-
ments which were shielded from anti-trust exposure. Competition between 
rail carriers existed but was based on the ability to provide service. Elimi-
nating single-line rate agreements will provide the rate competition that 
Congress desired, but it will not provide rail carriers with the adequate reve-
uues that they need. Elimination of single-line agreements, the absence of 
requirements of posting limited liability rates, and increased competition 
may bring about the return of certain discriminatory practices: the same 
discriminatory practices that led to the creation of the ICC.\textsuperscript{123} Prior to 
1896, railroads faced with destructive competition from other rail carriers 
gave preferential treatment to large shippers. This practice was specifically 
banned and enforcement was provided by the requirements that all tariffs 
be posted and that only the posted rate could be charged.\textsuperscript{124} In the near 
future, railroads will again be faced with the same destructive competition.

\textsuperscript{121} See Statement of James L. Tapley, Vice President-Law, Southern Railway Company 
Before the Subcommittee on Transportation and Commerce of the House Committee on Interstate 
and Foreign Commerce (Oct. 16, 1979); Statement 6, Edward G. Jorden, Chairman and Chief 
Executive Officer, Consolidated Rail Corporation (Conrail) Before the Subcom. Transportation & 

\textsuperscript{122} Id.


\textsuperscript{124} Louisville & Nashville Railroad Company v. Maxwell, 237 U.S. 95 (1915).
While discrimination is still prohibited, the regulatory mechanisms which were designed to ensure enforcement can now be easily circumvented by a carrier wishing to do so. If a carrier seeks to give undue preference to a particular shipper, he need only arrange it through a limited liability rate. For example, rate that only stipulates a one dollar deductible clause, but at a substantially reduced fare, need not be published.

E. CONCLUSIONS

The Staggers Rail Act increases managerial flexibility while giving the railroad the authority to compete for the express purpose of revitalizing and maintaining a private sector rail industry. The Act, however, does not give the rail carriers the ability to compete with other carriers or earn adequate revenues. Entry and exit authority have been altered, but the basic fundamental disadvantage of indirect subsidies of competitors' rights-of-way has not been addressed. Contract carriage by rail carriers may provide the competitive service edge necessary for rail carriers to attract new freight, but this must be offset against the industry's inability to price compete. The isolated view taken by Congress in creating competition through price flexibility failed to adequately address the competitive conditions among alternate modes of transportation. Even if the railroads are able to price competitively against other modes of carriage, they certainly will not be able to do so at levels that will revitalize the industry. The days of a private railroad system in the United States may be numbered. In the meantime, destructive competition and discrimination will exist.

V. ECONOMIC DEREGULATION GENERALLY

Historically, economic regulation has been promulgated for the protection of industry. Certain industries deemed to provide essential services have been shielded from the forces of competition. This was done to ensure their economic survival. Without regulatory protection, destructive competition arising out of unique market conditions would have ruined the industry. With the recent interest in deregulation generally, the lessons of the past should be remembered. A condition precedent to the decision to remove economic regulation is a determination of whether the industry can survive in an unregulated environment. If the industry cannot survive, then the question of whether it should continue to exist becomes an issue. The answers to these questions entail an understanding of the underlying economic conditions which led to the promulgation of regulations. The mere conclusion that the industry is presently competitive, as was determined in passing the Staggers Rail Act, is not enough. The rail industry was always

competitive. In fact, it was because the industry was too competitive that the railroads were regulated. Prior to any act of deregulation, the question that must be answered, which was not answered for the rail industry, is whether the factors which led to destructive competition have ceased to exist. The answer to this question for the rail industry is "no." Thus deregulation poses serious questions about the survival of this vital industry. While it may be too late for the railroads, there is hope for other industries if Congress learns from its mistake: The Staggers Rail Act of 1980.

Richard Dash
Airports: Full of Sound and Fury and Conflicting Legal Views

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I. INTRODUCTION

The United States is probably the noisiest nation on earth. People who live near airports are acutely aware of the problem. Aircraft noise disrupts their sleep and interferes with such ordinary endeavors as watching television, conversing, and enjoying music. While the federal government is taking an increasingly active role in the aircraft-airport noise issue, it may be decades before the problems are solved.

The Supreme Court of California in *Loma Portal Civil Club v. American Airlines, Inc.* set forth the major problems in the airport noise area which will be addressed in this article:

The use of large and powerful aircraft has created certain annoyances—noise, vibrations, and in some cases apprehension—to many people. The questions as to whether an individual should have redress for such annoyances...
ances, and, if so, under what theory and against whom, are very troublesome. These problems have become aggravated by the advent of jets, which are noisier than reciprocating engine craft and that require longer and shallower glide paths. The problems are peculiarly acute for landowners near airports, who suffer not only from the increase in the general noise level but particularly from their proximity to the low-level flying which is a necessary part of takeoff and landing. On the other hand, the great public benefit, in terms of commerce, transportation and defense, which is derived from the use of jet aircraft is obvious.¹

This paper will consider noise—how it is measured and defined, as well as the relevant federal regulations promulgated to control noise, particularly as they pertain to aircraft and airspace use. The history of the three primary theories of relief (trespass, nuisance, and inverse condemnation) used by persons adversely affected by noise from aircraft will be examined. Finally, the issues of federal preemption will be viewed vis-a-vis local police power and airport proprietary authority in regulating airport noise.

II. Noise

Noise has been defined as "unwanted sound."² Americans may have more of this unwanted sound than anyone else on the planet.³ While noise emanates from many sources, aircraft are one of the primary offenders. The Department of Transportation estimates that in the United States approximately six million people live in areas where aircraft noise is a significant annoyance.⁴ More than 600,000 people live in areas that are severely impacted by aircraft noise.⁵

Noise can be measured in a number of ways. Decibels, or dbA’s, measures sound in terms of intensity level by calculating pressure on the ear.⁶ To put this in perspective: a four-engine jet at take-off generates between 115 to 120 decibels. A dbA reading of 95 is considered to have a response criteria of "very annoying" and 135 dbA’s is "painfully loud."⁷ Factors other than intensity of sound, however, are important in determining a sound’s annoyance to human beings. The other important aspects of sound are its duration, pitch, and frequency.

PNdB (i.e., "perceived noise level") takes into account frequency and pitch as well as intensity.⁸ In measuring jet noise this distinction is important

³. Id. at 4.
⁴. U.S. DEP’T OF TRANSPORTATION, AVIATION NOISE ABATEMENT POLICY 17 (1976) [hereinafter cited as DOT NOISE POLICY].
⁵. Id.
⁸. LOWENFELD, supra note 6.
because the high-pitched scream of the jet engine is more annoying than an equal intensity level of a lower-pitched piston driven engine. EPNdB (i.e., "effective perceived noise decibels") adds duration of the noise as a component to be calculated.9

Aircraft noise can also be measured in terms of "noise footprints", technically known as "single event noise contour", using monitors which plot the geographical radius of PNdB or EPNdB measurements as a result of take-off or landing by a single aircraft.10 Further, the Noise Exposure Forecast (NEF) describes cumulative noise used to measure sound generated at given points around an airport in a twenty-four hour period.11 A grasp of these basic measurements will be helpful in understanding the cases discussed below.

III. FEDERAL STATUTES REGARDING AIRSPACE USE, AIRCRAFT SOUND EMISSION, AND NOISE CONTROL

There are basically three federal statutes dealing with airspace, aircraft, and airport noise regulation. They are the Federal Aviation Act of 1958,12 the Noise Abatement Amendments of 1968,13 and the Noise Control Act of 1972.14

A. FEDERAL AVIATION ACT OF 1958

The Federal Aviation Act gave the Federal Aviation Administration (FAA) power to regulate the nation’s navigable airspace. Section 1508 provided in part that "the United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ."15 The FAA is to use this power "to insure the safety of aircraft and the efficient utilization of such airspace. . . ."16 The Administration is directed to "prescribe air traffic rules and regulations governing the flight of aircraft . . . for the protection of persons and property on the ground.17 These provisions have been the basis for numerous court decisions holding that airspace regulation, even as it pertains to aircraft noise, has been federally preempted.

9. Id.
11. Id.
16. Id. § 1348(a) (1970).
17. Id. § 1348(c) (1970).
B. 1968 AMENDMENTS

In 1968, Congress passed an aircraft noise abatement amendment to the 1958 Act. Its primary purpose was "to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom . . . ."\textsuperscript{18} Section 611 of the Act, as amended, requires the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, to prescribe and amend standards for the measurement of aircraft noise and sonic boom and to prescribe rules and regulations necessary to provide for the control and abatement of aircraft noise and sonic boom.\textsuperscript{19}

In November of 1969, the FAA promulgated the first aircraft noise regulations, commonly known as FAR 36 (Federal Aviation Regulations, Part 36).\textsuperscript{20} These regulations set limits on noise emissions from large aircraft of new design\textsuperscript{21} and adopted a uniform system for measuring aircraft noise emissions.\textsuperscript{22} FAR 36 also dictated that the standards adopted would extent to newly manufactured aircraft of existing design when the required technology was developed.\textsuperscript{23} In effect, FAR 36 requires aircraft manufacturers to meet specified noise standards in order to obtain a type certificate which is needed before a new plane design can be put into production.\textsuperscript{24}

The new regulations under FAR 36 have been criticized because 1) they do not apply to all aircraft, 2) they do not mandate the development of new noise reduction technology, and 3) their effect is being counteracted by the rapid growth of commercial aviation.\textsuperscript{25} The last objection focuses on the fact that while individual planes are becoming quieter, the aggregate noise is greater because there are more planes in operation.

In 1976 the FAA issued its "retrofit" rule which requires all aircraft over 75,000 pounds to meet FAR 36 requirements by 1985.\textsuperscript{26} However, in 1980 Congress extended the 1985 deadline in certain limited situations.\textsuperscript{27}

Retrofitting can be accomplished in several ways: old planes can be replaced by new aircraft; engines can be replaced; engines can be refan-

\textsuperscript{19} Id.
\textsuperscript{20} 14 C.F.R. § 36 (1977).
\textsuperscript{21} DOT NOISE POLICY, supra note 4, at 30.
\textsuperscript{22} 14 C.F.R. § 36.101 (1977).
\textsuperscript{23} Id. § 36.2 (1970).
\textsuperscript{24} Bell, Airport Noise: Legal Developments and Economic Alternatives, 8 Ecology L. Q. 607, 637 (1980).
\textsuperscript{25} Id. at 638.
ned; or the engine housing can be equipped with sound absorbant material (SAM).\textsuperscript{28} SAM is the least effective of the retrofit methods, but also the least expensive. Hence, it will probably be the option deemed most attractive by the airline industry.\textsuperscript{29}

C. \textit{Noise Control Act of 1972}

As one author has noted, Congress passed the Noise Control Act of 1972\textsuperscript{30} in response to what it perceived as "foot dragging" by the FAA.\textsuperscript{31} The 1972 Act set up a complicated arrangement between the Environmental Protection Agency and the FAA. Under the Act, the EPA was instructed to conduct a nine-month study of, 1) the adequacy of FAA flight and operational noise controls, and 2) the adequacy of noise emission standards for new and existing planes.\textsuperscript{32} The Act further provided that the EPA should propose noise control rules to the FAA.\textsuperscript{33}

The FAA has been accused of "regulatory paralysis."\textsuperscript{34} While it acted swiftly in regulating noise emission standards for aircraft of new design in 1969 and newly manufactured aircraft of types that had already been certificated in 1973, it was dilatory with respect to aircraft that were already in operation.\textsuperscript{35} Over 77\% of the operating fleet in 1977 were older aircraft which contributed most to the noise problem and which could not meet federal noise standards.\textsuperscript{36}

In November of 1976, with the adoption of the Aviation Noise Abatement Policy,\textsuperscript{37} the FAA finally took action concerning these older aircraft. The "retrofit" provisions are discussed above. Aircraft which could not meet the deadlines for complying with FAR 36 requirements could be retrofitted—or retired.\textsuperscript{38} President Ford was instrumental in insuring action by the FAA and DOT. In the fall of 1976, he directed the FAA to set noise compliance standards not later than January 1, 1977.\textsuperscript{39}

\textsuperscript{28} Bell, supra note 24, at 640.
\textsuperscript{29} Id.
\textsuperscript{31} Muss. \textit{Aircraft Noise: Federal Pre-emption of Local Control, Concorde and Other Recent Cases}, 43 J. AIR. L. & COM. 753, 773 (1977).
\textsuperscript{33} 49 U.S.C. § 1431(c)(1) (Supp. V 1975). The FAA must publish the proposed rules in 30 days and commence hearings thereon in 60 days. The FAA is required within a reasonable time either to adopt the proposed rule or publish notice declining to promulgate the rule and explaining its reasons therefor.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 815.
\textsuperscript{37} DOT \textit{Noise Policy}, supra note 4.
\textsuperscript{38} Id. at 6-7.
\textsuperscript{39} Id. at 1.
The Aviation Noise Abatement Policy of 1976 contains a Federal Action Plan, an Air Carrier Action Plan, and a plan calling for Local Actions. Operating procedures are part of the Federal Action Plan and include such things as minimum altitude rules and approach procedures. An airport development aid program is also a part of the Federal Action Plan and calls for the FAA to establish a high priority for the use of Airport and Airway Trust Funds for airport land acquisition, for the purchase of noise suppressant equipment and for other noise reducing measures. The Air Carrier Action Plan deals primarily with FAR 36 compliance and the necessary retrofit financing.

The Local Actions Plan calls for land use planning and zoning in areas surrounding airports to ensure that land use is compatible with noise exposure in those areas. It also provides that notice of aircraft noise exposure should be given to purchasers of real estate near airports. In addition, Congress recently enacted the Aviation Safety and Noise Abatement Act of 1979 which limits recovery for damages caused by airport noise to purchasers who acquired the effected real estate after February 19, 1980, and had actual or constructive knowledge of the noise exposure map of the area. Those persons may recover only by showing that subsequent to their acquisition of the property, a significant change in airport operations resulted in additional noise.

The Policy summarizes the legal framework regarding aircraft and airport noise and provides, inter alia:

1. The federal government has preempted the areas of air space use and management, air traffic control, safety and the regulation of aircraft noise at its source.
2. Other powers and authorities to control airport noise rest with the airport proprietor—including the power to select an airport site, acquire land, assure compatible land use, and control airport design, scheduling and operations—subject only to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and air space management.

Although great technological strides are being made and the federal

\[\text{\footnotesize 40. Id. at 8.} \]
\[\text{\footnotesize 41. Id.} \]
\[\text{\footnotesize 42. Id. at 9.} \]
\[\text{\footnotesize 43. Id. at 10.} \]
\[\text{\footnotesize 45. DOT Noise Policy, supra note 4, at 34 (emphasis added). The Policy also provides that the federal government has substantial power to influence airport development through its administration of the Airport and Airway Development Program. Further, the state and local governments may protect their citizens through land use controls and other policy measures not affecting aircraft operations.} \]
government is taking an increasingly active role in aviation noise control, the problem is far from solved. Land owners near busy and noisy airports are not content to wait until science and the government can eliminate the noise. Property owners have based post legal actions on a number of theories in an effort to alleviate the problem or to recover compensation for living in noise-impacted areas. A discussion of these various legal theories and the applicable cases follows.

IV. Traditional Avenues of Recovery Available to Property Owners and a Review of Cases

A. Trespass Theory

In the common law, a landowner owned all of the airspace from the heavens to the depths of the earth.46 However, in 1946 the United States Supreme Court addressed the issue of how much airspace a landowner does own in United States v. Causby.47 Causby dealt with an action by a landowner whose property was directly below the take-off and landing glide paths of military aircraft. Although the planes never touched the surface of the plaintiff’s ground (a trespass), they did pass as low as 67 feet above his house which caused him considerable anxiety. In addition to the plaintiff’s personal apprehensions, the noise and vibrations frightened Causby’s chickens and disrupted his poultry business. The Court recognized that Congress had placed the navigable airspace within the public domain48 but held that these flights were not within the navigable airspace. The Court stated:

Superadjacent airspace is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.49

The Causby case combined elements of trespass with elements of nuisance (a substantial, unreasonable interference with a person’s use and enjoyment of his land) and marked “the advent of the theory of inverse condemnation.”50

46. 3 Bl. Com. 217 (1781).
47. 328 U.S. 256 (1946).
49. Causby v. United States, 328 U.S. at 265.
B. INVERSE CONDEMNATION

Inverse condemnation is really eminent domain—with a twist. It has been defined as "the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant even though no formal exercise of the power of eminent domain has been attempted by the taking agency." 51

Griggs v. Allegheny County 52 was based on an inverse condemnation theory. The question before the Court was whether the county has taken an air easement over Griggs' property for which it should pay just compensation. Griggs' home was 3,250 feet from the end of a runway at Greater Pittsburgh Airport. The airport was owned by Allegheny County. Planes passed within 30 feet of Griggs' residence and on take-off, the noise of the aircraft was likened to "the noise of a riveting machine or steam hammer." 53 During the flights, which were often only minutes apart, it was extremely difficult for people in the house to talk or sleep; windows in the house rattled and plaster fell from the walls and ceilings. In deciding the case, the Court reviewed Causby and said:

Following the decision in the Causby case, Congress redefined 'navigable airspace' to mean 'airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft. . . . By the present regulations the 'minimum safe altitudes' within the meaning of the statute are defined, so far as relevant here, as heights of 500 feet or 1,000 feet, 'except where necessary for take-off or landing.' 54

While the airspace above Griggs' house was necessary for take-off and landing, in the opinion of a majority of the Court, the interference with Griggs' property amounted to an unconstitutional "taking" of an air easement for which the county, not the United States, should pay.

Justice Black wrote a dissent which expressed the opinion that the United States and not Allegheny County should have been required to pay the just compensation. He stated:

These airspaces are so much under the control of the Federal Government that every takeoff from and every landing at airports such as the Greater Pittsburgh Airport is made under the direct signal and supervisory control of some federal agent. . . . 55 And where Congress has already declared airspace free to all—a fact not denied by the Court—pretty clearly it need not again be acquired by an airport. . . . Having taken the airspace of Griggs' private prop-

52. 369 U.S. 84 (1962).
53. Id. at 87.
54. Id. at 88 (citation omitted; footnote omitted).
55. Id. at 93.
property for a public use, it is the United States which owes just compensation.\textsuperscript{56}

The lower federal courts which have dealt with the issue of inverse condemnation have almost unanimously allowed recovery only to those property owners located directly below the flight-path.\textsuperscript{57} \textit{Batten v. United States}\textsuperscript{58} held that a physical trespass on or above the plaintiff's property is a requirement of a "taking." In the \textit{Batten} case, noise, vibration and smoke emission from jet planes at a nearby military base lessened the property owners' use and enjoyment of their property. There was no direct over-flight or physical invasion of their premises. The plaintiff's in \textit{Batten} argued that in \textit{Causby} recovery had been allowed for vertical sound and shock waves and that they should be allowed a like recovery for lateral waves. Nonetheless, the \textit{Batten} court held that recovery should be uniformly denied unless there was over-flight.

Judge Murrah dissented in \textit{Batten} stating:

[The constitutional test in each case is first whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar and of sufficient magnitude to cause us to conclude that fairness and justness, as between the state and the citizen, requires the burden imposed be borne by the public and not by the individual alone. . . . The interference shown here was sufficiently substantial, direct and peculiar to impose a servitude on the plaintiffs' homes quite as effectively as the overflights in \textit{Causby} and \textit{Griggs} . . . .]

I would, therefore, hold the damages constitutionally compensable.\textsuperscript{59}

The dissent has been the basis for a good deal of criticism of the majority rule. The "opposing school of thought has been adopted by a substantial number of state jurisdictions."\textsuperscript{60} One explanation of why some state courts may favor the more lenient test could be the wording of their state constitutions. A number of states provide that "private property shall not be taken or damaged for public or private use, without just compensation."\textsuperscript{61} In contrast, the Fifth Amendment to the U.S. Constitution provides "nor shall private property be taken for public use, without just compensation."\textsuperscript{62}

C. \textit{NUISANCE}

Nuisance is a theory of recovery whereby a property owner seeks relief for a substantial, unreasonable interference with the use and enjoyment of his property. Property owners have brought many suits in nuisance to enjoin airport noise.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 93.
\item \textit{Alevizos v. Metropolitan Airports Comm'n}, 298 Minn. 471, 216 N.W.2d 651 (1974).
\item 306 F.2d 580 (10th Cir. 1962).
\item \textit{Id.} at 587.
\item Russell, \textit{supra} note 50, at 93.
\item \textit{Colo. Const.} art. 2, § 15 (emphasis added).
\item U.S. Const. amend. V (emphasis added).
\end{enumerate}
\end{footnotesize}
Brooks v. Patterson\(^63\) was an early nuisance suit initiated by a number of individuals against the City of St. Petersburg to prohibit the city from allowing planes to fly at altitudes of less than 500 feet above their property. It was, in fact, a suit to enjoin the airport from operating at all, as no take-offs or landings would be possible if planes had to remain above 500 feet.

The Supreme Court of Florida held: "The airport is not a nuisance per se. So long as the defendants operate the airport, in the usual, normal and customary manner for operation of airports of this character, it cannot be declared a nuisance and its operation cannot be enjoined by plaintiffs. . . ."\(^64\) The Court further stated that "[T]he individual, although harassed, annoyed, and subjected to inconvenience, cannot stand in the way of progress but must yield to the . . . greatest good for the greatest number."\(^65\)

In 1964 the Supreme Court of California decided Loma Portal Civil Club v. American Airlines, Inc.\(^66\) The suit was brought by owners of property near a public airport to enjoin commercial airlines from certain flight operations. "The Complaint attempted only to set forth a cause of action sounding in nuisance, i.e., unreasonable interference with plaintiffs' use of their property, and sought only injunctive relief."\(^67\) The Court denied injunctive relief stating: "It is well established that public policy denies an injunction . . . where private property has been put to a public use by a public service corporation and the public interest has intervened."\(^68\)

The plaintiffs in Virginians For Dulles v. Volpe\(^69\) sought injunctive relief from alleged pollution from aircraft emissions and aircraft noise. The Court then found that a balancing of the equities was appropriate. In balancing the opposing rights, the rights of the individual property owners were deemed to be outweighed by the public interest. The Court said: "Burdensome as it may be, plaintiffs must submit to the great annoyance in the public interest . . . ."\(^70\)

The principal stumbling blocks to the successful assertion of the nuisance theory appear to be the virtual impossibility of obtaining injunctive relief and the "balancing of the equities." When an individual property owner pitted his problems against the public good, he was almost certain to be defeated.

If the plaintiff lived in a jurisdiction that gave relief in an inverse con-

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63. 159 Fla. 263, 31 So.2d 472 (1947).
64. Id.
65. Id.
66. 61 Cal.2d 582, 394 P.2d 548 (1964).
67. Id. at 552.
68. Id.
70. Id. at 579.
demnation suit only if there was direct overflight, was there any alternative for someone whose enjoyment and use of his property had been adversely effected by planes which passed nearby, but not directly overhead? Some courts found that where there was a will, there was a way . . . .

D. THE THORNBURG-MARTIN LINE

Based on the Batten dissent, an approach to inverse condemnation known as the Thornburg-Martin line was fashioned. It is derived from a 1962 Oregon Supreme Court case, Thornburg v. Port of Portland,71 and a 1964 case in the Supreme Court of Washington, Martin v. Port of Seattle.72

In Thornburg, the Court considered whether a noise-nuisance could amount to a taking where flights were close by, but not directly over the plaintiff’s property. "The Court concluded that a nuisance can amount to a taking whenever a possessor is ousted from the enjoyment of his land."73 Noise was held to amount to a nuisance and a taking, whether it was "coming straight down from above" or "from a direction other than the perpendicular."74 Similarly, the Martin Court held:

We are unable to accept the premise that recovery for interference with the use of land should depend on anything so irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff’s land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the nearby flights which interfere with the use and enjoyment of their land.75

The primary advantages of the Thornburg-Martin test are that the jury is not asked to balance the equities as in a pure nuisance action, and direct overflight is necessary. Instead, if the trier finds that the plaintiff has been deprived of the practical enjoyment of his property and the invasion has resulted in a definite diminution of its market value, his recovery is measured by this decrease in market value.

V. LOCAL NOISE CONTROL REGULATION: FEDERAL PREEMPTION AND COMMERCE CLAUSE CONSIDERATIONS

Between 1971 and 1976 noise-related litigation for both inverse condemnation and nuisance actions cost airport owners in excess of $28 million.76 Municipal airport owners have endeavored to reduce their liability through a number of regulatory and statutory enactments directed at reduc-

71. 233 Or. 178, 376 P.2d 100 (1962).
73. Russell, supra note 50, at 95.
74. Thornburg, 376 P.2d at 106.
75. Martin, 391 P.2d at 545.
76. DOT Noise Policy, supra note 4, at 18.
ing noise at their airports. They have met numerous obstacles which will now be discussed.

Local governments have attempted to reduce aircraft noise through regulation based on their police powers as well as their rights as airport proprietors. In regulating noise, they face potential conflicts between state and federal areas of control and possible Supremacy Clause and Commerce Clause problems. In attempting to resolve these conflicts, courts have viewed the cases from two perspectives: the kind of power exercised (police power v. proprietary power), and the types of controls used (active v. passive). 77

The landmark case dealing with local attempts at noise control is City of Burbank v. Lockheed Air Terminal. 78 To better understand Burbank, it is helpful to look at the cases which preceded it.

A. PRE-BURBANK CASES

In Allegheny Airlines v. Village of Cedarhurst 79 the Court dealt with an ordinance passed by the Village of Cedarhurst, New York which prohibited planes from flying over Cedarhurst at an altitude of less than 1000 feet. Cedarhurst was located near the airport, but was not the owner or operator of it. The Second Circuit Court of Appeals struck down the ordinance despite the fact that federal regulations required all flights over populated areas to be at altitudes in excess of 1000 feet. The Court held that the federal government had preempted the field of air traffic regulation under the Commerce Clause and further, that the ordinance was in direct conflict with federal statutes and regulations.

Twelve years later, in American Airlines Inc. v. Town of Hempstead 80 the Second Circuit Court of Appeals invalidated a town ordinance forbidding anyone from operating a device (including aircraft) which created noise in the town exceeding a certain ground level decibel limit. The Court based its decision on the ground that the ordinance was in direct conflict with federal law. This time, however, the Court passed over the preemption doctrine announced in Cedarhurst.

State and local statutes can run afoul of the scheme of federal regulation in two ways: 1) by being in direct conflict with a federal statute in a field which the Constitution has reserved for the federal government, and 2) by having its entire power to regulate in an area negated under the concept of preemption. 81

77. Muss, supra note 31, at 795.
80. 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969).
Preemption is more sweeping in its effect than is an exercise of federal power in striking down a conflicting law. A state regulation can be preempted where it is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In 1963, the U.S. Supreme Court developed two guidelines for determining Congressional intent to preempt a field. It will find this intent where "the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained." 

In 1947, Justice Douglas, writing for the U.S. Supreme Court, summarized the tests for Congressional intent for preemption. In *Rice v. Santa Fe Elevator Corp.*, he stated: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways." Preemption could be found where:

1. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.
2. The act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.
3. The object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the intent to preclude local regulation.
4. The state policy may produce a result inconsistent with the objective of the federal statute.

Where *Hempstead* backed away somewhat from the total preemption finding in *Cedarhurst*, the California Supreme Court in *Loma Portal Civil Club v. American Airlines, Inc.*, stated that it was not persuaded by the soundness of the contention that "state action affecting any aspect of flight operations is precluded by the extensive pattern of federal regulation in this field." The *Loma* Court conceded that a state law which conflicted with a federal law could not be enforced under the Supremacy Clause, but it would not accept the broader argument that federal regulations occupied

84. 331 U.S. 218 (1947).
85. Id. at 230.
86. Id.
87. Id.
88. Id.
89. Id.
90. 61 Cal.2d 582, 394 P.2d 548 (1964).
91. Id. at 591.
the entire field of aircraft control. In general, however, most pre-Burbank decisions invalidated local attempts to control noise.

B. **The Burbank Decision**

In 1973, the U.S. Supreme Court decided Burbank which dealt squarely with the issue of federal preemption of airport noise regulation. In this case a group of private owners of an airport brought suit against the City of Burbank, California, seeking an injunction against a city council ordinance which made it illegal for jets to take off from Hollywood-Burbank Airport between 11 PM and 7 AM. The ordinance affected only one intrastate flight each evening at 11:30 PM. In enacting the ordinance, the City was attempting to avoid the Cedarhurst and Hempstead pitfalls by limiting the hours of airport use instead of regulating the flights of the aircraft themselves.

Justice Douglas, expressing the views of five members of the Court, stated that "the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is preemption." The Court went on to add:

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.

The Court reviewed the federal statutory scheme at length and concluded that the "FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control." However, the Court limited the preemption to the states' police power. In the much-quoted footnote 14, the Court stated:

The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory. . . . But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. . . . Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a

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94. Id. at 639.
95. Id. at 633.
Airports

Justice Rehnquist, joined by three other members of the Court, dissented. As one commentator points out, "for each cite offered, Judge Rehnquist, dissenting, countered with authority that the Congressional intent was not to disturb the existing federal, state, and local governments balance of power."97

Justice Rehnquist's dissent relied largely on a letter from the Secretary of Transportation to the Senate Commerce Committee98 in which the Secretary expressed the following opinion with regard to the effect of the 1968 Noise Abatement Act99 as it amended the Federal Aviation Act of 1958:100 HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft. . . . Just as an airport owner is responsible for deciding how long the runways will be, so, is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. . . . [T]he Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. . . . [T]he Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.101

Burbank left open the possibility that airport operators, acting in their proprietary role, could regulate aircraft noise so long as they did not attempt to regulate flight or interfere with aviation safety. Several recent cases have dealt with this proprietary exception.

C. POST-BURBANK CASES

In Air Transport Association of America v. Crotti,102 a three-judge federal court reviewed the constitutionality of a California statute which required the California Department of Aeronautics to promulgate noise regulations for the operation of all aircraft at all airports in California, except those operated by the federal government. The standards adopted by the Department of Aeronautics were of two kinds: 1) Community Noise Equivalent Levels (CNEL) which established maximum levels of airport

96. Id. at 635-36.
98. S. Rep. No. 1353, 90th Cong. 2d Sess. 7 (1968) (citing a June 22, 1968 letter from the Secretary of Transportation to the Senate Commerce Committee).
100. Id. § 1301-1542 (1970).
noise around residential communities and required airports to monitor and measure noise levels; and 2) Single Event Noise Exposure Levels (SENEL) which established maximum noise emission levels for planes in flight.

The plaintiff, Air Transport Association, sought declaratory and injunctive relief on the ground that the noise standards were invalid under the Supremacy Clause. The Court found that the plaintiff's total reliance on Burbank was misplaced\(^\text{103}\) and stated:

> It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport. . . . [He is liable under Griggs for "'takings.'"] Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities.\(^\text{104}\)

The ultimate holding of the court was that the CNEL regulations were constitutional because they did not attempt to regulate aircraft in flight (which is federally preempted), while the SENEL provisions were unconstitutional because they would interfere with the federal regulatory scheme by prescribing noise levels for planes in flight.\(^\text{105}\)

In National Aviation v. City of Hayward,\(^\text{106}\) one Judge Peckham found himself "caught on the horns of a particularly sharp dilemma." Here, commercial airplane operators challenged the constitutionality of a city ordinance which prohibited aircraft exceeding 75 dbA from taking off between 11 PM and 7 AM from the Hayward Air Terminal. The ordinance, which was almost identical to the one in Burbank, had been passed by the City of Hayward in its airport proprietor's capacity. The court in upholding the ordinance relied on footnote 14 of Burbank to allow the city, acting in its proprietary capacity, to do that which it could not have done in exercising its police power.\(^\text{107}\)

The supersonic Concorde controversy is the most recent to deal with the two-tiered (police power vis-a-vis proprietary regulation) scheme of regulating airport noise. In British Airways Board v. Port Authority of New York & New Jersey\(^\text{108}\) the proprietor of John F. Kennedy International Airport (JFK) banned Concorde operations at that airport. After a long court battle, British Airways Board finally obtained an injunction prohibiting enforcement of the ban. In the final Court of Appeals decision, the court reviewed some of its earlier proceedings and concluded:

\(^{103}\) Id. at 63.
\(^{104}\) Id. at 63-64.
\(^{107}\) Id.
Our initial opinion in this case delineated the extremely limited role Congress had reserved for airport proprietors in our system of aviation management. Common sense, of course, required that exclusive control of airspace allocation be concentrated at the national level, and communities were therefore pre-empted from attempting to regulate planes in flight. . . . The task of protecting the local population from airport noise, however, has fallen to the agency, usually of local government, that owns and operates the airfield. . . . It seemed fair to assume that the proprietor’s intimate knowledge of local conditions, as well as his ability to acquire property and air easements and assure compatible land use. . . . would result in a rational weighing of the costs and benefits of proposed service. Congress has consistently reaffirmed its commitment to this two-tiered scheme . . . The maintenance of a fair and efficient system of air commerce . . . mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport. We must carefully scrutinize all exercises of local power . . . to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.109

At the court’s request, the Justice Department filed an amicus curiae brief which argued that while President Carter and the Secretary of Transportation favored allowing the Concorde to land at JFK, they were not attempting to pre-empt the Port Authority’s power to regulate noise at that airport.110 The government’s brief even asserted that under present law, the executive could not pre-empt the airport proprietor’s right to promulgate noise regulations. This point was undoubtedly made to emphasize the government’s position that it did not want Griggs reversed. A finding that the federal government had completely pre-empted the aircraft noise field would reverse Griggs and make the federal government liable for all inverse condemnation “‘takings,’” rather than the local governmental entity which owns and operates the airport.

VI. CONCLUSION

At first glance, the distinction between noise regulation enacted by a municipality in its proprietary role and that based on its police power may seem contradictory. However, if a municipality which was not the proprietor could, under its police power, enact regulations affecting the noise emissions of an airport, then an airport located amidst several localities could be subject to many conflicting regulations. The specter of this “‘fractionalized control’” was precisely what concerned the Court in Burbank. On the other hand, where only one controlling entity (the proprietor) establishes the per-


110. Brief for the United States, as amicus curiae at 4, British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75 (2d Cir. 1977).
missible noise levels at its airport it will probably not be disturbed by the
courts so long as it does not create an impermissible burden on interstate
commerce. The reason behind allowing a proprietor to exercise some
measure of control is an economic one. The federal government does not
want to preempt the entire area of airport and aircraft noise control, be-
cause to do so would make it liable for all "takings" which might occur.
Since, under Griggs, it is the local authority which bears the burden for
"takings" resulting from aircraft noise, the local authority should have a
Corresponding right to regulate that noise.

If no preemption of the proprietary power is assumed, courts must look
at each conflict on a case-by-case basis to examine the nature of the propri-
etor's regulation and determine whether it is reasonable, nondiscriminatory,
and not unduly burdensome to interstate commerce. The Second Circuit
Court of Appeals' comment in British Airways sums it up best:

[S]ince the operator controls the location of the facility, acquires the property
and air easement and is often able to assure compatible land use, he is liable
for compensable takings by low-flying aircraft. The right of the proprietor to
limit his liability by restricting the use of his airport has been thought a corollary
of this principle. It is perhaps more important, however, that the inherently
local aspect of noise control can be most effectively left to the operator, as the
unitary local authority who controls airport access.111

Allowing an airport proprietor to take an active role in the regulation of
the type, number, and frequency of flights at its facility seems only a fair
balance against its liability in inverse condemnation actions. Until technol-
ogy advances to the point where plane noise is no longer a burden to soci-
ety, the trade-off appears both equitable and necessary.

Mary Jo Soenksen

111. British Airways Board v. Port Authority of New York & New Jersey, 558 F.2d 75, 83
(emphasis added) (2d Cir. 1977).