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A PERFORMANCE REVIEW
OF THE
ALASKA TRANSPORTATION COMMISSION

October 24, 1978

Commissioner of the Department of Commerce and Economic Development	H. Phillip Hubbard
Deputy Commissioner of the Department of Commerce and Economic Development	Bertram L. Wagnon

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Alaska Transportation Commission

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JUNEAU, ALASKA 99811

October 24, 1978

Members of the
Legislative Budget and Audit Committee:

In accordance with the intent of Title 24 and 44 of the Alaska Statutes, the attached report is submitted for your review.

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THE ALASKA TRANSPORTATION COMMISSION

October 24, 1978

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Legislative Auditor
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PURPOSE AND SCOPE OF THE REVIEW

Purpose

In accordance with the provisions of Alaska Statutes 24.20.271 (1), 44.66.010, and 44.66.050 (sunset legislation), a review of the Alaska Transportation Commission (ATC) was conducted to determine if the Commission has been operating in an effective and efficient manner.

AS 44.66 currently specifies that this Commission will terminate on June 30, 1979 but will continue until June 30 of the next succeeding year for purpose of concluding its affairs. This report shall be considered during the legislative oversight function in determining whether the Alaska Transportation Commission should be allowed to terminate, be reestablished in its present form, or in a modified form.

Scope

The functions reviewed included the Commission's executive, administrative, enforcement, rates/tariff analysis, and records/docketing functions. Our review consisted of analyzing and evaluating the following:

(1) Applicable statutes and regulations;

(2) Interviews with Commission members and questionnaires sent to the Commissioners;

(3) Interviews with staff members and questionnaires sent to the staff;

(4) Questionnaires sent to regulated motor and air carriers;

(5) Questionnaires sent to shippers utilizing ATC regulated carriers;

(6) Questionnaires sent to attorneys who practice before the Commission;

(7) Questionnaires sent to other states' transportation regulatory agencies;

(8) Questionnaires and interviews sent to transportation associations;

(9) Observations of Commission weekly meetings and several types of hearings held before the ATC;

(10) Tests of ATC records and documents; and

(11) Interviews with Attorney General's office.

ORGANIZATION AND FUNCTION

The Alaska Transportation Commission was established by AS 42.07.011 in 1969 consisting of three members appointed by the Governor and confirmed by the legislature in joint session. The Commissioners are appointed for staggered six year terms with one member designated by the Governor as Chairman for a two year period.

The Commission is authorized by AS 42.07.121 to administer the Air Commerce Act of 1960, the Motor Freight Carrier Act, the Bus Transportation Act, and the Ferry Transportation Act. Under these Acts, ATC is primarily responsible for assuring that all transportation activity under its jurisdiction provides safe, adequate service at reasonable rates and that sound economic conditions prevail. In addition, the Commission may adopt their own regulations within the framework of the existing statutes to accomplish these purposes.

At the present time, the Commission has a staff of 27, consisting of an Executive Director, two hearing officers, a tariff section, and an enforcement section.

The Commission must frequently exercise its quasi-judicial function by conducting formal hearings on:

- Contested applications for new or extended authority.
- Complaint and accusation matters.
- Rate matters.

In addition they may also conduct hearings required by the Administrative Procedures Act (AS 44.62) for the adoption or amendment of rules.

The tariff section reviews rate changes by ATC regulated carriers. Significant changes are brought to the Commission's attention and may be suspended and investigated. In addition, they maintain a library of tariffs filed nationwide and related publications to aid in analysis of Alaskan tariffs.

The enforcement section investigates consumer and carrier complaints, participates in public hearings and other activities necessary to maintain satisfactory compliance by the regulated carriers, and conducts carrier surveys. If a violation of the statutes or regulations has occurred, civil penalties may be assessed.

REPORT CONCLUSION

Policy Issues

This review contains policy issues raised as a result of our evaluation of various Commission practices. The final policy decisions affecting these practices are not within the scope of this review but require legislative consideration. In debating these decisions, the legislative oversight committees should take into consideration the findings and recommendations presented in this report, so that the potential impact of policy changes can be evaluated.

Report Conclusions

In our opinion, the Alaska Transportation Commission should continue to regulate the transportation industry pending a comprehensive transportation study. The economic consequences of regulation or deregulation need to be determined in order to fully evaluate the public need for this agency.

However, in the interim, certain changes need to be implemented in order for the Alaska Transportation Commission to effectively accomplish its statutory purposes which are: (1) to provide shippers and receivers with a stabilized rate structure; (2) to foster sound economic conditions among the carriers which will guarantee transportation in the public interest; and (3) to promote adequate, economic services and reasonable charges.

The Commission has been hampered by the following problems in meeting these purposes. The statutes and regulations which affect the Commission are overdue for revision in many areas. Their inadequacy and obsolescence has resulted in several successful appeals of the Commission's decisions. The Commission staff is burdened with additional work due to obsolete legislation such as the Ferry Act as well as dump truck and recreational air carrier regulatory sections. Necessary statutory and regulation revisions must proceed if the ATC is to resolve other problems (see Recommendation Nos. 1, 2 and 3).

Improvement is needed in the manner in which ATC approaches its economic regulation mandate and its enforcement responsibilities. Obtaining data on carrier operations is a prerequisite to determining if a public need exists for the carriers and the rates which should be charged. Moreover, once available, the data must then be audited and analyzed in order to make useful comparisons. After carriers are authorized to operate, ATC must enforce the provisions of the various transportation acts with regard to their transport activities. Consistently suspending civil penalties

levied against carriers is not a useful deterrent in that connection. (See Recommendation Nos. 4 and 5).

Applications for authority to operate have not been processed in a timely fashion which is a disservice to the public. Moreover, communicating operating authority to carriers by telegram, before findings of fact and conclusions of law have been drafted, is contrary to statute and has been successfully appealed to the Superior Court. (See Recommendation Nos. 6 and 10).

The ATC Commissioners have not complied with the statutory requirement for providing notice and opening their meetings to the public. Further, the meetings have not been held weekly as is required. In addition, we have recommended both the Commissioners and the staff decline any future free offers of transportation from regulated carriers. (See Recommendation Nos. 9 and 12).

There has been a serious disregard of the prohibitions against ex parte communication by both the Commissioners and the staff. This is evidenced by phone calls to Commissioners from attorneys representing parties to a case before the Commission and orders written by staff members on cases to which they were a party. Also, it appears the Governor, through the Commissioner of Administration, has attempted to influence the judgement of the Commission. These practices must be corrected in order to avoid repercussions from the Alaska Bar Association or the Appeals Court. (See Recommendation Nos. 7 and 8).

Improvements in the efficiency of order writing and decision making would result from compiling a complete and accurate index of all prior orders and court decisions by subject, including name of case, ATC docket number, and court case number. Improvements in attorney and tariff analyst services should result from a transfer to ATC of the assistant attorney general and tariff analyst currently assigned to the Department of Law. This would be appropriate since much of their work is ATC related. (See Recommendation Nos. 13 and 14).

The primary goals of the Commission are to regulate air and motor commerce to ensure economically sound carriers and a stabilized rate structure. In general, the ATC does not have the necessary information on carriers profit, volume of traffic, trends in population, or traffic growth to make informed decisions on applications for authority or rate changes. Before ATC can develop a statewide plan for allocation of routes and rate structure, they must first complete a statewide study of all factors which concern effective and efficient movement of goods and passengers. ATC is mandated by statute to complete a statewide air commerce study and such a study, including all modes of transportation has been

started by the Department of Transportation in Southeast Alaska. The results of this study, as well as a similar study of other areas in the state should enhance ATC's ability to accomplish their primary goals.

In conclusion, the Alaska Transportation Commission should analyze and evaluate the methods of the Commission and take the necessary actions needed to perform and fulfill their responsibilities to the public.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The statutory requirements for the ATC to regulate bulk-type commodities and recreational air carriers should be eliminated.

AS 42.10.070 and .080 authorize the Commission to regulate common and contract motor freight carriers. AS 02.05.04 states that no person may engage in air commerce unless a certificate has been issued by the Commission. We believe, however, bulk-type commodity and recreational air carriers should not be regulated. Bulk-type commodity carriers (dump trucks) applications for authority are routinely issued, as we found in a 100% test of the applications for authority processed during fiscal years 1977 and 1978. The Commission granted authority to all of the applicants. The Commissioners agree that dump truck operators should be deregulated.

In another review, we determined that time was spent processing unnecessary paperwork for both dump truck operators and recreational air carriers (air guides and lodge pilots). Of the total applications for voluntary suspension of operations processed during fiscal year 1978, 25% were filed by dump truck operators and 30% were filed by recreational air carriers. Since these are seasonal operators, inactivity of business during winter months was the justification given for these suspensions. Besides processing these applications each fall, an order to resume operations is issued by the ATC each spring.

Air guides' professional skills and standards are regulated by the Guides Licensing and Control Board of the State of Alaska. In addition, both air guides' and pilots' flying qualifications and aircraft safety are regulated by the Federal Aviation Administration (FAA). The FAA's determination as to the type of safety regulations a recreational air carrier will be governed by is based solely on the carrier's type of operations, not whether ATC has or has not issued a certificate of authority to operate. Moreover, lodge pilots who service a recreational lodge and air guides are not servicing a public necessity.

Recommendation No. 2

The statutes and regulations governing the ATC should be revised.

We determined through interviews, questionnaires, and review of the ATC records that the statutes and regulations governing the ATC are conflicting, vague, obsolete and

inadequate to carry out the statutory purposes of the transportation acts. The examples received from the Commissioners, staff, and attorneys who practice before the ATC are numerous. The following are examples of the problems caused by the present statutes and regulations:

1. Cease and desist authority is needed to stop illegal carriers. These carriers' operations are oftentimes completed before the ATC can take any action.

2. A definition of a scheduled air carrier and clarification of the definition of an air taxi operator should be provided. Presently, a decision of the ATC has been appealed to the Supreme Court due to the inadequacies or absence of these definitions.

3. Procedural regulations for hearings conducted by the ATC should be adopted. The ATC is currently in the process of writing these regulations which should be implemented as soon as possible to reduce the time and expense of hearings.

4. A clarification of "incidental transportation to some other primary business" is needed. This is another example of inadequate statutes resulting in a decision of the ATC being appealed to the Supreme Court.

5. A statutory amendment is needed to give the Commissioners the authority to delegate their duty to preside over hearings to a hearing examiner. Due to the absence of this authority a decision of the ATC was successfully appealed to the Superior Court. The ATC has subsequently appealed the Superior Court decision to the Supreme Court.

6. Registration fees (air only), weight fees (motor freight and passenger) and application fees for all types of carriers have not been increased for at least nine years. Further, the fees in the Statutes for motor freight and air commerce do not agree with the amounts in the regulations. Also, the $150 civil penalty fee for motor carriers which may be assessed by the ATC for violations of the Statutes or regulations has not been increased since 1970. Inflation has invariably caused the amount of the above fees to be obsolete.

The adoption of statutes and regulations has taken excessive time in many instances. The uniform accounting regulations were drafted in 1965 but not adopted until 1972. Over two years ago, the Bus Transportation Act and regulations had been rewritten to remove the conflicts between them. However, they have not been adopted to date. In addition, 12 other sets of regulations were developed by the ATC staff over two years ago and forwarded to the Attorney General's office for review and approval. These regulations have not yet been adopted. In 1972 an attorney was engaged under a contract by the Legislative Affairs agency to rewrite the transportation acts. These revisions have not yet been enacted and are currently being reviewed by the Department of Law.

In order to ensure effective administration and enforcement of the transportation acts by the ATC, the statutes and regulations should be expeditiously revised.

Recommendation No. 3

The Commission should seek the repeal of the Alaska Ferry Transportation Act.

Presently, only one ferry operation between the Ketchikan International Airport and the City of Ketchikan falls under the jurisdiction of the ATC through this act. All state operated ferries are exempted from regulation by the ATC.

AS 45.25, the Alaska Ferry Transportation Act states that the Commission may issue a certificate of public convenience and necessity to a ferry operator engaged in the transportation of passengers or vehicles between points within the state.

Complaints from the public concerning this ferry operator may be investigated by and relief sought through a number of other existing agencies, such as the Ombudsman, Consumer Protection section of the Department of Law, Legislators, and the Better Business Bureau. Therefore, we do not find any public need for this Act.

Recommendation No. 4

ATC should regulate the economics of the transportation industry as required by the Alaska Statutes.

AS 02.05.010, AS 42.10.010 and AS 42.15.011 state in part, that the purpose of these chapters is to provide shippers and receivers with a stabilized rate structure, to foster sound economic conditions among the carriers which will guarantee transportation in the public interest, and to promote economical service and reasonable charges. In order that these statutory requirements be met, Alaska Transportation Commission should implement the following:

A. Carriers should be required to submit all pertinent financial data necessary for economic regulation.

ATC only receives financial data pertaining to the costs of operations from 20 scheduled air carriers. Only 20 out of 228 regulated air carriers are scheduled air carriers. The quarterly financial report form for air taxi operators does not include a request for costs of operations.

AS 02.05.170 states that the Commission may require reports from any air carrier covering any operations or business. The Commission may also require monthly, periodical and special reports from an air carrier and may prescribe the manner and form in which these reports shall be made.

Without knowledge as to the air taxi operators costs of operations, the Commission cannot determine if the rates are just, reasonable, and non-discriminatory. As a result the public may be paying excessive charges while air taxi operators make unreasonably high profits. Conversely, the public interest could also suffer from unstable service due to carriers not being allowed to apply rates which would return a reasonable profit. This financial instability could result in a poor quality of service or even a decrease in the number of carriers serving the public.

B. ATC should audit the carrier's accounting records to ensure they are prepared in accordance with regulatory accounting requirements and to determine the reasonableness of the financial data.

The Commission does not perform in-depth reviews of carrier accounting records. Presently, the procedures for field surveys of carriers do not include auditing the financial records. Also, out of approximately 600 regulated carriers, only 58 were surveyed during fiscal year 1978. In addition, the field surveys were conducted by personnel without accounting or auditing expertise.

Alaska Statutes 02.05.170(b), 42.10.120(a) and 42.15.041 authorize the Commission access to all accounts, books and records of the carriers for inspection and examination. AS 02.05.170(b) also states that the Commission may employ special agents or auditors to perform the examinations.

Many of the financial reports or data submitted by the carriers have not been previously audited by an independent certified public accountant. Therefore, there is no assurance that the data is uniformly prepared, consistently reported, or that it is sufficiently accurate to be used as a criteria for the decision-making process of the Commission.

We made a survey of several other states which are economic regulators of their transportation industry. All of them indicated that limited financial/compliance audits of carriers were performed on a regular basis by personnel with accounting expertise. One state required Certified Public Accountants for the Rate Analyst positions.

The following procedures should be implemented by the Commission:

1. Increase the number of field surveys performed each year.

2. Field surveys should include a limited financial/compliance audit of the carrier's accounting records.

3. Interim audits should be performed, as necessary, to verify the financial data submitted by the carriers to justify rate changes.

4. Personnel with accounting expertise and auditing experience, similar to the Utility Financial Analyst positions in the Alaska Public Utilities Commission, should perform the audits. This can be done through attrition in the Tariff Specialist positions.

   As an alternative, in order to decrease the necessary number of audits performed by the Commission staff, carriers who earn above a certain amount of dollars in gross operating revenue could be required by the ATC to submit financial data audited by an independent certified public accountant. This would require ATC to audit only the smaller carriers.

Adequate uniform audit procedures should reduce the time and expense of hearings before the Commission. This would be due to the decreased need for cross-examination to establish the credibility of the financial data introduced at hearings.

C. <u>ATC should establish written basic policies and procedures for analysis of rate changes</u>.

The ATC may require carriers to submit financial data to support and justify requests for rate changes. This financial information can be a very useful tool for the ATC in considering the merits of such requests. It is usually necessary, however, to first analyze the data and develop statistics which can be compared to industry standards in Alaska to effectively measure the justification for the rate change. We found that, in general, this is not being done.

In a review of the rate investigations of ATC, we determined that approximately 317 tariff changes were filed with the Commission during the fiscal year 1978. Of these, only 20 were suspended, pending investigation by the Commission. An examination of these 20 cases resulted in the following:

1. Of the seven cases for which hearings were held:

   - One had a final order which mentions an analysis prepared by the staff, but no work papers of the analysis could be found.

   - Another case had a final order with percentage of revenue and operating ratio calculations.

   - In a third case, a Tariff Specialist had a file containing copies of the carrier's revenue and payroll records. A schedule had been prepared of the different types and amount of revenue, however, there was no indication that some type of analysis of these figures had been done.

   - In the remaining four cases no work papers or indications of a staff analysis could be found.

2. Documents for the remaining 13 cases, for which hearings were not held, could not be found which would indicate that some type of analysis had been done by the staff.

3. Six tariff changes (less than 2% of the total tariff changes filed during the fiscal year 1978) were cancelled by ATC.

The decision whether or not to investigate and analyze the financial justification for rate changes is left to the discretion of each Tariff Specialist. Less than 1% of the tariff changes filed during fiscal year 1978 showed any indication that some type of analysis had been prepared.

We reviewed the operating ratios, (total costs expressed as a percent of revenue), for 97 out of 198 common motor carriers, which were prepared from data on the 1977 Annual Financial Reports submitted to the ATC. We found the ratios ranged as follows:

75% to 105% for Class I (carriers with gross operating revenue of $1,000,000 or more).

73% to 101% for Class II (carriers with gross operating revenue of $300,000 to $1,000,000).

31% to 972% for Class III (carriers with gross operating revenue of $300,000 or less).

The Federal motor carrier regulatory agency, the Interstate Commerce Commission, has determined an operating ratio of approximately 94% to be reasonable.

The wide variations in operating ratio of the Alaska intrastate common motor carriers could be in part a result of (1) some of the carriers' unsophisticated accounting procedures which may result in distorted and inaccurate financial data and (2) the Commission has not adequately regulated the economics of the transportation industry in order to stabilize the rate structure; to foster sound economic conditions among the carriers; or to promote economical service and reasonable charges. The Commission, as noted in part (A) of this recommendation does not obtain sufficient information from 96% of the air carriers to determine the reasonableness of their profits.

Alaska Statutes 02.05.140, 42.10.280, 42.10.285, 42.15.141, 42.15.161 and 42.15.201 require air, motor freight, and motor passenger (bus) regulated carriers, except contract carriers, to file with the ATC tariffs and any subsequent changes thereto, which may be subject to suspension and investigation by the Commission.

Two Commissioners defined a good regulatory policy as one which would allow a carrier a fair rate of return on investment. Neither could define a fair rate of return on investment. One explained that ATC really did not have sufficient information or the skilled personnel to determine the carrier's rate of return and the other did not have any specific percentage in mind but was mainly interested in whether the carrier had safe and sound equipment.

The Commission's current policies and procedures are not sufficient to ensure that the statutory purposes, to foster sound economic conditions among the carriers and to provide the public with stabilized and reasonable rates, are accomplished. We have suggested three general procedures which should assist the Commission in achieving these statutory purposes. In addition, a member of the Commission with economic or financial expertise, such as is required for the Alaska Public Utilities Commission, would be helpful in establishing these necessary policies and procedures and in continuous monitoring of their effectiveness. (See Recommendation No. 11).

Recommendation No. 5

Improvement is needed in the enforcement of the ATC statutes and regulations.

ATC is responsible for enforcing the provisions of the following acts:

1. Alaska Transportation Commission Act.

2. Alaska Motor Freight Carrier Act.

3. Bus Transportation Act.

4. Alaska Air Commerce Act of 1960.

5. Alaska Ferry Transportation Act.

A civil penalty of $150 was established in 1970 for the motor freight carriers and was later enacted into the Bus Transportation Act in 1972. Also, the Air Commerce Act in 1972 provided for a $150 civil penalty for each offense noted by the ATC.

We reviewed the enforcement activities of the Commission and noted the following deficiencies:

A. ATC does not process enforcement actions in a timely manner.

We analyzed complaint, investigation, and accusatory cases for the period of 1½ years ending June 14, 1978. We found the average delay between the initiation of an investigation and the issuance of a final order, for cases involving public hearings, was 12 months (100% test). The average delay in cases not involving a public hearing was seven months, (30% test). In addition 31% of the cases in our test involving violations of statutes pending before the Commission as of June 14, 1978, were older than six months.

None of these average delays include investigative activity prior to the formal issuance of an accusation since, in most cases, the files did not show investigation commencement dates.

Standard operating procedures for ATC enforcement activities are currently being developed. To ensure their effectiveness, they should include provisions to record the date on which investigation commences and continuous monitoring of open files in order that processing is expedient.

B. The Commission frequently suspends all or part of the civil penalties assessed for violations.

Approximately 80 cases during fiscal year 1978 resulted in fines being assessed by the Commission. In 46 cases all or a part of the fines were suspended. The amount suspended equalled 74% of the total fines assessed.

We believe, in the first place, fines limited to $150 for carriers are not a sufficient deterrent to prohibit the worst abuses of the transportation Acts. In addition, frequent suspension of fines diminishes an already weak deterrent. ATC should discontinue the practice of routinely suspending these civil penalties.

C. ATC enforcement staff duplicates the motor vehicle safety inspections done by the Department of Public Safety.

Currently, ATC enforcement agents perform safety inspections of motor carriers at scale houses along public highways and at the carrier's place of business. Field surveys at the carrier's place of business include a review of the driver's and maintenance logs. The Alaska State Troopers also make safety inspections at the scale houses. They have the authority to stop carriers on the highway for inspections also.

This results in a duplication of scale house inspections, and correspondingly, an insufficient number of field surveys performed by the Commission. Only 40 field surveys were made in FY 1978 by the ATC out of 385 regulated motor carriers.

We recommend ATC discontinue safety inspections at scale houses and on public highways. This should allow for a significant increase in the percentage of carriers surveyed by the ATC at their place of business. These surveys are particularly useful because they serve to educate the carriers on safety matters and should result in improved preventative maintenance. In addition, enforcement agents will respond to specific complaints by the general public, and by carriers themselves, in a more timely fashion.

Recommendation No. 6

Applications should be processed by the ATC in a more timely manner and temporary operating authority should be granted in accordance with Alaska Statutes.

We reviewed the applications for permanent authority (original, transfers and extensions) and temporary authority processed by the ATC for a period of 1½ years ending June 14, 1978. We found the average delay between the application date and the issuance of a final order for permanent authority applications, which included public hearings, was 12 months, (48% test). A seven month delay was found for applications without public hearings, (45% test). In a 100% examination of applications without a final order issued at June 14, 1978, 34% had been pending for six months or more.

In our review of 100% of the temporary authority applications two deficiencies were noted, untimely processing and granting temporary authority in violation of the Alaska Statutes. We found the average delay for applications involving public hearings was 13 months. Applications without a public hearing averaged nine months. Of the applications still pending at June 14, 1978, 11% were six months old to one year old and 57% were more than a year old.

According to the Alaska Statutes (AS 42.10.210, 42.15.111 and 02.05.060) the Commission may only issue a temporary permit to a carrier if it finds an emergency exists. We tested the temporary authority applications to determine if they had been granted due to an existing emergency. We determined that of the 22 applications that were granted, 12 were granted without the ATC finding an emergency public need existed. Further, we could not find any indication in the files that an emergency public need existed as justification for the application in 66% of the cases that were pending at June 14, 1978.

A decision by the ATC to grant temporary authority to a carrier was appealed to the Superior Court. The Court declared the order by the ATC void and of no effect. One reason given was that no supporting documents evidenced that an emergency existed. ATC's decision had been based solely on the application and proposed shipper's contracts. The Court further enjoined the Commission from granting temporary authority to the carrier until it had held a public hearing and received evidence that an emergency existed.

One possible cause for the untimely processing of the above applications is that the ATC does not have a written standard operating procedures manual. Our flowchart of the document flow emphasized the complexity of their present procedures. The ATC should review these procedures in order to eliminate unnecessary and time consuming processes and to streamline the flow of documents within the Commission.

Recommendation No. 7

The Commissioners and hearing examiners should write the formal written decisions (orders) on applications before the ATC.

It is a common practice of the ATC to require the staff to draft orders. A staff member generally is given the legal file and a tape recording of the hearing, if one was held, to prepare a final order. Frequently, the staff is given no instructions as to what evidence or laws support the Commissioners' decision. This practice often requires the staff to take excessive time in reviewing the legal file or tape recording to determine the evidence which supports the decision.

Not only does this practice utilize time which is needed by the staff to adequately perform their regular duties in connection with the economic regulation of carriers, (See Recommendation No. 4) and statutory enforcement (See Recommendation No. 5), but also, at times, violates the ATC's ethical regulations. This occurs when the staff drafts orders for applications for which a hearing was held and they actively participated. We found that this violation had occurred in 86% of the rate investigation hearings in which the staff had participated.

The ethical conduct regulations (3AAC60.010(a) & (h) prohibit parties in a pending matter before the ATC from communicating privately, directly or indirectly, with the Commissioners or hearing examiners about such matters or arguing the merits of those cases without their adversaries present or without notice to them. The Commission should avoid any situations that could be construed as violations of these rules of ethical conduct.

In order to effectively implement our recommendation, it would be appropriate to require one member of the Commission to be an attorney, since the deficiency most often discussed with us by the Commissioners was a lack of legal assistance (See Recommendation No. 11). In addition, a paralegal position would aid the Commissioners in both order writing and legal research.

Recommendation No. 8

The ethical conduct regulations should be complied with in matters before the ATC.

The ethical conduct regulations (3AAC60.010) apply to all persons appearing in proceedings before the Commission. Subsection (d) of these regulations specifically label unethical the practice of enlisting the aid of a public official in order to sway the Commissioner's judgement. Further, subsection (h) states that it is grossly improper for such persons to communicate privately, directly or indirectly, with the Commissioners or hearing examiners about pending matters or to argue the merits of these matters in the absence of their adversaries or without notice to them. If any person does not conform to the ethical standards, the Commission may refuse that person the right to appear before the ATC.

We noted two types of violations of the above regulations during our audit. In a pending case before the ATC an attorney for a protestant explicitly told the Commissioners what final decision should be made by them. Further, he requested the Commissioners to return his call to discuss the subject of the decision. In another case pending before the ATC, we found letters from the Commissioner of Administration to the Chairman of ATC which stated that the Governor had met with the applicant.

It also stated that the Governor had expressed his support for the applicant.

These types of communications with parties or their attorneys of a pending matter should be avoided by the ATC and the Executive branch. It is particularly improper for the Governor's preference to be communicated to the Commissioners in cases pending before the ATC because the Commissioners are appointed by the Governor. In addition, since one Commissioner's term expires in four months, such communications could give the appearance of influencing the Commission far beyond that of a simple expression of preference by a member of the general public.

Recommendation No. 9

Neither Commissioners nor ATC staff should accept free transportation from any regulated air or motor carrier.

During August, 1978, an ATC Commissioner and a staff member received free air transportation, from two regulated air carriers, between Fairbanks and Galena. We understand the sole purpose of the trip was to conduct ATC business, and therefore no personal gain resulted. However, due to the nature of the responsibilities vested with the Commissioners and their staff in regulating Alaska's transportation industry, they should decline offers of free transportation by regulated carriers for any purpose.

The conduct of the Commissioners and staff must be such that neither the public nor any regulated carrier can misconstrue any action of theirs as creating a conflict of interest. Moreover, they must at all times avoid even giving the appearance of a conflict of interest.

Recommendation No. 10

ATC should issue orders in accordance with the Alaska Statutes.

We noted several cases in which the ATC granted operating authority to an applicant by telegram prior to the preparation of a written order supported by findings of fact and conclusions of law.

According to 3AAC60.350 a decision issued by the Commission must be written and must contain required findings of fact and conclusions of law.

The Superior Court, after a telegram order was appealed, declared the order void and of no effect. Further, it stated the ATC was prohibited from granting authority unless it was granted by a written order containing the required findings of fact and conclusions of law.

The Commission continues to issue orders by telegram in the above manner. We recommend that the Commission discontinue this practice in view of the Superior Court's decision. Procedures should be followed which will minimize the possibility of the Commission's decisions being appealed, since appeals result in wasted time and unnecessary expenses.

Recommendation No. 11

The statutory qualifications for Commissioners of the ATC should require specific areas of expertise.

The statutory qualifications of Commissioners in terms of experience and education are outlined at AS 42.07.041. They are worded such that a candidate for the Commission may possess any of a variety of backgrounds however none of the specific areas of expertise included such as law or accounting, are mandatory. As noted in several of our prior recommendations there is a need for the Commissioners to have almost continuous economic and legal assistance in accomplishing their statutory goals. In order to help minimize the need for additional staffing to adequately regulate the transportation industry it should be required that the Commissioners each have expertise in a different field. One Commission member in each of the areas of transportation, law and economics would aid the ATC in performing its duties in a more efficient and effective manner.

The Alaska Public Utilities Commission (APUC) members are required by statute to have expertise in law, engineering and finance, accounting or business administration. According to the Attorney General's office the requirement for legal expertise in the APUC has partially satisfied their needs for legal advice and assistance. We believe the same would result if the ATC was required by statute to have Commission members with specific fields of expertise.

Recommendation No. 12

The ATC should give notice; hold or to the public; and maintain complete minutes of the Commission weekly meetings.

During fiscal year 1978 the ATC held 24 weekly meetings or less than 50% of the 52 weekly meetings required by statute. In addition, the ATC publishes no notice to the public of these weekly meetings. Minutes of these meetings consisted of a one or two word comment on each item on the agenda, which does not adequately describe the actions taken at the meetings.

AS 44.62.310 requires all meetings of the Commission to be open to the public except when holding a meeting solely to make a decision in an adjudicatory proceeding. Also, reasonable public notice shall be given for all meetings. 3AAC60.470 requires the Commission to meet on Monday of every week at 2:00 p.m. at the Commission office unless notice is otherwise given.

An appeal of a Commission decision before the Superior Court was due to the absence of adequate minutes of the Commission's weekly meetings. In its decision the Court stated the present Commission should be conducting regular meetings with recorded minutes so that any action occurring before the Commission would not be lost by the passage of time and dimming memories.

Recommendation No. 13

An index system should be developed for the final orders issued by the ATC and decisions on appeals from the courts.

Presently, there are three lists of decisions of the ATC which have been appealed; one prepared manually by the ATC; another by the ATC computer; and a third by the Department of Law. These lists are not uniformly cross referenced to the file docket number or the court case numbers. Moreover, each list does not contain the same cases nor do they include all cases. The decisions of the ATC are filed numerically which is not designed for quick reference to decisions made in similar type cases by the Commissioners and staff.

An index system which provides cross referencing by the subject, including the name of case, the ATC docket file number and the court case number, if any, would serve as a useful management tool. The Commission could review the decisions in a subject area to help determine the needs for statutory or regulatory changes and written internal policies within the Commission's discretionary powers. Further, it may reduce application processing and hearing time by allowing an applicant's attorney to review prior decisions and cases which are similar to his client's case.

Recommendation No. 14

The assistant attorney general and tariff analyst positions at Department of Law, which are assigned to ATC matters, should be placed organizationally and physically within the ATC.

Pursuant to AS 02.05.030(c), the ATC is authorized to represent the State in interstate transportation cases before the Interstate Commerce Commission, (ICC), and the Civil Aeronautics Board, (CAB).

The ATC is responsible for representing the State where the CAB or the ICC have authorized an air carrier or motor carrier rate change or operating authority change which is not in the State's best interest. Two positions within the Department of Law, an attorney and a tariff analyst, are assigned to assist the ATC with these matters which require their technical expertise.

In addition to these matters, the attorney position:

1. Represents the ATC before the courts in appeals,
2. Represents the ATC staff before the Commission,
3. Drafts ATC regulations, and
4. Assists in enforcement work.

These legal services are provided ATC through a reimbursable services agreement with the Department of Law.

The tariff analyst position, which is funded by the Department of Law, was initially acquired to assist with federal maritime rate cases. We understand however, the backlog of maritime cases has been cleared and the analyst has been assigned primarily to rate matters before the ICC and CAB.

We believe both these positions should be organizationally within ATC and should be physically located at ATC offices in Anchorage.

There has been disagreement between ATC and the Department of Law over assignment of the services of these positions for several years. This has led to ineffectiveness and inefficiencies at the ATC. Any arrangement where an employee performs most of his work for one agency and yet reports to, and is physically located at, another agency will result in conflicts in management policy and work priorities between the two agencies.

Since a majority of the attorney's duties are ATC matters, and the analyst's duties are ICC and CAB matters, also an ATC responsibility, they belong with ATC, not Department of Law. If the Department of Law has need of an analyst's expertise on maritime cases, ATC could provide such services to the Department of Law. It should not be the other way around because ATC has the primary responsibility for both intrastate and interstate regulatory matters.

ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analysis indicates both positive and negative attainments of the Commission and how its activities relate to the public need factors as defined by AS 44.66.050. This analysis is not intended to be comprehensive in nature. It has been limited by the scope of our review.

I. The extent to which the board, commission or program has operated in the public interest.

After Alaska became a State, statutes were enacted to regulate the transportation industry. Prior to enactment no study was made to determine the transportation needs or the type and extent to which it should have been regulated.

Therefore, to state whether regulation of the transportation industry is in the public interest or not, we must first have knowledge of the economic consequences which result from regulation or deregulation. Since this was beyond the scope of our audit we did not attempt to make this determination. However, we have recommended some carriers be deregulated as no public need for regulation could be determined. In addition, we have recommended to the Commission that a future study be made to determine the extent of the need for transportation regulation. (See Report Conclusion).

II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.

Administration and enforcement of the transportation acts has been impeded by existing statutes and current practices and procedures of the Commission (See Recommendation Nos. 2, 4 and 5).

III. The extent to which the board, commission or agency has recommended statutory changes which are generally of benefit to the public interest.

The Commission submitted two Senate Bills to the 1978 Legislature. These bills would have amended and clarified the existing statutes which would have aided the Commission in accomplishing their statutory purposes and relaxed the regulatory burdens of the air and motor carriers.

IV. The extent to which the board, commission or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.

The Commission publishes a bi-weekly journal which contains a description of each new application, the Commission's orders, enforcement actions and tariff changes. The journal is distributed to subscribers, news media, and other interested groups. A protest period of 30-days is allowed after each application has been published. Further, public hearings are held for the Commission to hear testimony and to receive evidence from any protesting party or any party who would like to attest to the public need for the services of the applicant.

V. The extent to which the board, commission or agency has encouraged public participation in the making of its regulations and decisions.

A review of the regulatory changes written by the Commission shows that the Commission had properly published and held public hearings as required by law.

However, the Commission has not given proper notice; held open to the public; maintained complete minutes; or held on a regular basis, the Commission's weekly meetings as required by statute. (See Recommendation No. 12).

VI. The efficiency with which public inquiries or complaints regarding the activities of the board, commission or agency filed with it, with the department to which a board or commission is administratively assigned, or with the office of the ombudsman have been processed and resolved.

The Commission processes complaints and accusatory cases in an untimely manner (See Recommendation No. 5).

The Ombudsman Office has received ten complaints concerning the Commission since 1975. Five cases have been closed. Of the five open cases, which were filed in 1976 and 1977, three are pending court action and two are still under investigation.

VII. The extent to which a board or commission which regulated entry into an occupation or profession has presented qualified applicants to serve the public.

The Commission, prior to granting authority to a regulated carrier, must determine whether the carrier is financially able and that it has proper and safe equipment in order to provide transportation services.

The regulated carriers are required to show proof of insurance prior to commencing operations to ensure that the public safety is protected. However, the ATC does not have all the pertinent financial data nor the procedures or staff for a proper audit and analysis to determine the financial condition of the regulated carriers. Therefore, the Commission's ability to adequately determine whether carriers are qualified to serve the public is impeded. (See Recommendation No. 4).

VIII. The extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission or agency to its own activities and the area of activity or interest.

In a review of the FY 78 personnel records of the Commission, we found that it had complied with the State personnel practices and the affirmative action requirements. Further, the Commission has never received a complaint alleging discrimination on the basis of race, religious affiliation, or sex, from any applicant for authority.

IX. The extent to which statutory, regulatory, budgeting or other changes are necessary to enable the agency, board or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to the previous section, Findings and Recommendations.

APPENDIXES

APPENDIX A

ALASKA TRANSPORTATION COMMISSION
REVENUES COMPARED WITH EXPENDITURES
Fiscal Year 1978

UNAUDITED[1]

Revenue Collected (See Schedule 1)	$ 135,848.80
Expenditures	1,234,136.58
Excess of Expenditures Over Revenues	$(1,098,287.78)

SCHEDULE 1
COLLECTED REVENUES

Revenues	Amount	Collection Time
Civil Penalties	Up to $150 for each offense	When assessed by Commission
Misdemeanor	Up to $500 for each offense	When assessed by Commission
Publication Fee	$40	Upon any application
Motor Freight Carriers		
Application Fee	$50	Upon application for permanent, temporary, extension or transfer of a permit.

Note 1

The records were not audited by us and accordingly we do not express an opinion on the Commission Revenues Compared with Expenditures.

Revenues	Amount	Collection Time
Initial Registration of Authority	$25	Annual
Continued Registration of Authority	$10	Annual, after initial registration
Motor Carrier-Bus		
Application Fee	$50	Upon application for certificate, transfer, lease, modification, consolidation, merger or contract to operate the property of one or more carriers
Air		
Application Fee, GTOW of 12,500 or less	$100	Upon application for permanent, temporary, transfer, amendment or lease
Application Fee, GTOW of 12,501 or more	$200	See above
Aircraft Registration Fees By Gross Take-Off Weight (GTOW)		
GTOW of 4000 or less	$25	Annually
GTOW of 4001 but less than 7900	$50	Annually
GTOW of 7900 but less than 12,500	$100	Annually
GTOW of 12,500 but less than 27,000	$150	Annually
GTOW of 27,000 but less than 50,000	$300	Annually
GTOW of 50,000 but less than 75,000	$400	Annually
GTOW of 75,000 or over	$600	Annually

APPENDIX B

PROGRAM ACTIVITY OF THE
ALASKA TRANSPORTATION COMMISSION
Fiscal Year 1978

UNAUDITED[1]

Activity	Number
New Dockets	527
Orders Issued	783
Hearings Held	125
Citations Issued	72
	Amount
Civil Penalties Assessed[1]	$134,915

Note 1

The records were not audited by us and accordingly we do not express an opinion on the Commission Revenues.

APPENDIX C

QUESTIONNAIRE SENT TO REGULATED MOTOR CARRIERS

1. Do you believe the Commission's procedures for processing applications, hearings and issuing final orders are adequate and completed on a timely basis? Inadequate? Please explain.

	Number of Motor Carrier Responses (See Notes 1 and 2)
Adequate and timely.	9
Inadequate, not timely.	4
Procedures adequate, not timely.	2
Procedures inadequate, timely.	1
No opinion.	2

Additional Comments

Carrier application misplaced by ATC.	1
Have to pay to find out about competitor's applications. Don't feel that was the intent of the statute.	1
Whole process too costly, inflationary, slow-moving to benefit the public.	1
Anyone sitting on Commission should have experience in PUC and ICC matters so they can make good judgments instead of mediocre ones as in the past.	1
Commission does not do a lot of checking on applications, not knowledgeable of bus transportation in Alaska.	1

2. Are there any statutes or regulations that you believe to be obsolete, vague, conflicting, unduly restrictive, and/or inadequate to allow the Commission to effectively and efficiently regulate transportation in Alaska? Please list and explain.

	Number of Motor Carrier Responses (See Notes 1 and 2)
Not knowledgeable enough to comment	2
No response	3
No	6
Yes	1
Some statutes and regulations vague and conflicting.	1
Need authority to stop illegal carriers.	1
15 days should be enough for tariff filing.	1
Believe should be able to tow any items they can properly handle.	1
Need more control over cabs who offer sightseeing without authority.	1
Make airlines realize air freight to small communities is essential.	1

Additional Comments

Update laws to be able to arrest illegal carriers.	2
Bill #362 would improve inadequacies, if passed.	1
Commission should have more and definite authority.	1
Enforcement of illegal carriers without authority is insufficient and a waste of tax dollars.	1
Small operators who do not do much volume dollarwise, and are fairly diverse for income, yet are expected to separate out the trucking business for reports- sales invoices, etc.	1

3. Do you feel public needs, i.e. lower costs, safer and more efficient transportation, etc., would be better met if the Commission were to relax or strengthen regulation of transportation in any specific area?

Commission doing a good job of regulation, regulation should remain as it is.	5
Strengthen regulations.	4
Relax regulations.	7
Undecided.	1
No response.	1

3. Question No. 3 (continued)

	Number of Motor Carrier Responses (See Notes 1 and 2)
Additional Comments	
Commission should have more people to travel to outlying areas.	1
Should enforce regulations more stringently.	1
Carriers should be able to expand their scope to include other zones, do away with the zone system.	2
Too costly and hopeless to get authority.	1
Allow contract or private carriers to be used by permit holders during peak demand.	1
Towing should be deregulated.	1
The only way to get lower costs, safer and more efficient transportation is to protect the people who have the investment, instead of letting everybody "just go at it".	1

4.a. Does the Commission enforce the statutes and regulations i.e. stop unauthorized carriers, safety, etc., adequately? Inadequately? Please explain.

Adequately	5
Inadequately	11
No response.	1
Don't know.	1

Additional Comments

Commission does not have any enforcement.	2
Need stronger penalties against unauthorized carriers.	1
Need regulations with more investigative and enforcement powers.	2
Need more enforcement man-power.	2
Enforcement more than adequate, sometimes nit picking.	1
Commission does not enforce statutes and regulations in any way.	1

4,a. Additional Comments (continued)

	Number of Motor Carrier Responses (See Notes 1 and 2)
ATC spends too much time harrassing carriers trying to run legally, and very seldom stopping unauthorized carriers they receive complaints about.	3
Unauthorized carriers have a financial advantage.	1
Easier to grant permits than to enforce regs.	1

4,b. In your opinion, is there a duplication of safety enforcement between the Commission and any other state agency? Please explain.

No response.	2
Unaware, don't know.	5
Yes	6
No	4
Cannot have excess of safety enforcement.	1

Additional Comments

Enforcement handled by police, troopers.	5
ATC needs to spend enforcement time getting both authorized and illegal carriers to comply with statutes.	1
Not unusual for driver and cargo to be checked more than once on trip.	1
Conflict of authority between ATC, State Labor Commission and ICC.	1

5. Any additional comments.

No additional comments.	9
Try to update present laws.	1
Failure to have automatic distribution of information pertaining to permit application to effected carriers-subscription charge seems unjust for small companies.	1
Enforcement needs to stop illegal hauling.	1
Make granting of permits more difficult for companies that have a bad record of paying their bills.	1

5. Any additional comments (continued)

	Number of Motor Carrier Responses (See Notes 1 and 2)
Trucks that operate beyond Anchorage and other cities do not give service and rates consistent with air freight forwarders.	1
Trucking industry in Alaska needs a great deal of help-problem rests with both the State and the industry.	1
Lot of government agencies are parasites of the transportation industry.	1
Expansion of ATC authority would be poor. Better to have no laws than poor ones.	1
Carrier cannot take in income necessary to upgrade equipment if others are allowed to operate illegally or too many authorities are granted in one area.	1
All in all, ATC does a good job.	1

Note 1

Number of regulated motor carriers included in sample	60
Number of motor carriers which responded	18
Response rate	30%

Note 2

Each regulated motor carrier may have responded to each question with several answers. Therefore, total responses for each question may exceed the number of motor carriers which responded.

APPENDIX D

QUESTIONNAIRE SENT TO REGULATED AIR CARRIERS

1. Do you believe the Commission's procedures for processing applications, hearings and issuing final orders are adequate and completed on a timely basis? Inadequate? Please explain.

	Number of Air Carrier Responses (See Notes 1 and 2)
Adequate	5
Inadequate	8
Adequate in some, inadequate in others.	1
No response.	1

Additional Comments

Commission slow.	8
Need to take applications in order received.	1
Limit time for hearings.	1
Too much paperwork.	1
Commission lost carrier documents filed with them.	1
Delays deprive applicant or complainant of due process.	1
Orders vague, devoid of findings.	1
Orders not adequate if not enforced.	1
Hearing Officer, or Commissioner should write order not employee who did not attend hearing.	1
Time figure will vary depending on who is filing for the authority and how much political pull he has.	1
Commission contributes to growth of monopolies.	1
Entire state licensing procedure should be abolished because it duplicates FAA.	1

2. Are there any statutes or regulations that you believe to be obsolete, vague, conflicting, unduly restrictive, and/or inadequate to allow the Commission to effectively and efficiently regulate transportation in Alaska? Please list and explain.

	Number of Air Carrier Responses (See Notes 1 and 2)
No	3
Yes	8
Existing regulations and procedures applied to enforce them are violative of due process.	1
No need for regulations.	1
No response.	1

Additional Comments

Regulation that requires prior approval of scheduled routes appear vague and unenforcable.	1
Procedure for protesting applications should be streamlined.	1
Form for quarterly reports too complicated for small carriers.	1
Commission should investigate the public need before they publish for protests.	1
Unfair operating advantage given by ATC to all "Grandfather" Operators.	1
Hearing process is one of the greatest obstacles applicants face.	1
Unduly restrictive on 45-day notice of rate increase.	1
No check to see if carrier is following regulations except if there is a complaint.	1
Should be more stringent regulations pertaining to guides flying for hire without a permit.	1
Particular statutes used by ATC in interpretation and justification of Alaska Travel Air case should be changed.	1
Entire Alaska Air Commerce Act of 1960 is not only unduly restrictive and inadequate, but also vague and conflicts with FAA and CAB regulations.	2

3. Do you feel public needs, i.e. lower costs, safer and more efficient transportation, etc., would be better met if the Commission were to relax or strengthen regulation of transportation in any specific area?

	Number of Air Carrier Responses (See Notes 1 and 2)
No	2
Strengthen	3
Relax	7
If regulations were any more relaxed, there would no longer be a need for the Commission.	1
No comment.	1

Additional Comments

Permit free competition as long as high standards are met.	2
Strengthen or drop the whole thing.	1
Liberalize or drop regulation.	3
Relax all efforts to be heavy-handed in imposing unrealistic restrictions on offenders.	1
Increase insurance coverage to protect public.	1
Public needs, per se, have not even been considered in some regulatory hearings.	1
Commission says that for authority to provide public service, only the public need is taken into consideration, when in fact all decisions are based on the protection of the industry, instead of the public.	1
Strengthen regs. for subcontractors of Wien and Alaska Mail Routes - IFR, Pilot Training.	1
Allow a reasonable time for a new certificate holder to become established before issuing other new certificates in that area.	1

4. Does the Commission enforce the statutes and regulations, i.e. stop unauthorized carriers, safety, etc., adequately? Inadequately? Please explain.

Adequately	1
Inadequately	11
As adequate as possible.	2

4. Ouestion No. 4 (continued)

	Number of Air Carrier Responses (See Notes 1 and 2)
Additional Comments	
Too many unauthorized air taxis.	6
Part 91 operators operate unsafely.	1
No enforcement against non-licensed carriers, much less efficient enforcement.	1
Six months after a complaint is filed is too long before an investigation.	1
A quick overnight visit or phone call is not adequate investigation for even a trivial complaint.	1
Insufficient number of field agents with too little travel money.	1
Let the Federal Government regulate safety.	1
Restrict pilots without sufficient Alaska flying time.	1
All the ATC does is move paper.	1
Have we combined the power of the PUC in Denver with the figurehead posture of the Texas Aeronautical Commission to produce the level of enforcement applied by ATC?	1

5. Any additional comments.

No additional comments.	5
Commission tries to do a good job, but responsibility outweighs authority.	1
Great over-supply of operators.	3
Commission available to only a select, political group.	1
Commission is a waste of the taxpayer's money.	1
Should have a minimum number of Alaska flying hours for pilots.	1
No continuity in tariffs with other carriers with like equipment.	1
Discontinue ATC, let free enterprise prevail.	3

5. Anv additional comments (continued)

	Number of Air Carrier Responses (See Notes 1 and 2)
ATC should oversee but not limit or impede private (contract) carriage or freight carriage.	1
Who do I see about protecting my operating authority given to me by the ATC?	1

Note 1

Number of regulated air carriers included in sample.	45
Number of air carriers which responded.	15
Response rate	33%

Note 2

Each carrier may have responded to each question with several answers. Therefore, total responses for each question may exceed the number of air carriers which responded.

APPENDIX E

QUESTIONNAIRE SENT TO SHIPPERS UTILIZING ATC REGULATED CARRIERS

1. Do you believe the Alaska Transportation Commission's (ATC'S) regulation of Alaska carriers has resulted in the following:

	Yes	No	No Opinion
a. lower freight costs for the consumer?	15%	70%	15%
b. stabilized transportation services?	50%	30%	20%
c. safe transportation of goods?	60%	5%	35%

2. Are you acquainted with ATC'S Journal which is published bi-weekly to give public notice of pending applications for authority, proposed rate changes and enforcement actions against Alaska carriers? 40% 60% 0%

3. Do you believe ATC'S procedures for investigating consumer complaints due to overcharges, unsafe operations, etc., are adequate? 30% 5% 65%

   If no, please explain why not.

4. Should ATC'S regulatory activities be:

   5% increased?

   40% decreased?

   55% kept the same?

   Please explain.

4. Question No. 4 (continued).

	No. of Responses
ATC appears to grant carriers anything asked for.	1
Competition should be encouraged.	5
Deregulation not in the shipping public's best interest.	1
ATC doing adequate job.	2
No major traffic problems in Alaska.	1
ATC should be more involved in activities and needs of shippers and carriers.	1

5. Can you suggest any other changes to the ATC which would be in the best interest of the public?

No comments.	13
Some shippers should be made part of Commission-ATC is biased.	1
Commission stand unclear on private carriage and freight forwarder.	1
Haul road should have been better coordinated.	1
Rates should follow "supply and demand".	1
Certification procedures unrealistic in free enterprise system.	1
Establish 3 year (instead of 6) statute of limitations.	1
Too many carriers.	1
Need checking on carrier financial back-up.	1
Greater promotion of docket and rate matters to shippers.	1
When ATC can control underlying causes of rate changes more services at reasonable cost can be provided.	1
Union wage and benefit demands hurt carriers.	1

Note 1

Number of shippers included in sample	63
Number of shippers which responded	20
Response rate	32%

Note 2

Each shipper may have responded to each question with several answers. Therefore, total responses for each question may exceed the number of shippers which responded.

APPENDIX F

QUESTIONNAIRE SENT TO ATTORNEYS WHO PRACTICE BEFORE THE ALASKA TRANSPORTATION COMMISSION

1. Are there any statutes or regulations that you believe to be obsolete, vague, conflicting, unduly restrictive, and/or inadequate to allow the Commission to effectively and efficiently regulate transportation in Alaska? Please list and explain.

	Number of Attorney Responses (See Note 1 and 2)
No	3
Not knowledgeable enough.	1
Statutes requiring air taxi operators to obtain a certificate of convenience are obsolete, monopolistic, and cause a lower quality of service - AS 2.05.055.	2
Encourages an air taxi operator to operate in a manner more specifically reserved to scheduled carriers - AS 2.05.050(d) (3).	1
Regularity of operations - AS 2.05.	2
Nobody really understands what this statute means when it refers to issuing an order for a temporary exemption under the Administrative Procedures Act (AS 44.62) - AS 2.05.060.	1
Allows a private party to bring a suit for injunctive relief against illegal operations in the Court, but the Motor Carrier Act does not allow such action - AS 2.05.210.	1
Lodge owners should be free from requirements of obtaining authority to carry their guests hunting, fishing, sight-seeing.	1
Hasn't been "regular" route application approved by Commission since Statehood - AS 42.10.420.	1
Too restrictive and presumably would prevent an owner-operator from leasing his truck to a private carrier - AS 42.10.420(2)(B).	2
Commission has never adequately defined the operations of a broker or forwarder - AS 42.10.420(2)(c).	1
Interpretation of "contract carrier" - AS 42.10.420(3).	1

1. Question No. 1 (continued)

	Number of Attorney Responses (See Note 1 and 2)
Existing exemptions too restrictive - AS 42.10.420.	1
"Incidental" has never been defined in Commission regulations as it has been by the ICC - AS 42.10.420(7)(A).	1
"Property" definition too restrictive. Many commodities of such low value should not be regulated. Deregulate dump trucks - AS 42.10.420 (11).	2
"Construction Contractor" not defined - AS 42.10.421 (12).	1
Commission's regulation over contract bus carriers has never been adequately figured out - AS 42.15.021.	1
In transferring an interest in a certificate, there has been some confusion as to whether a 50% transfer of interest requires application for approval of the transfer or just notification of the Board.	1
Confusion in trying to determine what interim management agreements are acceptable to ATC pending approval of transfer.	1
All of the statutes involved should be redrafted in a concise, simplified fashion, with a lucid and simple index.	1

2. Do you believe the Commission's procedures for processing applications, hearings, and issuing final orders are adequate? Inadequate? Please explain.

Proposed orders time consuming and unnecessary.	2
Commission should make better use of proposed decisions, findings of fact and conclusions of law prepared by applicants and protestants.	1
Commission too lenient in granting reopened hearings for applicants whose cases have been inadequately and improperly prepared in the first instance.	1
Should have at least one Commissioner present at each hearing.	1
Hearings conducted too informally.	1
Too great a lapse of time between date of application and hearing.	1
Evidentiary rules are interpreted and applied too loosely.	1

2. Question No. 2 (continued)

	Number of Attorney Responses (See Notes 1 and 2)
Should be some precise rules on confidentiality of testimony.	1
Administrative regulations do not sufficiently provide for pre-hearing discovery.	1
Increase travel budget to allow for more hearings in carriers area.	1
Procedures for processing unprotested applications should be expedited.	1
Procedures should be more explicitly defined.	1
Continued applications for the same authority.	1
Delays sometimes occur.	3
Commission does an adequate job.	4

3. Any additional comments.

No additional comments.	5
Commission has done a commendable job in enforcing the rule against ex parte.	1
Commissioners should take an added responsibility of drafting orders.	1
Commission should not have more than investigative right as to fitness of applicant, public need and necessity should be determined in the market place.	1
Surprised at attitude of existing established operators hiding behind the political skirts of the Commission in fear of competition.	1
Commission heavily influenced by big air taxi outfits.	1

Note 1

Number of Attorneys included in sample.	35
Number of Attorneys who responded.	10
Response rate	29%

Note 2

Each Attorney may have responded to each question with several answers. Therefore, total responses for each question may exceed the number of Attorneys who responded.

JAY S. HAMMOND
GOVERNOR

RECEIVED
JAN 11 A.M.
LEGISLATIVE
AUDIT

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1979

Mr. Gerald Wilkerson
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

We have reviewed your preliminary reports as shown below:

1. Board of Examiners in Optometry
2. Board of Dispensing Opticians
3. Board of Psychologist and Psychological Associate Examiners
4. Board of Chiropractic Examiners
5. Alaska State Medical Board
6. Board of Veterinary Examiners
7. State Physical Therapy Board
8. Board of Pharmacy
9. Board of Nursing
10. Board of Nursing Home Administrators
11. Board of Dental Examiners
12. Alaska Transportation Commission

We view these reviews of agency programs and activities which are specifically subject to termination in a manner different from those made of State departments or agencies. Usually we in the Executive Branch endeavor to respond directly to each finding and recommendation. However, in regard to the Boards and Commissions, the Executive Branch agency during a public hearing shall demonstrate a public need for its continued existence or the discontinuation of the program, and the extent to which any change in the manner of exercise of its functions or activities may increase efficiency of administration or operation consistent with the public interest.

The Executive Branch of Alaska Government has made an extensive study of the above Boards and the Alaska Transportation Commission. We are continuing to study those entities, their origin, their present and future potential, and other related subjects in conjunction with Alaska statutes 24 and 44 (Sunset Legislation). As prescribed in AS 44.66.050 one or more legislative hearings are to be held to receive testimony from the public, the Commissioner of the department having administrative responsibility for each, and the members of the Boards or Commission involved. During those hearings we will present our findings and recommendations affecting each of the foregoing Boards and the Alaska Transportation Commission.

Accordingly, we are presenting this in addition to the responses from the Department of Commerce, Department of Law, and the individual Board or Commission members and others on an interim basis.

Sincerely,

Michael Harper
Administrative Assistant
to the Governor

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT

ALASKA TRANSPORTATION COMMISSION

MacKAY BUILDING
338 DENALI ST.
ANCHORAGE 99501

January 3, 1979

Mr. Gerald L. Wilkerson
Legislative Auditor
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

This letter is in response to the preliminary performance review of the Alaska Transportation Commission prepared by the Division of Legislative Audit in accordance with Title 24 and 44 of the Alaska Statutes. The response represents as nearly as possible a consensus opinion of the present commission members who have independent thoughts in regard to the findings and recommendations contained in the preliminary report. The response to the recommendations will be made in the order in which they appear in the preliminary report.

RECOMMENDATION NO. 1:

<u>The statutory requirements for the ATC to regulate bulk type commodities and recreational air carriers should be eliminated</u>.

The Commission agrees that the regulation of that class of carriers transporting commodities in bulk in dump type equipment commonly referred to as dump truck operators should not be regulated in the manner presently provided for in AS 42.10. The restriction of entry provision presently contained in the Act could be substituted for the issuance of an annual permit to those wishing to engage in this type of transportation subject to having their vehicle inspected for compliance with current safety regulations and the tendering of proof that sufficient liability and property damage insurance is in effect for all vehicles while they are in use on the public highways.

The Alaska Air Commerce Act of 1960, AS 02.05, does not clearly provide for the transportation of persons or property which might be incidental to another private or primary business as do similar provisions in the Motor Freight Carrier Act, AS 42.10, and the Alaska Bus Act, AS 42.15. Accordingly the Commission has since its inception issued certificates to such carriers who have been providing in whole or in part transportation in connection with another primary business

such as guides or lodge owners. Carriers thus certificated are required to maintain adequate insurance for the protection of the public, file a tariff, register aircraft, and hold a certificate from the FAA which indicates that they are providing public transportation in conformance with specified safety regulations. Here again, the Commission believes that the entry requirements for this type of carrier could be replaced with public interest standards which would include the requirement that the carrier maintain adequate insurance for the protection of the public and require that the operation be conducted pursuant to safety standards established by the FAA for this type of operation.

RECOMMENDATION NO. 2:

The statutes and regulations governing the ATC should be revised.

The Commission is in full agreement with Recommendation No. 2 and makes no further comment to No. 2, except to say that various amendments to the regulatory acts have been introduced in almost every session of the legislature since 1970.

RECOMMENDATION NO. 3:

The Commission should seek the repeal of the Alaska Ferry Transportation Act.

The Alaska Ferry Transportation Act, AS 42.25, is serving a very limited public purpose as it is presently enacted. The Commission has no objection to the repeal of this act, but in so doing, the Legislature should give serious consideration to improving the service presently provided by vessel operators along the major riverways and coastal areas. Authorizing the ATC, together with other appropriate state agencies to conduct an investigation into the needs and services available to communities located along these waterways would be appropriate.

RECOMMENDATION NO. 4:

ATC should regulate the economics of the transportation industry as required by the Alaska Statutes.

A. Carriers should be required to submit all pertinent financial data necessary for economic regulation.

B. ATC should audit the carrier's accounting records to ensure they are prepared in accordance with regulatory accounting requirements and to determine the reasonableness of the financial data submitted to the Commission.

C. ATC should establish written basic policies and procedures for analysis of rate changes.

The Commission agrees that implementing these recommendations would enhance the agency's ability to carry out the declaration of policy

set forth in each of the transportation acts. We would point out, however, that there does not appear to be any practical way given the Commission's present budgetary and personnel limitations to implement these recommendations. The recommendations would greatly improve the quality of regulation and speed up the process of investigations, the development of adequate standards and methodology will be dependent upon the agency's ability to acquire technical personnel and sufficient funding.

RECOMMENDATION NO. 5:

Improvement is needed in the enforcement of ATC statutes and regulations.

A. ATC does not process enforcement actions in a timely manner.

B. The Commission frequently suspends all or part of the civil penalties assessed for violations.

C. ATC enforcement staff duplicates the motor vehicle safety inspections done by the Department of Public Safety.

In regard to Sub-Paragraph A, the Commission will only point out that lawyers are involved in the ATC's enforcement matters and lawyers sometimes view procedural delays as being in their clients best interests. The Commission's actions must be considered in accordance with due process provisions of the law and in many cases, due process means delay. Further, the decisions by the Commission are subject to review by the Superior Court and we have been careful not to burden the court with appeals taken from hastily prepared accusations and orders easily overturned or remanded for lack of sufficient findings of fact or conclusions of law.

In regard to Sub-Paragraph B, the Commission's policy of suspending a portion of a civil penalty is founded on the belief that the majority of the violations are a result not of intentional managerial misbehavior but rather a failure of many of the small carriers to perceive their responsibilities as members of the regulated industry. If compliance with the laws and regulations relating to transportation can be achieved through the practice of suspending civil penalties, then it appears to the Commission that this policy is in the public interest and should be used where factual situations warrant.

Regarding Sub-Paragraph C, in our opinion, the ATC enforcement staff complements rather than duplicates motor vehicle safety inspections which are performed by the Department of Public Safety. The Alaska State Troopers' vehicle safety inspections performed at the scale houses are ineffective because the scale houses are closed a large part of the time. We are not convinced that the inspection of vehicles at the carriers' place of business where he can show you just what he wants you to see is going to be a substantial deterrent to the operation of unsafe vehicles on the public highways. Additionally, there are elements of motor vehicle safety other than mechanical, for

instance, the transportation of hazardous materials where a violation of this sort almost always occurs while the commodity is being transported and not at the carrier's terminal. We agree that there is a need for more frequent and thorough safety inspections and that some, but not all, of this can be done at a carrier's place of business. We believe that there is a substantial amount of traffic moving at the present time by unauthorized carriers and in our opinion, the scale house is an invaluable tool for the ATC in both motor vehicle safety and economic regulation.

RECOMMENDATION NO. 6:

Applications should be processed by the ATC in a more timely manner and temporary operating authorities should be granted in accordance with Alaska Statutes.

The Commission's response to this recommendation is basically the same as in Recommendation No. 5A above. In addition, we note that even though there is still a substantial regulatory lag between the filing and the granting or denying of a given application, this delay has been reduced dramatically over what it was in prior years.

For the most part, the Commission grants a temporary authority subject to the recommendation of the staff who often have first-hand knowledge of a given situation or on a prima facie showing by a carrier or shipper that there is a need for the particular service. For the most part, these temporary authorities are limited to a period of ninety (90) days, although some have extended for longer periods. Many temporary authorites are ultimately turned into permanent authority subsequent to the filing of an application, notice and opportunity for hearing and a determination by the Commission that the additional authority is required by the public convenience and necessity. A substantial number of temporary authorities are granted by the Commission each year and a great portion of these temporary authorities are in the nature of a transfer of control from one business entity to another. Our recollection is that there has been only one (1) reversal by the Superior Court of the many decisions to grant temporary authority and in our opinion, this is not a bad record at all.

RECOMMENDATION NO. 7:

The Commissioners and Hearing Officers should write the formal written decisions (orders) on applications before the ATC.

The Commission agrees with this recommendation with the understanding that it would not preclude the Commissioner acting as a hearing officer in preparing a final order from availing himself of the assistance of Commission employees with expertise in technical areas, such assistance to include the actual drafting of the order under the supervision and with the assistance of the commissioner who presided over the hearing. We disagree that this recommendation would be more effectively implemented by requiring one member of the Commission to be an

attorney. At one point in time, the Commission was comprised of two attorneys and one layman and Commission records will demonstrate that the need for legal assistance was no less then than it is at the present time. Commission records might also demonstrate that the agency's productivity was considerably less during that period as compared to a similar period of time when the Commission was comprised entirely of laymen.

RECOMMENDATION NO. 8:

The ethical conduct regulation should be complied with in matters before the ATC.

The Commission agrees with this recommendation.

RECOMMENDATION NO. 9:

Neither commissioners nor ATC staff should accept free transportation from any regulated or motor carrier.

The Commission agrees with this recommendation.

RECOMMENDATION NO. 10:

ATC should issue orders in accordance with Alaska Statutes.

The Commission believes that it is issuing its orders in substantial compliance with Alaska Statutes. The granting of temporary authority by telegram is sometimes accomplished prior to the issuance of a formal written order containing findings of facts and conclusions of law in order to satisfy apparent public interest requirements. The comments made to Recommendation No. 6 are somewhat appropriate to this recommendation.

RECOMMENDATION NO. 11:

The statutory qualifications for Commissioners of the ATC should require specific areas of expertise.

The comments to Recommendation No. 7 apply in part as our response to this recommendation. In addition, we question the feasibility of the Legislature requiring one of more Commissioners to have financial or economic expertise. Expertise of this type would be of value to any Commissioner, but we are not convinced that reducing the pool of potential candidates from which the Governor can select persons to serve as ATC Commissioners is advisable. AS 42.07 requires that the Commission have access to experts in the field of law and economics and finance in order to develop a good transportation policy. Therefore, it is not necessary that individual Commissioners have this specific expertise. Experience in the field of transportation, regardless of mode, is a far greater advantage. The Governor should have the prerogative to appoint a person with the best over-all qualifications to fill Commission vacancies without the artifically imposed requirement to appoint individuals with expertise in specific fields.

RECOMMENDATION NO. 12:

The ATC should give notice; hold open to the public; and maintain complete minutes of the Commission weekly meetings.

At the present time, all of the Commission's meetings are held for the purpose of making decisions in an adjudicatory proceeding, and therefore, are not required to be open to the public. Although the procedural regulations presently require the Commission to meet on Monday of every week at 2:00 p.m., the Commission has replaced these (public) meetings with an open door policy which allows public access to the staff and the individual Commissioners at any time during the working day and throughout the working week. We find that this works very well and does not limit the public's access to the Commission to a particular time or day of the week. This open door policy does unfortunately, create the undesirable presumption that parties are conducting ex-parte communications with the Commissioners, however, generally speaking, this is not true and parties with matters pending before the Commission for a decision are admonished not to discuss the merits of these particular cases.

RECOMMENDATION NO. 13:

An index system should be developed for the final orders issued by the ATC and decision on appeals from the courts.

We concur in this recommendation.

RECOMMENDATION NO. 14:

The Assistant Attorney General and tariff analyst positions at the Department of Law, which are assigned to the ATC matters, should be placed organizationally and physically within the ATC.

We concur with this recommendation.

Yours very truly,

ALASKA TRANSPORTATION COMMISSION

Jake Johnson
Chairman

JJ/cjh

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

January 11, 1979

Gerald Wilkerson
Legislative Auditor
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

The Performance Review of the Alaska Transportation Commission, conducted by the Division of Legislative Audit and issued October 24, 1978, concludes that the ATC is authorized by statute to represent the s[illegible] before the Civil Aeronautics Board and the Interstate [illegible]merce Commission. The Review recommends that in order to accomplish this task the attorney assigned to ATC matters and the Transportation Analyst employed by the Department of Law should be transferred from the Attorney General's Office to the ATC.

I feel strongly that the proposed transfer should not take place because the ATC's statutory authority to represent the state before federal regulatory agencies is unclear and anachronistic, and, generally, because of the difficulties inherent with state regulatory bodies when they depart from their quasi-judicial intrastate functions and attempt to act as advocates in interstate proceedings before federal regulatory commissions.

The auditor's recommendation that the Department of Law's Transportation Attorney and Transportation Analyst be reassigned seems to come from a misconception that intrastate and interstate matters are the opposite sides of the same regulatory coin. In fact, they are entirely separate currencies and an examination of statute and practice among Alaska's three regulatory commissions reveals the impracticality of combining both functions in the same agency.

The Alaska Public Utilities Commission has the clearest mandate to represent the state in federal matters and it stems from AS 42.05.141(6) which provides that the APUC may "appear personally or by counsel and represent the

03-CSLH

interests of the state in all matters and proceedings involving a public utility pending before an officer, department, board, commission, or court of the state or the United States and to intervene in, protect, resist, or advocate the granting, denial, or modification of any petition, application, complaint, or other proceeding . . . "

In practice, however, the APUC defers to the Governor's Office of Telecommunications in formulating interstate communications policy and to the Attorney General's Office in advocating the state's interest before the FCC. The reason for this deference is that a well-functioning state regulatory agency cannot act as an independent, quasi-judicial body in intrastate proceedings involving a company and then transform itself into an advocate before a federal commission concerned with regulating the same company. There would be, for example, an obvious conflict if the APUC, concerned as it is with RCA Alascom intrastate tariffs, were to appear before the Federal Communications Commission as an advocate in proceedings involving interstate rates and ownership of satellites and earth stations to which RCA was a party. In these matters policy emanates from the Governor and concerned state agencies and is presented by the Attorney General.

The anachronism of state regulatory bodies acting both as independent, quasi-judicial agencies and also as policy makers and advocates was recognized by the legislature when it amended the powers and duties of the Alaska Pipeline Commission in 1976. Initially, the power of the APC to appear before federal regulatory bodies (ICC oil pipelines, FPC gas pipelines) paralleled that granted to the APUC. However, it was soon apparent that the APC could not fulfill both intrastate and interstate functions and the legislature changed AS 42.06.140(10) to read "[the APC] shall provide all reasonable assistance to the Department of Law in intervening in, offering evidence in, and participating in proceedings involving a pipeline carrier and affecting the interests of the state, before an officer, department, board, commission, or court of another state or the United States."

Thus, with regard to the APC, the legislature recognized the conflict in function between intrastate and interstate matters and codified the ad hoc practice which exists at the APUC.

The authority of the ATC to represent the state interest in interstate proceedings before federal agencies is the vaguest of the three Alaska commissions. Under title 42 the ATC has no specific power to appear before the Inter-

state Commerce Commission, the Federal Maritime Commission, or Civil Aeronautics Board. The Alaska Air Commerce Act of 1960, however, provides that the ATC, under AS 02.05.050(c), "may apply by petition to [the CAB] when the interstate rates, fares, charges or classifications of air carriers affecting the commerce of this state are, in the opinion of the commission, excessive or discriminatory . . . or when interstate services are inadequate, unsatisfactory or discriminatory . . ."

Thus legislative authority for ATC participation in federal proceedings extends only to one of the three federal transportation regulation commissions and even before the CAB, the ATC is, by statute, to be advised and represented by the Attorney General. Further, the Attorney General has separate authority in transportation matters through AS 44.23.060 which provides for the discovery of information and data from regulated carriers "[i]n a hearing or proceeding in which the Attorney General appears before a board, court, commission, committee, or officer of the United States involving traffic and commerce or rates of transportation between points in interstate or intrastate transportation . . ." The implication here is that it is the Attorney General who represents the state interest before federal commissions and not the ATC.

Aside from statutory considerations, however, there is a question of practicality involved and the same reasons which compelled the delegation of interstate matters from the APUC and the APC to the Governor and the Attorney General apply equally to the ATC: i.e. the ATC should not act as judge in intrastate proceedings and then appear as an advocate before federal agencies in matters which involve the same regulated carriers.

A second practical problem which arises when interstate and intrastate authority is combined in a single agency is that of communications between the ATC and elected officials. Recommendation number 8 of the Performance Review criticizes contacts between the Governor and the commission asserting "[i]t is particularly improper for the Governor's preference to be communicated to the Commissioners in cases pending before the ATC because the Commissioners are appointed by the Governor. In addition, since one Commissioner's term expires in four months, such communications could give the appearance of influencing the Commission far beyond that of a simple expression of preference by a member of the general public."

While this admonition extends only to cases docketed before the ATC, it is obvious that there will always

be instances where individual carriers have similar matters docketed before both the ATC and a federal commission. It thus becomes impossible for the Governor to formulate and communicate interstate policy to the ATC without influencing intrastate decisions made by the ATC.

An example of how interstate transportation proceedings can be handled without ethical conflict is the recent Southeast Alaska Service Investigation. There, in a case involving restoration of competitive air service between Southeast Alaska and Seattle, policy was developed by the Governor's Office in conjunction with the Departments of Commerce and Economic Development, Transportation, and Community and Regional Affairs, and the ATC, and was coordinated by the Department of Law's Tariff Analyst. As the case progressed it was apparent that the ATC and the Governor held different views and, had the proceeding been handled by the ATC, the state's position would probably not have reflected the administration's views. In fact, in two earlier CAB proceedings the filings were prepared by a Hawaii Consultant under contract to the ATC and were circulated to the Governor's Office too late for comment.

The importance of close cooperation between administration policy-makers and advocates of Alaska's interstate transportation interests is particularly crucial at the present time because of deregulation of federal transportation agencies. Traditional rate and route cases, which have their courterpart among ATC proceedings, are giving way to anti-trust, subsidy, and small communities service questions at the CAB and these matters more properly fall within the scope of the Department of Law and the Governor's Office. Similarly, deregulation at the ICC and FMC is rapidly approaching and the state position on whether modifications should be sought for Alaska interests is one which should be developed by the Governor and presented by the Attorney General. This approach would parallel the state's activities regarding energy deregulation before FERC, where it is the Attorney General, not the APC, who represents the state.

Finally, the Department of Law is adamently opposed to the decentralization of the Attorney General's staff. If, as the auditor recommends, attorneys whose duties are primarily directed towards a single agency are transferred to that agency, the Department of Law would virtually disappear and the Attorney General would no longer direct the state's legal business. Obviously, if state agencies retained their own counsel there would be tremendous pressure upon the in-house attorney to issue opinions favorable to the agency's desires and there would be no control over the state's legal policy. The balkanization of the Department of Law proposed here is unworkable.

Additionally, it should be pointed out that the Department of Law's Tariff Analyst is not simply assigned to transportation regulation matters. Since pipelines, telecommunications, and surface and air carriers are all somewhat similarly regulated industries, expertise in one area is in many instances transferable from one endeavor to another. The tariff analyst has, for example, been active in pipeline proceedings and is currently being assigned an expanded role in telecommunications. Consequently, transfer of the position from the Department of Law to the ATC would simply fragment a developing cohesiveness in the state's approach to presenting its views to a wide range of federal regulatory agencies. Moreover, the position is heavily involved with consumer advocacy and reassignment to the ATC would surely restrict the Department of Law's ability to bring consumer actions before federal regulatory agencies.

Sincerely,

Avrum M. Gross
Attorney General

AMG:ams

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

FINANCE DIVISION
POUCH WF—STATE CAPITOL

JUNEAU, ALASKA 99811

January 9, 1979

Members of the
Legislative Budget and Audit Committee:

We have reviewed the responses of the Alaska Transportation Commission to our audit report dated October 24, 1978. The responses appear thoughtfully prepared and we believe they will assist you in evaluating the Alaska Transportation Commission. Our comments on the responses follow.

Recommendation No. 5

ATC enforcement staff duplicates the motor vehicle safety inspections done by the Department of Public Safety.

The response states ATC safety inspections complement rather than duplicate safety inspections done by the Department of Public Safety.

We found ATC inspections at the scale houses were performed only during the hours State Troopers were performing similar activities at the scale houses. These ATC inspections do not result in increased safety enforcement.

Further, the State Troopers provide ATC with copies of any citations for safety violations issued at the scale houses during periods ATC enforcement personnel are not present. The copies provided include any instances of failure to display required ATC certificate numbers in addition to the safety violations.

We therefore reaffirm our finding that ATC safety inspections at the scale houses do not result in additional enforcement but merely duplicate State Troopers' activities, and should be discontinued.

31-Q1LH

Recommendation No. 6

Applications should be processed by the ATC in a more timely manner and temporary operating authority should be granted in accordance with Alaska Statutes.

The Commission stated it grants temporary authority if a carrier can show a need exists for the particular service. They also stated a substantial number of temporary authorities are granted by the Commission each year of which a great portion are in the nature of a transfer of control from one business entity to another.

The Commission's response does not fully address our recommendation with regard to the granting of temporary authority. Both the Motor Freight Carrier Act and the Air Commerce Act require demonstration of either an emergency situation or unusual circumstances before temporary permits may be issued. Our test sample indicated 55% of the temporary permits were not accompanied by these criteria. Moreover, it is not relevant, with regard to Motor or Air Carrier, that the reason for issuing a temporary permit is a change in firm ownership. An emergency or unusual circumstance must first be demonstrated. The change of firm ownership exemption from the demonstrated emergency requirement applies only to Motor Passenger Carriers (buses) which constituted two percent of our sample.

Recommendation No. 10

ATC should issue orders in accordance with Alaska Statutes.

The Commission believes that it is issuing its orders in substantial compliance with Alaska Statutes.

We believe that the Commission is not in compliance with AS 42.07.141 or 3 AAC 60.350 which require the written decision to contain the findings of fact and conclusions of law. During our audit we observed a case in which authority was issued by telegram but the required findings of fact and conclusions of law were not formulated or reduced to writing until several days after the authority was granted.

Gerald L. Wilkerson

Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

MOTOR VEHICLES IN ALASKA

PUBLISHED BY

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MOTOR VEHICLE MANUFACTURERS ASSOCIATION
of the
United States, Inc.

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May 1977

Motor vehicles--their manufacture, sale, servicing and commercial use--represent one of the most dynamic forces affecting our national economy. About one of every six employed persons work in automotive-related occupations. Some of the facts about motor vehicles include:

- Americans now own nearly 140 million cars, trucks, and buses--40 percent of the world total--or more than one vehicle for every two persons in the country.

- Motor vehicle producers maintain plant, office, warehouse or test facilities in nearly every state and in addition purchase materials, parts, and services from an estimated 40,000 independent suppliers.

- Directly and indirectly the industry contributes a large share of taxes to national, state, and local governments.

- Nearly two million Americans own stock in the motor vehicle manufacturing companies and many others benefit through participation in pension funds and investment programs involving automotive stock.

To highlight the importance of motor vehicles, the Motor Vehicle Manufacturers Association has prepared reports summarizing significant facts concerning the automotive industry for the various states. I hope you will find the attached report for your state interesting.

W. D. Eberle

Highlights

Employment

The manufacture, distribution, maintenance, and commercial use of motor vehicles in Alaska provides employment for almost 21,000 workers.

Automotive Businesses

Almost 400 different firms in Alaska are primarily engaged in the manufacture, distribution, and servicing of motor vehicles. In addition, 170 firms engaged in highway transportation employed 2,500 workers with an annual payroll of $40 million.

Motor Vehicle Manufacturers

Manufacturers of motor vehicles in Alaska, not including independent suppliers:

- Employ about 20 workers.
- Disburse $214,000 in annual wages and salaries.
- Pay almost $140,000 a year in taxes to state and local government.

Dealers

In Alaska there are:

- 32 new car and truck dealers.
- Employing 850 workers.
- Paying $13 million in annual wages and salaries.

Stockholders

About 600 residents in Alaska own stock in motor vehicle manufacturing corporations.

Vehicle Taxes

Highway users in Alaska paid $29 million in special state vehicle taxes. Motor vehicle, fuel, and license taxes accounted for six percent of total state tax revenues.

Federal automotive excise taxes paid by users in Alaska amounted to an additional $10 million.

Motor trucks in Alaska -- 32 percent of vehicles registered -- paid 53 percent of total special state vehicle taxes.

Vehicle Registrations

Total vehicles registered in Alaska amounted to 255,000 in 1976 -- 159,000 were automobiles and 96,000 were commercial vehicles.

New Vehicle Registrations

Passenger cars newly registered in Alaska in 1976 totaled 11,900 and 11,300 new motor trucks were also registered.

Drivers

There are 242,000 licensed drivers in Alaska or .95 drivers per registered vehicle.

Automobile Ownership and Use

Four out of five households in Alaska own an automobile. Privately owned automobiles are used by 60 percent of workers in the state to get to their jobs.

LIMITATIONS OF DATA FROM "COUNTY BUSINESS PATTERNS"

- *Much of the data used in this report is derived from* County Business Patterns, *a statistical by-product of employment and payroll information reported to the Treasury Department under the Social Security Program*

- *Self-employed persons are not included in the report. As a result, the counts of establishments, employment, and payrolls are understated. In the case of repair shops, trucking firms, taxicabs, and others, the number of such firms omitted may be quite large in relation to the number listed. Total employment and payrolls would also be affected but not the same extent*

- *It should also be noted that firms are classified by their principal line of business. This is another source of understatement for certain lines of business. For example, gasoline service stations operated as part of a new car dealership are not included in the count of such stations. Similarly, the count of tire, battery, and accessory retailers or of auto repair facilities would not include new car dealers or large department stores offering such sales and services*

Economy

A special study of motor vehicle manufacturers provides some new measures of the importance of the motor vehicle industry to the economy of the State of Alaska:

> Manufacturers of motor vehicles, not including independent suppliers, employ about 20 workers, with an annual payroll of $214,000. Annual taxes paid to state and local governments by these manufacturers exceed $140,000.
>
> Some 600 persons in the state are stockholders of motor vehicle manufacturing corporations.
>
> There are 32 new car and truck dealers in the state. They employ 850 people and pay $13 million in wages and salaries.

SOURCE: Special studies by Motor Vehicle Manufacturers Association of the U.S. Inc., 1976.

Registrations

Motor Vehicles	1975	Preliminary 1976
Automobiles	142,717	159,000
Trucks and Buses	82,858	96,000
Total	225,575	255,000

SOURCE: U.S. Department of Transportation, Federal Highway Administration.

* * *

Trucks-Special Type	1975
Truck-Tractor	1,990
Diesel Trucks	2,831
Diesel Buses	398
Motor Buses	
School	425
Commercial	576
Total	1,001
Commercial Trailers	
Full-Trailers	4,416
Semi-Trailers	1,455
Total Truck-Trailers.....	5,871

SOURCE: U.S. Department of Transportation, Federal Highway Administration

* * *

New Motor Vehicle Registrations	1975	1976
Passenger Cars	15,381	11,886
Motor Trucks	14,327	11,305
Total	29,708	23,191

SOURCE: R. L. Polk & Co.

* * *

Drivers

Number of Licensed Drivers in 1976	242,000
Drivers per Motor Vehicle	.95

SOURCE: U.S. Department of Transportation, Federal Highway Administration

Automotive Businesses

SUMMARY

Industry	Total Establishments	Number of Employees, March, 1974	Total Annual Payrolls, 1974 (000)
Automotive Businesses in State			
Wholesale Trade	56	421	$ 5,506
Retail Trade	256	1,950	23,907
Services	85	344	3,885
Highway Transportation ..	169	2,564	40,071
Total Automotive Businesses*	566	5,279	$ 73,369
All Businesses in State**	7,372	65,124	$927,305
Automotive Business as Percent of all Businesses in State	7.7	8.1	7.9
Automotive Related Businesses*** (not included above, partial list)	174	429#	$ 8,146#

- Partial Total

* - Some Automotive Businesses are not included in this analysis. Self-employed persons in the Automotive Business are not included. Persons employed in Automotive Departments of establishments, such as department stores whose principal business is in non-automotive products, would also be omitted.

** - Does not include agriculture, government, railroads, or persons in domestic service or who are self-employed.

*** - Petroleum extraction, refining, and wholesale distribution; highway and street construction; trailer parks.

SOURCE: Compiled by Motor Vehicle Manufacturers Association of the U.S., Inc. from County Business Patterns, 1974, U.S. Department of Commerce, Bureau of the Census.

TRADE

Industry	Total Establishments	Number of Employees, March, 1974	Total Annual Payrolls, 1974 (000)
WHOLESALE			
Automotive Wholesale Businesses in State			
Motor Vehicles and Automotive Equipment...	56	421	$ 5,506
Automobiles and Other Motor Vehicles.....	--	--	--
Automotive Parts and Supplies.....	43	325	4,095
Tires and Tubes.....	--	--	--
Total Automotive Wholesale	--	--	--
All Wholesale Business in State	56	421	$ 5,506
Automotive Wholesale as Percent of all Wholesale Businesses in State	526	4,064	$ 63,689
RETAIL	10.6	10.4	8.6
Automotive Retail Businesses in State			
Automotive Dealers and Service Stations.....	256	1,950	$ 23,907
New and Used Car Dealers.....	32	851	12,895
Used Car Dealers.....	--	--	--
Auto and Home Supply Stores.....	28	152	1,743
Gasoline Service Stations.....	150	D	D
Miscellaneous Automotive Dealers....	--	--	--
Total Automotive Retail.	256	1,950	$ 23,907
All Retail Trade Businesses in State....	1,734	15,224	$144,592
Automotive Retail Trade as Percent of All Retail Trade in State .	14.8	12.8	16.5

SOURCE: Compiled by Motor Vehicle Manufacturers Association of the U.S., Inc. from County Business Patterns, 1974, U.S. Department of Commerce, Bureau of the Census.

SERVICES

Industry	Total Establishments	Number of Employees, March, 1974	Total Annual Payrolls, 1974 (000)
Automotive Service Businesses in State			
Automobile Repair, Services and Garages....	85	344	$ 3,885
Automobile Rentals Without Drivers.....	17	D	D
Passenger Car Rental and Leasing.....	14	94	805
Truck Rental and Leasing.....	--	--	--
Utility Trailer Rental.	--	--	--
Automobile Parking.....	--	--	--
Automobile Repair Shops.....	61	195	2,694
Top and Body Repair Shops.....	14	59	884
Tire Retreading and Repair Shops.....	--	--	--
Paint Shops.....	--	--	--
General Automobile Repair Shops.....	29	D	D
Automobile Repair Shops, N.E.C.	--	--	--
Automobile Service, Except Repairs*.....	--	--	--
Total Automotive Service Services.....	85	344	$ 3,885
All Service Businesses in State.....	1,783	14,505	$149,087
Automotive Services as Percent of all Services in State.....	4.8	2.4	2.6

* - Automotive laundries, driving instruction, towing, etc.
N.E.C. - Not elsewhere classified.
SOURCE: Compiled by Motor Vehicle Manufacturers Association of the U.S., Inc. from County Business Patterns, 1974, U.S. Department of Commerce, Bureau of the Census.
D - Withheld to avoid disclosure

HIGHWAY TRANSPORTATION

Industry	Total Establishments	Number of Employees, March, 1974	Total Annual Payrolls, 1974 (000)
Highway Transportation Businesses in State			
Local Passenger Transportation.....	71	1,273	$ 6,715
Local and Suburban Transit.....	12	388	1,388
Local Passenger Transportation, N.E.C...	--	--	--
Taxicabs.....	38	398	2,424
Intercity Highway Transportation.....	--	--	--
School Buses.....	12	174	1,041
Trucking Local and Long Distance*.....	98	1,291	33,356
Trucking Terminal Facilities.....	--	--	--
Total Highway Transportation.....	169	2,564	$ 40,071
All Transportation and Other Public Utilities Businesses in State.....	468	9,157	$162,446
Highway Transportation as Percent of: All Transportation and Other Public Utilities Businesses in State.....	36.1	28.0	24.7

* - Data shown for reporting units, employment, and payrolls of trucking firms are substantially understated. The source data does not include establishments operated by self-employed persons. Furthermore, firms operating trucks but whose principal business may fall into some other business category are not included in these totals.
D - Withheld to avoid disclosure.
N.E.C. - Not elsewhere classified.
SOURCE: Compiled by Motor Vehicle Manufacturers Association of the U.S., Inc. from County Business Patterns, 1974, U.S. Department of Commerce, Bureau of the Census.

RELATED BUSINESSES

Industry	Total Establishments	Number of Employees, March, 1974	Total Annual Payrolls, 1974 (000)
Mining			
Crude Petroleum and Natural Gas	19	D	D
Highway and Street Construction	57	D	D
Manufacturing			
Petroleum Refining	--	--	--
Paving Mixtures and Blocks	--	--	--
Lubricating Oils and Greases	--	--	--
Wholesale Trade			
Petroleum Bulk Stations and Terminals	98	429	$8,146
Services			
Camps and Trailering Parks	--	--	--
Drive-in Motion Picture Theaters	--	--	--

D - Withheld to avoid disclosure.
SOURCE: Compiled by Motor Vehicle Manufacturers Association of the U.S., Inc. from County Business Patterns, 1974, U.S. Department of Commerce, Bureau of the Census.

* * *

Visitors Travel Expenditures	Expenditures 1975 (000)
Transportation	$190,934
Lodging	28,028
Food	57,743
Entertainment	8,418
Gifts	--
Incidentals	13,971
Total	$299,094

NOTE: These data are based on travel to a place at least 100 miles or more away from home. Travel by all modes is included; nationally two-thirds of travel expenditures were made by traveling by highway vehicle.
SOURCE: Travel Market Yearbook, 1976/1977.

Taxes

Highway User Revenues in State	Estimated 1976 (000)
Motor Fuel Gallonage Tax	$ 16,695
Motor Fuel Other Receipts	3
Motor Vehicle Registration Fees	9,670
Other Vehicle Motor Fees	1,187
Motor Carrier Taxes	770
Miscellaneous Fees	500
Total	$ 28,825

SOURCE: U.S. Federal Highway Administration.

* * *

Special Motor User Taxes	Estimated 1976 (000)
State Tax on Motor Vehicle Fuels	$ 24,403
State License Tax on Motor Vehicles .	11,370
State License Tax on Vehicle Operators	466
Total Motor Vehicle, Fuel and License Taxes	$ 36,239
Total State Tax Revenue	$ 598,807
Percent Motor Vehicle is to Total State Taxes	6.0%

NOTE: These are preliminary data on a fiscal year basis.
SOURCE: U.S. Department of Commerce, Bureau of the Census, State Tax Collections: 1976

* * *

Federal Automotive Excise Tax Collections in State	Estimated 1975 (000)
Motor Fuel	$ 6,129
Lubricating Oil	90
Motor Vehicle Use(1)	511
Trucks, Buses, Trailers	2,304
Parts and Accessories	176
Tires, Tubes, Tread Rubber	970
Total	$ 10,180

(1) Tax at $3.00 per 1,000 pounds per year on vehicle with taxable GVW over 26,000 pounds operated on the highways.
SOURCE: U.S. Department of Transportation, Federal Highway Administration.

Motor Truck

Truck Taxes in State, 1975		Truck Percent of Total
Registration Fees	$ 3,948,000	46.4
Miscellaneous Receipts	940,000	51.1
Motor Fuel Taxes	8,423,000	55.3
Motor Carrier Taxes	609,000	92.1
Total User Taxes	$13,920,000	53.0

Truck Registrations, 1975	76,535
Trucks as Percent of Total Registrations	33.2%

SOURCE: Truck Taxes by States--25th Annual Edition, American Trucking Associations, Inc.

* * *

Trucking Employment and Payrolls in State, 1975

Employment	15,200
Payrolls	$264,343,200

SOURCE: American Trucking Associations, Inc.

* * *

Major Use of Trucks in State

	Percent of Total Private Trucks in Operation		
	1963	1967	1972
Agriculture	5.5	3.9	2.3
Forestry and Lumbering	--	--	--
Mining	--	--	--
Construction	14.7	14.9	14.4
Manufacturing	2.9	--	1.1
Wholesale and Retail	11.3	6.3	6.2
For-Hire	6.1	3.7	3.0
Personal Transportation	48.7	58.6	59.4
Utilities and Services	7.4	6.5	9.2
All Other	3.4	6.1	4.6

SOURCE: U.S. Department of Commerce, Bureau of the Census, 1972 Truck Inventory and Use Survey.

Automobile Ownership and Use

Mode of Transportation to Work in State, 1970

Private Automobile	Percent of Workers
Driver	51.4
Passenger	9.0
Total Private Auto	60.4
Taxi	.2
Public Transit(1)	1.2
Other(2)	38.2
Total	100.0

(1) Public transit includes bus, street car, subway, elevated train and railroad.
(2) Other includes walked only, worked at home, and other means.

SOURCE: U.S. Bureau of the Census, Census of Population, 1970.

* * *

Household Ownership of Automobiles in State, 1970

Households with Automobiles	Number of Households	Percent of Households
One	42,769	54.1
Two	17,824	22.5
Three or More	2,968	3.8
With One or More	63,561	80.4
With No Automobile	15,498	19.6
All Households	79,059	100.0

SOURCE: U.S. Bureau of the Census, Census of Population, 1970.

Employment in Highway Transport Industry in State

Petroleum Industry	429
Automotive Sales and Servicing	2,715
Road Construction and Maintenance	1,934
Truck Drivers*	15,200
Motor Bus and Taxi Employment	572
Total	20,850

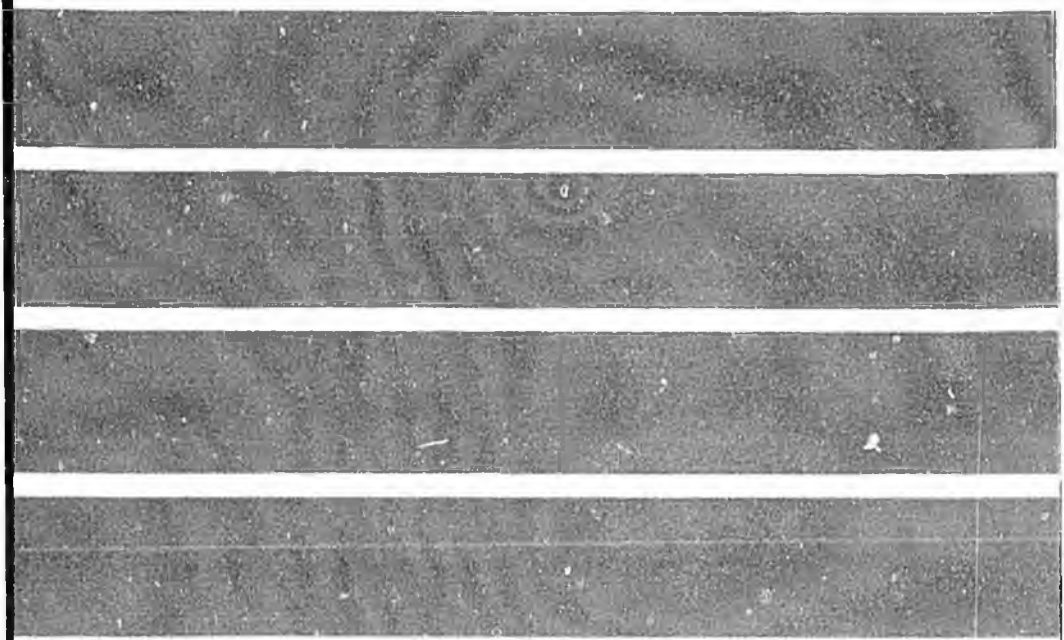
* - Including maintenance, shipping and other trucking employees.
SOURCE: Estimated by Motor Vehicle Manufacturers Association of the U.S., Inc. on the basis of latest Federal Government data by states.

* * *

Road and Street Mileage, 1975

Non-surfaced	3,780
Surfaced	6,161
Total	9,941

SOURCE: U.S. Department of Transportation, Federal Highway Administration.



MOTOR VEHICLE MANUFACTURERS ASSOCIATION
of the United States, Inc.

DETROIT: 320 New Center Building
Detroit, Michigan 48202
(313) 872-4311

WASHINGTON: 1909 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 872-9339

Brad 5/4/79

attached is the recomendation for the ATC pre-conference.
From Ben B.

It does nothing but continue the ATC for 2 years and increase the enforcement authority of the ATC

Jim

Original sponsor: Commerce Committee

Offered: 4/26/79
Referred: Judiciary and Finance

IN THE SENATE BY THE COMMERCE COMMITTEE

HOUSE CS FOR SENATE BILL NO. 236 am H

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act continuing the existence of the Alaska Transportation Commission and amending laws relating to the commission; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 44.66.010(2) is amended to read:

(2) Alaska Transportation Commission (AS 42.07.011) -- June 30, 1981 [1979];

* Sec. 2. AS 02.05 is amended by adding a new section to read:

~~Sec. 02.05.035. EXEMPT AIR CARRIERS. This chapter applies to all air carriers unless specifically exempted by this section. This chapter, except when specifically otherwise provided, does not apply to~~

~~(1) the operation of rotary-wing aircraft (helicopters) by an air carrier;~~

~~(2) the operation of unscheduled, single-engine, fixed-wing aircraft with a certified gross takeoff weight of 5,500 pounds or less by an air carrier.~~

* Sec. 3. AS 39.25.120 is amended by adding a new paragraph to read:

(12) the director, deputy director, hearing officers and staff legal counsel of the Alaska Transportation Commission.

* Sec. 4. AS 42.07.101 is repealed and re-enacted to read:

Sec. 42.07.101. EMPLOYMENT OF COMMISSION PERSONNEL. (a) The commission may employ an executive director who shall have had at least five years of experience in public transportation management or

regulation, law, accounting, or an allied field. The executive director may be a member of the commission. The commission may employ engineers, hearing officers, staff legal counsel, experts, clerks, accountants, and other agents and assistants it considers necessary. The executive director, if not a member of the commission, his deputy and staff legal counsel to the commission are in the partially exempt service under AS 39.25.120. All other employees and agents of the commission are in the classified service under AS 39.25.100. The salary of an executive director who is a member of the commission may not exceed that of a superior court judge.

(b) In addition to its staff of regular employees, the commission may contract for and engage the services of consultants and experts the commission considers necessary.

* Sec. 5. AS 42.07.121 is amended to read:

Sec. 42.07.121. GENERAL POWERS AND DUTIES. The Alaska Transportation Commission shall supervise and regulate transportation in the state as provided in this chapter and in AS 02.05 and AS 42.10 [, AS 42.15, AS 42.25], and may do all things, whether specifically designated in this chapter or in AS 02.05 or AS 42.10 [, AS 42.15, AS 42.25], or in addition thereto, which are necessary or convenient in the exercise of this power and jurisdiction.

* Sec. 6. AS 42.07 is amended by adding a new section to read:

Sec. 42.07.126. EXEMPT TRANSPORTATION CARRIERS. The jurisdiction of the commission does not extend to the regulation of ~~carriers by bus or to the regulation of~~ ferry transportation.

* Sec. 7. AS 42.07.131 is amended to read:

Sec. 42.07.131. AUTHORITY LIMITED BY FEDERAL LAW. The provisions of this chapter and AS 02.05 and AS 42.10 [AND AS 42.15] apply to transportation carriers engaged in foreign commerce and interstate commerce

to the extent permitted by the constitution and laws of the United States.

* Sec. 8. AS 42.07 is amended by adding a new section to read:

Sec. 42.07.136. INSURANCE OR DEPOSIT OF SECURITY ON EXEMPT CARRIERS. The commission shall require carriers exempted under AS 02.05.035, AS 42.07.126, and AS 42.10.020 to procure and maintain bodily injury and property damage liability insurance from a company licensed to write insurance in the state or deposit security for the limits of liability and upon the terms and conditions the commission determines necessary for the reasonable protection of the public against damage and injury for which the carrier may be liable by reason of its operation. Evidence of the required insurance shall be filed with the commission.

* Sec. 9. AS 42.10.020 is amended by adding a new paragraph to read:

(5) motor vehicles operated as tow trucks.

* Sec. 10. AS 42.10.090(2) is amended to read:

(2) require every private carrier and every exempt carrier except as provided in AS 42.10.020(4) and (5) to file information required by the commission to carry out this chapter, and supervise and regulate each private carrier in all other matters affecting its relationship with the shipping and the general public.

* Sec. 11. AS 39.23.060 is amended to read:

Sec. 39.23.060. REVIEW OF COMPENSATION AND BENEFITS; OFFICERS COVERED. The commission shall conduct an on-going review of compensation and retirement benefits for members of the legislature; the governor; the lieutenant governor; commissioners, deputy commissioners, and division directors of each executive department; members of the Alaska Public Utilities Commission; members of the Alaska Pipeline Commission; members of the Alaska Transportation Commission; members of the Alaska

Commercial Fisheries Entry Commission; and the judiciary, to determine the appropriateness of compensation and benefits.

* Sec. 12. AS 39.27.011(b) is amended to read:

(b) The salary schedule set out in (a) of this section has no effect upon other provisions of law specifying the salary of the governor, lieutenant governor, legislators, judicial officers as defined in AS 22.20.010, department heads, and members of the Alaska Public Utilities Commission, the Alaska Transportation Commission, the Alaska Pipeline Commission, or the Alaska Commercial Fisheries Entry Commission.

* Sec. 13. AS 42.07.071 is amended to read:

Sec. 42.07.071. COMPENSATION OF MEMBERS OF THE ALASKA TRANSPORTATION COMMISSION. The Commissioners are in the exempt service under AS 39.25 and shall receive an annual salary as established under AS 39.23 [SET BY AS 39.27.011(a) FOR RANGE 27, STEP C OF THE STATE PAY PLAN].

* Sec. 14. AS 42.15 and AS 42.25 are repealed.

* Sec. 15. AS 02.05.035(2), as added by sec. 2 of this Act, takes effect July 1, 1980. Sections 1 and 3 - 10 and 14 of this Act take effect July 1, 1979. Section 11 of this Act takes effect immediately in accordance with AS 01.10.070(c). Sections 12 and 13 of this Act take effect on the effective date of the next recommendation submitted to and accepted by the legislature under AS 39.23.080(c) following the effective date of sec. 11 of this Act.

Original sponsor: Sumner

Offered: 4/29/79
Referred: Rules

IN THE SENATE BY THE COMMERCE COMMITTEE

HOUSE CS FOR CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 60

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the Alaska Transportation Commission and to its regulation of air commerce under the Alaska Air Commerce Act of 1960."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 42.07.031 is amended to read:

Sec. 42.07.031. QUORUM. Two members of the commission constitute a quorum for the transaction of business, for the performance of a duty, or for the exercise of a power of the commission, except as provided in AS 42.07.181(d).

* Sec. 2. AS 42.07.101 is repealed and re-enacted to read:

Sec. 42.07.101. EMPLOYMENT OF COMMISSION PERSONNEL. (a) The commission may employ an executive director who shall have had at least five years of experience in public transportation management or regulation, law, accounting, or an allied field. The executive director may be a member of the commission. The commission may employ engineers, hearing officers, staff legal counsel, experts, clerks, accountants, and other agents and assistants it considers necessary. The executive director, if not a member of the commission, his deputy, hearing officers and staff legal counsel to the commission are in the partially exempt service under AS 39.25.120. All other employees and agents of the commission are in the classified service under AS 39.25.100. The salary of an executive director who is a member of the commission may not exceed that of a superior court judge.

(b) In addition to its staff of regular employees, the commission

may contract for and engage the services of consultants and experts the commission considers necessary.

* Sec. 3. AS 42.07.141 is amended by adding a new subsection to read:

(e) The commission may adopt regulations or issue orders governing the protection, assemblage, exchange, and distribution of information including the allocation of any costs incurred by a person in performing those activities.

* Sec. 4. AS 42.07 is amended by adding new sections to read:

Sec. 42.07.171. ENFORCEMENT AUTHORITY. An enforcement officer authorized and designated by the commission has the enforcement authority set out in this section in order to enforce regulations and orders of the commission and to enforce the statutes that the commission has the responsibility to administer. The commission may authorize that person to

(1) require the operator of any surface or air vehicle which may be subject to or is reasonably believed to be subject to the authority of the commission to present documents of vehicle registration, ownership, or other documents required by regulation to be in the possession of the operator;

(2) issue citations for the violation of a regulation, order, or statute under the jurisdiction of the commission; and

(3) apply to a court for an appropriate order.

Sec. 42.07.181. STOP ORDERS. (a) The commission may, following a hearing under its regulations, issue a stop order directed to a person violating a regulation, order, or statute under the jurisdiction of the commission.

(b) The commission may issue a stop order on its own motion before a hearing if it finds that immediate and irreparable harm is likely to occur to the public if the order is not issued. In addition, the commis-

sion may iss a stop order on its own motion if it finds that the party to whom the order is directed

(1) has failed to file required insurance or surety bonds;

(2) is no longer fit, willing and able to operate properly;

(3) is operating without an appropriate certificate or permit allowing him to conduct the transportation in question; or

(4) is operating in a manner that will jeopardize the public safety if such an order is not issued.

(c) A stop order issued by the commission on its own motion and without a hearing is effective for five days, and the order shall provide the respondent a hearing within five days. If requested by the respondent, the hearing shall be held in the judicial district in which the residence or principal place of business of the respondent is located. If a hearing has been provided within five days, the commission may extend the stop order an additional five days in order that the commission may decide the matter.

(d) If a single commissioner finds that a person engaging in transportation does so in a manner that creates a likelihood that the public safety will be jeopardized if a stop order is not issued, he may issue a stop order without a hearing. A stop order issued by a single commissioner is effective for 48 hours or until a stop order is issued by the commission under (c) of this section.

(e) A stop order shall be rescinded if the commission finds, upon petition or upon its own motion, that the respondent has complied with the terms of the stop order, or that the stop order was erroneously or improperly issued.

(f) If, after a hearing, the commission finds that a respondent violated the stop order, the commission may fine that person not more than $1,000 for each day the violation of the stop order continues, or

an amount equal to any revenue that person earned as a result of violating the stop order, whichever is greater. No fine may be collected if violations or alleged conditions upon which the stop order was issued are found by the commission or by a court not to apply.

(g) A respondent who is injured by the stop order or citation and is subsequently determined not to have been in violation of a regulation, order, or statute under the jurisdiction of the commission has a claim against the state. A claim under this subsection shall be filed in the superior court. It is not a defense to a claim under this subsection that the stop order or citation constituted a discretionary act on the part of the commission or the enforcement officer.

(h) In this section, "respondent" means a person against whom a stop order or citation is directed.

* Sec. 5. The Alaska Transportation Commission shall amend its rules of practice and procedure within 180 days of the effective date of this Act to insure that any person subject to a stop order issued under AS 42.07.181 has the opportunity to have the stop order rescinded because he has complied with its terms.

* Sec. 6. AS 02.05.050(d)(1) is amended to read:

(1) may, in accordance with his certificate, the limitations established by this chapter and regulations of the commission, utilize in all areas of the state from which he is authorized to operate, aircraft <u>which have a maximum payload capacity determined with reference to federal air regulations of not more than 7,500 pounds and a maximum passenger seating configuration, exclusive of any pilot's seat, of 30</u> [HAVING A MAXIMUM CERTIFICATED TAKEOFF WEIGHT OF 12,500 POUNDS OR LESS] except as authorized on certificates in effect on September 26, 1972 or as otherwise authorized by the commission;

* Sec. 7. AS 02.05.050(d)(3) is amended to read:

(3) may charge individual passenger fares and per pound cargo rates [ON BUSH ROUTES OR POINTS SERVED BY HIM ON AN IRREGULAR BASIS; HOWEVER, NO INDIVIDUAL PASSENGER FARE AND PER POUND CARGO RATE MAY BE LESS THAN THAT CONTAINED IN THE PUBLISHED TARIFF OF A SCHEDULED CARRIER BETWEEN POINTS BEING SERVED BY THE CARRIER];

Dividends from Deregulation

A benefit, on balance, for travelers and traffic

Almost exactly a year ago, Congress passed the Airline Deregulation Act, which in the name of free market economics all but stripped away the bureaucracy that had controlled and coddled the U.S. air travel industry for 40 years. Generally, the skies were opened to many new carriers, and operators were given unprecedented freedom to change routes, flight schedules and even their fares. Result after twelve months: a spurt of competition that has brought benefits for travelers as well as some headaches, but that may be cut short by new financial woes afflicting the industry.

On balance, deregulation has led to improved service. Scheduled carriers have added flights at more than 100 cities, and 35 carriers began serving 231 routes that had not previously been flown by lines that had permission to use them. In addition, 32 carriers have taken advantage of a rule that allows each line to begin flying one new route each year without having to get the Civil Aeronautics Board's assent. Insists United Airlines Chairman Richard Ferris: "About 98% of the traveling public has as much or more service available today than a year ago."

The big gainers have been hub cities such as Los Angeles, Houston, Chicago and New York and recreation meccas like Hawaii and Florida. But there have been losers too. Some 60 cities have been stripped of all scheduled airline service. In Chattanooga, which lost much of its service when United and Eastern pulled out this year, James Hunt, a Chamber of Commerce executive, says unhappily of deregulation: "Count us as one of the minuses."

The hope was that in places where service was curtailed or ended altogether, commuter airlines flying small planes and endowed with subsidies would fill the gap. Indeed, in the past twelve months more than 60 such lines have started up. But as a group they are plagued by a shortage of suitable aircraft and a poor safety record. So far in 1979, crashes involving commuter planes have killed 61 persons, vs. 42 in all of 1978.

The increased competition brought on by deregulation has cut average air travel costs. Traffic is up by 13.5% for the first nine months of this year, on top of a 17% increase in 1978, and about half of all air travelers now pay discount fares. The flood of flights has overstrained airports, creating booking, check-in and departure delays. Planes are packed, and even first-class seats can be difficult to get because more and more passengers are paying the premium rates to avoid the crowding and hassle of cabin class. But despite this booming business and a 32% increase in basic fares, the airlines are encountering profit problems, chiefly as a result of higher fuel prices. Says Marvin Cohen, chairman of the CAB: "Fuel has been a real bitch."

Jet fuel, which cost 25¢ per gal. in 1970, is now 70¢ and rising fast; today fuel accounts for about 30% of an airline's operating costs, up from 16% only two years ago. Having earned more than $1 billion in the first nine months of 1978, the industry cleared only $580 million in the same period this year, and all carriers are scrambling to cut costs. TWA has laid off 2,500 employees; and United, which was grounded by a long strike last spring and is now being hurt by passengers cashing in and flying on half-fare coupons, has furloughed 195 pilots and 400 other employees. Braniff has pulled out of 23 of the 40 markets it entered a year ago. Pan Am, which last week got CAB approval for its plan to merge with National, has dropped some overseas routes.

Some airline executives argue that deregulation has helped the carriers cope with runaway costs. Insists John Zeeman, vice president of passenger marketing at United: "If we did not have deregulation we would have been hurt worse. We have problems catching costs but we are now more flexible and can better respond to the market." The real test of that will come next year, when air travel is expected to drop as the recession begins to bite deeper. "The jury is still out," says Edwin Colodny, chairman of USAir (formerly Allegheny). "There will be no full answer on deregulation until the industry has gone through a full economic cycle, up and down."

For now, however, the carriers seem eager to exercise their new freedom to fight for business. At present, the hottest battleground is Florida, where National, Delta and Eastern are all facing new competition on routes in and out of the Sunshine State. Since deregulation, American, Ozark and Republic have all launched runs between Florida and points in the Midwest and other areas, while Braniff has increased its service from Texas and Western states. TWA and United plan to invade Florida this winter.

RAY FISHER

Passengers board a New York–bound Air Florida flight in Miami

Some "gnats" are spreading wings, and making money too.

One beneficiary of all this competition has been the traveling public. Sun seekers can now fly more nonstops to Florida than ever before, and for a multitude of discount fares. As a result, traffic is booming; in the year ending last July, the number of passengers passing through Miami airport was up 21%.

Another beneficiary has been Air Florida, one of the many smaller carriers across the country that have been able to spread their wings under deregulation. Two years ago, it was just another rickety one-state airline, linking six Florida cities with half a dozen planes. Today it is an aggressive regional carrier that serves 23 cities, including Washington, D.C., Philadelphia and New York, with a fleet of jets. This fiscal year it turned its first real profit: $2.4 million. Says Chairman C. Edward Acker: "Without deregulation we'd still be tiny. It has given us the ability to move fast into markets."

When Air Florida expanded to New York and Washington, it undercut its bigger competitors by offering one-way fares of just over $50 (since raised to $70). In a kind of backhanded salute to its aggressiveness, Eastern and other carriers struck back with lower fares on in-state routes. They forced Air Florida to reduce sharply its Miami-Tampa flights and all but abandon the Miami-Orlando run, but the airline retaliated, charging Eastern with "predatory pricing" before the CAB. Eastern spokesmen denied the Air Florida challenge, saying, "They're a gnat. We didn't even know they were there." As a result of deregulation, that may change. ■

Alaska State Legislature

Senate

Committee on Commerce

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM TO: Senator Clem Tillion
President, Alaska State Senate

FROM: Senator Brad Bradley
Chairman, Senate Commerce Committee

SUBJECT: Senate Commerce Committee Reports of Action Tkaen on Performance Reviews of Alaska Transportation Commission and Occupational Licensing Division

DATE: March 7, 1979

In accordance with the Secretary of the Senate Memorandum dated January 23, 1979, the Alaska Senate Commerce Committee has completed its public hearings and reviews of the Alaska Transportation Commission (Enclosure #2) and the Occupational Licensing Division (Enclosure #3) and forwards herewith the committee's reports of action taken.

WEB:jp
Encl (4)
1. Perf. Rev./ATC
2. Senate Commerce Comm. ATC Rept.
3. Perf. Rev./Occup. Lic. Div.
4. Senate Commerce Comm./Occup. Lic. Rept.

3 ATC

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WEB:jp
Encl

SENATE COMMERCE COMMITTEE REPORT
OF ACTION TAKEN ON PERFORMANCE REVIEW
OF THE
ALASKA TRANSPORTATION COMMISSION

STATEMENT OF PROBLEM

In accordance with the provisions of Alaska Statutes 44.66.010 and 44.66.050, the Senate Commerce Committee, as the delegated committee of reference, has conducted the required sunset review of the Alaska Transportation Commission. This report fulfills the legislative requirement for the committee of references' responsibility to make formal notification to the president of the Senate of its findings relative to the Alaska Transportation Commission.

BACKGROUND

The tenth legislature, acting in the interest of streamlining government and making it more efficient, decreed that certain bodies be reviewed and evaluated periodically to determine whether their continuation is in the best interest of the public. The Legislative Budget and Audit Committee has conducted their required performance review of the Alaska Transportation Commission and submitted it to the Legislature (attached as enclosure #1).

The Senate Commerce Committee was delegated as the committee of reference by the president of the Senate. The Senate Commerce Committee has held three public hearings during which testimony was received from all those who requested a chance to be heard. Among those who were heard were the Deputy Commissioner of the Department of Commerce and Economic Development representing the Commissioner of the Department of Commerce and Economic Development, and the Chairman of the Alaska Transportation Commission. The remainder of those who testified were from various sectors of the transportation industry, representing both the ground and air modes of transportation, and the public at large. Those individuals representing various organizations or those who themselves could not testify in person submitted written testimony.

DISCUSSION

The thrust of the testimony covered three general categories: (1) Adminstrative position, (2) Trucking Industry, and; (3) Air Industry. A summary of these positions follows.

(1) The general administrative position is to follow the recommendations embodied in the Performance Review (attached as enclosure #1). The administrative position as stated by the Department of Commerce and Economic Development included the following recommendations:

a. That the Alaska Transportation Commission not be assigned a dedicated attorney.

b. That the bulk commodity carriers (dump trucks) be de-regulated.

c. That a study should be made determining the affects of de-regulation prior to the implementation of de-regulation. In other words, the administration does not know what the consequences would be if the Alaska Transportation Commission were terminated June 30, 1979.

d. An additional recommendation made by the Chairman of the Alaska Transportation Commision was that an economist be assigned to the Commission in an advisory position.

(2) The concensus opinion presented by the trucking industry was that the Alaska Transportation Commission should be retained. It was the feeling of the industry representatives that regulation is necessary to insure a stable and responsive transportation system in the State of Alaska. One witness expressed a concern over the currently structured regulatory process. Another witness expressed a desire to de-regulate the entire commission with respect to the trucking and towing industry.

(3) The Alaska Air Carriers Association supports the findings of the Legislative Audit report and favors continuation of the Air Commerce Laws and Regulations. However, some individual air operators were for de-regulation of the air carrier portion of the Alaska Transportation Commission's

responsibilities. The central theme of their objections were concerned with limited entry provisions of the law, and a deep desire to let the public decide for themselves what they want and not be told what they can and cannot do.

CONCLUSION

The Senate Commerce Committee, after hearing the testimony, has come to the following conclusions:

(1) The Alaska Transportation Commission should be continued subject to correction of the deficiencies noted and resolution of the recommendations made by the Legislative Budget and Audit Committee (enclosure #1).

(2) The economic review study of de-regulation which was recommended by the Legislative Budget and Audit Committee should be funded by the Legislature and should be conducted by a qualified independent research organization.

(3) At this time, it does not appear that there is an alternative method of achieving the stated purposes and objectives of the Alaska Transportation Commission; however, the Economic review study (referred to in sub-paragraph (2) of this paragraph) may result in recommended administrative and operational changes.

(4) On the basis of the testimony received, it does not appear that the Alaska Transportation Commission could be consolidated with any other board or commission within the state government.

RECOMMENDATIONS

The Senate Commerce Committee recommends that the following actions be taken by the eleventh legislature.

(1) The Performance Review of the Alaska Transportation Commission, conducted by the Division of Legislative Audit, be approved and adopted as the required report to the president of the Senate together with this report.

(2) The Legislature fund an economic review study of de-regulation as recommended by the Senate Commerce Committee and Legislative Budget and Audit Committee.

(3) That legislation be drafted to extend the life of the Alaska Transportation Commission until June 30, 1980, pending the recommended economic review study of de-regulation. (see sub-paragraph (2) of this paragraph).

(4) In the interim, the Senate Commerce Committee recommends that certain legislative actions be taken to correct the deficiencies of the Alaska Transportation Commission as noted in the Legislative Budget and Audit Review. These would include, but should not be limited to SSSB 60, SB 97 and SB 236 (attached), which are currently scheduled for consideration by the Senate Commerce Committee during the first session of the eleventh legislature.

SENATE COMMERCE COMMITTEE

SENATOR BRAD BRADLEY, CHAIRMAN

SENATOR ARLISS STURGULEWSKI, V.C.

SENATOR TIM KELLY, MEMBER

SENATOR TERRY STIMSON, MEMBER

SENATOR FRANK FERGUSON, MEMBER

3/7/79
WEB:jp

SENATE COMMERCE COMMITTEE REPORT ON SUNSET REVIEW OF THE ALASKA TRANSPORTATION COMMISSION

STATEMENT OF PROBLEM

In accordence with the provisions of Alaska Statytes 44.66.010 and 44.66.050 the Senate Commerce Committe as the deligated committee of reference has conducted the required sunset review of the Alaska Transportation Commission. This report fulfilles the legislative requirment for the committee of references' responsibility to make formal notification to the president of the Senate of their findings relitive to the Alaska Transportation Commission.

BACKGROUND

The tenth legislature, acting in the interest of streamlining government and make it more efficient, decread that certian bodies be reviewed and evaluated periodically to determin weather their continuation is in the best interest of the public. The Legislative Budget and Audit Committee has conducted their required review of the Alaska Transportation Commission., and submittde their Preformance Review to the legislature (attached as inclosure #1).

The Senate Commerce Committee was deligated as the committee of reference by the President of the Senate. The Senate Commerce Committee has held three public hearings during which testimony was recieved from all those who requested a chance to be heard. Among those who were heard were the

deputy Commissioner of Commerce and Economic Development representing the Commission of Commerce and Economic Development, and the Chairman of the Alaska Transportation Commission. The remainder of those who testified were from various sectors of the industry and the public at large.

DISCUSSION

In The thrust of testimony fell into three catagories: (1) Administrative position, (2) Trucking Industry, and (3) Air Carriers. A Summery of these positions followes.

(1) The general administrative position is to follow the recomendations embodied in the Preformance Review (attached as enclosure #1). The administrative position as stated by the Department of Commerce and Economic Development included the following recomendations. (A) that the Alaska Transportation Commission not be assigned a dedicated attorney. (B)That the bulk commodity carriers (dunp trucks) be de-regulated. (C) That a study should be made determining the affects of de-regulation prior to the implementation of de-regulation. In other words thhe administration does not know what the affects of consequences whould be if the Alaska Transportation Commission were sunseted June 30, 1979. (D) An additional recomendation made by the Chairman of the Alaska Transportation Commission was that an economic economist be assigned to the commission in an advisory possition.

(2) The concenious opinion presented by the trucking industry was that the Alaska Transportation Commission should be ~~stronger~~ retained. It was the feeling of the industry representatives that regulation is an ~~absolute~~ necessity to insure a stable responsive transportation system to the State of Alaska. One witness expressed a concern over the currently structured regulatory process. Another witness expressed a desire to de-regulate the entire commission with respect to the trucking and towing industry.

(3) The conseccious position presented by the Air Carriers was for de-regulation of the air portion of the Alaska Transportation Commission responsibilities. The centeral theam of their objections were concerened with limited entry provisions of the law, and a deep desire to let the public decide for themselves what they want and not betold. The Air Carriers Association is in favor of continuel regulation.

cONCLUSION

The Senate Commerce Committee after hearing the testimony has come to the following conclusions:

(1) The Alaska Transportation Commission should be continued subject to resolution of the recomendations made by the Legislative Budgit and Audit Ckmmittee (enclouser #1).

(2) That the economic review study recomended by the Legislative

Budget and Audit Committee Report, be funded by the legislature, provided the study be conducted by an independent research orginization.

(3) It does not appear at this time that there is an alternative method of achieving the stated purposes and objectives of the Alaska Transportation Commission. The Economic review study (refered to in sub paragraph (2) of this paragraph) may ~~reeemmen~~ result in recomended changes.

(4) It does not appear, on the basis of testimony recieved, that the Alaska Transportation Commission could be consolidated with any other board or commission within the state government.

RECOMENDATIONS

The Senate Commerce Committee recomend the following actions be taken by the eleventh legislature.

(1) The Preformance Review of the Alaska Transportation Commission, conducted by Legislative Audit, be approved and adopted as the required report to the president of the Senate together with this report.

(2) The Legislature fund a review study as recommended by the Senate Commerce Committee and Legislative Budget and Audit Committee.

(3) That legislation be drafted to extend the life of the Alaska Transportation Commission until June 30, 1980, pending the recomended economic study of de-regulation. (see paragraph (2) of this paragraph.

(4) In the intrum the Senate Commerce Committee recomends that certian ~~legislatiion~~ legislative actions be taken to correct the deficencies of the Alaska Transportation Commsiiion as noted in the Legislative ~~Bugs~~ Budgit and Audit Review. These would include but not be limited to sponser substitute SB-60 and SB-97.

SENATE COMMERCE COMMITTEE REPORT
ON SUNSET REVIEW OF THE
DIVISION OF OCCUPATIONAL LICENSING,
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

STATEMENT OF PROBLEM

In accordance with the provisions of Alaska Statutes 44.66.010 and 44.66.050 the Senate Commerce Committee as the designated committee of reference has conducted the required Sunset Review of the Division of Occupational Licensing. This report fulfills the legislative requirements for the committee of references' responsibility to make formal notification to the President of the Senate of their findings relative to the Division of Occupational Licensing.

The Senate Commerce Committee is designated as the committee of reference by the President of the Senate. The Serate Commerce Committee has held one public hearing during which testimony was received from all those who requested a change to be heard. Among those who were heard were the Director representing the Division of Occupational Licensing and the Chief Investigator from Occupational Licensing. The remainder of those who testified were the Deputy Director of Commerce and Economic Development and a representative from the Alaska Health Coalition.

DISCUSSION

The thrust of testimony received fell into two categories: (1) Administration position and, (2) the Health Care Industry.

(1) The administrative position is to follow the recommendations embodied in the Performance Review (attached as enclosure #1). The administrative position as stated by the Department of Commerce and Economic Development included the following recommendations:

a., That the Division of Occupational Licensing should display better management through an in-house organization program.

b. That the Division of Occupational Licensing whose primary goal is to ensure that Alaskans are adequately protected from unscrupulous or incompetent practitioners, streamline the investigation process.

(2) The concensus position presented by the Health Care Coalition was that money is the major problem plaguing the various boards, especially money for investigative services. Lack of division funds for investigative services has stymied every board being reviewed. The Coalition also believes that more complaints would be filed if people were better informed as to the procedures for doing so. A major concern of the coalition was the lack of communication between the Division of Occupational Licensing and the boards. Reference was made that introduction of legislation directly affecting the boards

be discussed with the boards prior to introduction. The following recommendations were submitted by the Health Coalition:

a. That the Division of Occupational Licensing investigations be transferred to the Department of Public Safety.

b. The Division of Occupational Licensing be required to submit to boards all proposed legislation having a direct or indirect affect on the boards.

c. The Division of Occupational Licensing play a stronger role in settling disputes between boards and other agencies and departments.

d. Require the Division of Occupational Licensing to actively solicit names for possible appointments from the public and private sectors and that the division periodically review and update it with current information.

e. All the statutes in Chap. 08 by revised to limit the number of terms that any board member could serve to two.

f. The division should review the licensing fee structure and seek appropriate revisions.

CONCLUSION

One Senate Commerce Committee after hearing all testimony provided in the hearing has come to the following conclusions:

(1) The Division of Occupational Licensing should be continued subject to resolution of the recommendations made by the Legislative Budget and Audit Committee (attached enclosure 1).

(2) Statutory amendments are needed to assure that appropriate action is taken on consumer complaints against licensed persons.

(3) It does not appear at this time that there is an alternative method of achieving the stated purposes and objectives of the Division of Occupational Licensing.

(4) It does not appear on the basis of testimony received that the Division of Occupational Licensing could be consolidated with any other board or commission within the state government

RECOMMENDATIONS

The Senate Commerce Committee recommends the following actions be taken by the eleventh legislature:

(1) The performance Review of the Division of Occupational Licensing conducted by the legislative audit be approved and adopted as the required report to the president of the Senate together with this report.

(2) That legislation be drafted to extend the life of the Division of Occupational Licensing until June 30, 1980.

(3) In the interim the Senate Commerce Committee recommends that certain legislative actions be taken to correct the deficiencies in the Division of Occupational Licensing as noted in the Legislative Budget and Audit Performance Review. These would include, but not be limited to, SB 73.

Alaska State Legislature

Senate

Office of the Secretary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

January 23, 1979

MEMORANDUM TO: Commerce Committee

From: Secretary of the Senate RM

Subject: Sunset Audits with Discussion of Legislative Oversight Responsibilities

The President has referred the following reports to the Commerce Committee for public hearings:

A Performance Review of the Alaska Transportation Commission, October 24, 1978

A Performance Review of the Division of Occupational Licensing Department of Commerce and Economic Development, October 30, 1978

Also enclosed is the memorandum of January 22 from the Legislative Budget and Audit Committee pointing out the requirements set out in AS 44.66.050(c) d

President Tillion will expect to receive a report from your committee before the March 1st deadline.

Encls:

cc: President

Cross reference. — As to radiation protection, see AS 18.60.475.

Chapter 66. Review of the Activities of Agencies, Boards and Commissions.

Cross reference. — As to the termination, continuation and reestablishment of regulatory boards, see AS 08.03.010.

Editor's note. — Section 1, ch. 149, SLA 1977, provides: "The legislature finds that the substantial increase in the number of state agencies, boards and commissions, and the proliferation of rules and regulations which each has adopted have contributed to a public disenchantment with the operation of state government, and that there is need for an effective and regular system of scrutiny of the programs and activities of all agencies, boards and commissions. The legislature further finds that the establishment of a system for periodic review by the public and the executive and legislative branches of certain state agencies, boards and commissions will help the governor and the legislature to determine the need for the continued existence of each of the agencies, boards and commissions."

Sec. 44.66.010. Termination of state boards and commissions. (a) Boards and commissions listed in this subsection expire on the date set out after each:

(1) Alcoholic Beverage Control Board (AS 04.05.010) — June 30, 1979;

(2) Alaska Transportation Commission (AS 42.07.011) — June 30, 1979;

(3) State Board of Parole (AS 33.15.010) — June 30, 1980;

(4) Alaska Public Utilities Commission (AS 42.05.010) — June 30, 1980;

(5) Alaska Pipeline Commission (AS 42.05.010) — June 30, 1981;

(6) Alaska Council on Science and Technology (AS 44.19.181) — June 30, 1983;

(7) Alaska Renewable Resources Corporation (AS 37.12.010) — June 30, 1982.

(b) Upon termination, a commission listed in (a) of this section shall continue in existence until June 30 of the next succeeding year for the purpose of concluding its affairs.

(c) A commission scheduled for termination under this chapter may be continued or reestablished by the legislature for a period not to exceed four years. (§ 3 ch 149 SLA 1977; am § 3 ch 101 SLA 1978; am § 10 ch 1979 SLA 1978)

Effect of amendments. — The first 1978 amendment added paragraph (6) of subsection (a).

The second 1978 amendment added paragraph (7) of subsection (a).

Editor's note. — The reference in paragraph (5) to AS 42.05.010 should be to AS 42.06.010.

Sec. 44.66.020. Agency activities listed in this sub provided in § 30 of this c regular legislative session each:

(1) programs in the bud protection, and administra

(2) programs in the bud of Alaska — January, 19

(3) programs in the bu — January, 1982;

(4) programs in the management, developme

(b) An agency progra shall be subject to term convening four years aft termination at any time Budget and Audit Comm if under § 30 of this ch

Sec. 44.66.030. Prog session preceding each Legislative Budget and March 1 of those years, category which shall b The recommendations shall be submitted to th of a bill which, if enac programs and activitie ch 149 SLA 1977)

Sec. 44.66.050. Legi dissolution, continuati under AS 08.03.010 o under §§ 20 and 30 o house, which shall be as provided in the Un more hearings to rece of the department ha board, commission, o or commission involv committee shall also commission, or age 37.07.050(f), and the commission, or age

Sec. 44.66.020. Agency programs. (a) Agency programs and activities listed in this subsection which are specifically designated as provided in § 30 of this chapter are subject to termination during the regular legislative session convening in the month and year set out after each:

(1) programs in the budget categories of general government, public protection, and administration of justice — January, 1980;

(2) programs in the budget categories of education and the University of Alaska — January, 1981;

(3) programs in the budget categories of health and social services — January, 1982;

(4) programs in the budget categories of natural resources management, development and transportation — January, 1983.

(b) An agency program or activity designated in (a) of this section shall be subject to termination during the regular legislative session convening four years after the preceding review and may be subject to termination at any time upon the recommendation of the Legislative Budget and Audit Committee and the concurrence of the legislature as if under § 30 of this chapter. (§ 3 ch 149 SLA 1977)

Sec. 44.66.030. Program identification. During the legislative session preceding each of the years set out in § 20 of this chapter, the Legislative Budget and Audit Committee shall designate, not later than March 1 of those years, the programs and activities within each program category which shall be subject to termination in the next fiscal year. The recommendations of the Legislative Budget and Audit Committee shall be submitted to the respective houses of the legislature in the form of a bill which, if enacted into law, would terminate those designated programs and activities on or before July 1 of the following year. (§ 3 ch 149 SLA 1977)

Sec. 44.66.050. Legislative oversight. (a) Before the termination, dissolution, continuation or reestablishment of a board or commission under AS 08.03.010 or § 10 of this chapter, or of an agency program under §§ 20 and 30 of this chapter, a committee of reference of each house, which shall be the standing committee of legislative jurisdiction as provided in the Uniform Rules of the Legislature, shall hold one or more hearings to receive testimony from the public, the commissioner of the department having administrative responsibility for each named board, commission, or agency program, and the members of the board or commission involved. The hearings may be joint hearings. The committee shall also consider the proposed budget of the board, commission, or agency program, prepared in accordance with AS 37.07.050(f), and the performance audit of the activities of the board, commission, or agency program, prepared by the legislative audit

division as prescribed in AS 24.20.271(1). The committee may consider any other report of the activities of the board, commission or program, including but not limited to annual reports, summaries prepared by the Legislative Affairs Agency, and any evaluation or general report of the manner of conduct of activities of the board, commission, or agency program prepared by the office of the ombudsman.

(b) During a public hearing, the board, commission or agency shall have the burden of demonstrating a public need for its continued existence or the continuation of the program, and the extent to which any change in the manner of exercise of its functions or activities may increase efficiency of administration or operation consistent with the public interest.

(c) A determination as to whether a board or commission or agency program has demonstrated a public need for its continued existence shall take into consideration the following factors:

(1) the extent to which the board, commission or program has operated in the public interest;

(2) the extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters;

(3) the extent to which the board, commission or agency has recommended statutory changes which are generally of benefit to the public interest;

(4) the extent to which the board, commission or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided;

(5) the extent to which the board, commission or agency has encouraged public participation in the making of its regulations and decisions;

(6) the efficiency with which public inquiries or complaints regarding the activities of the board, commission or agency filed with it, with the department to which a board or commission is administratively assigned, or with the office of the ombudsman have been processed and resolved;

(7) the extent to which a board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public;

(8) the extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission or agency to its own activities and the area of activity or interest; and

(9) the extent to which statutory, regulatory, budgeting or other changes are necessary to enable the agency, board or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

(d) As to each board, commission, or agency program assigned to it

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(2) a statement, to
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(3) an identification
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(4) an assessment
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Chap

Sec. 44.77.010.

Legislative history
State v. ZIA, Inc., Su
(File No. 2518), 556 P.

for purposes of review, the committee of reference shall, not later than the 60th day of the legislative session, submit a report to the presiding officer of the house. The report shall contain a summary of the findings of the committee as to the compliance of the board, commission or program with the factors enumerated in (c) of this section, together with a summary or recommendations of the committee as to each of the following:

(1) an identification of the problems or the needs that the programs and activities of the board, commission or agency are intended to address;

(2) a statement, to the extent practicable, of the objectives of the program of the board, commission, or agency program, and its anticipated accomplishments;

(3) an identification of any other programs having similar, conflicting or duplicate objectives;

(4) an assessment of alternative methods of achieving the purposes of the program;

(5) an assessment of the consequences of eliminating the board, commission or program and consolidating its activities with another program, or of funding it at a lower level;

(6) a justification for the recommended continuation or extension of the board, commission or program, and an explanation of the manner in which it avoids duplication of or conflict with other efforts; and

(7) any other information which, in the opinion of the committee, would improve the performance of the board, commission or agency with respect to its representation of and responsiveness to the public interest.

(e) The committee of reference may introduce a bill providing for the reorganization or continuation of the board, commission or agency program. No more than one board, commission, or agency program shall be continued or reestablished in any legislative bill, and the board, commission, or agency program shall be mentioned in the title of the bill. (§ 3 ch 149 SLA 1977)

Sec. 44.66.060. Existing claims. This chapter shall not cause the termination or dismissal of a claim or right of a citizen against a board, commission or program of an agency terminated under this chapter which is subject to litigation. Claims and rights shall be assumed by the department to which the board or commission terminated under this chapter was attached for administrative purposes. (§ 3 ch 149 SLA 1977)

Part 8. Claims and Liability.

Chapter 77. Claims Against the State.

Sec. 44.77.010. Presentation of claims.

Legislative history of section. — See State v. ZIA, Inc., Sup. Ct. Op. No. 1337 (File No. 2518), 556 P.2d 1257 (1976)

This section is only applicable after the claimant has pursued an administrative remedy. State v. ZIA, Inc., Sup. Ct. Op. No.

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

FINANCE DIVISION
POUCH WF—STATE CAPITOL
JUNEAU, ALASKA 99811

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

January 22, 1979

To: Presiding Officer of Both Houses

From: Legislative Budget and Audit Committee
George Hohman, Chairman

Subject: Forwarding of Sunset Audits with Discussion of Legislative Oversight Responsibilities

Enclosed are Sunset Audit Reports of 13 boards and commissions that will terminate June 30, 1979. We are forwarding these reports to you so that they may be distributed to the appropriate standing committees you will designate to perform the legislative oversight function.

According to AS 44.66.050 the standing committee of legislative jurisdiction, as provided in Rule 20 of the uniform Rules of the Legislature, shall hold one or more hearings to receive testimony from the public and other parties that have associated responsibilities or interests. In addition the Committee shall consider Legislative Audit's report, the agencies proposed budget, the agencies program performance report and any other tools that might assist them in evaluating the conduct and activities of the agency being terminated.

It is important to note that the terminating agency shall have the burden of demonstrating a public need for its continued existence during the public hearings.

The determination of "public need" for continued existence shall take into consideration the following factors set out in AS 44.66.050(c):

(1) the extent to which the board, commission or program has operated in the public interest;

(2) the extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters;

(3) the extent to which the board, commission or agency has recommended statutory changes which are generally of benefit to the public interest;

(4) the extent to which the board, commission or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided;

(5) the extent to which the board, commission or agency has encouraged public participation in the making of its regulations and decisions;

(6) the efficiency with which public inquiries or complaints regarding the activities of the board, commission or agency filed with it, with the department to which a board or commission is administratively assigned, or with the office of the ombudsman have been processed and resolved;

(7) the extent to which a board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public;

(8) the extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission or agency to its own activities and the area of activity or interest; and

(9) the extent to which statutory, regulatory, budgeting or other changes are necessary to enable the agency, board or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

The Legislative Audit reports have addressed these issues individually but only to the extent allowed by restricted audit scopes detailed within the reports.

The Law further states that the committee of reference shall, not later than the 60th day of the legislative session, submit a report to the presiding officer of each house. The report is to include a summary of findings as to compliance with the "public need" factors enumerated above together with recommendations as to each of the following:

(1) an identification of the problems or the needs that the programs and activities of the board, commission or agency are intended to address;

(2) a statement, to the extent practicable, of the objectives of the program of the board, commission, or agency program, and its anticipated accomplishments;

(3) an identification of any other programs having similar, conflicting or duplicate objectives;

(4) an assessment of alternative methods of achieving the purposes of the program;

(5) an assessment of the consequences of eliminating the board, commission or program and consolidating its activities with another program, or of funding it at a lower level;

(6) a justification for the recommended continuation or extension of the board, commission or program, and an explanation of the manner in which it avoids duplication of or conflict with other efforts; and

(7) any other information which, in the opinion of the committee, would improve the performance of the board, commission or agency with respect to its representation of and responsiveness to the public interest.

The committee of reference may introduce a bill providing for the reorganization or continuation of the agency being terminated as stipulated in AS 44.66.050(c).

In addition, the Law requires the Legislative Budget and Audit Committee to designate, not later than March 1, 1979, programs or activities in the general government, public protection and administration of justice budget categories, which shall be subject to termination in the next fiscal year. It is anticipated that the Legislative Budget and Audit Committee will be recommending six to nine programs for termination which will be submitted to you in the form of bills by the required deadline.

cc: Members of the Legislature

SENATE JOURNAL
HOUSE JOURNAL
ALASKA STATE LEGISLATURE

ELEVENTH LEGISLATURE - FIRST SESSION

JUNEAU, ALASKA | Monday | June 4, 1979

JOINT FINAL SUPPLEMENT

ENROLLMENT

The following was engrossed and enrolled, signed by the President and Secretary of the Senate, and Speaker and Chief Clerk of the House, and the enrolled and engrossed copies transmitted to the Office of the Governor at 3:25 p.m., May 7, 1979:

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 142 — FCCS SB 142

MESSAGES FROM THE GOVERNOR

The following messages dated May 6, 1979 were received stating the Governor has signed the following bills and transmitted the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 5 amended House — HCS CSSB 5 am H
(relating to agricultural loans under the Alaska Agricultural Loan Act; and providing for an effective date)
Chapter 50, SLA 1979

SENATE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 141 — SCS CSHB 141
(establishing the Legislative Limited Entry Study Committee; and providing for an effective date)
Chapter 51, SLA 1979

HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 116 — HCS SB 116
(relating to public employee benefits; and providing for an effective date)
Chapter 52, SLA 1979

SENATE COMMITTEE SUBSTITUTE FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 30 amended Senate — SCS SSHB 30 am S
(relating to the Commercial Fishing and Agriculture Bank)
Chapter 53, SLA 1979

SCS CSHB 147 (Fin) am S — SENATE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 147 (Finance) amended Senate (amending the motor vehicle code; and providing for an effective date) Chapter 54, SLA 1979

CSHB 26 — COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 26 (relating to insurance coverage for persons receiving benefits under the public employees' and teachers' retirement systems) Chapter 55, SLA 1979

CSHB 12 (Fin) am S — COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 12 (Finance) amended Senate (relating to northern technology; and providing for an effective date) Chapter 56, SLA 1979

ENROLLMENT

SR 6 — The following were engrossed and enrolled, signed by the President and Secretary of the Senate and transmitted to the Office of the Governor at 1:15 p.m., May 8, 1979:

SR 15 — SENATE RESOLUTION NO. 6

SR 15 am — SENATE RESOLUTION NO. 15 amended

SR 17 — SENATE RESOLUTION NO. 17

SCR 3 am H HCS SCR 13 — The following were enrolled, signed by the President and Secretary of the Senate, and the Speaker and Chief Clerk of the House, and the enrolled and engrossed copies transmitted to the Office of the Governor at 1:15 p.m., May 8, 1979:

SENATE CONCURRENT RESOLUTION NO. 3 amended House

HCS CSSCR 33 — HOUSE COMMITTEE SUBSTITUTE FOR SENATE CONCURRENT RESOLUTION NO. 13

HCS SJR 25 (Fin) — HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE CONCURRENT RESOLUTION NO. 33

HCS SB 4 — HOUSE COMMITTEE SUBSTITUTE FOR SENATE JOINT RESOLUTION NO. 25 (Finance)

HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 4

HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 52 (Judiciary) — HCS SB 52 (Jud)

HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 63 (Finance) amended House — HCS SB 63 (Fin) am H

The following were enrolled, signed by the President and Secretary of the Senate, and the Speaker and Chief Clerk of the House, and the enrolled and engrossed copies transmitted to the Office of the Governor at 3:40 p.m., May 9, 1979:

HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 12 amended House — HCS CSSB 12 am H

HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 132 (Rules) — HCS CSSB 132 (Rls)

HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 137 amended House — HCS CSSB 137 am H

The following were engrossed and enrolled, signed by the President and Secretary of the Senate, and Speaker and Chief Clerk of the House, and the enrolled and engrossed copies transmitted to the Office of the Governor at 3:40 p.m., May 9, 1979:

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 14 — FCCS SB 14

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 53 — FCCS SB 53

Following is a Memorandum from J. H. Hogan, Director of the Legislative Finance Division regarding the budget:

MEMORANDUM

DATE: May 6, 1979

TO: Russ Meekins, Chairman
Free Conference Committee

John Sackett, Chairman
Senate Finance Committee

FROM: J. H. Hogan, Director
Legislative Finance Division

Following our discussion this morning, the five items listed below comprise the errata sheet for FCC for SSB 53:

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1. Page 52, line 21

Change "Mountain Village" to read "Mountain View".

2. Page 56, line 16

The "Angoon Cultural Facility" should read "$400,000" in both the appropriation item and general fund columns.

Page 60, line 8

The "Angoon Cultural Facility" item should be deleted.

3. Page 59, line 37

The "Eagle River Fire Station Completion" should read "$210,000" under the appropriation item and general fund columns.

4. Page 61, between lines 22 and 23

A new item should be inserted: "Crawler-tractor Grant to Craig" and $50,000 in the appropriation and general fund columns.

5. Page 63, between lines 4 and 5

There should be intent language reading: "This appropriation shall be paid as a grant to Anchorage."

The following was enrolled, signed by the President and Secretary of the Senate, and the Speaker and Chief Clerk of the House, and the enrolled and engrossed copies transmitted to the Office of the Governor at 4:10 p.m., May 9, 1979:

SB
241 SENATE BILL NO. 241

The following were engrossed and enrolled, signed by the President and Secretary of the Senate, the Speaker and Chief Clerk of the House, and the enrolled and engrossed copies transmitted to the Office of the Governor at
FCCS 4:10 p.m., May 9, 1979:
SB
118 FREE CONFERENCE COMMITTEE SUBSTITUTE
FOR SENATE BILL NO. 118

FCCS
SB FREE CONFERENCE COMMITTEE SUBSTITUTE
130 FOR SENATE BILL NO. 130

The following bill was engrossed and enrolled, signed by the President and Secretary of the Senate, the Speaker and Chief Clerk of the House, and the enrolled and engrossed copies transmitted to the Office of the Governor at 4:30 p.m., May 10, 1979: FCCS SB 236

FREE CONFERENCE COMMITTEE SUBSTITUTE
FOR SENATE BILL NO. 236
(continuing the existence of the Alaska Transportation Commission and amending laws relating to the commission)

The following memorandums explain changes made in the engrossed bill as passed by the House and Senate when the bill was enrolled as recommended by the Co-Revisor of Statutes. Speaker Gardiner, Representative Brown, President Tillion and Senator Bradley concurred in the above as enrolled, when contacted on May 10, 1979:

M E M O R A N D U M May 10, 1979

SUBJECT: FCCSSB 236

TO: Peggy Mulligan, Senate Secretary

FROM: Sally McIntire, Enrolling Secretary SM

At the request of the Revisor of Statutes I have made the following clerical corrections in this bill:

(1) *Sec. 12 of the bill has been deleted from the bill and the remaining sections renumbered accordingly.

(2) On page 7, line 16 the reference to AS 42.15 has been removed from the repealer.

I have enclosed a copy of the revisor's memorandum requesting the corrections. The presiding officers should be advised of these corrections made under Rule 42 of the Uniform Rules.

FCCS
SB
236

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM May 10, 1979

SUBJECT: FCCSSB 236

TO: Sally McIntire, Legal Editor

FROM: David T. Walker
Co-Revisor of Statutes

My investigation of conflicts within this bill causes me to conclude that the legislature did not intend for this bill to repeal AS 42.15 (Alaska Bus Act). I have spoken with the bill drafter, reviewed our bill file, and listened to the tape recorded explanations of the Free Conference Committee version of the bill given to the Senate by Senator Bradley and to the House by Representative Brown.

All the evidence indicates that it was the intention of the Free Conference Committee, and the House and Senate, to continue regulating carriers by bus in Alaska, and their belief that FCCSSB 236 did not violate that concept.

Rule 42 of the Uniform Rules requires me, in my role as revisor, to check the engrossed bill for legal content. I have marked on it in red pencil the corrections I believe should be made so they are readily identifiable.

I request that you include them as an authorized clerical correction and report the matter to the secretary under Rule 42, Uniform Rules, Alaska State Legislature.

The history back on the engrossed bill sent to the Governor reflects the action taken above and reflects the opinions of the Free Conference Committee members contacted.

The Governor's veto on the following bill was overridden in a joint session on May 4, 1979:

SCS
HB
45

SENATE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 45
(relating to the Alaska Legislative Council and the Legislative Budget and Audit Committee; eff. date)
Chapter 57, SLA 1979

FCCS SB 53

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M May 16, 1979

SUBJECT: FCCSSB 53 (Budget)

TO: Peggy Mulligan
Senate Secretary

FROM: Donna Spragg Pegues
Co-Revisor of Statutes

I have discovered a clerical error in the enrolled copy of FCCSSB 53 (Budget). At page 4, line 26, after "sec. 45," the words "ch. 163," should be inserted.

We plan to correct the bill before it is duplicated for inclusion in the 1979 session laws.

The following messages dated May 18, 1979 were received stating the Governor has signed the following bills and transmitted the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 25 amended House — HCS CSSB 25 am H

(relating to retirement and benefits for public employees including withdrawal from the federal Social Security System; and providing for an effective date)

Chapter 58, SLA 1979

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 359 — FCCS HB 359

(relating to salmon enhancement)

Chapter 59, SLA 1979

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 34 — FCCS HB 34

(relating to budgets, to appropriations, and to fiscal information; and providing for an effective date)

Chapter 60, SLA 1979

HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 234 (Finance) amended House — HCS SB 234 (Fin) am H

(relating to materialmen's and mechanics' liens)

Chapter 61, SLA 1979

SCS HB 185 — SENATE COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 185
(authorizing state aid to municipalities for the construction and development of cultural facilities)
Chapter 62, SLA 1979

FCCS SB 142 — FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 142
(transferring among fiscal year 1979 appropriations to the Department of Health and Social Services; making appropriations to the Department of Health and Social Services, the Department of Fish and Game, the Department of Community and Regional Affairs, the Office of the Governor, the Department of Law, the Department of Transportation and Public Facilities, the University of Alaska, and the legislative agencies; amending a condition on an appropriation made to the Department of Education in ch. 6, SLA 1979; amending certain fiscal year 1971 and 1973 capital project appropriations made to the Department of Fish and Game; continuing an appropriation made to the University of Alaska Geophysical Institute; and providing for an effective date)
Chapter 63, SLA 1979

SCS CSHB 290 (Rls) — SENATE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 290 (Rules)
(relating to limited entry; and providing for an effective date)
Chapter 64, SLA 1979

HCS SB 192 am H — HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 192 amended House
(relating to the leasing and exploration of state land for oil and gas development; and providing for an effective date)
Chapter 65, SLA 1979

CSSB 145 am H — COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 145 amended House
(relating to implementation of the Alaska coastal management program)
Chapter 66, SLA 1979

HCS CSSB 198 — HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 198
(relating to the hiring of nonpermanent employees in the state personnel system; and providing for an effective date)
Chapter 67, SLA 1979

SENATE BILL NO. 203 SB
(authorizing the issuance and sale of an additional $8,500,000 in revenue bonds for international airports; and providing for an effective date) 203
Chapter 68, SLA 1979

SENATE BILL NO. 202 SB
(making a special appropriation from the International Airports Construction Fund for the Fairbanks International Airport; and providing for an effective date) 202
Chapter 69, SLA 1979

COMMITTEE SUBSTITUTE FOR CSHB
HOUSE BILL NO. 394 394
(relating to state aid for community schools; and providing for an effective date)
Chapter 70, SLA 1979

COMMITTEE SUBSTITUTE FOR CSHB
HOUSE BILL NO. 19 19
amended Senate am S
(relating to agricultural and industrial fairs; and providing for an effective date)
Chapter 71, SLA 1979

May 18, 1979

The Honorable Clem Tillion HCS
President of the Senate SB
The Honorable Terry Gardiner 86
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. President and Mr. Speaker:

Upon the advice of the Attorney General, I am vetoing House Committee Substitute for Senate Bill 86, which expands upon the sunset program and requires fiscal notes for adopting administrative regulations. It is the Attorney General's view that combining those separate subjects in one bill and failing to express the latter subject in the bill's title are fatal defects.

Rather than permit an almost certainly invalid law to go on the books, I feel that the bill should be vetoed. If the legislature still wishes to act on the two subjects, two new bills can be enacted to achieve that result.

Sincerely,

Jay S. Hammond
Governor

The following message dated May 18, 1979 was received stating the Governor has signed the following resolutions and transmitted the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

CS HJR 25 am S
COMMITTEE SUBSTITUTE FOR
HOUSE JOINT RESOLUTION NO. 25 am S
(relating to the establishment and recognition of Children's Day in Alaska)
Legislative Resolve No. 31

HCS SJR 25 (Fin)
HOUSE COMMITTEE SUBSTITUTE FOR
SENATE JOINT RESOLUTION NO. 25 (Finance)
(urging the United States Government to release its interests in the improvements at the Aniak, Port Heiden, and Unalakleet White Alice sites and in property at the Unalakleet airport to the State of Alaska)
Legislative Resolve No. 32

The following messages dated May 18, 1979 were received stating the Governor has read the following resolutions and transmitted the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

SR 17
SENATE RESOLUTION NO. 17
(relating to licensing or permit requirements for shelters for victims of domestic or sexual assault)
Senate Resolve No. 8

SR 6
SENATE RESOLUTION NO. 6
(relating to an amendment to the Icy Cape No. 1 timber sale, contract number SC-182, permitting exportation of round logs)
Senate Resolve No. 9

SR 15 am
SENATE RESOLUTION NO. 15 am
(relating to the exploration and development of Beaufort Sea oil and gas)
Senate Resolve No. 10

HR 11
HOUSE RESOLUTION NO. 11
(relating to licensing or permit requirements for shelters for victims of domestic or sexual assault)
House Resolve No. 6

HR 13
HOUSE RESOLUTION NO. 13
(relating to amendments to the 1906 Antiquities Act and the Federal Land Policy and Management Act of 1976)
House Resolve No. 7

HR 14
HOUSE RESOLUTION NO. 14
(relating to planning for the new capital city)
House Resolve No. 8

SENATE CONCURRENT RESOLUTION NO. 29 — SCR 29
(urging the Governor to direct the commissioner of administration to negotiate no salary or benefit increases which do not meet specifi d criteria)
Legislative Resolve No. 27

HOUSE COMMITTEE SUBSTITUTE FOR — HCS
SENATE CONCURRENT RESOLUTION NO. 13 — SCR 13
(directing the Department of Transportation and Public Facilities to secure possession of buildings at the Aniak, Port Heiden, and Unalakleet White Alice sites for educational purposes)
Legislative Resolve No. 28

SENATE CONCURRENT RESOLUTION NO. 3 am H — SCR 3 am H
(relating to utilization of "flex time" for state employees)
Legislative Resolve No. 29

HOUSE COMMITTEE SUBSTITUTE FOR — HCS
COMMITTEE SUBSTITUTE FOR — CS
SENATE CONCURRENT RESOLUTION NO. 33 — SCR 33
(relating to a continued study of a direct investment by the state in the Alaska natural gas pipeline project)
Legislative Resolve No. 30

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR — FCCS
HOUSE CONCURRENT RESOLUTION NO. 3 — HCR 3
(relating to the designation of incompatible uses within the Chena River Recreational Area)
Legislative Resolve No. 33

The following messages dated May 31, 1979 were received stating the Governor has signed the following bills and transmitted the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR — FCCS
HOUSE BILL NO. 20 — HB 20
(relating to state loan programs and the loan programs of state agencies; and providing for an effective date)
Chapter 72, SLA 1979

COMMITTEE SUBSTITUTE FOR — CSHB
HOUSE BILL NO. 229 — 229
amended Senate — am S
(relating to fish and game licenses; and providing for an effective date)
Chapter 73, SLA 1979

SB 241 — SENATE BILL NO. 241
(continuing the existence of the Board of Nursing; and providing for an effective date)
Chapter 74, SLA 1979

FCCS SB 14 — FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 14
(relating to agricultural development; and providing for an effective date)
Chapter 75, SLA 1979

HCS SB 63 (Fin) am H — HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 63 (Finance) amended House
(making appropriations to the Office of the Governor, to the Alaska Power Authority for feasibility studies for the Susitna hydroelectric project, and to the Legislative Affairs Agency; and providing for an effective date)
Chapter 76, SLA 1979

HCS SB 4 — HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 4
(relating to worker's compensation; and providing for an effective date)
Chapter 77, SLA 1979

HCS SB 52 (Jud) — HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 52 (Judiciary)
(relating to float planes under the Fish and Game Code; and providing for an effective date)
Chapter 78, SLA 1979

HCS CSSB 132 (Rls) — HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 132 (Rules)
(relating to fisheries taxes; and providing for an effective date)
Chapter 79, SLA 1979

FCCS SB 53 — The following message dated June 1, 1979 regarding FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 53 (appropriating for the operating and capital expenses of the state government, effective date) was received:

The Honorable Clem Tillion
President of the Senate
The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

RE: FCCS SB 53
CHAPTER 80

Dear Mr. President and Mr. Speaker:

I am today signing Free Conference Committee Substitute for Senate Bill 53 into law. For the first time in four years the legislature has passed an appropriation bill beneath the ceiling I presented to them in my budget message. This is a most significant precedent and one which I encouraged by assuring the legislature that so long as administrative priorities were accommodated, I would not be forced to veto legislative programs falling beneath such ceiling. While I may not agree with some of the specific uses proposed for these funds, compared to those proposed in my budget, joint acceptance by the legislature and administration of a budget ceiling is a far greater consideration. FCCS SB 53

I am, however, vetoing a portion of Section 15 of this bill, which would have amended Sections 1 and 2 of chapter 2, SLA 1978 by reducing the appropriation made last year to the Department of Transportation and Public Facilities for delineation of a utility corridor and right-of-way extension of the Alaskan Railroad to the Canadian border from $865,000 to $600,000. This section then appropriated $265,000 to the Legislative Council for a similar purpose which I have allowed to stand. The Department of Transportation and Public Facilities had already obligated the majority of these funds when the Free Conference Committee on the budget was taking this action and, therefore, these funds are not available for lapse.

In addition to this veto, I feel I must notify you that there are other sections and "riders" that you placed in the bill which are not legally binding. Since these are not birding, I have -- with notable exception of the bill of attainder at page 18 -- not lined them out in the bill, but I am attaching the review of the bill performed by the Department of Law which outlines the legal responsibilities imposed by the various "riders." As you will note when you read this attachment, many of the "riders" that were placed in the bill have no legal force and in other cases are in direct violation of existing law. Of course, state agencies must follow existing law when there is a conflict between the "rider" and other statutes.

The bill in Section 20 contains language that would lead the public, and perhaps some legislators, to believe that there would be no reduction in services below the level provided in fiscal 1979. This is simply not the case. While the budget I submitted could have retained such service levels, because the legislature shifted funds from my proposed operational budget to capital projects there will be a decrease in certain services. State agencies will, of course, attempt to minimize the service reductions, but there needs to be an understanding that service and employment reductions will occur.

Sincerely,

Jay S. Hammond
Governor

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APPENDIX

Review of Riders on FY 80 General
Appropriations Bill
May 17, 1979

OPERATIONAL BUDGET.

1. Positions. After many of the entries indicating the purpose of an appropriation is a parenthetical indicating a number of positions, i.e., permanent personnel. Appropriation bills must be confined to appropriations. Alaska Const., art. II, § 13. Fixing the numbers of positions in various offices is not an appropriation. Accordingly, these parentheticals are treated as informational, reflecting a likely understanding, but not having the force of law.

2. Page 9, lines 16-19 */ (Capital '80): An appropriation bill must be confined to appropriations. Alaska Const., art. II, § 13. The Fiscal Procedures Act covers purchases of goods and services by all state agencies. AS 37.05.220--280, 320(2). The rider on lines 12-13 cannot be construed to amend the Fiscal Procedures Act.

3. Page 11, lines 25-28, 30-33 (University of Alaska): This rider would require a transfer of $125,000 from the "UNIVERSITY PLANT FUND TO THIS APPROPRIATION AS PROGRAM RECEIPTS FROM EXCESS COLLECTIONS OF DEDICATED REVENUE BOND FEES." The university has title to all its personal property. Alaska Const., art. VII, § 2. Its property is to be managed and disposed of as provided by law. Id. There is nothing in AS 14.40.280--450 which provides for the university to match appropriations from the general fund with money from one or another of its funds or accounts. Because it must be confined to appropriations, it is unlikely that an appropriation bill can be used to achieve that effect. The appropriation probably can be made conditional on a match from the university's own money. Specifying the source, however, gets into managing the university's money directly, and probably goes too far to be valid as a condition.

4. Page 12, lines 5-13, 17-25 (University of Alaska): This

*/ Page references are to the print of the bill as it will appear as a session law. The print is longer (84 pages) than the bill (71 pages) due to printing style differences. Thus, for example, page 56 of the print is page 47 of the bill.

rider contains a conditional exception to the statutory prohibition against making transfers between appropriations. Generally, an appropriation cannot amend other, substantive law. There are two reasons why the provisions here are probably valid. One, the exception made by them is one recognized by case law at any event. Even without these provisions, a reorganization which combined the two units to which the money was appropriated would result in the money's being combined. Two, the subject of the substantive law is appropriations; therefore, the bill is acting only on appropriations and does not exceed the constitutional restriction.

5. Page 13, lines 7-10 (University of Alaska): This is the same as 3, above, i.e., probably over intrusive and invalid. A less intrusive condition requiring a match from the university probably would be valid.

6. Page 13, line 21 (Ketchikan Community College): This is an explanatory item within an allocation and has no real effect.

7. Page 15, lines 20-24 (U of A, Mineral Industry Research Laboratory): The provisions in this rider for lapsing money in the event of a shortfall in the receipt of matching monies appear to duplicate the provisions of section 3 of the bill.

8. Page 16, lines 23-30 (Child Support Enforcement): This rider conditions the expenditure of funds on their not being used to invade constitutionally protected rights. It is directly and substantially related to the appropriation, and therefore, is valid.

9. Page 17, lines 14-16. (Youth Services): The use of the appropriations bill for pass-through grants where a grants program has not been established by law creates both legal and administrative problems because of the absence of standards for determining recipients and amounts. For example, if there are entities similarly situated to the named grantees which are ready, willing, and able to perform the same services, how is one selected and the other not. Does that deny equal protection. Is the legislature by selecting out a single, identified entity to perform a service for a specific amount of money actually contracting for the state for it. Does that violate the separation of powers. The Fiscal Procedures Act. Grants to municipalities (or their agencies) are clearly permissible; they are the state's political subdivisions. But grants to others must be treated as appropriations for contractual services and the provisions of the Fiscal Procedures Act must be followed.

10. Page 17, lines 18-31 (Adult Supportive Services): These

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provisions create the same problems as 9, above. Of course, many of the named recipients provide a singular service, and it can be argued that, as a practical matter, each constitutes a single source. However, under ordinary and customary practice, the state agencies would make requests for proposals and by doing so could create additional sources. As a result, legislative identification of the grantee evades the requirements of the Fiscal Procedures Act. Because this bill cannot amend that Act, its provisions must be followed.

11. Page 18, lines 5-7 (Social Services, Southern Region): This appropriation bill cannot be used to impose a legal requirement that there be a night in-take program at Ketchikan. These provisions are valid as a statement of intent and are entitled to great weight. They also afford ample reason for the agency administrators to assume that the elimination of the program will be followed by a reduction in the appropriation by an amount equal to support two positions.

12. Page 18, lines 8-10 (Social Services, Southern Region): What is true for Ketchikan is also true for Wrangell. This appropriation bill cannot dictate the staffing of the Wrangell office.

13. Page 18, lines 13-16 (Social Services, Central Office): So too, no appropriation is made by a provision, such as in the rider here, relating to deleting a position. Moreover, since this rider applies to a clearly ascertainable person, and is clearly intended as a punishment, it is a bill of attainder prohibited by the constitution. United States v. Lovett, 328 U.S. 303, 315 (1946). Its invalidity is beyond reasonable dispute.

14. Page 18, lines 21-24 (Office on Aging): This is another grant where the selection of the grantee must follow the Fiscal Procedures Act as discussed in 9, above.

15. Page 18, lines 26-27 (Grants): Same problem.

16. Page 19, lines 9-12 (Internal Audit): The Legislative Auditor probably should be funded directly by program receipts rather than by a rider for these and similar audits.

17. Page 20, lines 17-20 (Social Services, CETA): This provision creates the grants problem discussed in 9, above.

18. Page 20, lines 21-37 (Adventure-Based Education Program): Notwithstanding the need for prompt action expressed by these provisions, the agency's administrators must comply with the applicable law covering contracts for goods and services. It is not the agency's fault that this appropriation came so late in the year. The directive to encumber

$25,000 and transfer the money from other appropriations is of dubious validity. It does not effect a transfer by law as has been done in other bills this year.

19. Page 21, lines 28-29, 37-38 (Handicapped Children and Regional Labs): The direct grant raises the questions raised in 9, above.

20. Page 22, lines 7-13 (Public Health Administration): Same.

21. Page 23, lines 16-21 (Alcohol Abuse): The direct grants, because they are made to a municipality, are valid items.

22. Page 23, lines 30-34 (Mental Health): To the extent the grants are to municipalities, they are valid. To others, section 9, above, applies.

23. Page 24, lines 5-8 (Residential Care): Same.

24. Page 24, lines 10-15 (Family Support): Same.

25. Page 24, lines 20-21 (Mental Health): Same.

26. Page 25, lines 10-19 (Natural Resource Administration): Partial funding is patently inconsistent with the Executive Budget Act. This comment will not be repeated with respect to other agencies which are also partially funded.

27. Page 26, lines 35-38 (Commercial Fisheries): This appropriation bill cannot be used to set the staffing for Haines or Dillingham. This "condition" is invalid.

28. Page 27, lines 19-27 (Admin. and Support): The direct grants raise the questions discussed in 9, above. Contracts for performing the specific projects must be let under applicable law.

29. Page 27, lines 33-35 (Investigations and Research): Same as 27, above.

30. Page 30, lines 33-35 (Occupational Licensing): As this rider does, an appropriation bill can set the period for which an appropriation is made and it need not be the same as others in the same bill. Alaska Const., art. IX, § 13.

31. Page 31, lines 37-39 (Highway Safety): Same.

32. Page 32, lines 30-32 (Criminal Justice Planning): Same.

33. Page 35, lines 35-39 and page 36, lines 4-24 (Renewable Resources Board): While these provisions, being part of an

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appropriations bill, can have no lawful force or effect, they constitute a valid statement of the legislature's wishes and should be responded to accordingly.

34. Page 36, lines 36-39 and page 37, line 4 (Economic Enterprise): The problem with this provision is that the $65,000 appropriation referred to is not one expressly contained in the bill. Nevertheless, Budget and Management should be able to see that the sums come out as intended by the legislature.

35. Page 37, lines 19-21 (Tourism): Again, the direct grants must be governed by law as discussed in 9, above.

36. Page 38, lines 10-13 (Community Planning): Same.

37. Page 39, lines 5-10 (DOT/PF Commissioner's Office): These provisions add nothing to the existing law and, being part of an appropriations bill, cannot impose a legal duty on the commissioner beyond that imposed by existing laws.

38. Page 39, lines 28-36 (M & O, Administration): These provisions cannot compel the department to contract with the railroad for the specified service. This is an invalid rider on an appropriations bill.

39. Page 40, lines 14-19 (Highways): Nor can a rider be attached to provide for road maintenance on an off-system road in violation of existing law. The money probably could be used to support ferry service.

40. Page 40, lines 31-34 (Airports): The rider for a direct grant for air-taxi mail delivery raises the problems discussed in 9, above.

41. Page 42 lines 5-23 (Executive Office): The rider requiring the Governor to report on the consolidation of certain functions has no legal force or effect. The Governor can, of course, honor the rider as a request.

42. Page 42, lines 28-34 (Budget & Management): This rider, being part of an appropriation bill, has no legal force or effect. Moreover, insofar as it would intrude the legislative branch into the exercise of a power over the budget vested exclusively by the constitution in the executive, it would probably be invalid even if enacted as a separate law.

43. Page 43, lines 6-9 (Internal Audit): A rider in an appropriations bill cannot be used to effect a transfer of an agency or function between the principal departments of the executive branch. Accordingly, this is an invalid condition. The function of the Internal Auditor is not, however, placed

in the Department of Administration by law; and therefore, the Governor has authority to relocate it.

44. Page 43, lines 10-13 (Internal Audit): A rider on an appropriations bill cannot establish a legal duty. Nevertheless, duplication of functions by the executive and legislative auditors should be avoided.

45. Page 43, lines 16-20 (Bethel Office): The legislature may refuse to fund a given function, and when it does, that will generally be the end of it. The rider here, however, has no effect on the Governor's use of his contingency fund, which may be used to fund a trouble shooter at Bethel. Additionally, the legislature's power to refuse funding cannot be used to inflict a punishment, for to do so would make the rider an unconstitutional bill of attainder.

46. Page 43, lines 25-30 (AWCF Services): This is merely an explanation of an accounting adjustment.

47. Page 43, lines 34-38 (U of A Audit): This rider has no legal force or effect.

48. Page 44, lines 6-18 (Salary Increases): This rider has no legal force or effect. Neither the executive nor legislative branches are bound by it. Nevertheless, it is a valid statement of the consensus of the 11th State Legislature and entitled to great deference and respect.

49. Page 44, lines 26-32 (Risk Management): It is highly unlikely that a $13.6 million appropriation for insurance, half of which will be expended before the so-called condition can occur, will be held to be conditioned on a report concerning four positions. This rider merely illustrates how any requirement can be stated as a condition.

50. Page 44, lines 35-39 and page 45, line 4 (General Services): The rider requiring the Departments of Administration and of Transportation and Public Facilities to establish joint car rental policies can have no legal effect.

51. Page 45, lines 13-17 (Data Processing): This rider appears to make storage space a purpose of the FY 79 appropriation for data processing. In effect, it amends last year's appropriation bill. That is almost certainly permissible.

52. Page 45, lines 19-38 and page 46, lines 4-9 (Data Processing): This rider appears to both explain and reflect an adjustment by the legislature in the budget for data processing. It relates directly and solely to appropriations, and therefore, is valid.

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53. Page 46, lines 23-26 (FERC Proceedings): This language provides for a lapse of the appropriation when the tariff proceedings terminate. It is valid.

54. Page 46, lines 33-36 (Permanent Fund Management): This is a similar provision for a lapse.

55. Page 47, lines 23-31 (Procurement): This language specifies the period of a portion of the appropriation. That is valid.

56. Page 47, lines 32-35 (Tenakee Health Center): This rider has no legal force or effect.

57. Page 47, lines 36-39 and page 48, lines 4-5 (Combined Facilities): This rider has no legal force or effect.

58. Page 48, lines 17-19 (Communications): This rider has no legal effect, but it is a proper statement of legislative intent, as are similar riders mentioned above and below. Ordinarily, it is the kind of statement which is placed in a committee report, as are many of this bill's riders.

59. Page 48, lines 21-25 (Communications): This rider has no legal force or effect.

60. Page 48, lines 29-37 (Communications): The breakdown of the appropriation item contained in this rider does not impose a legal restriction on the use of the appropriated money.

61. Page 49, lines 4-19 (Television): These riders place no legal duty on anyone to do anything.

62. Page 49, lines 20-38 (Television): This rider appears to state that, notwithstanding the actual apparent appropriation of $2,170,815 for television, the agency should spend $2,553,000, the "full funding" for FY 80. Unfortunately, the language does not parallel that used by other riders which clearly state the legislature's intent to fund at a higher level than the amount appropriated in the bill. Accordingly, that intent probably cannot be inferred, and the expenditures cannot be made, absent some other evidence of it.

63. Page 50, lines 11-19 (Vehicle Repairs and Rentals): These riders have no legal force or effect.

64. Page 50, lines 24-27 (Audits): This rider has no legal force or effect.

65. Page 51, lines 5-35 (Legislative Council): This rider

is explanatory and has no legal effect. Again, it is the kind of material which ordinarily appears in a committee report.

CAPITAL BUDGET.

66. Page 55, lines 8 and 19 (Election District): The indication of election districts is informational only. An error in district designation has no effect on the appropriation or its expenditure.

67. Page 60, lines 18-27, 32, 36, etc. (Grants): The capital budget, like the operating budget, includes a large number of "grants" to nongovernmental entities for services or facilities or both. The same questions raised under 9, above, are raised by the "grants" in this portion of the bill. They will have to be handled as discussed in 9, above, i.e., under applicable statutes, most particularly the Fiscal Procedures Act and the Public Facilities Procurement Act.

68. Page 62, lines 29-30 (Sutton Community Building): There is no municipality of Sutton, and the "community of Sutton" is not a juridicial entity with which the state can transact business. It appears, therefore, that the agency must, in this and similar situations, seek out a responsible group or association in the community to be responsible legally for the community building, and to contract with the state for the money.

69. Page 63, lines 20-22 (St. James Mission): There is a City of Tanana. Presumably, the grant is to it. The purpose of the grant, rehabilitation of a mission, raises establishment of religion problems. In order to expend public funds, it must be for a non-religious purpose.

70. Page 63, lines 23-26 (Gateway R.E.A.A.): Direct grants to the named villages raise public purpose questions. This appropriation appears to be to the Department of Natural Resources for Parks and Recreation (page 62, lines 4-5) for the Gateway REAA, to be divided among five communities. No purpose is stated. Presumably it relates to recreation. The agency and the intended recipients are, however, apparently left to devise a purpose. This is almost certainly an overly broad and unconstitutional delegation of the power of appropriation. It appears that the bill contains a large number of such items. Unless there is some legislative documentation of the purpose of these grants, they raise real questions of validity.

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71. Page 66, lines 9-12 (Commercial Fisheries and Agriculture Bank): The rider's explanatory material limits the appropriation. It is a valid limitation, relating solely and directly to the appropriation.

72. Page 66, lines 22-29 (AHFC Mobile Homes): This rider states an "intent" rather than a condition. "Legislative intention without more is not legislation." Train v. City of New York, 420 U.S. 35, 45 (19[illegible]). Had the legislature intended to make $1 million solely available for a mortgage insurance for mortgage financing for mobile homes, it would have appropriated it that way. A statement of intent must be perceived as a lesser restriction.

73. Page 68, lines 8-13 (Farm Projects): These are more examples of the problems discussed above in 9 relating to legislatively prescribed, non-governmental grantees.

74. Page 68, lines 15, 17-35 (Grants): Same.

75. Page 70, lines 23-26 (Firehalls): Volunteer fire departments fall into a category which is quite close to municipalities. They probably constitute de facto service areas in the unorganized borough, and because of the statutorily prescribed governmental functions they perform, may well be de jure service areas. Grants to them should, therefore, be treated much the same as grants to municipalities.

76. Page 70, lines 30-33, 34-36, 37-39 (Grants): While these riders name entities within municipalities, it is best to infer that they are part of the object or purpose of the appropriation and that the grant is to the respective municipalities for those purposes, e.g., for recreational facilities in Spenard.

77. Page 71, lines 7-9 (Grant): The grant to the Thomas Bay Power Authority raises questions concerning its purpose. If there is no legislative documentation on the p[illegible]ose, it may well be an invalid appropriation.

78. Page 71, lines 21-24 (Takotna Grant): Takotna does not appear to be a city. If not, the grant must be handled so as to ensure its expenditure is for a public purpose and not for private benefit.

79. Page 73, lines 13-15, 16-18 (Grants): Chalkyitsik and Cantwell were not incorporated cities as of 1978. Where a grantee does not exist, the grant probably fails. Legislative documentation (or lack of it) should be determinative.

80. Page 73, lines 22-24 (Grants): Healy Lake was not an

incorporated city in 1978.

81. Page 73, lines 31-35 (Grants): These grants may be too indefinite as to recipient and purpose to be valid constitutionally. It will depend upon the existence of legislative documentation identifying both more precisely.

82. Page 75, lines 7-9 (Traffic Signals): This rider merely further identifies the purpose of the appropriation.

83. Page 75, lines 11-12 (Street Repairs): As a general rule, a "community council" cannot be given power to supervise the expenditure of public funds. This rider, therefore, does not have the force of law.

84. Page 75, lines 21-24 (Road Improvements): Same.

85. Page 76, lines 11-13 (Paradise Haven Lodge): This rider is invalid. First, in order for a condition on an appropriation to be valid, it must have a direct and substantial connection to the appropriation. Second, the lawmaking power is not the power to pick and choose the buildings to be used for park facilities.

86. Page 77, lines 19-20 (Priorities): While a valid statement of concern and entitled to great weight, this rider can have no legal effect.

87. Page 79, lines 12-23 (Landscaping): This rider's statement of intent does not have the force of law required to remove these projects from the application of other laws which could frustrate the very intent stated by the rider.

88. Page 81, lines 19-22 (Fourth Floor): This rider -- vesting the Legislative Finance Division with control over the fourth floor in the capitol -- has no legal effect. First, so long as there is space on the fourth floor of the capitol occupied by another branch of the government, an agency of the legislature cannot -- under the separation of powers -- usurp that space or have supervening control over it. Second, under existing law, space occupied by the legislature and its agencies is under the control of the Legislative Affairs Agency. AS 24.20.060(5). A rider on an appropriations bill cannot amend that substantive law. Of course, the second consideration is solely a matter of internal concern to the legislature, and no law on the subject is required at all.

The following messages were received dated June 1, 1979 stating the Governor had signed the following and transmitted the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

CSHB 29 am S — COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 29 amended Senate (relating to the public employees' and teachers' retirement systems; and providing for an effective date) Chapter 81, SLA 1979

FCCS HB 260 — FREE CONFERENCE COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 260 (relating to retirement and benefits; and providing for an effective date) Chapter 82, SLA 1979

FCCS SB 118 — FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 118 (relating to financial institutions) Chapter 84, SLA 1979

HCS CSSB 12 am H — HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 12 amended House (relating to adult and adventure-based education) Chapter 86, SLA 1979

FCCS SB 130 — FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 130 (establishing programs of financial and academic assistance to students in universities and colleges; and providing for an effective date) Chapter 87, SLA 1979

HCS CSSB 137 am H — The following message dated June 1, 1979 regarding HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 137 amended House (municipal code; effective date) was received:

The Honorable Clem Tillion
President of the Senate
The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

RE: HCS CS SB 137 am H
CHAPTER 83, SLA 1979

Dear Mr. President and Mr. Speaker:

I am allowing House Committee Substitute for Committee Substitute for Senate Bill 137 am H to become law with-

HCS
CSSB
137
am H

out signature. I know that a great deal of hard work has gone into the bill and that, in most respects, it is good legislation.. Nevertheless, because it would create an impossible situation with respect to apportionment of borough assemblies and allow a multiplicity of zoning jurisdictions to exist within organized boroughs, I am compelled not to sign it. Because the House and Senate managers of the bill have promised that curative legislation will be brought to the floor during the next session, I am not vetoing the bill.

The first defect is that the provision which provides for the voters to choose the kind of apportionment a borough assembly should have creates a method by which two electorates within a borough could select two different kinds of apportionment. No means is provided for resolving the difference. If reapportionment were imminent, a veto would be necessary. But there is yet time to cure this defect, and it can be done at your next session.

The second problem concerns zoning. Since the inception of organized boroughs in Alaska shortly after statehood, it has been an accepted and indisputable fact that, at a minimum, three functions of local government were areawide by their very nature: education, planning and zoning, and tax assessment and collection. Nothing has occurred in the meantime to alter that conclusion. Indeed, if anything, the opposite is true, particularly with respect to land-use planning and zoning.

I am aware that the particular zoning needs of some cities presently appear to be very great, but they must and can be met in some other fashion than the giant step backward proposed by this bill. No greater disservice can be done to our citizens, particularly those who own homes and businesses, than to fragment our local planning and zoning. Another solution must, and will, be found, and the administration will work closely with you to find one.

Sincerely,

Jay S. Hammond
Governor

FCCS
HB
66

June 1, 1979

The Honorable Clem Tillion
President of the Senate
The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. President and Mr. Speaker:

I have signed the following bill and am transmitting the enrolled and engrossed copies to the Lieutenant Governor's Office for permanent filing:

FREE CONFERENCE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 66
(relating to the management and disposal of public land; and providing for an effective date)
chapter 85, SLA 1979

Although I am signing Free Conference Committee Substitute for House Bill 66 into law because it makes important improvements by removing statutory impediments to transfer of state land to private ownership, I would like to note that the measure does pose some serious implementation problems. There are conflicting and contradictory provisions that will make it difficult to implement some portions of the bill within the various short deadlines contained in the bill. Nevertheless, I have directed the Department of Natural Resources to aggressively find solutions to accomplish true legislative intent. Specifically, I have instructed the department to dispose of 100,000 acres during FY 80 rather than FY 81 as the act requires. In addition, I have instructed that although municipalities may no longer disapprove of state subdivision plats, the department make every effort to plat in a way the boroughs would approve, had they a choice.

Two sections of the bill are especially troublesome. Counsel advises that Sections 2-5 and 45 which could be construed as restricting the state's right to refuse municipal selections that are clearly contrary to the state's interest (the surface estate at Prudhoe Bay, for example), is almost certainly unconstitutional. Nevertheless, due to present classification of these lands, it is unlikely that such conflicts will arise and the question is probably more academic than practical.

Even worse is Section 44, which rewards trespassers by granting them an interest in public lands without due notice and without providing a similar chance to law abiding citizens to secure the same interest. On the advice of the Attorney General, I have instructed the Department of Natural Resources to not implement that provision because of its unconstitutionality. Almost surely, the matter can then be decided in court.

FCCS
HB
66

All in all, however, I am most pleased to sign into law this important legislation and to pledge eager implementation of its very postive land disposal sections.

Sincerely,

Jay S. Hammond
Governor

June 1, 1979

FCCS
SB
236

The Honorable Clem Tillion
President of the Senate
The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. President and Mr. Speaker:

I have vetoed Free Conference Committee Substitute for Senate Bill 236, an act continuing the existence of the Alaska Transportation Commission and amending laws relating to the commission; and providing for an effective date.

The Department of Law has pointed out serious defects in the language relating to the issuance of stop orders by the Alaska Transportation Commission, the effect of the language would be to dilute the power of the Alaska Transportation Commission's enforcement of its own orders.

Section 12 of the enrolled bill (insurance on exempt carriers) has been previously discussed in regard to the "deregulation" of air service. However, it also should be noted that sec. 12 would require all currently exempt vehicles, including motor vehicles operated by federal, state, and municipal government, those operated by ranchers, farmers, and dairymen under 12,000 pounds gross vehicle weight, and those operated by construction contractors to file insurance coverage with the commission. Such regulation would in fact, increase the scope of regulatory control by the commission and could quite possibly necessitate an increase in commission personnel. Additionally, there is doubt that the language relating to insurance requirements for exempt carriers is clear enough that the provision is enforceable.

Existing law provides that the Alaska Transportation Commission would be terminated June 30, 1979 but would continue in existence until June 30, 1980. Therefore, I

FCCS SB 236 believe that there is sufficient time for the legislature to address the issue in a timely manner. Additionally, it should be noted that the deregulation provisions relating to fixed wing aircraft would not take effect until July 1, 1980. Some operators of light aircraft that the legislature intended to exempt from regulation, i.e., guides, would continue to be regulated due to the proviso for providing 12 months of service.

The fiscal impact of the bill is significant, analysis indicares a cost of 97.7 thousand dollars annually, no funding was provided with the measure.

Sincerely,

Jay S. Hammond
Governor

Index to vetoed and reduced bills received after adjournment:

VETOED BILLS

REDUCED BILL

This joint final supplemental journal completes the record of legislation for the First Session of the Eleventh State Legislature.

Peggy Mulligan
Secretary of the Senate

June 4, 1979

Irene Cashen
Chief Clerk of the House

June 4, 1979

Alaska State Legislature

House

JUNEAU, ALASKA

MESSAGE TO THE SENATE DATE ~~April~~ May 2, 1979

MR. PRESIDENT:

The House has passed SB 236 (continuing the existence of the Alaska Transportation Commission; eff. date) with the following amendment:

HCSSB 236amH (continuing the existence of the Alaska Transportation Commission and amending laws relating to the commission; eff. date)

and it is transmitted herewith for consideration.

Chief Clerk of the House

Owner-Operators of Alaska,

Have you taken a good look at your earnings lately as opposed to your expenses? How many of you are aware of the proposal and amendment presently being considered for adoption by the Alaska Transportation Commission? If adopted, your earnings will, inevitably, be reduced further. You are the only work force in Alaska that has taken a reduction in earnings for four consecutive years!

It would appear that fourteen different Carriers have conspired against you by giving their Power of Attorney to one man, enabling him to represent their desires and he presented this proposal in Anchorage at the A.T.C. Not one Owner-Operator was present at that hearing. Did you see the notice of that hearing posted in your local newspaper? To date, I have not found anyone that did.

A hearing was not scheduled for Fairbanks until Joe Gilbertson filed a formal complaint with A.T.C. A hearing was then scheduled for January 24, 1980 in Fairbanks. As I understand it, a notice is to be published in at least three different publications. This was handled by a notice in the "Juneau Southeast Empire", "Nome Nugget", and the "Journal", a magazine subscribed to by the Carriers. In all fairness, I must add that the A.T.C. claims a notice went out to all the Newspapers. I havn't as yet found any hard evidence to support the claim. This action tells me, they didn't want any Owner-Operator representation. However, as a notice was hand carried to all the Carriers shortly before the hearing, Joe Gilbertson notified as many as possible. About a dozen Owner-Operators were present.

This proposal and amendment appear fairly innocent on the surface, but was cleverly devised to shift all the operational cost from the Carrier to the Owner-Operator while at the same time rendering your Union Contract "non-applicable". Indeed, the Carrier would become a "Broker" and the Owner-Operator would be a "Sub-Contractor".

Can the Owner-Operator afford more expense? Can you pay your own Secretary, all payroll taxes, including Workmans' Comp., cargo insurance, and the deductable on the trailer belonging to the Carrier? From whom do you collect if you sustain a permanent injury on the job? Do you sue yourself?

Furthermore, this puts the A.T.C. in the position your Union has held. Basically, they are negotiating your next contract. The "Brokers" won't need a Union. You'll be loading your own loads or paying a hostler out of your own pocket as some are already doing.

Some of you claim you are happy without the Union. How happy will you be in the absence of a Union and faced with possible deregulation on June 30th? When the next pipeline begins and there isn't any control over Alaska hire, every Independent in the lower fourty-eight can come up here and take your jobs. They'll work for less, live in their trucks, and send their money outside. While you're all sitting home, who will pay your house payment, your truck payment, ard feed the family? You're kidding yourselves if you don't think it can and will happen! That is exactly what this new proposal is all about.

In fact, the same person weilding the fourteen Powers of Attorney and this proposal at A.T.C., is the same person that devised the illegal lease which was presented to the Sager drivers, in anticipation of this proposal being adopted. They are all counting on the fact that truckers seldom stick together, even on basic issues. They steadily decrease your earnings, make you dependent on the next pay check, then zap it to you. You're right on the edge of that now as each of you have consistently robbed your savings to meet Carrier "back-charges" this past year.

At the time of the Statehood Act, Owner-Operators were not a consideration under the statutes adopted for Transportation, as they were non-existant. You've all been "manipulated" under provisions concerning lease equipment. Consequently, these regulations can, at will, by requests of the Carriers, be changed at their desire and for their benefit. While requesting changes to shift more operational expense to the Owner-Operator on one hand, with the other, they are filing reduced rates to further decrease your earnings. They want all of you to be so financially dependent on them for your next truck payment, you'll work for nothing. Up to this time, and over the last three years you've all sat back and watched it happen.

This time you had better all stand up and be counted. File your objections with the Transportation Commission and your Legislators. At the end of the last pipeline there were over four hundred Owner-Operators in the State. Each one puts a mimimum of $75,000 back into the economy annually. That adds up to a basic figure of $30,000,000. On that figure alone, the Owner-Operator should have the right to request the attention of your Legislature.

You had all better insist on funding for the A.T.C. while at the same time asking for a statute to protect Owner-Operators. You need a statute depicting the minimum amount your truck will be paid, and how often it will be paid. Ask that the driver will be an employee of the Carrier so you don't get stuck with their overhead. You desperately need a statute the Carriers can't jack around!

There is a subtle conspiracy in this State to take down the Unions and reduce your wages. Consider the hardships endured and the loss of jobs when the City of Fairbanks refused to negotiate new Labor contracts this last year. Their problems are still going on. How many are aware that outside carpenters were brought in to build the new Pizza Hut in Fairbanks, while Alaska carpenters picketed. Sager Trucking in Delta Junction are bringing in outsiders while Alaskans picket. The oil companies brought in electricians, to Prudhoe Bay, a couple of weeks ago, claiming there were not enough qualified Alaskans. We have Alaskan Electricians out of work. How many non-residents were hired for pipeline security by Alyeska? I doubt most people are aware of the percentage of non-Alaskans working at Prudhoe Bay and all the Pump Stations along the way.

For once, all the Union Organizations had better stand together. All our jobs are at stake here, not just the Teamsters.

I'm asking all Owner-Operators, all Union people and all concerned Alaskans that agree with what I've said here, to cut out ~~this letter~~, sign it, include your name and address, and send it to the Legislator of your choice.

For once let ALASKANS stand up for Alaskans, before we all find out we can be replaced for less!

These are my feelings also as a 28 yr Alaskan — I approve and ask your Support.

Gene Cecil

ALASKA TRUCKING ASSOCIATION, INC.

3443 Minnesota Drive • Anchorage, Alaska 99503 • Phone (907) 276-1149

June 7, 1979

The Honorable Jay Hammond
Governor of Alaska
Juneau, Alaska

Sir:

The Special Committee of the Alaska Trucking Association wishes to thank you for allowing us the opportunity of meeting with you on June 4, 1979. I think it was agreed among our group that a frank discussion took place and that there was a free exchange of opinions. At the close of that meeting, how ver, our committee left with rather frustrated feelings. We, of course had been seeking a strong expression of support from the Administration regarding the year round maintenance of the State road from Fairbanks to Deadhorse. It was our feeling that your Administration gave us only qualified support and that you were relying on Alyeska Pipeline Service Company to provide that maintenance which we feel is the State of Alaska's obligation.

At this time we would like to summarize the key reasons that we feel that the State of Alaska should maintain that highway on a year round basis.

1. Affect on Motor Carrier Industry

We as an industry are seriously concerned that a six month closure of the road will in fact result in the demise of a significant portion of the motor carrier industry. We have provided you statistics which indicate that at a minimum $25.7 million dollars were earned in revenues by motor carriers from operations on the North Slope in 1978. Out of those revenues approximately $9.5 million dollars in wages were paid directly to approximately 308 drivers. It is our feeling that the motor carriers and the various owner/operators who operate on the North Slope could not economically maintain facilities, equipment and employees on the basis of operating less than six months per year. Consequently if the road was only open for that period of time it could be presumed there would not be sufficient transportation to haul freight over the road.

2. The Economic Impact on Fairbanks

It is well recognized that Fairbanks already has an unemployment rate of 14% or greater. Many of the motor carriers operating to the North Slope have drivers and support facilities domiciled in Fairbanks. The resultant unemployment caused by the six month closure of the road would only add to the unemployment factor in that city. Using the ripple effect, that impact would be even greater. It has been stated by one airline company in this State that if the road were closed, unemployment in Fairbanks would actually diminish because of the resultant growth in the air freight industry. It is our feeling that the closure of the road will not mean significant diversions of freight to aircraft. All indications we receive from the oil industry are that the diversion of freight will rather take place to barges traveling from Seattle to Prudhoe Bay or up the McKenzie River to Prudhoe Bay. Consequently it is erroneous to assume that the air freight industry will grow to any extent in the Fairbanks area.

3. The Economic Affect on the State of Alaska

At least one oil company (Atlantic Richfield Company) has stated that they expend approximately $78 million dollars per year for goods and services purchased from approximately 1,100 Alaskan vendors. They have indicated that if the road is closed significant portions of those expenditures would be made in the Lower 48 rather than Alaska. It is our understanding that the oil companies and Alyeska Pipeline Service Company are conducting studies at this time to provide similar statistics such as Atlantic Richfield's. We have been assured by those oil companies that when the final statistics are compiled the economic impact of a six month road closure on the State of Alaska will be staggering.

4. Future Development of Resources Within the State

Recent passage of the Udall-Anderson Bill by the U. S. House of Representatives was widely recognized as being a deterrent toward the economic development of the resources within the State of Alaska. It is particularly disconcerting at this time to see our own State government further weaken the economic development of the State and the oil industry in particular through closure of the road for six months.

It is widely known that the Atlantic Richfield Company has plans to develop the Kuparuk Oil Field. The reserves in that field are believed to be quite significant. It is obvious that if the road is closed the cost and time frame of developing that field will greatly increase. It should also

be noted that we understand that Sohio-BP has a large number of leases in that oil field. Sohio-BP has publicly stated that there will not be any significant drilling programs undertaken until such time as the State's attitude toward the oil industry improves. Obviously any closure of the road would only be a further indication to Sohio-BP that the State does not have a positive attitude toward the oil industry. Consequently the road closure could cause Sohio-BP to delay any development of the Kuparuk Field.

5. Maintenance of the Alyeska Pipeline

During the course of the meeting on June 4 you expressed great concern regarding the difficulties in safely maintaining the pipeline during the six month period when the road was to be closed. It is obvious to all that any breakdown or major oil spill that would occur on the pipeline would have a disastrous affect both environmentally and economically on the State. For instance, it has been estimated that a closure of the pipeline for one day could cause a loss of revenue of approximately $2.08 million dollars to the State. Any major breakdown of the pipeline during the winter months while the road was closed could potentially cost the State tens of millions of dollars in lost revenues. In addition, it could be visualized that the State would have some legal liability for any major oil spills due to the fact that they did not maintain adequate transportation corridors for the pipeline.

6. Alternate Modes of Transportation

During the course of the construction of the pipeline and of the development of the Prudhoe Bay oil field there were always available alternate methods of transporting goods. The most commonly used methods were either by motor truck, barge or air freight. The closure of the road for a six month period could drastically affect the alternatives of shipping goods. It should be remembered that a few years ago the sealift barge movement was prevented by ice formations from arriving at Prudhoe Bay. In that particular instance the majority of goods were diverted to motor truck. If such an occurrence should happen again only a limited amount of those goods could be diverted to air freight due to economic and size factors. It is also possible that because of weather conditions aircraft cannot serve the needs of the pipeline or the oil field for sustained periods of time. In such emergencies it would be disastrous if a maintained road was not open to serve the needs of the industries.

June 7, 1979

Over the course of the past few weeks our committee has found that the sentiment of the business community within Alaska is overwhelmingly in favor of having the State maintain the road on a year round basis. It is our understanding that various communities and Chambers of Commerce have passed resolutions in favor of such year round maintenance and have forwarded those resolutions to you. As you also know, a poll was conducted by the Resource Development Council to ascertain the sentiment of the Alaska State Legislators toward year round maintenance. Of those legislators contacted, an overwhelming majority appear to favor year round maintenance. In fact, it is obvious to all that less than a handful of legislators are the only roadblock that prevents the year round maintenance from occurring. It is our belief that the economic well being of this State and of the motor carrier industry in particular is too significant to be thwarted by the wishes of a few individuals. We believe that the climate is right for your Administration and for the State legislators as a whole to take a strong stand and once and for all demonstrate that they are concerned about the economic well being of this State. Year round maintenance of the North Slope Road by the State would be a good demonstration of that support. We do not believe that Alyeska Pipeline Service Company should be expected to provide the funds needed for that maintenance. It is obvious that they and the oil companies in the Prudhoe Bay area are by far the largest contributors toward the revenues received by the State Treasury. It is our opinion that it is the moral and probably legal obligation of the State to provide for and fund the maintenance of the road which is vital in maintaining a healthy oil industry in this State.

Because of all of the above, the Alaska Trucking Association at their Board of Directors meeting on June 6, 1979 authorized the Special Committee to send a resolution to you. That resolution is as follows:

> It is our understanding that Governor Hammond intends to call a Special Session of the State Legislature in the near future. It is our belief that when the Governor calls that Special Session, he can include the issue of year round maintenance of the State highway from Fairbanks to Deadhorse. We believe that the State has an obligation to maintain that road and

June 7, 1979

that it is paramount to the economic well being of this State that such maintenance be performed. We therefore call upon the Governor to exercise his leadership and the authority of his office to include the issue of the State highway funding on the agenda for the Special Session of the legislature.

We would appreciate receiving a response regarding the above resolution as soon as possible.

Respectfully yours,

ALASKA TRUCKING ASSOCIATION
SPECIAL COMMITTEE

H. Russell Painter
Chairman

HRP:lh

cc: Members of State House & Senate Members

SUBCHAPTER I—GENERAL PROVISIONS

§ 1301. Definitions

As used in this chapter, unless the context otherwise requires—

(1) "Administrator" means the Administrator of the Federal Aviation Administration.

(2) "Aeronautics" means the science and art of flight.

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(6) "Aircraft engine" means an engine used, or intended to be used, for propulsion of aircraft and includes all parts, appurtenances, and accessories thereof other than propellers.

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Secretary of Transportation may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

(8) "Air navigation facility" means any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft.

(9) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(11) "Appliances" means instruments, equipment, apparatus, parts, appurtenances, or accessories, of whatever description, which are used, or are capable of being or intended to be used, in the navigation, operation, or control of aircraft in flight (including parachutes and including communication equipment and any other mechanism or mechanisms installed in or attached to aircraft during flight), and which are not a part or parts of aircraft, aircraft engines, or propellers.

(12) "Board" means the Civil Aeronautics Board.

(13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(14) "Civil aircraft" means any aircraft other than a public aircraft.

(15) "Civil aircraft of the United States" means any aircraft registered as provided in this chapter.

(16) "Conditional sale" means (a) any contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time, upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (b) any contract for the bailment or leasing of an aircraft, aircraft engine, propeller, appliance, or spare part, by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract. The buyer, bailee, or lessee shall be deemed to be the person by whom any such contract is made or given.

(17) "Conveyance" means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property.

(18) "Federal airway" means a portion of the navigable airspace of the United States designated by the Secretary of Transportation as a Federal airway.

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

SUBCHAPTER I—GENERAL PROVISIONS

§ 1301. Definitions

As used in this chapter, unless the context otherwise requires—

(1) "Administrator" means the Administrator of the Federal Aviation Administration.

(2) "Aeronautics" means the science and art of flight.

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(6) "Aircraft engine" means an engine used, or intended to be used, for propulsion of aircraft and includes all parts, appurtenances, and accessories thereof other than propellers.

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Secretary of Transportation may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

(8) "Air navigation facility" means any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft.

(9) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(11) "Appliances" means instruments, equipment, apparatus, parts, appurtenances, or accessories, of whatever description, which are used, or are capable of being or intended to be used, in the navigation, operation, or control of aircraft in flight (including parachutes and including communication equipment and any other mechanism or mechanisms installed in or attached to aircraft during flight), and which are not a part or parts of aircraft, aircraft engines, or propellers.

(12) "Board" means the Civil Aeronautics Board.

(13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(14) "Civil aircraft" means any aircraft other than a public aircraft.

(15) "Civil aircraft of the United States" means any aircraft registered as provided in this chapter.

(16) "Conditional sale" means (a) any contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time, upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (b) any contract for the bailment or leasing of an aircraft, aircraft engine, propeller, appliance, or spare part, by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract. The buyer, bailee, or lessee shall be deemed to be the person by whom any such contract is made or given.

(17) "Conveyance" means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property.

(18) "Federal airway" means a portion of the navigable airspace of the United States designated by the Secretary of Transportation as a Federal airway.

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(22) "Intrastate air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage solely in intrastate air transportation.

(23) "Intrastate air transportation" means the carriage of persons or property as a common carrier for compensation or hire, by turbojet-powered aircraft capable of carrying thirty or more persons, wholly within the same State of the United States.

(24) "Landing area" means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

(25) "Mail" means United States mail and foreign-transit mail.

(26) "Navigable airspace" means 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.

(27) "Navigation of aircraft" or "navigate aircraft" includes the piloting of aircraft.

(28) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

(29) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(30) "Propeller" includes all parts, appurtenances, and accessories thereof.

(31) "Possessions of the United States" means (a) the Canal Zone, but nothing herein shall impair or affect the jurisdiction which has heretofore been, or may hereafter be, granted to the President in respect of air navigation in the Canal Zone; and (b) all other possessions of the United States. Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this chapter to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(32) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

(33) "Spare parts" means parts, appurtenances, and accessories of aircraft (other than aircraft engines and propellers), of aircraft engines (other than propellers), of propellers and of appliances, maintained for installation or use in an aircraft, aircraft engine, propeller, or appliance, but which at the time are not installed therein or attached thereto.

(34) The term "special aircraft jurisdiction of the United States" includes—

(a) civil aircraft of the United States;

(b) aircraft of the national defense forces of the United States;

(c) any other aircraft within the United States;

(d) any other aircraft outside the United States—

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or

(ii) having "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; and

(e) other aircraft leased without crew to a lessee who has his principal place of business in the United States, or if none, who has his permanent residence in the United States;

while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard.

(35) "Supplemental air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

(36) "Supplemental air transportation" means charter trips, including inclusive tour charter trips, in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 1371(d)(3) of this title to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 1371(d)(1) and (2) of this title. Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour in air transportation by selling or offering for sale individual tickets directly to members of the general public, or to do so indirectly by controlling, being controlled by, or under common control with, a person authorized by the Board to make such sales.

(37) "Ticket agent" means any person, not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or foreign air carrier, who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation.

(38) "United States" means the several States, the District of Columbia, and the several Territories and possessions of the United

States, including the territorial waters and the overlying airspace thereof.

Pub.L. 85-726, Title I, § 101, Aug. 23, 1958, 72 Stat. 737; Pub.L. 87-197, § 3, Sept. 5, 1961, 75 Stat. 467; Pub.L. 87-528, § 1, July 10, 1962, 76 Stat. 143; Pub.L. 90-514, § 1, Sept. 26, 1968, 82 Stat. 867; Pub.L. 91-449, § 1(1), (2), Oct. 14, 1970, 84 Stat. 921; Pub.L. 93-366, Title I, § 102, Title II, § 206, Aug. 5, 1974, 88 Stat. 409, 419.

Historical Note

1974 Amendment. Pars. (22) to (33). Pub.L. 93-366, § 206, added pars. (22) and (23). Former pars. (22) to (31) were redesignated (24) to (33), respectively.

Par. (34). Pub.L. 93-366, §§ 102, 206, redesignated former par. (32) as (34) and, as so redesignated, relettered former subpars. (c)(i) as (c) and (c)(ii) as (d)(i), added subpars. (d)(ii) and (e), and expanded time period when, for purpose of definition, aircraft is considered in flight.

Pars. (35) to (38). Pub.L. 93-366, § 206, redesignated former pars. (33) to (36) as (35) to (38), respectively.

1970 Amendment. Pars. (32) to (36). Pub.L. 91-449 added par. (32). Former pars. (32) to (35) were redesignated (33) to (36), respectively.

1968 Amendment. Par. (33). Pub.L. 90-514 expanded supplemental air transportation to include the conduct of inclusive tour charter trips but prohibited individually ticketed service by supplemental air carriers.

1962 Amendment. Pars. (32), (33). Pub.L. 87-528 added pars. (32) and (33). Former pars. (32) and (33) were redesignated (31) and (35), respectively.

Pars. (34), (35). Pub.L. 87-528 redesignated former pars. (32) and (33) as (34) and (35), respectively.

1961 Amendment. Par. (4). Pub.L. 87-197 substituted "operation or navigation of aircraft within" for "operation or navigation or aircraft within".

Change of Name. "Federal Aviation Administration" has been substituted for "Federal Aviation Agency" in par. (1) and "Secretary of Transportation" has been substituted for "Administrator of the Federal Aviation Agency" in pars. (7) and (18) pursuant to Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation and a Federal Aviation Administration, headed by an Administrator, within such Department of Transportation and transferred all functions, powers, and duties of the Federal Aviation Agency and the Administrator and other offices and officers thereof to the Secretary of Transportation, with specific function thus transferred to be exercised by the Administrator of the Federal Aviation Administration. See section 1655(c) of this title.

Effective Date. Section 1505 of Pub.L. 85-726, provided that:

"The provisions of this Act [see Short Title note under this section] shall become effective as follows:

"(1) Section 301, section 302(a), (b), (c), (f), (i), and (k), section 303(a), section 304, and section 1502 [section 1311, section 1342, section 1343(a), (d), (g), and (i), section 1344(a), section 1345, and note set out under section 1341 of this title] shall become effective on the date of enactment of this Act [August 23, 1958]; and

"(2) The remaining provisions shall become effective on the 60th day following the date on which the Administrator of the Federal Aviation Agency [now Administrator of Federal Aviation Administration] first appointed under this Act [this chapter] qualifies and takes office."

The Administrator of the Federal Aviation Agency was appointed, qualified and took office on Oct. 31, 1958.

Short Title of 1974 Amendment. Section 101 of Pub.L. 93-366 provided that: "This title [which enacted sections 1514 and 1515 of this title and amended this section and sections 1471 to 1473 and 1487 of this title] may be cited as the 'Antihijacking Act of 1974'."

Short Title. Section 1 of Pub.L. 85-726, provided that Pub.L. 85-726, which enacted this chapter, amended sections 212, 485a, 485b, 1101, 1102, 1103, 1105, 1108, 1111, 1110, 1151, 1152, 1155, 1157 and 1160 of this title, sections 81, 82 and 90 of Title 14, Coast Guard, section 45 of Title 15, Commerce and Trade, section 7a of Title 16, Conservation, section 686 of Title 31, Money and Finance, section 474 of Title 40, Public Buildings, Property, and Works, sections 485, 485c and 485d of Title 48, Territories and Insular Possessions,

section 123 of Title 50, War and National Defense, and sections 1622 to 1622c of Appendix to Title 50, War and National Defense, repealed sections 171, 174 to 177, 179 to 184, 401 to 403, 421, 422, 423 to 427, 451 to 460, 481 to 485, 486 to 496, 521 to 524, 551 to 560, 581, 582, 601 to 603, 621 to 623, 641 to 649, 671 to 681, 701 to 705, 711 to 722, and 1211 to 1215 of this title, section 7 of 1940 Reorg.Plan No. III, section 7 of 1940 Reorg.Plan No. IV, and Reorg.Plan No. 10 of 1953, and enacted notes set out under this section and sections 486, 1321 and 1341 of this title, shall be popularly known as the "Federal Aviation Act of 1958".

Separability of Provisions. Section 1504 of Pub.L. 85-726, provided that: "If any provision of this Act [this chapter] or the application thereof to any person or circumstance is held invalid, the remainder of the Act [this chapter] and the application of such provision to other persons or circumstances shall not be affected thereby."

Savings Clause; Effect of Transfers, Repeals, and Amendments. Section 1501 of Pub.L. 85-726, provided that:

"(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, rates and privileges which have been issued, made, or granted, or allowed to become effective, by the President, the Department of Commerce, the Secretary of Commerce, the Administrator of Civil Aeronautics, the Civil Aeronautics Board, the Airways Modernization Board, the Secretary of the Treasury, the Secretary of Agriculture, or the Postmaster General, or any court of competent jurisdiction, under any provision of law repealed or amended by this Act [see Short Title note under this section], or in the exercise of duties, powers, or functions which, under this Act, are vested in the Administrator of the Federal Aviation Agency [now Federal Aviation Administration] or the Civil Aeronautics Board, and which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrator or the Board, as the case may be, or by any court of competent jurisdiction, or by operation of law.

"(b) The provisions of this Act shall not affect any proceedings pending at the time this section takes effect before the Secretary of Commerce, the Administrator of Civil Aeronautics, the Civil Aeronautics Board, the Chairman of the Airways Modernization Board, the Secretary of the Treasury, or the Secretary of Agriculture; but any such proceedings shall be continued before the successor agency, orders therein issued, appeals therefrom taken, and payments made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or repealed by the Administrator, the Civil Aeronautics Board, the Secretary of the Treasury, or the Secretary of Agriculture or by operation of law."

"(c) The provisions of this Act shall not affect suits commenced prior to the date on which this section takes effect; and all such suits shall be continued by the successor agency, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed. No suit, action, or other proceeding lawfully commenced by or against any agency or officer of the United States, in relation of the discharge of official duties, shall abate by reason of any transfer of authority, power, or duties from such agency or officer to the Administrator or the Board under the provisions of this Act, but the court, upon motion or supplemental petition filed at any time within twelve months after such transfer, showing the necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the Administrator or the Board."

Repeal of Inconsistent Laws. Section 1401(e) of Pub.L. 85-726, provided that: "All other Acts or parts of Acts inconsistent with any provision of this Act [this chapter] are hereby repealed."

Transfer of Functions. All functions, powers, and duties of the Federal Aviation Agency and of the Administrator and other offices and officers thereof, and all functions, powers, and duties of the Civil Aeronautics Board and of the Chairman, Members, offices, and officers thereof under subchapters VI and VII of this chapter were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See sections 1655(c), (d) and 1657(f), (g), of this title.

Legislative History. For legislative history and purpose of Pub.L. 85-726, see 1958 U.S.Code Cong. and Adm.News, p. 3741. See, also, Pub.L. 87-197, 1961 U.S. Code Cong. and Adm.News, p. 2563; Pub.L. 87-528, 1962 U.S.Code Cong. and Adm.News, p. 1844; Pub.L. 90-514, 1968 U.S.Code Cong. and Adm.News, p. 3591; Pub.L. 91-449, 1970 U.S.Code Cong. and Adm.News, p. 3990; Pub.L. 93-366, 1974 U.S.Code Cong. and Adm.News, p. 3975.

Library References

Aviation ⇐32.

C.J.S. Aeronautics and Aerospace §§ 15 to 18.

Notes of Decisions

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1. Purpose

Purpose of this section providing that any person who causes or authorizes operation of aircraft shall be deemed to be engaged in operation of aircraft within meaning of this chapter was to subject classes of persons named equally with pilots to the rules, regulations and penalties provided in this chapter. Rogers v. Ray Gardner Flying Service, Inc., C.A. Tex.1970, 435 F.2d 1389, certiorari denied 91 S.Ct. 1255, 401 U.S. 1010, 28 L.Ed.2d 516.

Purpose of Air Commerce Act of 1926, former section 301 et seq. of this title, was to promote safety in aircraft flight by eliminating pilot fatigue resulting from aircraft duties. U. S. v. Ozark Air Lines Inc., D.C.Mo.1974, 371 F.Supp. 234, affirmed 506 F.2d 520.

This section is not intended to replace legal relationships created by state common law or statute with respect to tort liability and does not require that negligence of pilot-lessee of aircraft be imputed to lessor and sublessor. Rosdail v. Western Aviation, Inc., D.C.Colo.1960, 207 F.Supp. 681.

Policy behind the chapter is primarily to centralize power in the public interest so as to frame rules for the safe and efficient use of the nation's aeronautics facilities, as well as to provide an agency endowed with the authority to supervise airline rates and services. Trans World Airlines, Inc. v. Hughes, Del.Ch.1974, 317 A.2d 114.

2. State or local regulation and control

This section providing that any person who causes or authorizes operation of aircraft shall be deemed to be engaged in operation of aircraft within this chapter did not preempt Oklahoma bailment law that negligence of nonagent operator-lessee of airplane may not be imputed to owner-lessor and, as to deaths of passengers killed in crash of private airplane in Oklahoma, owner-lessors were not vicariously liable for negligence of the lessee pilot. Rogers v. Ray Gardner Flying Service, Inc., C.A.Tex.1970, 435 F.2d 1389, certiorari denied 91 S.Ct. 1255, 401 U.S. 1010, 28 L.Ed.2d 516.

The Texas Aeronautics Act, Vernon's Ann.Civ.St. art. 46c-1(a, i), does not conflict with federal law, and did not preclude application of this section defining operations of aircraft to an intrastate flight. Sosa v. Young Flying Service, D.C.Tex.1967, 277 F.Supp. 551.

This chapter preempted field of interstate air transportation in regard to routes and points to be served by interstate carriers to exclusion of conflicting regulation by state, and State Railway Commission lacked authority to compel carrier licensed by Civil Aeronautics Board to continue operations over intrastate segment of route which Board had authorized to be discontinued. Application of Frontier Airlines, Inc., 1963, 122 N.W.2d 476, 175 Neb. 501.

Federal government has not preempted field of economic regulation of air carriers and the states have power to act so long as there is no conflict with federal law. Texas Aeronautics Commission v. Braniff Airways, Inc., Tex.1970, 451 S.W.2d 199, certiorari denied 91 S.Ct. 244, 400 U.S. 943, 27 L.Ed.2d 247.

3. Air carrier

Absence of allegation that parties, who allegedly engaged in selling air transportation through bogus affinity group membership certificates, were acting in concert with air carriers did not preclude determination that they acted as indirect air carriers. C. A. B. v. Carefree Travel, Inc., C.A.N.Y.1975, 513 F.2d 375.

"Social club" whose real business was selling tours and air transportation on chartered aircraft, was an "indirect air carrier" within meaning of par. (3) of this section and thus was required to have in force a certificate issued by the Board. Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., C.A.Cal. 1972, 466 F.2d 552, certiorari denied 93 S. Ct. 1444, 410 U.S. 967, 35 L.Ed.2d 701.

"Indirect air carrier" is one who holds out to public that it will undertake to transport property by air and enters into contracts with shippers wherein it binds itself to discharge such undertaking with respect to particular shipments. Railway Exp. Agency, Inc. v. C. A. B., 1965, 345 F.2d 445, 120 U.S.App.D.C. 228, certiorari denied 86 S.Ct. 102, 382 U.S. 870, 15 L.Ed.2d 120.

Firm which assembled and shipped air freight was an "air freight forwarder" or "indirect air carrier". Airborne Freight Corp. v. Civil Aeronautics Bd., 1958, 257 F.2d 210, 103 U.S.App.D.C. 206.

Defendant who owned, operated through his employees, maintained and offered services of airplanes to others who leased airplanes for exclusive use for passengers or cargo was a "carrier" of persons and property for hire within regulation providing that no person may engage in carriage of persons or property for hire in air commerce without, or in violation of commercial operator operating certificate. U. S. v. Bradley, D.C.Tex.1966, 252 F.Supp. 804.

A city which operated and managed a public airport through its commissioners, and a corporation which operated a restaurant and other facilities at the airport, were "air carriers," within this chapter. U. S. v. City of Montgomery, D.C.Ala.1962, 201 F.Supp. 590.

Airline which operated entirely within state of California and which was not engaged in air transportation involving interstate, overseas, or foreign air commerce or transportation of mail by aircraft, was not "air carrier" within meaning of former section 401(2) of this title. In re Airlines Transport Carriers, D.C. Cal.1955, 120 F.Supp. 670.

Airline to which Board had issued letter of registration and air carrier's operator certificate, and which carried passengers in interstate commerce, was "air carrier" within meaning of former section 401 of this title. Id.

4. Air commerce

The phrase "in the conduct or furtherance of a business or vocation" appearing in definition of "air commerce" in safety regulation provisions of this chapter had no application in construction of "air transportation" subject to economic regulation under this chapter and that resort hotel did not furnish air carriage in conduct or furtherance of business or vocation could not relieve it from economic regulation. Las Vegas Hacienda, Inc. v. C. A. B., C.A.9, 1962, 298 F.2d 430, certiorari denied 82 S.Ct. 1158, 369 U.S. 885, 8 L.Ed.2d 286.

That resort hotel operator was not primarily in transportation business and that furnishing of air transportation to and from city in another state was only incidental to promotion and operation of resort hotel and that it was assertedly not interested in profiting and did not profit directly from transportation did not require Board to hold that such carriage was outside of economic regulation coverage of this chapter. Id.

Under former section 101 of this title "air commerce" applied to operation of aircraft in foreign countries only where such operation involved commerce with United States, and United States licensed airplanes privately owned by defendant and flown by copilot in foreign country and having no contact with commerce moving between United States and that country were not subject to safety regulations. Hansen v. Arabian Am. Oil Co., D.C.N.Y.1951, 100 F.Supp. 183, affirmed 195 F.2d 682, certiorari denied 73 S.Ct. 31, 341 U.S. 828, 97 L.Ed. 645.

5. Air transportation

A flight between San Francisco, California, and Los Angeles, California, was not within definition of "air transportation," as limited to "interstate air transportation" within this chapter. Dower v. United Air Lines, Inc., C.A.Cal.1961, 329 F.2d 681.

"Free" flights included in package tours sold by hotel operator to all who wished to purchase them were no less common carriage because available only to members of public interested in patronizing such hotel, and such flights constituted "air transportation" as defined in this section and prohibited thereunder in absence of authorization from Board. M & R Inv. Co. v. C. A. B., C.A.9, 1962, 308 F.2d 49.

Board's conclusion that individuals engaged in physical operation of flights conducted by hotel operator without Board authorization were themselves engaged in "air transportation" within meaning of this chapter was not supported by the record. Id.

Under certificate authorizing air carrier to engage in air transportation with respect to property between points enumerated therein including Philadelphia and that the holder could regularly serve a point named therein through any airport convenient thereto, proposed service to Philadelphia by truck through the Newark airport was adequate air service within the meaning of the certificate. City of Philadelphia v. C. A. B., 1961, 289 F.2d 770, 110 U.S.App.D.C. 104.

Where certificate authorized air carrier to engage in air transportation for property between enumerated points including Philadelphia, order granting carrier authority to move Philadelphia freight by truck to and from the Newark airport where the transcontinental air journey began or ended was not invalid as not constituting "air transportation". Id.

Flower shipping cooperative, which was incorporated for purpose of consolidating shipments of members so they would receive a reduced shipping rate, was engaged indirectly in air transportation and Board did not abuse its discretion in requiring the cooperative to submit itself to the special limited regulations the Board had set up for air freight forwarders. Consolidated Flower Shipments-Bay Area v. Civil Aeronautics Bd., C.A.9, 1954, 213 F.2d 814.

This chapter brings within its regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally. U. S. v. Caribbean Ventures, Ltd., D.C.N.J.1974, 387 F.Supp. 1250.

"Air transportation", as used in former section 481(a) of this title prohibiting such transportation without a certificate from Board, means the carriage by aircraft in commerce of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft. Pacific Northern Airlines v. Alaska Airlines, 1948, 80 F.Supp. 592, 12 Alaska 65.

Since Honolulu International Airport is not point of destination of residents of another island homeward bound from elsewhere, interisland airline carrying such passengers is engaged in "air transportation" within this chapter, whether such passengers are preticketed or not. Application of Island Airlines, Inc., 1963, 381 P.2d 530, 47 Haw. 1, 87.

6. Common carrier

Record supported Board's conclusion that resort hotel operator selling package tours from city in another state, including "free" airplane rides on its craft, was a "common carrier for compensation or hire" within economic regulation provisions of this chapter. Las Vegas Hacienda, Inc. v. C. A. B., C.A.9, 1962, 298 F.2d 430, certiorari denied 82 S.Ct. 1158, 369 U.S. 885, 8 L.Ed.2d 286.

Whether an air carrier is a common carrier is determined by the same principles applicable in the cases of carriers by other means. Arrow Aviation, Inc. v. Moore, C.A.Neb.1959, 266 F.2d 188, 73 A. L.R.2d 337.

A carrier is a "common carrier" if it holds itself out to the public as willing to carry all passengers for hire indiscriminately, and holding out may either be by advertising or by actually engaging in the business of carriage for hire. Id.

Air carrier which operated planes for carriage of persons and property between Alaska and the United States, seeking and advertising for the traffic and carrying all offered to the limit of its capacity, for compensation, was, as to such operations a "common carrier". Pacific Northern Airlines v. Alaska Airlines, 1948, 80 F.Supp. 592, 12 Alaska 65.

While transportation under contract from the United States to Alaska of explosives and other property not generally or ordinarily carried by air and transportation of fresh fish from Alaska to the United States under contract were such as might in themselves be classed as special services which air carriers are permitted to render without regard to certificate, when considered in connection with predominant body of Alaskan air carrier's common carrier operations, they must be classified as common carriage. Id.

Corporation, which by advertising and later by conduct held itself out to public generally as a carrier of freight and passengers by air for hire, was a "common carrier" within subds. (10) and (21) of former section 401 of this title and required to obtain a certificate of public convenience and necessity, though corporation soon discontinued advertising, did not operate planes on schedule but under charter, usually on hourly rate basis, retaining, however, control of plane, and due to limited facilities served only a portion of public. Alaska Air Transport v. Alaska Airplane Charter Co., D.C.Alaska 1947, 72 F.Supp. 769.

Aircraft common carrier may at times and for certain purposes become a private carrier or bailee for hire, when as matter of accommodation or special engagement he undertakes to carry something which is not his business to carry. Executive Aviation, Inc. v. National Ins.

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Underwriters, 1971, 91 Cal.Rptr. 347, 10 C.A.3d 709.

7. Conveyance

Under former section 401(18) of this title defining "conveyance" as meaning a bill of sale, contract of conditional sale, mortgage, assignment of mortgage or other instrument affecting title to, or interest in, property, the phrase "or other instrument affecting title to, or interest in, property" referred to transactions similar in nature to those enumerated and an attachment was not tantamount to a conveyance. Marrs v. Barbeau, 1957, 140 N.E.2d 353, 336 Mass. 416.

8. Foreign air transportation

The provision of former section 401(21) of this title that common carrier by airplane between places in and outside United States might be deemed engaged in foreign air transportation for purpose of former section 401 et seq. of this title did not constitute a corporation operating aircraft between United States and contiguous foreign country a common carrier, but its status as such had to be determined outside such provisions or by applying principles of common law, in absence of statute. Pan Am. Airways, Inc. v. U. S., Cust.Ct.1957, 150 F.Supp. 509.

9. Interstate air commerce

Scheduled flights carrying persons or property between islands of Hawaii were in "interstate air commerce" through airspace over places outside state of Hawaii, within this chapter. C. A. B. v. Island Airlines, Inc., D.C.Hawaii 1961, 235 F. Supp. 990, affirmed 352 F.2d 735.

10. Interstate air transportation

The general principle of supremacy of federal control over interstate and high sea flights must prevail over the economic importance of interisland air transportation to Hawaii. Island Airlines, Inc. v. C. A. B., C.A.Hawaii 1965, 352 F.2d 735.

The high seas over which interisland flights flew while traveling among the various islands of Hawaii, were a "place" within this section defining jurisdiction of the Board over interstate air transportation which defines interstate commerce as transportation between points in the same state over a foreign country or high seas as well as over another state. Id.

Where certificate authorized air carrier to engage in air transportation between Pacific Coast terminal point, various intermediate points and Portland, Maine, and Philadelphia was an intermediate point enumerated in the certificate, carrier was authorized to engage in interstate air transportation of freight including movements between Philadelphia and the Pacific Coast as well as between Philadelphia and intermediate points. City of Philadelphia v. C. A. B., 1961, 289 F.2d 770, 110 U.S.App.D.C. 101.

Where certificate authorized air carrier to engage in air transportation with respect to property between points enumerated therein including Philadelphia and that the carrier could regularly serve a point named therein through any airport convenient thereto and the Board authorized service to Philadelphia by truck through the Newark airport if that airport was convenient to Philadelphia, requirement of the certificate was met. Id.

Under former section 401 et seq. of this title, air express and air freight are not different classes of traffic requiring separate authority for each class from the Board, but were both included within the "property" authorization of former section 401(21) of this title. Delta Air Lines, Inc. v. Civil Aeronautics Bd., C.A. 5, 1957, 247 F.2d 327.

"Place", within par. (21) (a) of this section defining interstate air transportation as flight between a place in United States and place in any other state or through airspace over any place outside thereof, refers to definite locality or specific area within definite physical limits, and, with respect to interisland transportation, refers to place which itself has boundaries, not international waters outside boundaries of any place. Application of Island Airlines, Inc., 1963, 381 P.2d 536, 47 Haw. 1, 87.

Par. (21)(a) of this section, extending federal jurisdiction to commerce between places in same territory was continued in force in Hawaii during the two-year transitional period which had not expired or been terminated. In re Island Airlines, Inc., 1961, 361 P.2d 390, 44 Haw. 631, rehearing denied 361 P.2d 390, 44 Haw. 683.

"Through the airspace over any place outside thereof", within par. (21) (a) of this section defining interstate transportation as flights between places in same state through airspace over any place outside thereof, denotes passage through airspace over another state or country having jurisdiction of airspace, not merely passage through airspace outside state without encountering sovereignty of any other state or country. Id.

Jurisdiction of Board over air commerce between places in State of Hawaii

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continued for two-year transitional period unless assumption of state re responsibility was advanced by state enactment. Id.

11. Operation of aircraft

Congress, in enacting provisions of this chapter including rental or leasing of airplanes within definition of "operation of aircraft" and making it illegal for any person to operate aircraft in careless or reckless manner so as to endanger life or property of another, merely intended to subject owners equally with pilot to rules, regulations, and penalties provided in this chapter, and not to make them civilly responsible for pilot lessee negligence. Sanz v. Renton Aviation, Inc., C. A.Wash.1975, 511 F.2d 1027.

Even though lease provided that construction company-lessee would take over operation of helicopter, which was licensed in restricted category, rather than standard category, and was therefore not authorized under Federal Aviation Administration regulations to operate for "compensation or hire," in view of fact that pilot had been chief pilot of certified helicopter operating company, and in view of fact that that company's president controlled that company and helicopter leasing company, and, indirectly, had substantial control over the record owner of helicopter, the lessor "operated" the aircraft within meaning of par. (28) of this section. Aircrane, Inc. v. Butterfield, D.C.Pa.1971, 369 F.Supp. 598.

This section providing that any person who authorizes operation of an aircraft in capacity of owner or otherwise shall be deemed to be engaged in operation of the aircraft was applicable to flight which resulted in death of lessee-pilot and his passengers, and constituted a basis for imputing negligence of pilot to owner, even though the fatal flight was entirely intrastate. Sosa v. Young Flying Service, D.C.Tex.1967, 277 F.Supp. 551.

Provision of this section stating that any person authorized in the operation of aircraft is deemed to be engaged in operating it within meaning of this chapter did not create for widow of deceased passenger a civil remedy against owner of aircraft based upon imputed negligence of pilot operating plane with owner's consent. Nachsin v. De La Bretonne, 1971, 95 Cal.Rptr. 227, 17 C.A.3d 637.

Intrastate operations of aircraft on a civil airway or which directly affect or endanger the safety of interstate, overseas, or foreign air commerce, are subject to the provisions of this chapter. 1941, 40 Op.Atty.Gen. 95.

12. Navigable airspace

Traversing airspace above another's land is not alone a trespass, and is lawful unless done under circumstances which cause injury. Pueblo of Sandia ex rel. Chaves v. Smith, C.A.N.M.1971, 497 F. 2d 1013.

Airspace above land acquired by municipality in adjacent town at end of runway was within meaning of "clear zone" as defined in federal regulation and, as part of the navigable airspace, was subject to federal regulation and orders of state court purporting to regulate flight of aircraft in the clear zone infringed on federal regulation of navigable airspace. U. S. v. City of New Haven, C.A.Conn.1974, 496 F.2d 452, appeal dismissed, certiorari denied 95 S.Ct. 218, 419 U.S. 958, 42 L.Ed.2d 174.

Neither par. (20) of this section nor section 1101 of this title would support action by passengers who were injured in airplane crash and who sought to impute negligence of lessee pilot to the owners-lessors of the airplane. McCord v. Dixie Aviation Corp., C.A.Utah 1971, 450 F.2d 1129.

Land near airport in sparsely settled community in Mojave Desert was not in a congested area for purposes of regulation fixing navigable airspace as commencing at 500 feet over uncongested and 1,000 feet over congested areas. Aaron v. U. S., Ct.Cl.1963, 311 F.2d 708, 160 Ct.Cl. 205.

Congress has declared a public freedom of transit through the navigable airspace, and has defined "navigable airspace" to include airspace needed to insure safety in takeoff and landing. Aaron v. City of Los Angeles, 1971, 115 Cal.Rptr. 162, 10 C.A.3d 171.

"Navigable airspace" means airspace above minimum altitudes of flight prescribed by applicable regulations, including airspace need to insure safety in takeoff and landing of aircraft. Johnson v. Airport Authority of City of Omaha, 1962, 115 N.W.2d 420, 173 Neb. 801.

Superadjacent airspace between 250 feet and 500 feet above property lying near to runway of aviation authority's airport was not within "navigable airspace" which Congress has placed in the public domain and owners of the property did not have to establish a private property right in such airspace to recover from authority compensation for damages sus-

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tained by owners because of landings and takeoffs of jet aircraft. Hillsborough County Aviation Authority v. Benitez, Fla.App.1967, 200 So.2d 194.

Provision of this section defining navigable airspace as meaning airspace above minimum altitudes of flight prescribed by regulations and as including airspace needed to insure safety in takeoff and landing of aircraft did not give carte blanche authority to municipalities to appropriate whatever airspace they desired to insure safety in takeoff and landing. Jackson Municipal Airport Authority v. Evans, Miss.1960, 191 So.2d 126.

13. Public aircraft

Where defendant operated its specially developed aircraft pursuant to its contract with National Aeronautics and Space Administration and made three flights transporting spacecraft components, aircraft was a "public aircraft" within meaning of that term as used in par. (32) of this section and regulations issued under section 1421(c) of this title and exempting from regulatory control and from rules and regulations relating to civil aircraft any aircraft used exclusively in service of government, and defendant was not required to obtain a commercial operator's certificate, and was not subject to civil penalties for engaging in air commerce using aircraft of more than 12,500 pounds maximum certified takeoff weight. U. S. v. Aero Spacelines, Inc., C.A.Cal.1966, 361 F.2d 916.

14. Supplemental air carrier

The Board rule authorizing supplemental air carriers to operate foreign originating travel group charters maintained substantial and vital differences between such service and conventional service available to individual traveler. Pan Am. World Airways, Inc. v. C. A. B., C. A.2, 1974, 517 F.2d 734.

Board's decision that stockholders of parent corporation of supplemental air carrier were not eligible for charter service was not so clearly arbitrary as to warrant court's intervention. Trans Intern. Airlines, Inc. v. C. A. B., 1970, 432 F.2d 607, 139 U.S.App.D.C. 174.

Board's determination that stockholders of parent corporation of supplemental air carrier were not eligible for charter service by carrier was within scope of power of agency to interpret regulations within framework of adjudicatory proceeding. Id.

15. Supplemental air transportation

The authorization within this section of supplemental air transportation does not prohibit charters from being solicited, directly or indirectly, from general public. Pan Am. World Airways, Inc. v. C. A. B., C.A.2, 1975, 517 F.2d 734.

16. Vessel

In view of provisions of former section 177 of this title, and former section 401 et seq. of this title, a "seaplane" is not a "vessel" within meaning of section 3 of Title 1, defining vessel as including water craft or other artificial contrivance used or capable of being used as a means of transportation on water. U. S. v. Peoples, D.C.Cal.1943, 50 F.Supp. 402.

§ 1302. Consideration of matters in public interest by Board

In the exercise and performance of its powers and duties under this chapter the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the United States Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

Cite this Pocket Part by Title Number and Section Thus: —— U.S.C.A. § ——

TITLE 49

TRANSPORTATION

CHAPTER 20—FEDERAL AVIATION PROGRAM

SUBCHAPTER I—GENERAL PROVISIONS

§ 1301. Definitions

As used in this chapter, unless the context otherwise requires—

[See main volume for text of (1) to (10)]

(11) "All-cargo air service" means—

(A) the carriage by aircraft of only (i) property as a common carrier for compensation or hire, or (ii) mail, or both, in commerce between a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(B) the carriage by aircraft of only (i) property as a common carrier for compensation or hire, or (ii) mail, or both, in commerce between a place in any State of the United States or the District of Columbia and any place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico and a place in the Virgin Islands;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(12) "Appliances" means instruments, equipment, apparatus, parts, appurtenances, or accessories, of whatever description, which are used, or are capable of being or intended to be used, in the navigation, operation, or control of aircraft in flight (including parachutes and including communication equipment and any other mechanism or mechanisms installed in or attached to aircraft during flight), and which are not a part or parts of aircraft, aircraft engines, or propellers.

(13) "Board" means the Civil Aeronautics Board.

(14) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(15) "Civil aircraft" means any aircraft other than a public aircraft.

(16) "Civil aircraft of the United States" means any aircraft registered as provided in this chapter.

(17) "Conditional sale" means (a) any contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time, upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (b) any contract for the bailment or leasing of an aircraft, aircraft engine, propeller, appliance, or spare part, by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract. The buyer, bailee, or lessee shall be deemed to be the person by whom any such contract is made or given.

(18) "Conveyance" means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property.

(19) "Federal airway" means a portion of the navigable airspace of the United States designated by the Secretary of Transportation as a Federal airway.

(20) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

(21) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(22) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the

United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(23) "Intrastate air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage solely in intrastate air transportation.

(24) "Intrastate air transportation" means the carriage of persons or property as a common carrier for compensation or hire, by turbo-jet-powered aircraft capable of carrying thirty or more persons, wholly within the same State of the United States.

(25) "Landing area" means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

(26) "Mail" means United States mail and foreign-transit mail.

(27) "Navigable airspace" means 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.

(28) "Navigation of aircraft" or "navigate aircraft" includes the piloting of aircraft.

(29) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

(30) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(31) "Propeller" includes all parts, appurtenances, and accessories thereof.

(32) "Possessions of the United States" means (a) the Canal Zone, but nothing herein shall impair or affect the jurisdiction which has heretofore been, or may hereafter be, granted to the President in respect of air navigation in the Canal Zone; and (b) all other possessions of the United States. Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this chapter to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(33) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

(34) "Spare parts" means parts, appurtenances, and accessories of aircraft (other than aircraft engines and propellers), of aircraft engines (other than propellers), of propellers and of appliances, maintained for installation or use in an aircraft, aircraft engine, propeller, or appliance, but which at the time are not installed therein or attached thereto.

(35) The term "special aircraft jurisdiction of the United States" includes—

(a) civil aircraft of the United States;

(b) aircraft of the national defense forces of the United States;

(c) any other aircraft within the United States;

(d) any other aircraft outside the United States—

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or

(ii) having "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; and

(e) other aircraft leased without crew to a lessee who has his principal place of business in the United States, or if none, who has his permanent residence in the United States;

while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard.

(36) "Supplemental air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

(37) "Supplemental air transportation" means charter trips, including inclusive tour charter trips, in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 1371(d)(3) of this title to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 1371(d)(1) and (2) of this title. Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour in air transportation by selling or offering for sale individual tickets directly to members of the general public, or to do so indirectly by controlling, being controlled by, or under common control with, a person authorized by the Board to make such sales.

(38) "Ticket agent" means any person, not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or foreign air carrier, who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation.

(39) "United States" means the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof.

As amended Pub.L. 95–163, § 17(b), Nov. 9, 1977 91 Stat. 1286.

1977 Amendment. Par. (11). Pub.L. 95–163, § 17(b)(2), added par. (11). Former par. (11) was renumbered (12). Pars. (12)–(39). Pub.L. 95–163, § 17(b)(1), renumbered former pars. (11) to (38) as (12) to (39), respectively.

Legislative History. For legislative history and purpose of Pub.L. 95–163, see 1977 U.S.Code Cong. and Adm.News, p. 5175.

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1. Purpose

By enactment of this chapter, Congress intended to impose duty on Federal Aviation Administration to promote maximum safety in use of nation's air space. Clemente v. U. S., D.C.Puerto Rico 1976, 422 F.Supp. 504, motion denied 426 F. Supp. 1.

2. State or local regulation and control

To extent that state law conflicts with any part of this chapter it is preempted by this chapter under Congress' power to regulate interstate commerce. Feldman v. Philadelphia Nat. Bank, D.C.Pa.1976, 408 F.Supp. 24.

Where state's law, as reflected by Uniform Commercial Code, did not conflict with this chapter, it was applicable to transactions involving aircraft. Id.

Recording provisions of this section do not remove transactions involving aircraft entirely from effect of state law. Id.

Despite comprehensive effect of federal regulation on air commerce, states and localities retain power to regulate ground activities not directly involving actual aircraft operation. Garden State Farms, Inc. v. Bay, 1975, 343 A.2d 832, 130 N.J. Super. 1, reversed on other grounds 370 A.2d 37, 146 N.J.Super. 438.

4a. Aircraft

Alleged failure of the Administrator of Federal Aviation Administration to determine that hang gliders were "aircraft" within meaning of this section was discretionary function so that suit thereon under Tort Claims Act, sections 1346(b) and 2671 et seq. of Title 28, was barred. Fielder v. U. S., D.C.Cal.1976, 423 F.Supp. 77.

8. Foreign air transportation

States and municipalities are without authority to regulate any operation or navigation of aircraft within limits of any federal airway or any operation or navigation of aircraft which directly affects interstate, overseas or foreign air commerce. Garden State Farms, Inc. v. Bay, 1975, 343 A.2d 832, 130 N.J.Super. 1. Reversed on other grounds 370 A.2d 37, 146 N.J.Super. 438.

17. Charter

Congress intended the word "charter," to be flexible term which Board is free to define in accordance with experience and changing circumstances as long as integrity of scheduled service traffic is not violated. Trans World Airlines, Inc. v. C. A. B., C.A.2, 1976, 545 F.2d 771.

§ 1302. Consideration of matters in public interest by Board

General factors for consideration

(a) In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the United States Postal Service, and of the national defense;

(2) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(3) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(4) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the United States Postal Service, and of the national defense;

(5) The promotion of safety in air commerce; and

(6) The promotion, encouragement, and development of civil aeronautics.

Factors for all-cargo air service

(b) In addition to the declaration of policy set forth in subsection (a) of this section, the Board, in the exercise and performance of its powers and duties under this chapter with respect to all-cargo air service shall consider the following, among other things, as being in the public interest:

(1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (A) the present and future needs of shippers, (B) the commerce of the United States, and (C) the national defense.

(2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.

(3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

As amended Pub.L. 95–163, § 16(b), Nov. 9, 1977, 91 Stat. 1284.

1977 Amendment. Pub.L. 95–163 redesignated existing undesignated provisions as subsec. (a) and existing cls. (a) to (f) thereof as cls. (1) to (6), and added subsec. (b).

Legislative History. For legislative history and purpose of Pub.L. 95–163, see 1977 U.S.Code Cong. and Adm.News, p. 5175.

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Promotion of competition 13

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2. Purpose

Since central objective of this section is to promote regulated competition in air transportation industry and since primary means for achieving goal is certification process in which board must consider whether applicant is fit, willing and able and whether requested authority would serve public convenience and necessity, rigid constraints on board's ability to consider applications on their merits are generally disfavored. World Airways, Inc. v. C. A. B., 1976, 547 F.2d 605, 178 U.S.App.D.C. 398.

Clear intent on part of Congress in enacting this chapter was to provide against improper design and manufacture of aircraft. In re Paris Air Crash of March 3, 1974, D.C.Cal.1976, 399 F.Supp. 732.

4. Sovereignty of federal government

Doctrine of federal preemption of aviation law does not generally extend to

REPRINT OF

Title 3

COMMERCE

Part 6. Alaska Transportation Commission
Chapter 60. Practice and Procedure
(3 AAC 60.010 – 3 AAC 60.630)

ALASKA ADMINISTRATIVE CODE

September, 1973

PART 6. ALASKA TRANSPORTATION COMMISSION

Chapter
- 60. Practice and Procedure
- 64. Motor Freight Carriers
- 66. Carriers by Bus
- 68. Air Commerce
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CHAPTER 60. PRACTICE AND PROCEDURE

Article
- 1. Practice Before the Commission
- 2. Pleadings
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ARTICLE 1. PRACTICE BEFORE THE COMMISSION

Section
- 10. Ethical conduct
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3 AAC 60.010. ETHICAL CONDUCT. (a) These canons are in furtherance of the purp of the commision's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the state of Alaska, and such standards are taken as the basis for these specifications, modified insofar as the nature of the practice before the commission requires.

(b) It is the duty of the practitioner to maintain towards the commission a respectful attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. In many respects the commission functions as a court, and practitioners should regard themselves as officers of that court and strive to uphold its honor and dignity. The commission, not being wholly free to defend

itself, is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the commission, it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

(c) It is the duty of the practitioner not only to his client, but also to the commission and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

(d) It is unethical for a practitioner to attempt to sway the judgment of the commission by propaganda, or by enlisting the influence of intercession of members of the legislature or other public officers, or by threats of political or personal reprisal.

(e) Marked attention and unusual hospitality on the part of a practitioner to a commissioner, examiner, or other representative of the commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between commission and practitioners.

(f) The selection of commissioners is a duty of the Governor with confirmation by the legislature. It is the duty of the practitioners insofar as they attempt to advise the appointing or confirming officers, to endeavor to prevent any consideration from outweighing fitness in the selection.

(g) No client, corporate or individual, however powerful, no cause, civil or political, however important, is entitled to receive, and no practitioner should render any service of advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But, above all, he will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

(h) In the disposition of contested proceedings the commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capactiy. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner, or other representative of the commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practioners at all times should scrupulously refrain in their communications to and discussions with the commission and its staff from going beyond *ex parte* representations that are clearly proper in view of the administrative work of the commission.

(i) It is the duty of a practioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

(j) It is unethical to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interest when, in behalf of one client, it is his duty to contend

for that which duty to another client requires him to oppose.

(k) The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

(l) A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come to the case.

(m) When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

(n) Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethern, but, nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner, generally after communication with the practitioner of whom the complaint is made.

(o) A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertake to negotiate or compromise the matter with him, but should deal only with the practitioner who represents the other party. It is incumbent upon the practitioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

(p) A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

(q) Attempts to influence the action and attitude of the members and examiners of the commission through propaganda, or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such measures. On the other hand, it is not against the public interest or unfair to the commission that the facts of pending litigation shall be made known to the public through the press in a fair and unbiased manner and in dispassionate terms. Practitioners should, themselves, avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the commission, or to influence the commission's course and judgment as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is to make it anonymously.

(r) The practitioner must decline to conduct a cause or to make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

(s) When a practitioner discovers that some fraud or deception has been practiced, which has unjustly imposed upon the commission or a party, he should endeavor to rectify it; first by

advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or his counsel (practitioner), so that appropriate steps may be taken.

(t) If any such person does not conform to such standards, the commission may decline to permit such person to appear in a representative capacity in any proceeding. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.141

3 AAC 60.020. FORMER EMPLOYEES. (a) No former employee of the commission may at any time after severing his employment with the commission appear in a representative capacity on behalf of other parties in a formal proceeding wherein he previously took an active part as a representative of the commission unless written permission by the commission is granted therefor.

(b) No former employee of the commission shall at any time after severing his employment with the commission appear, except with the written permission of the commission, as an expert witness on behalf of other parties in a formal proceeding wherein he previously took an active part in the investigation as a representative of the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.141

3 AAC 60.030. JOINT HEARINGS WITH FEDERAL REGULATORY AGENCIES. In any proceeding wherein the commission participates jointly with the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission, or other federal regulatory agency, the rules of practice and procedure of such federal agency shall govern. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.141

ARTICLE 2. PLEADINGS

Section
- 40. Pleadings enumerated
- 50. Applications - contents
- 60. Formal complaints - contents
- 70. Petitions - contents
- 80. Answers
- 90. Replies
- 100. Intervention
- 110. Motions
- 120. Time for pleadings
- 130. Amended pleadings
- 140. Form and size
- 150. Filing, copies required
- 160. Service of pleadings and motions

3 AAC 60.040. PLEADINGS ENUMERATED. (a) Pleadings shall consist of applications, formal complaints, petitions, answers, replies, and motions.

(b) All pleadings except applications shall conform to and comply with secs. 40-160 of this chapter and shall have at the top of the page, *State of Alaska, Alaska Transportation Commission,* title of the case, title of the pleading and docket number, if any, as follows:

STATE OF ALASKA

ALASKA TRANSPORTATION COMMISSION

In the Matter of the Application of	)	
John D. Doe, d/b/a Doe's Flying Service, for an Air Commerce Certificate	)	Docket No.____
	)	TITLE OF PLEADING

(Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.050. APPLICATIONS - CONTENTS. (a) An application is a pleading which applies or prays for any right, power, privilege, or other authority under a statute or regulation requiring the filing of an application.

(b) Applications may be made at any time on a form provided by the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.060. FORMAL COMPLAINTS - CONTENTS. (a) Complaints shall set forth the full name and address of each party complainant and of each party defendant.

(b) Complaints shall fully and clearly set forth concisely the specific act complained of, or the alleged grievance, so as to advise the parties and the commission completely of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief requested.

(c) Complaints shall set forth a citation of the statutes or rules and regulations alleged to have been violated. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.070. PETITIONS – CONTENTS. (a) A petition is any other pleading praying for affirmative relief other than complaints, answers, replies, applications or motions and shall include requests for leave to intervene.

(b) A petition shall set forth all facts upon which the request for relief is based, with the dates of all occurrences which may be essential for the disposition of the matter, together with a citation of the statute and rules and regulations upon which the petition is based, and such other information as required by the commission's rules and regulations under which the specific type of petition is filed.

(c) In the case of petitions, the commission may require notice be given to interested parties and order a hearing. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.080. ANSWERS. (a) Any party against whom a complaint is directed or who desires to contest or make any representations in connection with an application or petition shall file with the commission an answer thereto within the time required by sec. 120 of this chapter.

(b) Answers shall be so drawn as to advise fully and completely the nature of the defense, contention, or representation, and shall admit or deny specifically and in detail all material allegations of the complaint or a protest to a tariff change as provided in sec. 190 of this chapter.

(c) Matters alleged by way of affirmative defense shall be separately stated and numbered. Any defense which challenges the jurisdiction of the commission over the subject matter of the proceeding shall be pleaded as an affirmative defense. Any defense based upon the existence of operating authority shall affirmatively allege such authority.

(d) In case a party fails to answer within the time specified in sec. 120 of this chapter, he shall be deemed in default, and all material allegations of the complaint, application, or petition may be deemed admitted and any further hearing waived. Thereafter, the proceeding may be disposed of without further notice to the defaulting party and without formal proceeding as to such party.

(e) The commission may, upon such terms as may be just, at any time after mailing of an order entered upon a default, relieve the party affected thereby where it appears the order was entered through mistake, inadvertence, surprise, or excusable neglect of such party. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.090. REPLIES. A party desiring to reply to an answer shall file the same with the commission within the time set forth in sec. 120 of this chapter. Failure to file a reply within said time shall be deemed a general denial. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.100. INTERVENTION. (a) Any person may petition the commission for permission to intervene in any proceeding in writing prior to the time of the hearing except as provided in (c) of this section. Any person can petition the hearing officer for permission to intervene orally or in writing at the time of the hearing. Such petition shall contain the following:

(1) the name and address of the party intervening and of his attorney, if any;

(2) the interest of such party in the proceeding; and

(3) the position of such party in the proceeding, including the name of the party in whose behalf such intervention is requested.

(b) Intervention shall not broaden the issues in the proceeding and may be allowed at the

discretion of the hearing officer at the hearing or the commission prior to the hearing.

(c) Intervention in any application proceeding shall be within the time specified in the notice of application as published in a newspaper of general circulation. (Eff. 12/28/69, Reg. 31)
Authority: AS 42.07.150

3 AAC 60.110. MOTIONS. Service of any motion, unless specified in these rules, shall be made on all other parties to the proceedings and the original and one copy shall be served on the commission and if the case has been given to the hearing officer, two copies thereof shall be given to the hearing officer. The commission or the hearing officer shall decide the motion with or without hearing. If the case is before the hearing officer, he will decide the motion and if the case is before the commission, the commission will decide the motion. (Eff. 12/28/69, Reg. 31)
Authority: AS 42.07.150

3 AAC 60.120. TIME FOR PLEADINGS. (a) A motion directed to a complaint must be filed before the answer is due; provided, however, a motion directed towards the legal sufficiency of a complaint to state a cause for relief may be made at any time.

(b) A motion directed to an answer must be filed before the reply is due; provided, however, that a motion directed to the legal sufficiency of any answer to state a cause of defense may be made at any time.

(c) A motion directed to a reply or to the legal sufficiency of a reply must be filed within 10 days after service of the reply.

(d) Answer, if made, must be filed within 20 days.

(e) Reply, if made, must be filed within 10 days after the service of the pleading against which it is directed.

(f) A motion directed to the legal sufficiency of an application or petition may be made at any time.

(g) Unless otherwise specified by these regulations, any reply to a motion shall be served within 10 days of the date of serving of the original motion.

(h) The commission may shorten or extend the time required to file any pleading on its own motion or on the motion of a party stating the reasons for the requested extension. (Eff. 12/28/69, Reg. 31)
Authority: AS 42.07.150

3 AAC 60.130. AMENDED PLEADINGS. Amendments to pleadings may be allowed at any time and upon such terms as may be deemed proper in the discretion of the commission. (Eff. 12/28/69, Reg. 31)
Authorityy: AS 42.07.150

3 AAC 60.140. FORM AND SIZE (a) Pleadings shall be fastened at the top, shall be typewritten on paper 8½ x 11 to 14 inches in size, and exhibits or appendices, annexed thereto, folded to that size. The impression shall be on one side of the paper only and shall be double spaced, except that footnotes or quotations shall be single spaced and indented.

(b) Reproduction of original document may be by any process, provided all copies are clear and permanently legible. (Eff. 12/28/69, Reg. 31)
Authority: AS 42.07.150

3 AAC 60.150. FILING, COPIES REQUIRED. (a) Upon the filing of an original complaint or amendment thereof, there must also be filed conformed copies equal in number to two more than the number of defendants named in the complaint.

(b) Published application and petition forms will be furnished upon request, and the original and one conformed copy shall be filed with the commission.

(c) Unless otherwise expressly provided in the rules and regulations governing a particular proceeding, an original and two conformed copies of all other pleadings shall be filed with the commission. (Eff. 12/28/69, Reg. 31)
Authority: AS 42.07.150

3 AAC 60.160. SERVICE OF PLEADINGS AND MOTIONS. (a) Service by commission: all complaints and final orders will be served by the commission. Service may be made by registered

United States mail, postage prepaid, addressed to recipient as his address appears in the records of the commission, or his agent of process. Service shall be deemed complete when said document is so deposited in the United States mail or hand delivered by an agent of the commission.

(b) Service by parties.

(1) all other pleadings shall be served by the pleader upon each other party to the proceeding or his attorney of record;

(2) service of pleadings by parties shall be made by delivering one copy to each party in person or by first-class mail, properly addressed with postage prepaid;

(3) when a party has appeared by attorney, service upon such attorney of pleadings and all decisions and order of the commission in the proceeding, will be deemed valid service upon the party;

(4) how service is made: whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the commission; service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the commission; delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is not one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; service by mail is complete upon mailing; service, execution, and return based on a copy of any paper transmitted by telegraph or radio may be made by the person to whom directed with the same effect as if such copy were the original; in such case, the original shall be filed with the commission;

(5) service by mail: whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, five days shall be added to the prescribed period except in time periods prescribed for tariff change proceedings; and

(6) there shall appear on the original of every pleading either an acknowledgement of service or certificate in substantially the following form:

> I hereby certify that I have this day served a true copy of the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed with postage prepaid, to the following parties or attorneys of parties:
>
> _____
>
> _____
>
> _____
>
> Dated at _____ this _____ day of _____, 19____.
>
> (Signature) _____
>
> Of Counsel for _____

Where the method of service is other than by mail, there must be attached a certification by the person who made the service stating the method of service, upon whom service was made, the time, date, and place. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

ARTICLE 3. HEARINGS

Section
170. Hearings
180. Notice
190. Protests
200. Postponement of hearings
210. Continuances
220. Consolidation of proceedings
230. Conferences
240. Stipulation as to facts
250. Subpoenas
260. Depositions

3 AAC 60.170. HEARINGS. (a) Hearings may be ordered by the commission for applications, clarification of authority, transfers, investigations, tariff suspension, or other just cause not herein specified.

(b). The commission shall order the place of hearing at a place most convenient to all parties.

(c) All hearings shall be conducted by a hearing officer appointed by the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.180. NOTICE. (a) The time and place of holding formal hearings will be set by the commission and notice served on all parties or their representative at least 30 days prior to the date of said hearing, by depositing said notice in the United States mail, postage prepaid, addressed to recipient as his address appears in the records of the commission. The commission may by order or in the notice of hearing require a hearing to be held on less than 30 days' notice.

(b) The commission shall compile a journal of all applications, petitions, complaints and other proceedings to be published regularly not less frequently than once a month. Notice to all carriers and the general public shall be accomplished by publication of the journal. Official notice is completed upon publication in the journal. Upon payment of the charge therefor, any person may subscribe to the journal which shall be mailed first class to his designated address. Copies of the journal shall be maintained for public inspection at the offices of the commission in Anchorage, Fairbanks and Juneau. (Eff. Reg. 31; am 10/4/73, Reg. 47)

Authority: AS 42.07.141

3 AAC 60.190. PROTESTS (a) Any protests to an application shall state the specific grounds for the protest on one or more of the following grounds:

(1) financial ability of the applicant;

(2) deficiency in experience or inability of applicant to perform the service;

(3) lack of necessity for proposed service; or

(4) proposed service would be detrimental to the public interest.

(b) Anyone filing a protest shall indicate therein whether or not they will be present at the hearing by stating

> "I hereby certify that I will/will not appear at the hearing and will/will not participate fully in any and all proceedings concerning this application."

(c) Any protest to a tariff change shall be filed at least 15 days prior to the effective date of the tariff change. Protests shall state the specific grounds for the protest and identify the specific tariff and portion thereof. Motions for the suspension of tariffs shall be filed in accordance with sec. 410 of this chapter. The commission shall file all protests with the originator of the tariff change. Answers to protests shall be filed with the commission at least five days prior to the effective date of the tariff change. The commission may order a formal hearing to consider the tariff change.

(d) Protests shall be postmarked not later than 15 days from the last day of publication. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.200. POSTPONEMENT OF HEARINGS. (a) Any party who desires a postponement shall, immediately upon receipt of notice of the hearing or as soon thereafter as facts requiring such postponement come to his knowledge, notify the hearing officer in writing at least 10 days before the date of the hearing,

stating in detail the reasons why such postponement is necessary.

(b) The hearing officer in passing upon a request for a postponement shall consider whether such request was promptly made. For good cause shown, the hearing officer may grant such a postponement and may, for good cause shown, order a postponement upon his own motion at least 10 days before the date of the hearing. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.210. CONTINUANCES. (a) During a hearing, if it appears that further evidence or argument should be received, the hearing officer may, in his discretion, continue the hearing for good cause shown.

(b) The date of such continued hearing may be fixed at time of hearing or by later written notice to the parties. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.220. CONSOLIDATION OF PROCEEDINGS. Proceedings may be consolidated for hearing in the discretion of the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.230. CONFERENCES. (a) It is the policy of the commission, in order to make possible a more effective use of hearing time in formal proceedings, and otherwise to expedite the orderly conduct and disposition of such proceedings, to arrange for conferences between parties to such proceedings and the hearing officer to consider the following matters:

(1) simplification and clarification of the issues and elimination of irrelevant or immaterial issues;

(2) the possibilities for obtaining stipulations as to facts pursuant to sec. 240 of this chapter, authenticity of documents, admissibility of evidence, order of proof, and other matters to which stipulation might be expected to conserve hearing time; and

(3) such other matters as may aid in expediting the orderly conduct and disposition of the proceeding.

(b) In any proceeding the hearing officer may, in his discretion, call the parties together for a conference prior to the taking of testimony or may recess the hearing for such conference. The hearing officer shall state on record the results of such conference. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.240. STIPULATION AS TO FACTS. (a) Parties to any proceeding may, by stipulation of record, agree upon the facts or any portion thereof involved in the controversy, which stipulation shall be binding upon the parties thereto and may be regarded and used by the hearing officer as evidence at the hearing.

(b) Proof by evidence of the facts stipulated to may, however, be required, notwithstanding the stipulation of the parties, by the hearing officer or upon request of the parties, by the hearing officer or upon request of the commission, in either of which events notice will be given and an opportunity to produce afforded. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.250. SUBPOENAS. (a) The issuance of subpoenas, unless otherwise directed by the commission or the hearing officer on his own motion, shall be made in writing and include the name and address of the desired witness.

(b) Subpoenas duces tecum shall specify the particular document record, or part thereof, desired to be produced.

(c) Service of subpoenas shall be made as provided in civil suits in the Superior Court for the state of Alaska and the original shall be forthwith returned to the commission or the hearing officer.

(d) A subpoena issued under this section extends to all parts of the state and shall be served in accordance with the rules of civil procedure. No witness is obliged to attend at a place out of the election district in which he resides unless the distance is less than 100 miles from his place of residence, except that the commission, upon affidavit of a party showing that the testimony of the witness is material and necessary, may endorse on the subpoena an order requiring the attendance of the witness. A

witness who is not a party and who appears under a subpoena is entitled to receive

(1) fees, except a witness who is an officer or employee of the state or a political subdivision of the state;

(2) mileage in the same amount and under the same circumstances as prescribed by law for a witness in a civil action in a superior court; and

(3) an additional fee and mileage to a per diem compensation of $15 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing, if the witness attends a hearing at a point so far removed from his residence as to prohibit return to his residence from day to day.

(c) Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.260. DEPOSITIONS. (a) Preliminary:

(1) the commission may either upon its own initiative, or for good cause shown by a party to a proceeding, issue an order to take a deposition;

(2) depositions shall be taken before an officer authorized to administer oaths by the laws of the State of Alaska;

(3) unless under special circumstances and for good cause shown, no deposition shall be taken within 10 days prior to the assigned date of the hearing in such proceeding.

(b) A petition requesting an order to take a deposition shall be filed with due regard to the time periods specified in (a) (3) of this section and shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken.

(c) Order and interrogatories:

(1) if the petition requesting an order to take a deposition is granted, which action may be taken without awaiting the possible filing of a reply, the commission will serve upon the parties an order which will name the witness whose deposition is to be taken, and specify the time when, the place where, and the officer before whom the witness is to testify, but such time and place and the officer before whom the deposition is to be taken, so specified in the commission's order, may or may not be the same as set out in the petition;

(2) in lieu of participating in the oral examination, parties served with the order for taking of a deposition may promptly transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) The officer before whom the deposition is to be taken shall observe the provisions requesting appearances, put the witness on oath, and shall personally, or by someone acting under his discretion and in his presence, record the testimony of the witness. The testimony shall be taken verbatim and transcribed unless the parties agree otherwise.

(e) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

(f) When the testimony is fully transcribed or otherwise recorded, the deposition of each witness shall be submitted to him for examination and shall be read to or by him. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall state at the foot thereof the fact of the waiver or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reason, if any, given thereof; and the deposition may then be used as fully as though signed, unless, on a

motion to suppress, the commission finds that the reasons given for the refusal to sign are sufficient to require rejection of the deposition in whole or in part.

(g) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not of counsel or attorney for any of the parties, and that he is not interested in the event of the proceeding.

(h) The officer shall securely seal the deposition in an envelope endorsed with the title of the proceeding and shall promptly send the original and one copy thereof, together with the original and one copy of all exhibits, by registered mail to the commission. The deposition must reach the commission not later than five days before the date of the hearing at which it is to be offered as evidence.

(i) Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

(j) The party taking the deposition shall give prompt notice of its filing to all other parties.

(k) At the oral hearing, if one is held, the deposition may be offered in evidence by the party at whose instance it was taken. If not offered by such party, it may be offered in whole or in part by the adverse party. If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it, which is relevant to the part introduced, and any party may introduce any other parts. Such deposition shall be admissible in evidence subject to such objections as to competency of the witness, or to the competency, relevancy, or materiality of the testimony as were noted at the time of taking of said deposition, or are made at the time it is offered in evidence. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.270. ORDER OF PROCEDURE. (a) The presentation of evidence as hereafter set forth shall be followed except as the hearing officer may otherwise change or modify such order of presentation

(1) upon formal complaints: complainant, defendant, commission's staff in proceedings in which the commission is not the complainant, and rebuttal by complainant;

(2) in investigation and/or suspension proceedings: respondent, commissions's staff, protestants against suspended schedules, interested parties, and rebuttal by respondent;

(3) upon applications and petitions: applicant or petitioner, protestants, interested parties, commission's staff, and rebuttal by applicant or petitioner.

(b) In hearings of several proceedings upon a consolidated record, the hearing officer shall designate the order of procedure.

(c) Interveners shall follow the party in whose behalf the intervention is made. In the event the intervention is not in support of either original party, the hearing officer shall designate when such interveners shall be heard. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.280. APPEARANCES. (a) Parties shall enter appearances at the beginning of the hearing by giving their names and addresses in writing to the reporter or hearing officer who will include the same in the record of the hearing.

(b) The hearing officer conducting the hearing may, in addition, require appearances to be stated orally so that the identity and interest of all parties present will be known to those at the hearing.

(c) An attorney who has appeared for a party in any matter pending for hearing before this commission may be permitted to withdraw as counsel for such party only as follows:

(1) for good cause shown upon motion and notice served on the other party not less than 10 days before the time specified for the hearing;

(2) where the party has other counsel ready to be substituted for the attorney who wishes to withdraw; or

(3) where the party expressly consents to the withdrawal of his attorney, orally to the hearing officer, or in writing.

(d) Any party who shall fail to appear at a scheduled conference or hearing, after being duly notified thereof shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen any matter determined at such conference or hearing, or to recall for further examination witnesses who were excused, unless the hearing officer shall determine that the failure to be represented was unavoidable or that the interests of the other parties and of the public would be prejudiced by not permitting such reopening or further examination.

(e) Every witness testifying in a proceeding before the commission shall under oath state or affirm that the testimony he gives is the truth and nothing but the truth. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.290. EVIDENCE. (a) Subject to the provision of this section, all relevant evidence is admissible when, in the opinion of the hearing officer

(1) it is the best evidence reasonably obtainable, having due regard to its necessity, availability, and trustworthiness; and

(2) relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs regardless of the existence of a common law of statutory rule which makes improper the admission of evidence over an objection in a civil action.

(b) Oral evidence may be taken only on oath or affirmation. Each party may

(1) call and examine witnesses;

(2) introduce exhibits;

(3) cross-examine opposing witnesses on matters relevant to the issues, even though that matter was not covered in the direct examination;

(4) impeach a witness regardless of which party first called the witness to testify; and

(5) rebut the evidence against himself.

(c) The hearing officer may, in his discretion, either with or without objection, exclude inadmissible evidence or order cumulative evidence discontinued.

(d) If hearsay evidence is objected to, it may not be used by itself to support a finding unless it would be admissible over objection in a civil action. Hearsay evidence may be used, however, even over objection, to supplant or explain direct evidence.

(e) Parties objecting to the introduction of evidence shall state the grounds of such objection at the time such evidence is offered. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.300. OFFICIAL NOTICE. (a) In addition to matters concerning which courts of this state take judicial notice, official notice will be taken of the following matters:

(1) rules, regulations, administrative rulings and report of the commission and other governmental agencies;

(2) orders of the commission exclusive of findings of fact;

(3) contents of permits and licenses issued by the commission; or

(4) documents and records in the files of the commission which are required by law or by the rules of the commission so filed.

(b) In addition, the commission and hearing officer may at their discretion take official notice of the results of his own inspection of the physical conditions involved and may take official notice of the results of their previous experience in similar situations and the general information concerning the subject which goes to make up their fund of expert knowledge, including findings of fact in prior orders.

(c) Where official notice is taken of any matter, the findings of fact shall so specify.

(d) Whenever practicable, the hearing officer and commission shall notify the parties to the proceeding that official notice will be taken of any pertinent facts. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.310. RESOLUTIONS. (a) Resolutions, properly authenticated, of the governing bodies of cities, boroughs, or other governmental agencies, will be received in evidence if offered at the hearing by the head of the agency or governing body or by the secretary or other officer charged with the official custody of such records.

(b) Such resolutions shall be received subject to rebuttal by adversely affected parties as to either the authenticity of the resolution or the circumstances surrounding its procurement.

(c) Recitals of fact contained in resolutions shall not be deemed proof of these facts, and such resolutions shall only be recieved for the limited purpose of showing the expression of the official action of the resolving body with respect to the matter under consideration of the proceeding. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.320. EXHIBITS. (a) Exhibits prepared for the hearing shall be upon paper 8½ x 11 to 14 inches in size or folded in multiples thereof. The impression shall be one side of the paper only and shall be double spaced, except that footnotes or quotations shall be single spaced and indented.

(b) When exhibits apart from exhibits attached to an application are offered in evidence, copies must be furnished to all parties of record and two copies to the hearing officer, except when otherwise directed.

(c) When relevant and material matter offered in evidence by any party is embraced in a book, paper, or document containing other matters not material or relevant, the party offering the same must plainly designate the matter so offered. If other matter is in such volume as would necessarily encumber the record, such book, paper, or document will not be received in evidence but may be marked for identification, and, if properly authenticated, the relevant or material matter may be read into the record or, if the hearing officer so directs, a true copy of such matter in proper form shall be received as an exhibit and like copies delivered by the party offering the same to all other parties or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the book, paper, or document, and to offer in evidence in like manner other portions thereof found to be material and relevant.

(d) An official rule, report, order, record, or other document, prepared and issued by any governmental authority, when admissible for any purpose, may be evidenced by an official publication thereof; by a publication of a recognized reporting service deemed by the hearing officer to constitute a sufficient guaranty of trustworthiness; or by a copy attested by the officer having the legal custody thereof, or his deputy, if accompanied by a certificate that such officer has such custody, and authenticated by the seal of his office. When such official records, otherwise admissible, are contained in official publications or publication by recognized reporting services and are in general circulation and readily accessible to all parties, they may be introduced by reference, provided, however, that proper and definite reference to the record in question is made by the party offering the same.

(e) Papers and documents on file with the commission, if otherwise admissible, may be introduced by reference to number, date, or by any other method of identification satisfactory to the hearing officer. If only a portion of such paper or document is offered in evidence, the part so offered shall be clearly designated.

(f) The direct testimony of a witness may be presented in writing. Unless otherwise directed by the hearing officer, such testimony, when properly authenticated by the wirness under oath or affirmation, may be transcribed into the record or marked as an exhibit. Such written testimony shall contain a statement of the qualifications of the witness, and shall be accompanied by any exhibits to which it relates. Such written testimony shall be subject to the same rule of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.330. PREPARED TESTIMONY AND EXHIBITS IN RATE HEARINGS. (a) The commission may require any carrier subject to its jurisdiction, filing a tariff for a rate increase, to file all proposed testimony and/or exhibits with the commission before setting a date for hearing or rendering a decision. Such written testimony shall contain a statement of the qualifications of the witness, and shall be accompanied by any exhibits to which it relates. Such written testimony shall be subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner.

(b) Every person or party required or who desires to submit proposed testimony and/or exhibits shall file with the commission a minimum of four copies. Where additional parties have become known before the time required to file proposed testimony and/or exhibits, then additional copies may be required to be filed with the commission for every known party. In addition, a sufficient number of copies shall be made available for distribution to all parties of record at the time of hearing if parties have not already been furnished with copies.

(c) Duplication of testimony and/or exhibits shall comply with the requirements under sec. 320(2) of this chapter. Duplicate original copies shall be submitted in easily readable form. Where duplicate original copies do not meet the requirements of legibility, the commission may require the party to submit easily readable copies.

(d) A waiver of this section, as to the testimony or exhibits or a portion of the same of a particular witness, may be obtained ex parte from the commission prior to the hearing upon a showing of good cause.

(e) Whenever, in the circumstances of a particular case, it is deemed necessary or desirable, the commission or the hearing officer may direct that oral testimony and/or exhibits be reduced to exhibit form and be offered in the manner hereinbefore described. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.340. RECORDS IN OTHER PROCEEDINGS. In case any portion of any other proceeding is admissible for any purpose and is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit, unless

(1) the party offering the same agrees to supply such copies later at his own expense, if required by the commission or the hearing officer; or

(2) the portion is specified with particularity in such manner as to be readily identified; and

(3) the parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference and that any portion offered by any other party may be incorporated by like reference. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.350. FORM OF DECISION. (a) A decision issued by a hearing officer or the commission shall be written and shall contain required findings of fact and/or conclusions of law.

(b) A decision in a primarily judicial proceeding has retroactive effect in the same manner as the decision of the state court. (Eff. 12/28/68, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.360. BRIEFS. (a) Briefs shall be bound on the top and shall be typewritten or reproduced by any process provided all copies are clear and permanently legible and shall be on paper 8½ x 11 to 14 inches in size.

(b) Briefs may be filed in any proceeding by any party within 20 days after mailing of the proposed decision by the hearing officer. Any party desiring to respond to a brief will do so within 10 days after mailing of brief. Briefs shall be filed by any party to a proceeding upon the request of the commission or hearing officer and within such time as shall be directed. The commission or hearing officer may require parties to file either separately or as a part of such brief proposed findings of fact and conclusions of law.

(c) The original and two copies of each brief shall be filed with the commission and copies

thereof shall be served on all parties in the case, or their counsel, and proof of such service furnished to the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.370. ORAL ARGUMENTS. (a) In case matters require an immediate decision, the parties or their counsel may be required to present their arguments and authority orally at the close of the hearing instead of by written brief.

(b) Any party in any case may request oral argument before the commission.

(c) If oral argument is granted to a party or parties, the commission shall order the time, date, and place of oral argument and shall give the parties at least 10 days' notice except where good cause is shown for shorter time of notice. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3AAC 60.380. EFFECTIVE DATE. (a) A commission decision or order shall become effective on the date specified in the decision or order unless the commission allows or initiates a motion for reconsideration as specified in sec. 390(f) of this chapter.

(b) Effective dates specified in any commission order shall not be less than 30 days from the date of service except as noted in sec. 390(g) of this chapter.

(c) Should the commission allow or initiate a reconsideration, as specified in sec. 390(f) of this chapter, replies will be permitted until 30 days after the effective date of the original order. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.390. RECONSIDERATION. (a) A motion seeking any change in a decision, order, or requirement of the commission shall specify whether said motion is for rehearing, further hearing, reconsideration, or modification of the effective date.

(b) A rehearing may be initiated by the commission on its own motion or on a motion of any party if there is substantial evidence showing that the original hearing was conducted in violation of Alaska statutes or commission regulations in effect at the time of the original hearing.

(c) Further hearing may be initiated by the commission on its own motion or on the motion of any party to introduce evidence. The evidence to be adduced must be stated briefly and explanation must be given why such evidence was not previously adduced.

(d) Reconsideration may be initiated by the commission on its own motion or on the motion of any party on any matter claimed to have been illegally or erroneously decided. Such motion must specifically set forth alleged violations in the case of an illegal decision or proceeding, or specifically set forth an alleged error on the part of the commission which is not within the discretionary power of the commission.

(e) Effective dates may be changed by the commission on the motion of the commission or on the motion of any party if there is substantial evidence showing that the effective date is not in the public interest, works an unreasonable hardship on the applicant or protestant, or is based on an emergency circumstance not in evidence of record.

(f) Motions for rehearing, further hearing, reconsideration, or modification of the effective date of a commission decision, order, or requirement shall be filed at least 10 days prior to the effective date of the order. Commission initiation of, or action on, the motion will be made prior to the effective date of the order.

(g) Commission orders directing compliance with statutes or commission regulations are effective upon publication and are not subject to reconsideration until such time as compliance with the law or regulation has been made and the commission petitioned for reinstatement.

(h) All commission costs incurred as result of reconsideration will be borne by the party or parties moving for reconsideration unless otherwise determined by the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.400. PETITION FOR REDUCTION OF PENALTY. The commission may, on petition filed by a carrier, reduce any penalty except that no petition requesting the vacation of an order or revocation will be considered by the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

ARTICLE 4. SPECIAL PROCEDURES OF COMMISSION

Section
410. Tariff suspension
420. Investigation
430. Temporary authority
440 Transfers
450. Declaratory ruling
460. Investigations and audits
470. Commission meetings
480. Confidential files
490. Informal complaints
500. Petitions for rule making
510. Attachments and executions
520. Filing of complaint when tariff is not on file with the commission
530. Failure to file insurance
540. Other procedure
550. Application of rules to pending proceedings

3 AAC 60.410. TARIFF SUSPENSION. (a) In any case where the commission suspends a tariff, it can do so only for a period of not more than 180 days from the proposed effective date of the tariff that is suspended, except for the statutory period specified for bus tariff suspension.

(b) The commission can suspend tariffs on its own motion at any time prior to the proposed effective date or on the request of a protestant filed 15 days or more before the proposed effective date of the tariff.

(c) In all cases where the commission suspends tariffs it shall state in its order of suspension the reason for the suspension of the tariffs. Tariff suspension orders shall be published prior to the effective date of the proposed tariff change. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.420. INVESTIGATION. The commission may at the request of a party, or on its own motion, order an investigation and hold a hearing on an investigation, to determine whether the laws, rules, regulations, tariffs, classifications of a carrier are being complied with and may order that the carrier or group of carriers be deemed a respondent, and may order such responding carriers to furnish such evidence as the commission deems necessary in order to make any appropriate findings of fact or conclusions of law. The commission may not amend or alter any certificate of permit after an investigation, except after a responding carrier, subject to its regulations, has had notice and an opportunity to be heard. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.430. TEMPORARY AUTHORITY. (a) The commission shall notice all application for temporary authority in the manner provided in sec. 180 of this chapter, except that only one day's publication shall be required.

(b) Protests to the application shall be as provided in sec. 190 of this chapter, except that protests shall be postmarked not later than 10 days from the last day of publication.

(c) All applications for temporary authority must state the statute under which temporary authority is requested and shall be accompanied by affidavits, exhibits, or other evidence necessary for the commission to make a finding that temporary authority should be granted.

(d) The commission may require any other evidence which it deems necessary to make findings as to whether temporary authority should be granted and shall require notice to carriers or shippers and may require, by order a hearing if it deems one necessary. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.440. TRANSFERS. The commission shall notice all applications for a transfer in the same manner as provided in sec. 180 of this chapter. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.450. DECLARATORY RULING. (a) Any interested person may petition the commission for a declaratory ruling. The

commission shall consider the petition and within a reasonable time the commission shall

(1) issue a non-binding declaratory ruling; or

(2) notify the person that no declaratory ruling is to be issued; or

(3) set a reasonable time and place for a hearing on the matter and give reasonable notification to the person of the time and place for such hearing and of the issues involved.

(b) If a hearing is held, as provided in (a)(3) of this section, the commission shall within a reasonable time

(1) issue a binding declaratory rule; or

(2) issue a non-binding declaratory ruling; or

(3) notify the person that no declaratory ruling is to be issued.

(c) All declaratory rulings shall be kept on file with the commission in numerical order and made available to all interested parties. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.460. INVESTIGATIONS AND AUDITS. The commission may direct any commissioner or member of the staff of the commission or authorized agent to make investigation, audits, examine records, and all commission staff members shall have proper identification indicating that they are authorized agents of the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.470. COMMISSION MEETINGS. The commission shall meet on Monday of every week at 2:00 p.m. at the commission office unless otherwise noticed. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.480. CONFIDENTIAL FILES. All files of the commission are public records except files of the commission relating to complaints, investigations, and personnel files of the commission. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.490. INFORMAL COMPLAINTS. (a) Matters presented by informal complaint may be taken up by the commission with the parties affected, through correspondence or otherwise, in an endeavor to bring about an adjustment of the subject matter of the complaint without formal hearing or order.

(b) Oral informal complaints will be considered only if written complaint follows.

(c) Informal procedure is recommended whenever practicable, but is designed only for the amicable adjustment of disputes and no mandatory or prohibitory order shall be issued in an informal proceeding. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.500. PETITIONS FOR RULE MAKING. Petitions for rule making shall be in the form required by AS 42.62.220. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.510. ATTACHMENTS AND EXECUTIONS. Upon service of legal attachments by authorized court of law in the State of Alaska, the commission will

(1) not transfer the permit; and

(2) reserve the right to revoke or suspend permit for just cause. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.520. FILING OF COMPLAINT WHEN TARIFF IS NOT ON FILE WITH THE COMMISSION. If proper tariffs are not on file with the commission, the commission will file a complaint. The defendant shall not have to answer, but shall be required to appear at the date set for the hearing of the complaint or file the required tariff. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.530. FAILURE TO FILE INSURANCE. If proper insurance is not on file with the commission, the commission may suspend the permit without hearing provided the commission serves a notice on the carrier whose insurance is being cancelled in a form as follows:

"The Alaska Transportation Commission has received a notice of cancellation of_____

_____

insurance. Unless proper insurance is on file with the commission before the effective date of the cancellation, your permit will be suspended for a period of 60 days, during which period a hearing will be held regarding your failure to file insurance. If no insurance is on file at the end of the 60-day suspension period, your permit may be revoked."

(Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.540. OTHER PROCEDURE. Where under a statute administered by the Alaska Transportation Commission, a procedure other than one prescribed by these regulations is authorized, the commission shall follow the procedure authorized by the statute. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.550. APPLICATION OF REGULATIONS TO PENDING PROCEEDINGS. All pending proceedings before the commission at the time of the adoption of these rules shall be conformed to these regulations of practice on application by interested parties. Parties shall have until March 1, 1967, to petition the commission for relief if they are substantially prejudiced by the adoption of these regulations. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.250

ARTICLE 5. GENERAL INFORMATION

Section

560. Applicability of regulations
570. Construction and waiver of the regulations
580. Address for filings
590. Remittances
600. Fees
610. Rejection of filings
620. Commission staff as a party
630. Definitions

3 AAC 60.560. APPLICABILITY OF REGULATIONS. (a) The general regulations of practice and procedure are for general application to proceedings and hearings before the commission.

(b) Special regulations involving methods of procedure may be adopted by the hearing officer or the commission when stipulated by all parties. These special regulations so adopted will govern throughout the proceeding. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.570. CONSTRUCTION AND WAIVER OF THE REGULATIONS. (a) These regulations shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.

(b) In special cases and for good cause shown the commission or hearing officer may allow deviations from or waiver of a particular regulation. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.580. ADDRESS FOR FILINGS. All pleadings or other written communications or documents shall be filed by presentation by mail, postage prepaid, to the Alaska Transportation Commission, 1000 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501, or may be delivered in person to the Alaska Transportation Commission, Anchorage, Alaska. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.590. REMITTANCES. Remittances to the commission shall be by check, money order, bank draft or certified check payable to the Alaska Transportation Commission. Remittances in currency or coin are wholly at the risk of the remitter and the commission assumes no responsibility for loss thereof. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.600. FEES. Fees, when required by law, must be tendered with any application and no such application will be considered filed until such fees have been paid. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.610. REJECTION OF FILINGS. (a) Pleadings or other documents, other than tariffs, received by the commission which are not in substantial compliance with these regulations, the commission's orders or applicable statutes,

may be rejected and not accepted for filing at the discretion of the commission.

(b) Pleadings or other documents required ro be filed with the commission within a specified time or by a specified date but which fail to substantially comply with these rules, the commission's orders or applicable statutes, will be deemed conditionally filed, for the purpose of satisfying such filing date, on the date received by the commission.

(c) Conditionally received filings shall not be deemed filed or entered on the commission's docket until approved as being in substantial compliance with these rules, the commission's orders or applicable statutes. Conditionally received filings shall be rejected unless amended or supplemental filings in compliance with the conditions are received within the time granted by the commission.

(d) Rejected filings or conditionally received filings may be returned with an indication of the deficiencies therein and the reasons for rejection or conditional receipt, as the case may be; or, if a pleading or document omits information required by these regulations, the commission's orders or statutes, the commission may require an amendment or supplement containing such information.

(e) The commission may require the filing of additional information at any stage in the proceeding. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.620. COMMISSION STAFF AS A PARTY. The staff of the Alaska Transportation Commission shall be considered a party in every case before the commission except that the staff, when it actively participates in the case, must file a notice of appearance with the hearing officer prior to the hearing. The commission may order the staff to act as a party at any time for good cause shown. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

3 AAC 60.630. DEFINITIONS. Unless the context indicates otherwise, in this chapter

(1) "applicants" means persons applying for any right, privilege, or other authority, under a statute requiring the filing of an application therefore;

(2) "carrier" means any person subject to the laws, rules and regulations administered by the Alaska Transportation Commission;

(3) "classification of parties" means parties to proceedings shall be styled applicants. complainants, petitioners, defendants, respondents, interveners, protestants, or interested parties according to the nature of the proceeding and the relationship of the parties thereto;

(4) "complainants" means persons who complain to the commission of any act or omission by any other person, and in any proceeding in which the commission on their own initiative files a complaint;

(5) "defendants" means persons against whom any complaint is filed;

(6) "interested parties" means all persons directly affected by an application or petition, and such person may file protests, complaints, petitions, and otherwise be given the right to appear in proceedings before the commission;

(7) "interveners" means persons permitted to intervene as provided in sec. 100 of this chapter;

(8) "person" or "party" when used in these regulations means any individual, copartnership, corporation, association, municipal organization, or other entity, and shall include the plural;

(9) "petitioner" means persons applying for permission to exercise any right or privilege under a statute requiring the filing of a petition or persons requesting a rehearing, reopening of the record, or other relief;

(10) "practitioner" means any person appearing pro persona, or the attorney for any party;

(11) "protestants" means the person who has authority to provide service or has an application for authority to provide service in the same area as the applicant and who objects on the grounds of a private or public interest to the approval of an application made to the

commission concerning the same area except as provided in (6) of this section; and

(12) "respondents" means persons designated in an investigation. (Eff. 12/28/69, Reg. 31)

Authority: AS 42.07.150

CHAPTER 64. MOTOR FREIGHT CARRIERS

Article

ARTICLE 1. VEHICLE LEASING

Section

3 AAC 64.010. LEASING. No vehicle shall be leased or the possession thereof transferred, other than by sale, by any person to any other person under any circumstances except in accordance with the provisions of this article. (Eff. 7/29/64, Reg. 15)

Authority: AS 42.10.010
AS 42.10.070
AS 42.10.080

3 AAC 64.020. WRITTEN LEASE REQUIRED. Where possession or use is transferred, other than by sale, of any motor vehicle, trailer or other transportation equipment, such transfers shall be made only by written lease. Oral agreements for such transfers

are prohibited. (Eff. 7/29/64, Reg. 15)

Authority: AS 42.10.010
AS 42.10.070
AS 42.10.080

3 AAC 64.030. WRITTEN LEASE REQUIREMENTS. The lease or other arrangement for the transfer of possession or use of any motor vehicle, trailer or other transportation equipment shall

(1) be made between the common or contract carrier and the owner of the equipment;

(2) be in writing and signed by the parties thereto, or by their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements;

(3) specify the period for which it applies which shall not be less than 10 days when the equipment is to be operated for the common or contract carrier by the owner, or an employee of the owner;

(4) provide during the term of the lease for the exclusive possession, control and use of the motor vehicle, trailer or other transportation equipment to be completely vested in the lessee in such way as to be good against all the world, including the lessor; for the complete assumption of responsibility in respect to the lease by the lessee; and for the operation of the leased equipment to be conducted under the supervision and control of the lessee;

(5) provide that during the period of the lease, contract or other arrangement the driver of the leased vehicle shall be to the lessee as servant to master and the driver shall be paid by the lessee;

(6) specify the compensation to be paid by the lessee for the rental of the leased equipment; and

(7) specify the time and date of the circumstances on which the lease or other arrangement begins and the time or the circumstance on which it ends. (Eff. 7/29/64, Reg. 15)

Authority: AS 42.10.010
AS 42.10.070
AS 42.10.080

3 AAC 64.040. PERIOD OF LEASING. No common or contract carrier shall lease from any person any vehicle for period of less than 30 days except any such carrier may lease only from another contract or common carrier having an Alaska permit a vehicle or vehicles for a period of not more than 14 days within any one 60-day period and any extension of the 14-day period is prohibited. The 60-day period shall commence on the date any such lease shall become effective. (Eff. 7/29/64, Reg. 15)

Authority: AS 42.10.010
AS 42.10.070
AS 42.10.080

3 AAC 64.050. COMMISSION APPROVAL AND AUTHORIZATION. No common or contract carrier shall lease any vehicle, extend any lease of any vehicle, or commence using any vehicle under any lease, from any person without obtaining prior written approval and authorization by the commission of such a lease or extension except no such prior commission approval and authorization is required for any lease less than 14 days as permitted under sec. 40 of this chapter. (Eff. 7/29/64, Reg. 15)

Authority: AS 42.10.010
AS 42.10.070
AS 42.10.080

3 AAC 64.060. LEASES BY COMMON OR CONTRACT CARRIERS. Common or contract carriers may lease vehicles, but may not lease any vehicle to any person other than a common or contract carrier. (Eff. 7/29/64, Reg. 15)

Authority: AS 42.10.010
AS 42.10.070
AS 42.10.080

3 AAC 64.070. COMPENSATION. The amount of compensation to be paid under a lease shall not be based upon a division of revenue, including but not limited to a percentage basis dependent upon gross receipts per trip or period of time. Compensation shall not include any arrangement whereby the lessee shall pay the lessor directly or indirectly for a driver or provide a rebate therefore unless otherwise ordered by the commission upon application therefore. (Eff. 7/29/64, Reg. 15)

Authority: AS 42.10.070
AS 42.10.080

ISSUES AND ANSWERS

WHAT TO SAY
WHEN YOU'RE
ON THE
FIRING LINE . .

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FOREWORD

The Public Relations Council of the American Trucking Associations, Inc. is dedicated to providing trucking executives with the skills and information needed to carry out their function as highly professional spokesmen for the motor carrier industry. This booklet, "Issues and Answers" will be helpful in responding to the media, (Primarily TV and radio), legislators and public forums.

The trucking industry must work constantly for favorable publicity and media attention if the industry is to quell the myths about the motor carrier industry that pervade much of today's popular opinion. Spokesmen must be prepared with ready and honest answers to respond effectively to indictments.

The public is concerned about energy shortages, pollution, speeding, tailgating, rates and regulation vs. deregulation. By effectively responding to questions about the trucking industry from government and consumer critics as well as the media, the motor carrier executive can play a major part in bringing the message of his company and the industry to the public. He can present vital information about the trucking industry in a way which will produce better understanding and acceptance of the industry that moves America.

You may want to enlarge upon the response to a specific question . . . but remember that short answers are best for radio and TV and in public forums.

Approximate times are listed with our suggested answers. You may want to time yourself. Remember, answers as much as possible should be non-technical and in language laymen can understand. Your manner, and the image you create, is more important than slide rule responses.

You are always in control of your answers. Project! Convey! Enlighten! Frame your answers for public consumption, not for the questioners.

Joan Vinson
Executive Director
Public Relations Council

CONTENTS

How large is the trucking industry?

Trucking receives about three out of every four revenue dollars spent for freight movement. In 1977, motor freight carriers did an estimated 130 billion dollars in business. This figure represents more than seven per cent of the country's gross national product. There are more than 16,000 trucking companies. There are also many privately owned trucks carrying freight for individual companies. The industry is one of the most diversified in the country.

(approximately 30 seconds)

How many people are employed by the trucking industry?

About 9 million for all trucking. This covers freight, service industries and utilities. About 2½ million of these are drivers. The payroll for this total is slightly more than 100 billion dollars annually. For motor freight carriers only the yearly payroll is between 65 and 78 billion dollars, or between 50 and 60 per cent of revenues.

(approximately 25 seconds)

Why are trucks always speeding and ignoring the 55 mph speed limit?

The regulated trucking industry, of which I'm a part, has waged a national campaign for compliance with the nation's speed limits. Over all, federal studies show trucks obey the 55 mile per hour limit more than automobiles. We know the 55 mph saves both lives and fuel.

The industry has road patrols that observe truck speeds and report violations to motor carrier management. We've told the federal government and state enforcement agencies that they have the full support of the industry for enforcement of speed limits.

(approximately 35 seconds)

Why do trucks cause so many accidents?

Accidents caused by trucks are very low compared to the number of accidents involving all types of vehicles. For 1976, the National Safety Council estimated there were 16,800,000 accidents involving drivers of all types of vehicles. The larger types of trucks, such as tractor semi-trailer, and other truck combinations, were involved in only 2.9% of those accidents. Even involvement doesn't mean that these trucks caused the accident. It has been reliably estimated that in 63% of the accidents involving a truck with another vehicle, the other vehicle is at fault. Actually, larger trucks cause less than 2% of all accidents.

(approximately 40 seconds)

What training is given to drivers to promote highway courtesy and safety?

The trucking industry has a variety of driver training and safety programs. There are special truck driver training schools. And driver trainers are utilized by motor carriers to monitor experienced drivers and to provide additional training if a driver has picked up bad habits. Safety meetings are conducted regularly to remind drivers of their safety responsibilities and to pass on new rules and regulations.

(approximately 25 seconds)

Is the trucking industry fighting deregulation to prevent competition?

Regulation of trucking isn't anti-competitive. For the most part, the industry is made up of small companies, many family owned. Only two industries in the United States show a more intense competitive picture than trucking. They are the manufacturers of miscellaneous machinery and the makers of women's clothing.

(approximately 15 seconds)

Don't the big carriers really dominate the business?

Not true. The four largest carriers account for just 10 per cent of the industry's total revenues, and the eight largest for only 14 per cent. Look at three other of America's prominent industries by contrast: In automobile manufacturing four companies account for 91 per cent of the volume. In steel, the four largest companies account for 47 per cent of the volume and in cigarette manufacturing the four largest companies account for 84 per cent. According to the latest Census of Manufacturers, trucking trails 415 other major industries in terms of the market share concentration of the eight largest firms. Most trucking companies are small businesses, grossing only about half a million a year.

(approximately 40 seconds)

A specific example for competition:

Between the city of Philadelphia and, say, Akron, Ohio, a shipper has 30 single line choices for moving freight. Even most small towns have two to a dozen or more.

(approximately 10 seconds)

Don't some segments of the industry favor deregulation?

The impetus for deregulation comes from a few large shippers and a handful of academicians. I should also throw in a few justice department anti-trust attorneys. The real experts in this field—economists, bankers and transportation executives—disagree. Some independent truckers who carry exempt farm commodities to market believe they should be allowed to carry back other freight. But, this would only shift freight from one truck to another. It wouldn't reduce the number of empty trucks.

(approximately 25 seconds)

What portion of the revenues of the trucking industry comes from the top five percent of the companies?

First of all, there are more than 16,600 regulated trucking companies. To take five percent of this number would be meaningless—as it would amount to more than 800 individual firms. It would be more appropriate to talk in terms of the top 50 motor carriers. Overall, the regulated trucking industry received about $30 billion in total (gross freight) revenues in 1977. Of this, the largest 50 companies accounted for $10.9 billion—or thirty-six percent of the total. Trucking is less concentrated in terms of any measurement than virtually any industry in the United States.

(approximately 35 seconds)

There's more and more congestion on the roads. Isn't this due to trucks?

No. The vast majority of vehicles are still autos, pick-up trucks and vans. Federal government statistics show that the number of tractor-trailer combinations, the big highway "rigs," was about 1.2 to 1.3 million in 1977. That's out of 144 million registered vehicles. A proportion of the remaining vehicles, called "straight trucks," are freight oriented, but this proportion is not easily determined. The total number of straight trucks was about 700,000 in 1977. Many of these are used for the pick-up and delivery of freight in urban areas.

(approximately 35 seconds)

Radio and Television Tips

- Be on time. A live show will go on with or without you. If you're late for a taped program, you'll tie up technicians, the host, and studio time. This means money to the station. Either way you will never be invited back.
- Be flexible. Broadcasters work in a constant state of tension. The more understanding of delays and interruptions, the better the chance you'll be invited back.
- Prepare ahead of time. You should know what you want to say and be forearmed for possible trouble areas. Broadcasters will be willing to give you a few minutes of free promotion for a few minutes of interesting conversation.
- Don't rely on the interviewer's questions to cover the points you want to make. You needn't answer only the question asked. Practice turning questions to subjects you want to discuss.
- Have four or five interesting stories prepared ahead of time. If the interview becomes too technical, tell a story.
- Ignore studio technicians. Concentrate on the host and other panelists. Remember you are playing to the audience, not the people in the studio.
- Don't worry about lighting, sound levels, and camera angles. That is the technicians' job.
- Never answer questions "yes" or "no". Questions that can be answered "yes" or "no" are leading questions seeking agreement with someone else's opinion. Make your own statements.
- Let opponents speak for themselves. Don't voluntarily agree with them.
- Most often, style is more important than substance. The impression left with the audience is more lasting than any one thing said.
- Broadcasting is an intimate medium. Speak as if someone is sitting next to you.
- Don't worry about dead air time. Dead air time is the broadcaster's problem, not yours. It is not your duty to fill it.

Television Tips Only

- Don't swivel in your chair. You'll look like a child on his first amusement park ride.
- Make soft, smooth gestures. Avoid quick, jerky motions.
- If you cross your legs, cross them at the knee. If you rest your foot on your leg, your knee will keep bobbing in and out of a close-up. This also sets up a barrier between you and the audience in a long shot.
- Look at the speaker. If the camera catches you when someone else is speaking, and you're looking around the studio or at the floor, the audience will think you're bored.
- Call hosts by their first names. Television is intimate. Since hosts are seen everyday, viewers look upon them as friends.
- Television is a visual medium. If visuals—props, slides, film, models—help tell your story, bring them to the studio. They will help the interview move along.
- Do not wear hats, shiney jewelry, or plaids. Hats shadow the face, shiney jewelry reflects into the camera lens, and plaids make the television screen dance.
- Don't worry about make-up. If it is needed, a technician familiar with the studio's lights will apply it. If it's suggested don't refuse. It's for your own good.
- If you're asked to sign a release, read it carefully and make sure you get a copy. The release will basically say that you agree to be filmed.
- Try to watch a program in advance of your appearance. This will give you a feel for the show and the type of material used. It will also help you choose clothing that complements the set.

Most people feel trucks tear up the highways. Why should motorists pay for trucks using the roads?

They don't. Trucks pay 38 per cent of all state and federal highway user taxes, but they account for only 18 per cent of the traffic. In 1976, for example, motor carriers paid 8 billion dollars out of the 21 billions collected in state and federal highway user taxes. Every recent study of the user taxes has found that trucks pay more than their fair share of the costs for construction and maintenance of the nation's highway system.

(approximately 30 seconds)

How about those big tractor-trailers?

Even when the question is narrowed to combination trucks, the largest intercity vehicles, the evidence indicates they are paying more than their fair share. All combination vehicles registered in the United States paid 18.9 per cent of all federal highway user taxes in 1975, the latest available year. This compares favorably to a finding in the most recent federal highway cost allocation study that combination vehicles were responsible for 18.6 per cent of highway costs.

(approximately 25 seconds)

What is the trucking industry doing to become more fuel efficient—not only now, but ten and twenty years in the future?

Trucking has, and is, devoting much of its technological know-how toward conserving energy. New engine and transmission designs, air deflectors on some types of equipment, radial tires, demand-actuated cooling fans have all enabled the motor carrier industry to operate much more efficiently in terms of fuel used than it did just a few short years ago. Better highways, better scheduling and further improvements in maintenance procedures have also helped. On down the road, we are looking toward much greater use of diesel engines in total and especially in the smaller city-type trucks, and still more refinements in the design of the large highway "rigs" to conserve even more fuel in the future.

(approximately 40 seconds)

Example of savings:

Secretary of Transportation Brock Adams said at a press conference held August 9, 1978 that the national truck fuel economy program has saved the nation more than 1.7 billion gallons of fuel since 1973.

(approximately 10 seconds)

I keep reading that railroads are more fuel efficient than trucks.

Railroads are not more energy efficient than trucks. While rails may be more efficient in hauling certain commodities, like coal, long distances, trucks are more efficient at hauling other types of freight, such as light and bulky general merchandise. Furthermore, railroads do not serve 60% of America's communities. These communities would cease to exist, as we know them, if trucks were precluded from hauling their freight.

(approximately 25 seconds)

The following specific test result can also be used:

A 1975 study conducted for the U.S. department of Transportation by Reebie Associates of Greenwich, Conn., found that twin trailers used less fuel than other modes of transportation in a test run between Portland, Ore. and Los Angeles, Calif. comparing fuel consumed in loading, transfer, pickup and delivery as well as that used in traversing the 950-mile route.

Fully expecting to find the railroads to be more efficient than trucks, and an improved intermodal system using both trucks and trains to be better than either, the Reebie researchers were surprised at the results of their study.

(approximately 38 seconds)

Why are empty backhauls allowed? They're inefficient.

Well, a good idea, which won't work, is to "eliminate empty backhauls." Quite correctly, trucks sometimes go back empty. But that problem can only be solved by more freight. A federal government study found that the chief reasons for empty trucks are the regional traffic imbalances inherent in our society and the use of specialized equipment such as auto carriers and tank trucks. Only about three per cent of the empty miles appeared to be avoidable in the study.

(approximately 25 seconds)

A specific example on backhauls:

You can't haul heating oil in a tank truck from Oklahoma City to Milwaukee and then haul milk back to Oklahoma City in the same tanker.

(approximately 10 seconds)

Isn't the ICC in the trucking industry's pocket?

The answer is "no". Emphatically "no." We find ourselves many times in ICC rulemaking proceedings opposing a particular rule or regulation. The industry has taken the ICC to court and argued that the commission has gone beyond the bounds of its statutory authority, or acted in an arbitrary manner.

While we don't always like how the commission regulates, we do recognize the need for an umpire between the carrier and the shipper with the overall public interest in mind. The ICC is there to determine what will "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation" as required by the National Transportation Policy set forth by Congress in 1940.

(approximately 40 seconds)

Collective ratemaking is a rip-off of the consumer, isn't it?

Quite the contrary. The system protects the consumer from damaging forms of economic discrimination. Collective ratemaking reduces the chaotic to the manageable. There's a gross misunderstanding among those promoting deregulation that rate bureaus allow motor carriers to arbitrarily set rates in a secret and collusive manner. Actually there is nothing secretive or collusive about rate bureaus.

(approximately 22 seconds)

But, rate bureaus drive up costs.

Truck rates haven't risen as fast as other prices in the present inflation. Let's compare the relative price for motor carrier service with changes in the consumer price index. From a base of 100 in 1967, the revenue per ton mile for regulated for hire motor carriers rose to 166.2 in 1977. During the same period, the consumer price index rose from 100 to 181.5, or 15 points higher than the price of motor carrier service.

(approximately 30 seconds)

Examples of typical transportation costs:

A hammer retails in a Chicago hardware store for $8.23. Total cost for transportation by motor carrier from manufacturer in Farmington, Connecticut, to Chicago—6 cents.

A washing machine retails in Butte, Montana, for $311.78. Cost for shipment by motor carrier from Columbus, Ohio, for this heavy, expensive appliance—$18.37.

A stove retails in Los Angeles for $398.88. Cost of transportation by motor carrier from Mansfield, Ohio: $17.32.

A portable electric typewriter retails in a Chicago store for $249.47. It was manufactured in New York. Cost for motor carrier transportation from New York to Chicago--$1.74, or 7/10 of 1 percent of the total price.

A man's suit retails in Indianapolis for $94.01. Cost of transportation by motor carrier from Atlanta, Georgia—28 cents, or 20/100 of 1 percent.

(Note: These are truckload rates. Transportation charges are slightly higher for less than truckload shipments, based on a graduating scale dependent on weight of shipment.)

Why do trucking companies pay millions of dollars for operating certificates?

To get additional service points so they can expand their operations. Let me point out immediately, however, that the value of the certificates doesn't enter into the rate base for rate making purposes. Lately, the cost of authorities has taken a downhill trend because the ICC is approving approximately 95 per cent of new authorities sought. The decision to control entry is an involved issue, but basically it is to prevent excessive services resulting in an unhealthy and unstable transport industry clearly not in the public interest. The point is: If the public isn't underwriting sales of operating certificates and the certificates allow carriers to obtain easier financing for capital improvements, then the sales are a benefit to our transportation system.

(approximately 45 seconds)

Why are the trucking industry minority hiring practices so poor?

They're not. The trucking industry's minority hiring practices are good and have been for many years. The trucking industry is committed to a policy of affirmative action and equal employment. In 1967, the percentage of minorities employed in the trucking industry was 6.6 per cent. Only five years later the percentage was up to 11.3. It's now at 12 per cent. Since 1969, minority hiring in the trucking industry has outpaced minority employment in the American work force as a whole.

(approximately 30 seconds)

Isn't the household goods moving industry ripping off customers by weight bumping?

Absolutely not. There have been only two indictments in as many years for weight bumping. Only one of those cases has been successfully prosecuted and it is on appeal. The other never came to trial. What is important for the customer to know is that the moving industry does not knowingly tolerate within its ranks any person who cheats a customer.

The moving industry does everything in its power to encourage the ICC and the U.S. Attorney General to bring charges in a court of law and to prosecute anyone it finds who may be involved in any alleged wrongdoing.

The moving industry handles about 1.65 million interstate moves each year. There are some 2500 companies and some 50 to 60 thousand independent contractors (owner-operators) engaged in this high volume, intensive work.

(approximately 45 seconds)

Why do trucking companies always concede to Teamster economic demands?

The question implies that hard bargaining does not take place. This assumption simply is not true.

In the major trucking labor negotiations, hard bargaining always takes place. So does much compromise. In consideration for economic gains the companies seek to negotiate agreements which recognize industry requirements to improve productivity and efficiency. Uninterrupted service to the public at reasonable rates is really the only thing the motor carrier has to sell. In an excessive settlement there are no winners, and this is true for employers and employees alike.

(Approximately 30 seconds)

How much effect does organized crime have on trucking companies and the Teamsters?

Hopefully, not much. Management and union representatives, like all other people, may be honest, dishonest, likable, or unlikable people. The vast majority cannot be tarred with the same brush which has touched some officials with known criminal records or involvements.

Having a public service obligation, the trucking industry works hard to keep theft and pilferage out of its business. Its freight security programs are sophisticated, on-going, and have achieved a measure of success.

(approximatley 35 seconds)

This paper is the result of a study
commissioned by the following
motor-carrier associations:

Central and Southern Motor Freight Tariff Association, Inc.
Central States Motor Freight Bureau, Inc.
Eastern Central Motor Carrier Association
Middle Atlantic Conference
Middlewest Motor Freight Bureau
National Motor Freight Traffic Association, Inc.
New England Motor Rate Bureau, Inc.
Niagara Frontier Tariff Bureau, Inc.
Pacific Inland Tariff Bureau, Inc.
Rocky Mountain Motor Tariff Bureau, Inc.
Southern Motor Carriers Rate Conference

Collective Ratemaking in Trucking: The Public-Interest Rationale

Jesse J. Friedman
Economic Consultant
Washington, D.C.
October 1977

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I.

Introduction

The system by which motor freight rates are collectively established is a matter of no small importance to the public. Motor carriers, of course, have a vital stake in the way rates are determined for the transport services they supply. Equally, the shippers of goods transported have an important stake in the way rates are assessed for moving these goods. Over and above the interests of carriers and shippers is the interest of the general public. Motor-carrier freight rates enter into the prices of almost everything consumers buy, and rate levels and relationships can and do affect the economic well-being of industries and communities and the employment opportunities they provide. The public is entitled to assure itself that its interests are protected under the system by which those rates are established. The aim of this paper is to examine the rationale for the system of collective ratemaking in trucking in terms of its significance for the public interest.

• • • •

Under collective ratemaking, rates are established by joint consideration of the motor carriers serving a particular territory. Collective pricing action by competitors would, under ordinary circumstances, violate the antitrust laws. But when carried on in conformity with conditions specified in the Interstate Commerce Act, collective ratemaking in trucking, as in other surface transport modes, is "relieved from the operation of the antitrust

laws".[1]

A great deal of the controversy concerning collective ratemaking turns on the question of whether the reduction of rate competition among carriers, made possible by the antitrust exemption, is good or bad for the public. The basic misconception that must be overcome if clear thinking is to be applied to this question is the notion that the economic benefits ordinarily associated with competition are the only benefits that are important to the economic welfare of the public. Government policy in many cases recognizes that some restraints upon competition are necessary and desirable in the interest of achieving other economic benefits that are judged to be even more important to the public than those attributed to competition. In such cases, the application of the antitrust laws is waived. As Professor J. M. Clark has observed in his *Competition as a Dynamic Process:*

> Antitrust action, being directed against restraints of competition, may tend to develop an unspoken presumption that competition can be defective only in the direction of being too weak, never too severe ... [A]ttitudes expressed in other areas of governmental policy have in various ways sanctioned restraints on competition, on the assumption that it can be unduly severe, from the standpoint of the public interest.[2]

The principal economic benefits which are achieved by collective ratemaking in trucking relate to the avoidance of damaging forms of economic discrimination which, because of the structure and character of motor freight transport, would be inevitable under unrestrained competition. In the absence of collective ratemaking, it would be impossible to prevent rate differences which are not justified by any difference in cost or any other relevant economic consideration. It would be impossible to assure that all shippers, large and small, are treated in a nondiscriminatory way by carriers as a group, or to assure nondiscriminatory treatment among competitively-related commodities. Not only shippers, but communities and employees as well, would suffer unjustifiable economic hardship, economic resources would be misallocated, and economic efficiency would be impaired. With collective ratemaking, there exist the opportunity and the machinery for averting these consequences.

The collective ratemaking process provides the means for shippers to call the attention of motor carriers to inequities requiring remedy, and for motor carriers to act as a group in dealing with such inequities. Shippers are not guaranteed the relief they may feel is justified and carriers retain the freedom to act individually. But the forum provided for simultaneous exchange of views and information concerning proposed rate changes among all affected shippers and carriers, the important degree of insulation of the carriers from the pressures of large shippers in dealing with such proposals, and the opportunity of the carriers to act together where such action appears justified comprise a mechanism uniquely adapted to achieving as even-handed and nondiscriminatory a rate structure as the nature and organization of motor freight carriage practicably permit.

Collective price action involves by definition a restraint upon rate competition, but such a restraint does not mean that the competitive process itself is thereby undermined. Nor does an antitrust exemption automatically imply any undermining of antitrust policy. The principle involved has been neatly expressed by Professor Bastiann Fortman in his *Theory of Competition Policy:*

> It is not the purpose of antitrust policy to foster economic competition without qualification. The aim is not to maintain simply competition but to preserve competition only where it may be expected to produce desirable effects ... The exemptions concerning e.g. labour, transport and agriculture relate to specific structural conditions of demand and supply which

[1] Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b.

[2] John M. Clark, *Competition as a Dynamic Process*, Brookings Institution, Washington, 1961, p. 48.

> render unrestricted operation of competition undesirable ... Prohibition of a certain way of competing such as price discrimination is not as such inconsistent with a policy to maintain open competition ... Preserving competition ... does not mean that all possible methods of competing in the economic process must be tolerated nor that all private economic regulation should be prohibited. [3]

As developed later in this paper, collective ratemaking in trucking co-exists with a substantial degree of price and non-price competition and is surrounded by strict provisions for government review and control to insure that the results serve the best economic interests of the public.

The collective ratemaking system in the motor-carrier industry operates through "rate bureaus". Organized according to the geographic areas their member carriers serve, these bureaus provide the administrative machinery by which carriers jointly consider, debate, decide, and publish the rates pertaining to the traffic they haul.

There are ten major territorial rate bureaus.[4] The membership of each bureau consists of carriers providing motor freight service within a particular territory or between territories. A carrier may voluntarily choose to belong or not to belong to any of the rate bureaus publishing rates covering territories applicable to its traffic. The combined motor freight services of the carriers comprising the major rate bureaus extend over the entire United States and between the United States and Canada.

[3] Bastiann de Gaay Fortman, *Theory of Competition Policy*, North-Holland Publishing Co., Amsterdam, 1966, pp. 244-246.

[4] Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carrier Association; Middle Atlantic Conference; Middlewest Motor Freight Bureau; New England Motor Rate Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference

Proposals for rate changes are normally initiated by a carrier or a shipper. Consignors and consignees of traffic participate actively with the carriers in discussions related to rate proposals. In most of the bureaus, the initial recommendation on a proposal for a rate change is made by a committee of rate experts employed by the rate bureau. If no party objects to the recommendation, it is published for the carriers. However, if any party does object, or if the bureau machinery does not provide for a committee of employed rate-experts, a committee consisting wholly of carrier personnel considers and acts on the rate proposal and the final decision is made by a majority vote of that group.

Every rate-bureau member, either on its own volition or through election by the general membership, has the opportunity to designate an employee to serve on the bureau's carrier committee. Each such designee may vote on the rate proposals which come before the committee, whether or not his company directly participates in the traffic involved. The action of the committee on a rate proposal is made public, but confidentiality is preserved as to the vote of any individual carrier. Any carrier member of the rate bureau may at any time establish by independent action a rate which differs from that generally applicable.

Collective rate actions resulting from rate-bureau procedures are subject to all of the tests of lawfulness laid down by the Interstate Commerce Act. Any shipper, carrier, or other interested party may protest to the Commission that any such action fails to meet those tests. The Commission is authorized to suspend any such action, and after investigation may declare it unlawful and may prescribe the rates it determines to be proper.

In addition to the ten major rate bureaus (and numerous minor rate bureaus which operate in the same territories), the ratemaking process, as contemplated by the Interstate Commerce Act, utilizes a uniform freight classification for the hundreds of thousands of products moved by motor common carriers. For most of the traffic carried, this is achieved through the mechanism of the

National Motor Freight Traffic Association.[5] This organization operates in a manner generally similar to that of a rate bureau except that its function consists not of establishing rates but of categorizing all commodities carried by motor carriers into generally fifteen classes—differentiated broadly by shipping, handling, and value characteristics—so that commodity groups possessing similar characteristics may be similarly classified and bear similar rates. The system provides a continuous opportunity to reclassify existing products as their characteristics change and to classify new products as they are introduced into the market.

The basic practice is that the member carriers within each rate bureau establish class rates which are applied uniformly throughout its territory and which are so scaled that for all of the commodities grouped in a given class the rate for all shipments of the same size over the same distance will be the same. Differences in other transportation characteristics, such as shipment size or length of haul, will be reflected in correspondingly different rates which also will be generally uniform throughout the bureau's territory. The preponderance of motor-common-carrier traffic moves under these class rates. In special circumstances justifying a rate different from (and ordinarily lower than) that applicable to a general class, an exception to the class rate may be approved or a commodity rate, governing the traffic of a specific commodity between named points of origin and destination, may be established.

General rate increases are applied essentially across the board to all traffic. The special problems of equity as among shippers are typically resolved by lowering one or more rates. In terms of the numbers of rate-bureau actions, the vast majority of rate changes, whether the proponent is a carrier, a consignor or a consignee, involve rate reductions.

Given the enormous range of commodities to be carried, the almost limitless combinations of points to be served, the complexities of alternative routings, and the multiplicity of legal, economic, and transportation factors to be accommodated, it would be futile to expect the motor-carrier collective-ratemaking system to be ideal in all respects. The real question, however, is not whether the present system is ideal but whether, in practical terms, it serves the public interest by effectively meeting the transportation requirements of the nation. In order to answer that question, it is important to have some familiarity with the historical background of collective ratemaking in trucking and with the basic public-interest considerations underlying current practice.

[5] A separate classification, the Coordinated Freight Classification, is maintained by The New England Motor Rate Bureau, Inc. for traffic moving wholly within the New England territory.

II.

Historical Background

The issue of collective ratemaking in transportation has been a subject of recurring public discussion for more than a hundred years. Collective ratemaking in trucking grew out of the ratemaking system first developed in the late nineteenth century to meet practical problems of the railroad industry.

Sixty years before the 1935 enactment which brought motor carriers under Interstate Commerce Commission regulation, the railroads organized the first broad-based freight-rate bureau, covering the territory south of the Potomac and Ohio Rivers and east of the Mississippi. By the time of the passage in 1887 of the Act to Regulate Commerce, as the initial version of the present-day Interstate Commerce Act was known, some eleven such bureaus, covering virtually all the competitive railroad traffic of the country, were in operation.

A major reason for enacting the 1887 statute had been to achieve a reasonably uniform, stable, nondiscriminatory set of railroad rates in place of the flagrant practices of railroads in according preferential treatment to some shippers, localities, and types of traffic, to the serious detriment of the public. "Wild rate cutting, rate instability, personal favoritisms, sectional discriminations, and gross prejudices between localities, had brought many carriers and shippers and great industries to the point of ruin, and had created or fostered industrial monopolies." [1]

[1] *Regulation of Rate Bureaus, Conferences and Associations*, Hearings on H.R. 2536, United States Senate, Committee on Interstate Commerce, 79th Congress, 2nd Session, (1945). Testimony of ICC Commissioner Clyde B. Aitchison, p. 1133.

The remedy which the Act undertook to provide was to outlaw rates which were unjust or unreasonable or gave any shipper, locality, or particular type of traffic an undue preference or advantage to the prejudice of another. From the beginning the Commission supported the view that, because of inevitable and aggressive rivalries among competing carriers, shippers, and localities, the statutory objective of uniform, stable, and nondiscriminatory rates could not, as a practical matter, be achieved without cooperation among the carriers in the ratemaking process.

The earliest railroad rate bureaus had not only attempted to set rates in common but generally entered into pooling arrangements, involving the sharing of traffic, revenues, or earnings. The 1887 Act specifically prohibited pooling arrangements,[2] but was silent on the question of collective ratemaking as such. The ambiguity resulting from this silence was to create legal problems when Congress in 1890 passed the Sherman Antitrust Act, which prohibited every combination, contract or agreement in restraint of trade. It was not clear whether the Sherman Act was meant to apply to railroads at all, whether collective ratemaking by railroads fell within the scope of prohibited business conduct, or whether the intent of the Act to Regulate Commerce had been to reserve exclusive jurisdiction over railroad ratemaking to the Interstate Commerce Commission.

The Supreme Court in 1897 settled these questions by holding, in a case instituted by the Department of Justice against the Trans Missouri Freight Association, that the Sherman Act applied to the activities of all industries without exception, and that the agreement establishing the rate bureau was a restraint of trade in violation of the antitrust law.[3] An identical decision was handed down a year later in a case involving a similar rate bureau

[2] The Interstate Commerce Act was subsequently amended to permit pooling arrangements when explicitly approved by the Commission, but no rate bureau in operation today embodies any pooling or market-sharing arrangement.

[3] United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).

agreement.[4]

Some modifications were made in rate-bureau agreements as a result of the Court decisions. The practical need for collective ratemaking, however, remained manifest. Aided by a helpful opinion from the Attorney General, collective ratemaking by railroads was permitted to continue. It was clear, and strongly emphasized by the Interstate Commerce Commission, that in the absence of joint action by the carriers in the establishment of rates many of the evils which had given rise to the interstate commerce law in the first place would reappear.

In its Annual Reports to Congress, the Commission described the practical situation:

> It is alleged ... that the interests of different lines of transportation, different localities, and different commodities cannot be properly adjusted, so that the rates shall be reasonable and non-discriminatory within the terms of the act, without the power to confer, discuss, and determine by mutual agreement what the rate shall be.
>
> There is great force in this claim ... It is extremely difficult to see how carriers can intelligently adjust their rates so as to fulfill the general requirements of the act without the right to organize in some form for the purpose of obtaining necessary information and applying that information as occasion requires. To one familiar with actual conditions it seems practically out of the question to establish rates that are relatively just without conference and agreement ... [5]
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> ... [T]he decision of the United States Supreme Court in the Trans-Missouri Case and the Joint Traffic Association Case has produced no practical effect upon the railway operations of the country. Such associations, in fact, exist now as they did before those decisions, and with the same general effect ... [I]t is difficult to see how interstate railways could be operated, with due regard to the interest of the shipper and the railway, without concerted action of the kind afforded through these associations. [6]

One of the reasons that had been cited by the government in urging the Supreme Court to find rate-bureau agreements unlawful was that as a result of judicial interpretation of the 1887 Act the Commission was without truly effective powers to regulate rates.[7] In the Commission's own words: "The principles of this law ... are conceded to be sound and beneficent, but at present they amount to little more than the declaration of a sentiment ... The machinery for enforcing its substantive provisions is fatally defective." [8]

These defects were cured in substantial measure by the Hepburn Amendment of 1906, which empowered the Commission to prescribe maximum reasonable rates, and the Mann-Elkins Amendment of 1910, giving the Commission the power to suspend rates so as to afford opportunity for investigation and a determination of lawfulness before they could become effective.

Railroad rate bureaus again became the subject of Congressional interest in the early 1920's when, pursuant to a Senate resolution, an ICC investigation into the operations of a major rate bureau resulted in a reaffirmation by the Commission of the practical importance of the system of establishing rates through collective carrier action: "It is manifest that the Transcontinental Freight

[4] United States v. Joint Traffic Association, 171 U.S. 505 (1898).

[5] Annual Report of the Interstate Commerce Commission, 1898, pp. 15-16.

[6] Annual Report of the Interstate Commerce Commission, 1901, p. 16.

[7] "The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it." Argument of Solicitor General in United States v. Joint Traffic Association, 171 U.S. 505, 557 (1898).

[8] Annual Report of Interstate Commerce Commission, 1898, p. 22.

Bureau ... is of advantage to shippers as well as carriers. The need for some organization of this character is demonstrated upon the record ... It is abundantly shown that operation of the bureau tends to obviate or remove the discriminations, as between persons and localities, the law condemns." [9]

When motor carriers were brought within the regulatory jurisdiction of the Commission in 1935, the same basic considerations that had prompted shipper and ICC support of the railroad rate bureaus gave rise, again with shipper and ICC support, to joint action in the establishment of motor-carrier rates. The main provisions of the Interstate Commerce Act relating to railroad rate regulation were applied to the regulation of motor-carrier rates. Despite numerous economic differences between the two forms of transportation, it was felt that from the public's standpoint a stable, nondiscriminatory structure of rates that were equitable in relation to each other and based upon a uniform freight classification was as essential in trucking as in railroading. The practical feasibility of achieving such a structure of rates unless carriers were free to "confer, discuss, and determine by mutual agreement what the rates shall be" seemed remote. No specific mention of motor-carrier rate bureaus was made in the 1935 legislation, but their formation and operation along lines broadly similar to the railroad rate bureaus was taken for granted and naturally ensued.

The Interstate Commerce Act had, from its passage, suffered from the lack of a broad but explicit statement by Congress to serve as a guidepost to the Commission and the courts in determining what constituted the "public interest" in the field of transportation. That lack was remedied in 1940, when Congress prefaced the Act by a declaration of National Transportation Policy. As embodied in that declaration, among the most significant Congressional economic policy objectives related to the ratemaking process were these:

[9] In re Transcontinental Freight Bureau (1923), 77 ICC 252, 279.

1. promoting adequate, economical, and efficient service.
2. fostering sound economic conditions in transportation.
3. barring unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices.
4. achieving a coordinated transportation system to meet national needs.

The National Transportation Policy decreed by Congress to guide the interpretation, administration, and enforcement of all of the provisions of the Interstate Commerce Act became a vital part of the total statutory scheme for achieving a sound national transportation system and today plays a crucial role in the basic public policy concept that governs collective ratemaking in motor-carrier transport as in other modes.

Even after the enactment of the National Transportation Policy, the Interstate Commerce Act itself still contained no specific provision with respect to collective establishment of rates. The holdings of the Supreme Court in the *Trans-Missouri* and *Joint Traffic Association* cases that rate-bureau agreements violated the Sherman Act were still the last judicial word on that subject. Following long years of official inattention to the antitrust status of rate bureaus, a number of developments in the early 1940's led to a movement to give clear legislative sanction to collective ratemaking. These developments included various antitrust suits initiated by the Justice Department against railroad and motor-carrier rate-bureau activities. In addition, the State of Georgia had sued the Eastern railroads alleging freight rate discrimination, and a Supreme Court decision on the jurisdictional aspects of that suit, holding that "none of the powers acquired by the Commission since the enactment of the Sherman Act" legalized rate bureaus, raised serious questions about the vulnerability of collective ratemaking to antitrust attack.[10]

After extensive hearings marked by a great outpouring of

[10] State of Georgia v. Pennsylvania R.R., 234 U. S. 439, 457 (1945).

support by shipper and community organizations across the country for the functions performed by rate bureaus, Congress in 1948 enacted the Reed-Bulwinkle amendment, which became Section 5(a) of the Interstate Commerce Act. Approved over a Presidential veto by a large margin in both House and Senate, that amendment gave the Commission authority to approve rate-bureau agreements under which carriers of a particular mode could jointly consider and establish rates if such agreements were found by the Commission to be in furtherance of the National Transportation Policy, preserved the right of individual carriers to take action independent of the rate bureau with regard to any rate, and incorporated conditions or procedures prescribed by the ICC. Participation in rate-bureau discussions and decisions under any Commission-approved agreement was to be free from attack under the antitrust laws. The Reed-Bulwinkle amendment provides the statutory authorization for motor-carrier collective ratemaking today.

The case for collective ratemaking from the regulator's standpoint was summarized by Commissioner Joseph B. Eastman, whose practical knowledge and dedication to the public interest during a long career on the Commission place him high in the esteem of students of transportation and of economic regulation:

> ... [I]f the carriers of the country are to respond to the duties and obligations imposed upon them by the Interstate Commerce Act, and if the rate structure is to be reasonably free from unjust discrimination or undue preference and prejudice, as simple and consistent as may be, reasonably stable, and sufficient for the financial needs of private ownership and operation, the carriers must be in a position to consult, confer, and deal collectively ... [11]

[11] *Interstate Commerce Act of 1943 (Regulation of Rate Bureaus)*, Hearing on S. 942, United States Senate, Committee on Interstate Commerce, 78th Congress, First Session (1943), Part I, p. 875. Supreme Court Justice Brandeis is said to have called Eastman "the ideal public servant." (Charles D. Drayton, *Transportation Under Two Masters*, National Law Book Co., Washington, D. C., 1946, p. 114.)

In finally enacting specific legislation on the subject of collective ratemaking, Congress recognized that the paramount issue is how best to serve the public interest. On the one hand, it recognized that cooperative action in the making of rates deprives the public of the benefits normally associated with price competition among suppliers. On the other hand, it recognized that the circumstances in transportation are not typical of those in the economy generally and that there are special practical needs to be met in order to assure the public of the benefits intended by transport regulation, practical needs which are reflected in the statement of national transportation policy. The dilemma was how best to balance these considerations. Congress resolved the dilemma by authorizing the regulatory agency to examine each rate-bureau operation, case by case, in the light of the public-interest standards embodied in the National Transportation Policy viewed against the public-interest objectives reflected in the antitrust policy of unrestricted rate competition, and to decide how, on balance, the public interest would be best served.

> Under the standard in the bill Congress entrusts to the Commission the task of applying to particular cases the general formula which Congress finds is determinative of the public interest, and directs the Commission to determine whether the advantages to the public interest, through furtherance of the national transportation policy, are such as to outweigh the disadvantages to the public interest intended to be guarded against by the antitrust laws.[12]

This "formula" for the balancing of public-interest considerations by a regulatory agency charged with administering the will of the Congress is the principle under which collective ratemaking in trucking is carried on.

[12] H. R. Report No. 1100, 80th Congress, First Session, (1947), p. 14.

III.

Basic Considerations

At the heart of the present system of collective ratemaking in the motor-carrier industry is the opportunity for carrier members of rate bureaus to establish rates by joint action under conditions which make it possible to meet regulatory and commercial needs effectively without violating the antitrust laws. The basic public policy issue posed by the collective ratemaking system is whether the benefits which accrue to the public from uniformity, stability, and equitableness in the structure of motor-carrier rates outweigh any drawbacks flowing from limitations that collective rate action places upon the workings of competition.

By definition, the collective ratemaking system involves restrictions upon rate competition of a type which would normally be prohibited by the antitrust laws. As noted earlier, the Interstate Commerce Act now specifically provides for exemption from the antitrust laws for collective ratemaking activities carried on pursuant to rate-bureau agreements found by the Commission to be in furtherance of the public interest as reflected in the Congressional declaration of National Transportation Policy.

There is an extreme view, strongly pressed by the Department of Justice at the time of the Reed-Bulwinkle hearings and from time to time voiced in academic and consumer-advocacy circles,[1] that the public policy of unrestricted rate competition associated with the antitrust laws is the only means of protecting the public

[1] See, for example, George W. Hilton, *The Transportation Act of 1958*, Indiana University Press, Bloomington, Ind., 1969, and Robert Fellmeth, *The Interstate Commerce Commission*, Grossman, New York, 1970.

interest and that collective ratemaking tends to defeat rather than advance the public interest. Even adherents of this view generally recognize that where traffic moves between points over a combination of the routes of two or more carriers, those carriers must be permitted to confer in order to be able to establish joint rates applicable to such routes. All other forms of collective rate action by carriers, however, would be condemned.

It is traditional in the United States to look with favor upon competition as an effective prod for producers to operate efficiently, maintain high quality in the goods or services they offer, and hold prices down. As Wendell Berge, then head of the Antitrust Division, expressed the point thirty years ago: "[I]t is the underlying philosophy of the Sherman Act, and deeply ingrained in our American tradition, that the public has a right to a competitive price." [2]

But the general public policy presumption in favor of competition is not a commandment to apply a policy of unrestricted competition indiscriminately in all situations. The paramount consideration is always the pragmatic one of how best to serve the public interest. The same tradition which gives a high priority to a policy of unrestricted competition enforced by the antitrust laws recognizes that, in the interest of serving the public well, such a policy can not and should not be applied in wholesale fashion across the entire spectrum of economic activities of the nation.

Outside of transportation, an outstanding instance of Congressionally-authorized collective pricing occurs in connection with broad national farm policy. The Capper-Volstead Act permits agricultural producers to price and sell their output in common through cooperative marketing associations under immunity from the antitrust laws.[3] The Congressional rationale for the immunity

[2] *Regulation of Rate Bureaus, Conferences, and Associations*, Hearings on S. 110, United States Senate, Committee on Interstate and Foreign Commerce, 80th Congress, First Session (1947), p. 73.

[3] 7 U.S.C. Sec. 291, 292.

is that in this vital segment of the economy the public is better served by collective action than by unrestricted competition of producers.

Similarly, Congress has placed major areas of the economy under the primary jurisdiction of regulatory agencies which are authorized to approve transactions, such as consolidation, facilities-sharing, and other agreements among carriers, which might otherwise be condemned under antitrust standards but which are considered to be necessary to meet objectives deemed by Congress to be of higher significance for the public welfare than rigid maintenance of competition.

In most cases, the substitution of regulatory for antitrust jurisdiction is accompanied by strict standards and procedures applied by the regulatory agency. That is not always so, however. No specific regulatory standards or procedures are prescribed for the operations of agricultural marketing cooperatives. By contrast, in order for the antitrust exemption to apply to collective ratemaking in trucking, each motor-carrier rate-bureau agreement must be subjected to scrutiny by the Interstate Commerce Commission and must incorporate such conditions as the Commission specifies as essential to the public interest.

What are the public-interest considerations that justify the continuation of the present system of collective ratemaking in trucking and the antitrust waiver it entails?

There is first the need for adequate freedom for carriers to confer with each other so that the relationships of rates established by the entire group of carriers serving a territory can equitably balance the economic position of shippers, industries, markets, localities, points, or, in the catch-all phrase of the statute, of "any particular description of traffic." Transportation rates can be, and frequently are, a crucial element in the total production cost of an enterprise — or an industry — and can exert a decisive influence on its competitive position. The Interstate Commerce Act had its origins in a fundamental abhorrence — an abhorrence still deeply felt — of "discrimination in its various manifestations", discrimination spurred particularly by the ambitious striving of shippers seeking a decisive trade advantage over their competitors in the form of favored rate treatment. The impact of such favored treatment is felt not only by the disadvantaged shipper firms and their customers or suppliers, but by their labor force and, in some cases, by the entire economy of the communities in which they are located.

As the Supreme Court has stressed: "Discriminatory rates are one form of trade barrier. Their effect is not only to impede established industries but to prevent the establishment of new ones ... Nondiscriminatory class rates remove that barrier by offering that equality which the law was designed to afford. They insure prospective shippers not only that rates are just and reasonable per se but that they are related to those of their competitors." [4]

It is elementary that in the absence of collective ratemaking, giant shippers controlling large volumes of traffic would be in a position to gain more favorable rates than smaller shippers. Under collective ratemaking, the rate charged by all the carrier members of a rate bureau for a given movement under given conditions is the same regardless of the economic power of the shipper; a carrier serving a large shipper does not maintain a lower rate than that charged a smaller shipper by another rate-bureau carrier. As Commissioner Eastman once summed it up in a Congressional hearing: "If I know anything from experience with certainty, it is that if we rely upon competition as the governing factor in the determination of freight rates by all types or any type of carrier, the benefits will go to shippers in proportion to the size of the 'traffic club' that they wield." [5]

The problem of avoiding rate favoritism has many aspects. Collective ratemaking helps to insure, for example, that two competing producers located at point A and obtaining their raw materials from point B will receive equal treatment in trucking

[4] State of New York v. United States, 331 U.S. 284, 308 (1947).

[5] *Interstate Commerce Act of 1943 (Regulation of Rate Bureaus)*, Hearings on S. 942, United States Senate, Committee on Interstate Commerce, 78th Congress, First Session (1943), pp. 822-823.

rates even if they are served by different carriers between those same two points. Similarily, the two competitors will receive equal treatment in trucking rates in shipping their finished goods to a third point. Where there are various market destinations, the class rates from a given origin to the various market points will be uniform, on a scale adjusted for distance, for all carrier members of the rate bureau. Where the raw materials come from different geographic sources in the territory, the opportunity for equality of treatment is similarly assured. Equality of treatment in trucking rates for the movement of import or export traffic to or from competing ports is facilitated. Where commodities having different physical characteristics but similar transportation characteristics compete with each other, there is again an opportunity to establish equality of treatment in transportation rates.

In each of these situations, it is not enough that any one carrier abstain from rate discrimination. If an appropriate parity of rates is to be effectively achieved it must be reflected in the rates charged by other carriers as well. The collective ratemaking process affords the opportunity for, and helps to insure, such parity with respect to the rates charged by all carriers belonging to the rate bureau.

Collective rate action is the only practical means available for avoiding the evils of favored treatment and the disruptions and dislocations it causes. Given the thousands of motor carriers, tens of thousands of geographic points, literally billions of individual rates, as well as the numerous rivalries among competing origins, destinations, commodities, markets, and routes, the temptations and opportunities for discrimination in the absence of collective ratemaking seem more than any regulatory system could be expected to control if rates were made entirely through individual carrier competition. And, of course, the extent of rate regulation required for such a control effort would be far greater than that prevailing today.

It may be possible to postulate economic models of the trucking industry under which, given conditions of perfect competition, the

evils of rate favoritism, preference, prejudice, and the like can be theorized out of existence. But the very structure and character of motor-carrier operations preclude conformance to any textbook ideal, and a theoretical "long run" is for all practical purposes an infinity away to a firm, a locality, or a port which finds itself a victim of flagrant discrimination in the here and now.

The authority of the member carriers of the rate bureau to "confer, discuss, and determine by mutual agreement what the rates shall be" provides the means for sorting out the numerous and vexing complexities of ratemaking; for keeping all parties — shippers as well as carriers — informed; for creating opportunities for the gathering of relevant information and a forum for discussion, argument, and negotiation; for appeals to consideration of equity, logic, common sense; and, above all, for a judicious balancing of all these considerations, because the process requires the continual exercise of informed, experienced judgement as well as the compilation and weighing of facts with respect to both motor transport and the markets it serves.

In order for the collective ratemaking process to work well, it is essential that shippers be heavily involved. The present system insures ample opportunity for such involvement. Shippers play an active role in the motor-carrier rate bureaus in the discussion of rate changes before such changes are acted upon. They provide indispensable intelligence as to technological developments, changing market relationships, and current and prospective competitive conditions, all of which require close consideration in the making of nondiscriminatory rates. The present system permits a shipper to file a rate proposal in a single forum reaching carriers which provide total service covering his market throughout a given rate territory. In the absence of the rate bureaus, the typical shipper would have to deal with a great number of individual carriers to establish rates to all of the relevant destination points involved. And under collective ratemaking the shipper is assured of rates reasonably related to those enjoyed by his competitors, large or small.

From the standpoint of shippers, one of the most important values of the making of rates by collective as opposed to individual carrier action lies in the high degree of rate stability that collective action affords. Because of the crucial, practical need to plan their operations with a high degree of certainty as to their own transportation costs and the corresponding costs of their competitors, many shippers place even more importance upon the stability than upon the absolute level of rates they pay. "Shippers have a basis for planning ahead by relying on a coherent rate structure reflecting competitive factors."[6] Such stability undoubtedly is an important aid in the decision-making processes of business leading to plant expansion and market growth.

Under collective ratemaking, rate changes occur only after due notice to, and opportunity for deliberation by, all interested parties, and the centralization of tariff publication gives shippers immediate and reliable intelligence as to prevailing rates. One of the prices paid by shippers for unrestricted rate competition by individual carriers would be a high degree of rate instability and corresponding confusion and uncertainty concerning applicable rates.

The rate-bureau system makes possible an enormous reduction and concomitant savings in the administrative costs associated with the processing of tariff filings by the regulatory agency, because the give-and-take of carrier and shipper discussions before rate proposals are finally decided and submitted for regulatory review tends to minimize the number of protests requiring Commission action.

It is frequently overlooked that despite the lessening of rate competition which is inherent in the process of establishing rates by collective action there remains a substantial degree of competition in the motor-carrier field.

An important source of such competition arises within the rate bureau itself from the unequivocal right written into the law guaranteeing to every carrier member the opportunity and means of establishing its own rates independent of any rate-bureau action. The "free and unrestrained" right of such independent action is a significant limitation upon the establishment of rates by simple majority rule in circumstances where a particular carrier feels that its interests and the interests of the shippers it serves require a rate action different from that resulting from collective consideration. Under the rules of the Commission, such independent action may be taken at any time — before, during, or after a collective decision — and Commission records of the number of independent actions filed demonstrate that the right of such action is invoked with considerable frequency.

The competitive significance of the right of independent action, however, goes beyond the mere number of such actions filed. In the conferences, negotiations, and compromises that are an intrinsic part of the collective ratemaking machinery, an indication that a carrier may choose to back up a proposal for a specific rate reduction with an independent filing with the Commission may well impel other carrier members, in the interest of meeting the competition, to agree to match the reduction. A similar situation may occur where an individual carrier elects not to go along with all or part of a general increase proposed by the majority. For competitive reasons, the other carriers may be forced to forego the increase as originally proposed. The result in such cases is that competition has had its effect within the rate bureau even without the formalities of an official independent action.

Other forms of competition also exert influence upon the rates established by rate bureaus. There are common carriers serving a territory that choose not to belong to the rate bureau and are not party to its rate actions. There are contract carriers operating under specific Commission authority to haul the traffic of a shipper within a broad or narrow geographic area and under rates negotiated between the carrier and the shipper involved. There are large numbers of private carriers operating truck fleets ranging in size from the modest to the mammoth, fleets wholly owned by the shippers themselves and in a position to exercise powerful

[6] State of New York v. United States, 33, U.S. 284, 308 (1947).

pressure upon the rates charged by carrier members of rate bureaus. There are numerous other shippers which can and do exercise such pressure by dint of their evident resources and capacity to undertake private fleet operations if common carrier rates become excessive. And there is ever-present strong competition from other transport modes — from railroads with respect to truckload traffic, from United Parcel Service with respect to small package freight, and from airlines for intermediate types of traffic where speed of service is a significant factor.

The combination of the unfettered independent action of rate-bureau members and the rate pressures felt from non-members, from contract carriers, from private carriers, and from other modes of transportation represents a major offset to the restrictions upon pricing competition which are otherwise embraced in collective ratemaking.

Furthermore, collective rate actions by rate-bureau members in no way inhibit the vigor of their competition for traffic by devices other than pricing. The quality of equipment, efficiency of operations, speed and reliability of service, tailoring of service to the characteristics of the cargo, attentiveness to shipper needs in the many ways that make one carrier's service more economic and appealing than another — all of these forms of competition, highly prized by the shipping public, are prominent under collective ratemaking.

An argument is often made that the general level of motor-carrier rates under collective ratemaking must be higher than would be the case if unrestricted rate competition prevailed. There is no way of determining with any degree of sureness what would happen to rates in the absence of collective ratemaking. Some rates might be higher, some might be lower. To proceed much beyond conjecture in this realm would require a whole set of assumptions about many other aspects of industry regulation and organization. It is important to realize, however, that the carrier members of the rate bureaus have only the power to propose rates, not to rule on their lawfulness. Critics of the collective ratemaking system have at times characterized it as a form of "private government",[7] but the connotations of such a label are out of line with reality. The Commission has all the authority needed to make sure that the level of motor-carrier rates under collective ratemaking is not in excess of what is reasonable from a public-interest standpoint. All rates so established are subject to close review and regulation by the Commission. Every proposal for a general rate increase must be given wide publicity and must be accompanied by an extensive body of cost, traffic, and financial data stipulated by the Commission. The proposal must meet criteria as to revenue need, capital requirements, profit margins, rates of return, and similar factors used by the Commission to enable it to assure itself that the public is adequately protected. And the right of any party to appear before the Commission and to appeal a Commission decision to the courts is secure. These mechanisms provide the necessary assurance that the rate level is consistent with the public interest.

Another criticism heard is that because rate levels established collectively are designed to produce a reasonable margin of profit or rate of return based upon the costs of member carriers as a whole, such rate levels are too high in relation to the costs of the more efficient carriers and tend to protect the carriers with relatively high cost structures. The basic answer to this criticism is that the governing consideration from the standpoint of public policy is "to insure equality of rates as to all and to prevent favoritism."[8] The long history of the country with transportation rates has left the evidence and the conviction that unrestricted rate competition among carriers can not provide that insurance. Given the public-interest importance of guarding against "discrimination in all its forms," there is no alternative to the establishment of rate levels adequate to cover the total costs of providing the

[7] Arne C. Wiprud, *Justice in Transportation*, Ziff-Davis Publishing Co., Chicago and New York, 1948, p. 77.

[8] Chicago and Wisconsin Points Proportional Rates, 17 MCC 513, 578.

services required by all shippers. The public is protected so long as these rate levels as a whole are not unreasonably high in relation to such costs, including capital costs, even if those rate levels result in different rates of profitability for individual carriers.

It is worth adding, however, that many factors having nothing to do with operating efficiency as such — factors such as the handling characteristics of the commodities carried, the nature of the routes, or the density of the traffic — can affect the costs of individual carriers. Some carrier managements are undoubtedly more skillful operators than others. But there is nothing in the collective ratemaking process as such that deters efforts to improve efficiency. Nor does the process protect the inefficient operator. General rate levels established under the collective ratemaking process are geared to the average costs of the carriers as a group, not to the costs of the least efficient among them. Carriers which can not cover their operating and capital costs at the rate levels which are adequate for bureau members as a whole will fall by the wayside. There is, therefore, the strongest incentive for marginal carriers to reduce costs through improved efficiency. In fact, the ordinary forces of profit maximization insure that *all* carrier managements will strive to optimize their returns by serving shippers as efficiently and at as low a cost as possible — the less efficient carriers, in order either to remain in business or to approach the results of the more successful operators, and the more efficient carriers, in order to maintain or improve their advantage.

As pointed out earlier, a basic aspect of the present system of collective ratemaking in trucking is the right of any carrier member of a rate bureau to avail itself of the opportunity to serve on a carrier committee which represents the bureau membership in discussing and passing upon rate proposals coming before the committee. A member of such a committee acts on a proposed rate regardless of whether the rate involves a single-line or inter-line haul, or whether the carrier itself offers service between the specific points covered by the rate, or even whether it carries the specific commodity involved. Much of the controversy relating to the collective ratemaking process in recent years has involved efforts to impose limits as to which carriers are entitled to participate in deliberations and decisions on specific proposals. It is important to understand why present practice is an integral and indispensable part of the process.

Motor-carrier traffic between two points may move either by single-line service, where one carrier handles the movement from origin to destination, or by inter-line service, where a combination of two or more carriers handles the movement. It is common for a carrier to offer single-line service between two cities and at the same time to join with another carrier to offer inter-line service via a "through" route connecting at an intermediate point. In some cases, the same carrier may participate with various other carriers to form a number of alternative inter-line routes between the two cities. For competitive reasons, the rate must be the same whether the traffic is hauled in single-line service or via any of the inter-line alternatives.

It is commonly assumed by critics of motor-carrier collective ratemaking as presently practiced that a carrier with single-line operating authority between two cities will always prefer to carry the traffic entirely on its own route rather than share the traffic by inter-lining with another carrier. Another assumption frequently made is that inter-line service is less efficient than single-line service.

Such assumptions ignore many operating realities. Inter-lining is a significant aspect of achieving a coordinated national system of efficient motor transport. Traffic patterns and densities and the imperatives of efficient operation often dictate the choice of an inter-line over a single-line route. Where the traffic consists of considerable volumes of less-than-truckload traffic, for example, it can be advantageous for a carrier, despite its own single-line authority, to route a cargo via an interchange point with another carrier so that the original load can be broken down into various

shipments destined for differing cities and integrated with other shipments destined for those cities, some of which will be served by the originating carrier and some by the interlining carrier or carriers. In such cases, interlining can produce marked advantages of efficiency and expeditiousness of service over single-line movements, to the marked and mutual benefit of both shipper and carrier. Similar efficiency and expeditiousness can be achieved by two carriers, neither of which has single-line authority between the points, who join in an inter-line service which competes with the single-line service of another carrier.

One major dimension of the competition of motor carriers for traffic is clearly the competition among carriers offering either single-line service or inter-line service or both between a pair of cities. Another major dimension of the competition for traffic is the competition between carriers moving a particular commodity from a given origin to a given destination and other carriers moving that commodity from the same origin to a competitive destination or from a competitive originating point to the same destination. Still another major dimension of motor-carrier competition for traffic involves the movement of commodities which, while different in physical terms, are in active competition with each other for specific end uses, so that the transportation rates have strong competitive implications for the carriers as well as the shippers of those commodities.

The ability of rate committees to act in a capacity which is representative of the bureau membership as a whole would be seriously impaired if the carriers serving on such committees were not free to deal with all rate proposals affecting the rate structure throughout the entire bureau territory. Even more basically, competitive rate relationships in motor freight transport are closely interlaced: the fundamental objective of motor-carrier collective ratemaking to achieve equitable and nondiscriminatory rate structures could not as a practical matter be realized if single-line and inter-line rates were established in isolation from each other; if rates for one inter-line movement were established without heed to the rates for competitive inter-line movements; if rates between one pair of points were established without regard to rates to or from competitively related points; or if rates governing one commodity were established with no concern for the rates covering another commodity for which it was a competitive substitute.

IV.

Conclusion

How is the public interest affected by collective ratemaking in trucking? The brief answer is that the public gains advantages that are obtainable only through collective rate action and, while foregoing some of the benefits of rate competition among carriers, avoids the damage and inequities that unrestricted competition would bring.

Collective ratemaking reduces, but falls far short of eliminating, competition in trucking. Within the rate bureaus themselves, actual and potential independent actions by carrier members are reflected in downward pressures on rates. Similar pressures are felt from carriers of other modes, from motor common carriers in the territory who operate outside of the rate bureau, from contract motor carriers, and from private motor carriers. And there is active vying for traffic among rate-bureau members on the basis of every aspect of quality of service which is of value to shippers.

What collective ratemaking does eliminate, to a substantial extent, are the negative and destructive impacts which, notwithstanding the advantages of competition in principle, would inevitably accompany unlimited rate competition in trucking. The basic structure and character of motor carrier transportation — its multitude of carriers, points served, alternative routings, commodities carried, and shipper and market rivalries — make it certain that without joint consideration among carriers in the making of rates it would be impossible to avoid a whole catalogue of undesirable results: favored treatment to economically powerful shippers at the expense of those less powerful; inequities among competing market or producing centers; continuous rate fluctuations and concomitant uncertainty among shippers as to rates currently being paid by their competitors; needless waste, confusion, and inefficiency in tariff publication; great additional burdens upon the Commission as a result of a proliferation of protest actions demanding regulatory consideration; and a weakening of the complex of interline arrangements which have heretofore made possible an integrated national network of motor transport in line with the goal of a "coordinated transportation system to meet national needs" sought by the National Transportation Policy.

As a matter of public policy, there are good reasons for the reliance which, in most industries, is placed upon the competitive process as the way to protect the public interest. Valid as the general presumption favoring a policy of competition may be, however, doctrinaire adherence to the presumption can defeat that purpose. In fact, public policy has long recognized that there are several areas of the economy in which traditional competition policy would damage rather than promote the public interest. In those areas, an exception to the policy of competition is implemented by an exemption from the application of the antitrust laws.

Congress has gone to considerable lengths to make certain that in granting such an antitrust exemption in the case of collective ratemaking in trucking the public interest is thoroughly protected.

First, it has laid down a statutory rule that the advancement of the public interest, as reflected in the Congressional declaration of National Transportation Policy, shall be the prime standard applied by the Commission in determining whether collective ratemaking by a rate bureau shall be allowed at all. No rate-bureau agreement may be approved by the Commission except upon a specific finding that an antitrust exemption will further that policy.

Second, it has given the Commission broad authority to condition its approval of any rate-bureau agreement upon the incorpora-

tion of such terms and conditions as the Commission prescribes as necessary to insure that the public-interest standards of the National Transportation Policy are met.

Finally, to make sure that no carrier is bound by a collective rate determination unless it wishes to be, Congress has denied the Commission the power to approve any rate-bureau arrangement which fails to provide "the free and unrestrained right of independent action either before or after any determination." [1]

No other statute providing exemption from the antitrust laws is surrounded by safeguards so explicitly framed to protect the public interest.

Further, Commission approval of the organic agreement under which a rate bureau operates does not carry with it any commitment to approve any specific collective rate action the bureau may take. Every such action must meet the same standards of lawfulness under the Interstate Commerce Act as would be applied to a rate proposal of an individual carrier acting alone. The shippers of the country are well-organized, and any shipper, whether acting individually or through an organization, may protest a rate-bureau proposal. Whether or not protested, a rate-bureau action may be suspended and investigated by the Commission. Where a general increase is proposed, the proposal receives especially close regulatory attention, is subject to the same rights of protest that apply to changes of more limited application, and must satisfy all the tests the Commission sees fit to impose to insure that the resulting rate level is reasonable from the public's standpoint. Any interested party may institute a complaint against any rate-bureau action before the Commission. As an ultimate resort, appeal to the courts is always open.

In weighing collective ratemaking against a policy of unrestricted rate competition, the practical lessons of a hundred years of transportation history, the fundamental characteristics that differentiate motor-carrier ratemaking from pricing in most industries, and the importance of uniform, stable, and equitable rates to the well-being of the country are not to be lightly dismissed. The feeling of certainty that widespread discrimination would accompany unrestricted rate competition in trucking is not baseless alarmism. It reflects not only the views of the carriers who supply the trucking service, but the judgment of shippers — particularly shippers of limited resources and limited economic leverage — who use the service and know from hard experience not only the complexities of motor-carrier ratemaking but its potentials for rate favoritism. That same feeling of certainty that collective ratemaking is necessary in the public interest is expressed in the unwavering view of the regulatory commission which is charged by Congress with acquiring expert knowledge of the industry and with regulating it with the public interest as its overriding consideration

Against this background, it requires extraordinary, if not blind, faith in the therapeutic virtues of unrestricted competition as a universal medicine to give it serious consideration as a substitute for collective ratemaking in motor freight service. The present system of collective ratemaking in trucking does not fit the dogmatic view of an economic world in which unrestricted competition is unvaryingly the best policy. For that matter, no area of antitrust exemption fits that view. But the Congressional concept of the economic world is more pragmatic. It recognizes that the paramount purpose of antitrust, as of any other public policy, is how best to serve the public interest. Such a concept envisions special situations in which an unyielding insistence on the antitrust standard would be a disservice to the public. Congress accordingly makes provision for antitrust exemptions to apply in those situations.

Collective ratemaking in trucking is such a situation. Congress regards collective rate action as the only means of realizing the public-interest goals set forth in its declaration of national transportation policy. Congress provides the opportunity for such collective action and exempts it from antitrust restraints, but only

[1] Section 5a of the Interstate Commerce Act, 49 U.S.C. 5b.

under conditions carefully tailored to protect the public from abuse of the limitations upon competition that are inherent in collective establishment of rates.

It would be difficult to improve upon the statutory and regulatory scheme designed by Congress to make sure that the opportunity granted for collective rate action serves the public interest. It has written into the law an unqualified guarantee that any carrier may make its own rates independent of the actions of any rate bureau; it has specified criteria by which the public interest must be found to be furthered in order for a collective ratemaking arrangement to win approval; it has empowered the Commission to specify the provisions and procedures which must be embodied in a collective ratemaking arrangement in order to justify an antitrust exemption; and it has maintained intact regulatory supervision over all collective rate actions of the rate bureaus operating under such an exemption.

The economic logic for the statutory policy favoring collective ratemaking over rigid rate competition is as compelling today as when it was enacted almost thirty years ago. Motor transport is of greater importance in the economy now than it was then, reaching every community in the country, large or small, and making possible a national marketing and distribution system of high efficiency. The economic leverage of powerful shippers, the potential for rate discrimination in its many aspects, the need for equitable, stable, reasonably predictable rates — all are at least as important now as when Congress formally adopted a statutory policy authorizing collective ratemaking. Congress assigned to the Interstate Commerce Commission the responsibility for implementing that policy through effective regulation. The Commission can and should be held to strict account in carrying out its responsibility. But the basic Congressional policy of permitting collective ratemaking under conditions that benefit and protect the public interest remains sound.

Jesse J. Friedman, whose experience as a government official and a consulting economist has embraced almost every aspect of competition policy, heads the economic consulting firm of Jesse J. Friedman & Associates, which since its inception in 1954 has acted in an advisory capacity to business corporations and associations in a wide range of regulated and unregulated industries. On numerous occasions his work has involved the study of the implications of government and business policies for the public interest. He was staff director of a cabinet committee established by President Truman on problems of competition and monopoly and has served as economic consultant to the Antitrust and Monopoly Subcommittees of both the United States Senate and the House of Representatives, the Senate Committee on Interstate and Foreign Commerce, and the Department of Commerce, Department of Justice, and various state agencies. His studies published by Congressional Committees include *Concentration in American Industry*, *Corporate Mergers and Acquisitions*, and *Merger in a Regulated Industry*. In private consulting, he has made and directed studies and advised corporations and their counsel on the economic soundness of business policies affecting competition and on varied economic issues of antitrust and regulatory [illegible] including issues relating to pricing and competition in air, [illegible], rail, and water transportation. He is co-author of a study entitled *Relative Profitability and Monopoly Power*, published in the December 1972 issue of the Conference Board Record, and the author of a book entitled *A New Air Transport Policy for the North Atlantic*, published in 1976.

from —

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truck line

NIT LEAGUE REAFFIRMS SUPPORT FOR COLLECTIVE RATEMAKING IN TRUCKING, SUGGESTS WAYS TO CLARIFY POLICY

In a move that may aid opponents of congressional action to end the trucking industry's exemption from federal antitrust law for ratemaking purposes, one of the nation's major shipper organizations this week reaffirmed its support for the collective rate bureau method of setting the fees for trucking services.

STRONG "ENERGETIC" SUPPORT

Members of the National Industrial Traffic League voted in Florida at the group's annual meeting earlier this week to continue strong public support for the conference method of establishing motor carrier rates -- within the League's existing policy guidelines.

ENDORSEMENT A SETBACK FOR KENNEDY

Although the shipper group said it will clarify some of its own policies about how truck rates are set, the endorsement of collective ratemaking must be regarded as a setback of sorts for U.S. Sen. Edward Kennedy, D-Mass., who has indicated he will introduce legislation in the next Congress to end current collective ratemaking practices.

SINGLE-LINE RATE QUESTION

One of the policy clarifications approved by NIT League members involves rate bureau voting on single-line rates, an issue currently under consideration by the Interstate Commerce Commission.

ICC ISSUE

The ICC wants to apply to trucking the same prohibitions that now keep railroads from voting on single-line traffic in which they do not participate.

VOTING POLICY SPELLED OUT

What the NIT League said is it believes a carrier should be allowed to vote on a tariff for any single-line or joint-line traffic in a situation where he is elected to represent other carriers, and where he and those he represents are able to participate in that traffic -- even if they might not be doing so at the time.

(more)

WHEN CAN REPRESENTATIVES VOTE?

At the same time, however, the League said it would like the various rate bureaus to set up procedures for determining that a carrier representing other carriers is absolutely sure he can vote for them on any rate proposal.

INDEPENDENT ACTIONS

According to the League's policies, there would be no voting within a bureau on single-line proposals for accounts of only one carrier. The rates in those cases would effectively be the result of an independent action.

ONLY CARRIERS CAN PROPOSE

Another item reaffirmed by NIT League members is that only carriers -- and not the staff of a rate bureau -- have the authority to make any rate proposals on their behalf.

ICC ASKS OPEN MEETINGS

Although ICC Chairman Daniel O'Neal earlier this year called for making public all voting and discussion within collective ratemaking sessions, the NIT League did not wholeheartedly endorse that approach.

VOTING RECORD SUGGESTED INSTEAD

Instead, the shippers suggested that a record of carrier voting be maintained for a reasonable amount of time -- perhaps one year -- and that the record be furnished to the ICC whenever the agency should request it.

INTRASTATE RATE AUTHORITY

One final policy clarification the shippers recommended involves the ICC's authority to rule on intrastate truck rates. Present law permits the agency to rule on intrastate rail rates when the ICC considers them so high as to be a barrier to interstate commerce.

The ICC does not have the same authority for motor carrier rates, and the NIT League recommended action to change the law in order to give the commission that authority for all modes.

Despite the spate of policy statements, in the end NIT League members endorsed a strong public stance in favor of continuing the present collective ratemaking system for trucking.

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SOME DO'S AND DON'TS AND
A WORD OF CAUTION ABOUT ANTILOCK

Comments and discussion at the recent ATA convention in New York indicate there is still some confusion about antilock in the wake of the U. S. Supreme Court's refusal to review a lower court decision voiding the antilock requirement of the federal 121 Brake Standard.

So we want to review for you one more time what you can and can't do as purchasers and operators, and to add a note of caution from our engineers about disengaging antilock from certain model year tractors.

DON'T ACCEPT ANTILOCK ON NEW TRUCKS

Purchasers: As purchasers you can now buy trucks -- tractors and trailers -- without antilock. The advice ATA's General Counsel Nelson Cooney gave in New York is that purchasers "stick to their guns". He noted that some manufacturers may have a rough time deciding just how to remove antilock in the safest way but, he said, "That is their problem."

CHECK PRIOR ORDERS

If you had an order in for new equipment prior to the Supreme Court ruling October 2, the advice is that you press for delivery of your new equipment without the antilock devices. You can argue strongly -- and correctly -- that the National Highway Traffic Safety Administration mandate for antilock no longer applies.

DISCONNECT EQUIPMENT

Operators: As operators of trucks currently equipped with antilock, you can now disconnect the antilock device if you haven't already done so.

In the past many operators did uncouple antilock because the agency charged with enforcing truck equipment standards, the Bureau of Motor Carrier Safety, never attempted to enforce the antilock requirement.

LIABILITY CONCERN FADES

Many operators, however, were wary of removing antilock because they were concerned about liability problems that might arise in an accident. In view of the court ruling that antilock is generally unsafe, it appears that this concern can be put aside.

DEALERS, MANUFACTURERS MAY ASSIST IN UNCOUPLING ANTILOCK

Moreover, you should note that in some cases the vehicle manufacturer may be willing to assist you in removing antilock. In the past, operators had to uncouple the device themselves. But in light of a NHTSA interpretation in 1977 that manufacturers could modify earlier vehicles to correspond with a revision in the standard at that time, it's possible manufacturers or their dealers may be persuaded to help in the current situation.

(over)

SOME CAUTIONS

Although operators shouldn't experience any serious problems in all of this, several notes of caution are in order.

DEALER COMPLIANCE REQUIRED

One has to do with having your dealer disconnect antilock. He must still certify that vehicles meet the parts of the standard still in effect.

STOPPING DISTANCE

The most critical requirement a dealer -- not you -- is still obliged to meet is the 60-foot stop with an unloaded truck on wet pavement from 30 mph -- without deviating from a 12-foot lane. We mention this because some earlier model trucks and tractors may not be capable of this without antilock.

AGGRESSIVE BRAKE PROBLEMS

The other note of caution involves the extremely aggressive front brakes on tractor and trailers built to conform to the 121 Standard in effect during 1975 through to mid-1976.

According to our engineers, these vehicles rely heavily on antilock to protect the driver from the aggressive braking, and if antilock is removed it should not be done without a concurrent downgrading of the steering axle brakes.

DOWNGRADING ADVISED

The engineers suggest either relining with relatively low coefficient or friction linings, or installing shorter slack adjusters or even smaller air chambers on '75-76 models.

CHECK MODULATOR VALVES

When disconnecting antilock, your dealer or maintenance section should also check modulator valves. They have air filters which can plug up and decrease or remove braking action. We suggest replacing them with relay valves or servicing them regularly.

CLEAR DASH LIGHTS

Some final notes: removing a fuse will not in all cases make the antilock inoperative. You must remove the power source. We also suggest that if you disconnect antilock you remove the dash warning light and, in fairness to your drivers, add a "disconnected" sign.

Trailer antilock systems may be disconnected with no other actions required.

PASS ALONG TO MAINTENANCE

Finally, we suggest you pass this information along to your maintenance section or use it in talking with dealers or manufacturers if they agree to help disconnect the antilock device.

NEWS

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FOR IMMEDIATE RELEASE

CONTINUED ECONOMIC REGULATION VITAL SAYS ATA OFFICIAL

WASHINGTON, Nov. 28 -- Continued economic regulation of the motor carrier industry is vital if consumers are to have a dependable supply of goods, an official of the American Trucking Associations, Inc. said here today.

Speaking before a meeting of the Washington chapter of the professional transportation society, Delta Nu Alpha, ATA Virginia State Vice President J. Harwood Cochrane also predicted financial problems for motor carriers if the industry is deregulated.

Cochrane, who is also chairman of the board of Overnite Transportation Co. of Richmond said:

"A sound and effective transportation system is essential to American business--it is essential to the consumer."

Cochrane also noted that persons advocating deregulating the industry often overlook the fact that the efficient, orderly system of ground transportation as developed under the Interstate Commerce Commission is essential to making sure all consumers have equal access to goods.

Noting that the trucking business was "shaky" in the days before coming under ICC control in 1935, Cochrane said:

"Regulation has changed all that. Today, the industry is looked upon by the financial community as stable, and necessary finances in most cases are available at rates enjoyed by the large manufacturers."

He added:

-more-

"But we have been warned by any number of financial experts that the deregulation of the system will result in a deterioration of this relationship. The money just will not be available."

Cochrane continued:

"For one thing, deregulation will make operating certificates worthless. For another, as one Wall Streeter put it recently, deregulation will re-introduce a climate of instability into the industry, and lenders are not known for advancing money for unstable enterprises."

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December 11, 1978

TRAFFIC WORLD

THE WEEKLY NEWSMAGAZINE OF TRANSPORTATION MANAGEMENT

ICC Favors Exempt Fresh-Produce Hauls by Rail

Proposal to eliminate economic regulation by Commission of transportation of fresh fruits and vegetables moving by railroad, with no time limit for the exemption, is adopted unanimously by agency, but carriers would be required to comply with ICC accounting and report requirements and to submit to the Commission copies of rate quotations made under the exemption. **Pages 11 and 17**

Major Cases Now Pending at ICC Are Listed

Compilation of total of 41 'significant' cases in categories of operating rights, finance and rates that are awaiting final disposition at Commission, with 'target date' for the decision in each case, is made public by agency's Office of Proceedings. **Page 38**

History of Motor Carrier Entry Regulation Reviewed

Detailed recapitulation of developments leading to its recent adoption of regulations providing protest standards in operating-rights application cases is issued by ICC as background information for proposed general policy statement on the giving of greater weight to the benefits of competition, less to 'the historic practice of protecting existing motor carriers,' in entry cases. **Page 40**

SP Co. Said to Imperil SCL-Chessie Merger Plan

Attorney for Seaboard Coast Line Industries, parent company of Family Lines System, tells ICC that unification of Family Lines with Chessie System could be endangered by uncontrolled purchases of SCL common stock by Southern Pacific Co., holding company for SP Railroad. Continuance of ICC's cease-and-desist order against SP Co. to stop its acquisition of more SCL stock sought. **Page 88**

CAB Adopts Lottery System for Unused Air Routes

Aeronautics Board announces effectuation of system of drawing of lots to determine order of priority of competing applicants for future 'unused' or 'dormant' routes, to prevent continuance of a situation that could have resulted in 'a perpetual queue outside the board's offices' in Washington, D.C. **Page 95**

Decisions and Orders

Commission Presents Detailed Review Of Regulation of Motor Carrier Entry

A detailed review of federal regulation of motor carrier entry and of developments leading to the recent adoption of regulations providing protest standards in application proceedings for operating authority was given by the Commission as background information in proposing a general policy statement under which it will give greater weight to the benefits of competition in reviewing motor carrier entry and acquisition cases and less weight to the Commission's "historic practice of protecting existing motor carriers."

The Commission's action drew a similarly detailed dissent from Commissioner George M. Stafford who, in brief, viewed the proposed policy statement as "the next logical step in the Commission's steady march toward elimination of entry controls in the trucking industry" (T.W., Dec. 4, p. 12).

Comments on the proposed statement of general policy are to be filed within 60 days of the publication of notice in the *Federal Register*. The case is Ex Parte MC-121, Policy Statement on Motor Carrier Regulation. The comments should be addressed to the ICC's Office of Proceedings at its offices in Washington, D.C. 20423.

The American Trucking Associations immediately asserted that the trucking industry is "completely opposed" to the proposed policy statement. The ICC, according to the ATA, "is administratively thwarting the intent of Congress. It is placing maximum participation in the industry ahead of exisiting carriers, which the Congress intended as a stabilizer for the industry."

In furnishing supplementary information about the proposed general policy statement on easing entry into the trucking business, the Commission said:

"Pertinent to the adoption of the policy statement are the regulations recently adopted by the Commission in Ex Parte No. 55, Sub. 26, *Protest Standards in Motor Carrier Appliation Proceedings*, 43 FR 50908 (1978) (T.W., Nov. 6, p. 117). Under the standards adopted there, the automatic right of one carrier to oppose the application of another carrier will be limited to cariers which, among other things, have performed service withic the scope of application. These are the carriers which would be in the best position to meet the burden of proof which, if the proposed policy statement is adopted, would be placed upon them. By the same token, it is anticipated that this policy statement would provide guidelines for determining whether carriers not having an automatic right to protest should be given leave to intervene in opposition to an application.

Background

"Federal regulation of motor carrier entry began with the passage of the Motor Carrier Act of 1935. The statutory test which the Commission must apply in determining whether to grant an application for new interstate motor common carrier authority—public convenience and necessity—has remained unchanged since the Act was passed. The test applied in deciding contract carrier applications—consistence with the public interest and the National Transportation Policy—was last modified legislatively in 1957.

"A number of factors combined to cause the Congress to bring motor carrier transportation under federal regulation in the 1930s. First, and probably most important, was the state of the economy itself. The worst economic depression in our history was at its height, and a great many, if not most, businesses were in serious financial difficulties. Intercity trucking, being young and just beginning to grow, suffered more problems than did most other businesses. Certainly, one of the principal purposes behind the 1935 act was to bring economic stability to an industry which was perceived by the Congress as one which would inevitably come to provide important and essential services for the public.

"There seems to have been no one who predicted the course which the motor carrer industry, under regulation, would take in the years following the passage of the Motor Carrier Act. Some observers believed that motor transportation would develop in much the same way as had the railroads, with a relatively small number of companies operating over fixed routes between major points, and a somewhat larger number of smaller companies feeding them traffic. Such large regular route carriers have indeed developed, but to a much greater extent, both in numbers and route structures, than anyone foresaw. Certainly, there was no anticipation that the highly specialized, truckload volume, irregular route trucking services which are so prevalent today would develop to the extent that they have. Nor, apparently, did anyone foresee the phenomenal growth of private transportation which has occurred and which now represents a major source of competition for the regulated carriers.

"After passage of the 1935 act, the Commission received and processed about 90,000 applications for 'grandfather' authority. Since that time, the Commission has both received and granted an increasing number of motor carrier authorities. In the first six months of fiscal year 1978, which began October 1, 1977, the Commission received an average of 950 new applications per month for permanent motor carrier authority. During the same period, of the applications for motor carrier authority which reached decision on the merits (that is, all those which were not either dismissed or withdrawn), 94.3 per cent resulted in a complete or partial grant of authority. The grant rate for June, 1978, was 98.2 per cent, and for July it was 96 per cent. The highest rate previously attained was 86.4 per cent in fiscal year 1975. The rate dropped to about 80 per cent in fiscal 1976, and rose again to 86 per cent in fiscal 1977.

"The Commission's policies for dealing with motor carrier applications have evolved gradually over the more than 40 years that regulation has been in effect. As the economy changed and the Commission's membership changed; as motor carrier technology developed and the industry became strong and more specialized; and as shipper distribution practices and techniques change, the Commission changed its policies gradually to meet what it perceived to be the needs of the shippers and the carriers.

"Thus, even though the statutory language which the Commission must follow in deciding motor carrier entry cases has remained the same for many years, the way the language has been interpreted and applied has changed over time in recognition of a constantly changing world. Over the years, the trend has been to make it easier for applicants to obtain new operating authority. What we have seen in the past year or two is an acceleration of that trend—a trend which reflects clearly discernible changes in the regulated industry and the national economy.

"The regulatory policies which became fixed in the 1930s and 1940s were characterized by a protectionist attitude which unquestionably reflected the national need for the development of a stable and profitable motor carier industry. When that industry was young and was faced with the economic disaster of the depression years—and then when it was growing stronger and developing in the post-war years—protection was necessary. Carriers needed to be protected from excess competition if they were to raise the capital, make the investments, and develop the operating patterns necessary to make them financially viable and to meet the public need for service. When stable and reliable bus and trucking services were the exception rather than the rule, and when the automobile and private truck had not yet become a practical alternative, the need for a strictly regulated motor carrier industry, upon which the common carrier obligation to serve could readily be enforced, was a necessity to travelers and shippers.

"Today, the motor carrer industry has arrived at a state of maturity characterized by routes and service patterns which blanket the nation; by financial prosperity; by the existence, side-by-side and competing, of hundreds of successful firms, meeting both new and old customer needs and earning healthy profits; and by generally highly competent managements which have developed sophisticated technologies, cost-control systems, and pricing structures. Obviously, all bus and truck companies are not uniformly well positioned or well managed. In particular, we have recognized the financial problems of the regular route sector of the bus industry.

"In the years since the Motor Carrier Act of 1935 was enacted, the regulated industry has matured into one of the most profitable, diverse, competitive, and best managed in the United States. New permanent operating authorities are being granted at the rate of almost 8,000 a year, but the nation's expanding economy continues to create an apparently never-ending need for new motor carrier services. Although the Commission has become more liberal in granting motor carrier applications, it has still, up to now, been following entry control policies which have changed but little since the advent of federal regulation. Today, the flood of applications has made it virtually impossible for the Commission to give more than passing attention to each, and has made well-informed, precise motor carrier entry regulation difficult, if not impossible.

"In responding to these changing conditions and developing service needs, the Commission has recently tended to give added weight to the needs and wishes of those supporting motor carrier applications. It has also given more weight to the benefits of competition, recognizing it as an effective force for regulating prices and service quality."

"In evaluating motor common carrier applications, the Commission has long followed the three-point test first established in *Pan America Bus Lines Operation*, 1 MCC 190, 203 (1936). That test provides that the Commission will consider an application for new authority in the light of the following criteria:

" 'Whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.'

"Common Carriage—Today's conditions require a change in that test. The criteria are overly protective for a mature and financially healthy industry, and they tend to restrain healthy competition. The third part of the *Pan American* test, which provides existing carriers with protection from competition which would endanger their abilities to continue to perform service needed by the public, offers what we are convinced is a sufficient degree of protection to carriers already in a particular market. Obviously, only the existing carrier is in a position to show that a grant of the application will have this impact upon it, and it is, therefore, the protestant which will have to bear the burden of proof as to this test. We believe that the second of the three tests laid down in the *Pan American* case—that is, the test which, in effect, requires an applicant to prove that the service it proposes cannot be performed by existing carriers—has outlived its usefulness, and it will no longer be applied.

"In determining applications for *motor common carrer authority*, the Commission will henceforth apply the following test in deciding what service is required by the present and future public convenience and necessity:

" '(1) An applicant must demonstrate that the service proposed will serve a useful public purpose, responsive to a public demand or need.

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

"Contract Carriage—In determining motor contract carrier applications, the Commission must apply certain statutory tests. First, it must be shown that the service proposed is that of a contract carrier as defined in 49 USC section 10102(12) (formerly section 203(a)(15) of the Interstate Commerce Act). Under this provision, a contract carrier is defined as one which provides service 'under continuing contract with one person or a limited number of persons either (a) for the furnishing of transportation service through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.' The Commission must also consider each contract carrier application in connection with certain criteria contained in 49 USC 10923(b)(2) (formerly section 209(b) of the Act). They require that, in determining whether to issue a permit to a contract carrier, the Commission consider 'the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of the shipper's requirements.'

"In considering *motor contract carrier* applications, the Commision's policy will be to find that the effect of a grant of contract carrier authority upon protesting carriers will not be a significant factor unless the protestants themselves can establish that such a grant would endanger or impair their operations to the extent that they would be unable to continue to provide adequate service within the scope of their authorities."

"Emergency Temporary Authorities—The Commission is considering establishing, by rule, a category of short-term, non-renewable emergency temporary authorities which would be issued upon receipt of a prospective user's certification that an immediate and urgent need for additional transportation service exists. These authorities would be limited in some respect, perhaps, in terms of a time limit, or perhaps in terms of the number of loads or trips that the carrier could preform. Longer-term temporary authorities, including any renewal of a short-term authority, would be issued only after an informal record has been completed, following *Federal Register* publication and an opportunity for the filing of protests."

"The Commission is concerned that is present policies in deciding applications of motor carriers to control, merge with, or purchase the operating authorities of other motor carrier may lead unnecessarily to the reduction of effective competition, especially with respect to short-haul markets and service at smaller communities. It has become common for a long-haul carrier to purchase the authority of a short-haul carrier, and to use that new authority solely as a means of extending its long-haul service into another market. The result is that the shippers who had relied upon the vendor's service no longer have

that service available. Admittedly, they will instead have available the vendee's new single-line service for long-haul traffic, which may well be to their advantage. However, in the short-haul market formerly served by the vendor, the amount of motor carrier competition will have been diminished. It is our firm view that a purchase proceeding should not be used solely to provide for the extension of a motor carrier's service into new markets. In determining motor finance proceedings, the Commission will authorize an acquisition of operating authorities only if the acquiring carrier establishes that it will continue to perform service similar in scope and character to that authorized by the rights being acquired. If only a new service is intended, the proper vehicle is the filing of an application for new authority.

"The Commission is also concerned that it is spending an inordinate amount of its resources considering motor carrier finance proceedings which do not have a significant effect either on the motor carrier industry or on the markets in which the carriers operate. Guidelines are now being developed to identify those motor carrier transfers and consolidations that warrant close scrutiny and possible challenge. We plan to use the guidelines to avoid a routine examination of motor carrier financial transactions and to focus only on those transactions which have discernible public interest consequences.

"In order to carry out this policy, the Commission, in reviewing motor carrier finance applications, will concentrate most heavily on the potential competitive—or anticompetitive—aspects of the transaction. The parties will be expected to develop the record fully in this respect. For our part, we will make a positive effort to increase the expertise of our staff in antitrust and related matters."

In his dissent, Mr. Stafford continued:

"A false premise underlies this proposal and, in fact, is the touchstone of almost all current Commission thinking with regard to trucking regulation. The false premise of which I speak is the theory that regulatory policies beginning in the 1930s and 1940s 'were characterized by a protectionist attitude' toward the trucking industry.

"The premise is false because it implies that protection of existing carriers was the primary consideration in the Commission's decisional process. This is wrong. The truth is that the decisional process involved a balancing of competing interests. But always the need of the public (shippers and passengers) was the primary concern of this agency. The balancing of sometimes competing interests was what Congress envisioned in the Motor Carrier Act of 1935. Congress did not want and did not need 11 Commissioners and a staff of 2,000 to act as a rubber stamp.

"Nothing evidences historical Commission policy in favor of the shipper better than the *Pan American* case cited in the proposed statement. That landmark decision requires an applicant to show that the public needs a given transportation service. Showing that, the burden switches to existing carriers to show they can meet that public need. Then, the burden reverts to the applicant, to show that its service is in some way superior to that currently available. This is the balancing; but always the assurance of adequate, responsive transportation to the public is the ultimate concern in that decisional process."

Protectionism

"The proposed statement also claims that the industry has matured and grown so sophisticated during the last 40 years of regulation that it no longer needs the alleged 'protections' referred to above. Surely, there are many more large companies, and industry leaders are far larger than any thing ever envisioned in the early days. But the large carriers are still comparatively few in number and small carriers represent the great bulk of the industry. If there ever was a need to protect the small carriers, there is no reason to believe that that need is any less today than it was 30 or 40 years ago. It is the bigger carriers, not the smaller ones, that are so much more sophisticated.

"In fact, there can be little doubt that the persons that suffer most from relaxed entry standards are the small carriers. It is generally recognized that the larger carriers could survive equally well in a regulated or an unregulated environment. They have the size, the financial wherewithal, and technical experitse, to adjust prices and meet competition at all levels. The smaller carriers, however, already are probably operating on a shoestring, and do not have the financial or operational flexibility to adjust as well to new competition."

The Real Impact

"The proposed statement of policy takes on greater significance when read in conjunction with two other recent decisions, *Liberty Trucking Co., Ext.—General Commodities* 130 MCC 243 (decided October 6, 1978) and Ex Parte 55, Sub. 26, *Protest Standards in Motor Carrier Application Proceedings* (not printed) (decided October 10, 1978). Under the proposed statement, the adequacy of existing service issue (set forth in *Pan American*) will no longer be a consideration. The third *Pan American* criterion will apparently remain intact. In *Liberty*, however, it was made clear that this criterion, potential adverse impact on existing carriers, will be virtually impossible to prove and will rarely be given consideration.

"The proposed statement also modifies the criteria that will be considered in contract carrier licensing cases again by imposing an almost impossible burden of proof on protesting carriers. In the *Protest Standards* case, it was announced that henceforth common carriers would not be allowed to protest automatically a contract carrier application. By keeping our affected common carriers, there will be no effective opposition to contract carrier applications and those carriers who are allowed to intervene will never be able to prove their case."

Conclusion

"In summary, therefore, I offer the following: The majority premises its proposal on an inaccurate statement of the way regulation has been administered. Furthermore, assuming protectionism for the industry was once an important goal of regulation, there is nothing (other than some vague, conclusory comments) to prove that small trucking companies do not still need those same protections. The proposed changes, viewed in conjunction with other recent decisions indicate that henceforth opposition to a licensing case will be a futile act. I believe that even the majority would agree that meaningful entry control in trucking will no longer exist when this statement is ultimately adopted."

Barker's Wins Authority Without Vehicle Limit

The Commission has granted Barker's School Bus Service authority to provide what has been described as a more economical type of bus service in the transportation of passengers and their baggage, in round-trip charter operations, from and to points in Indiana and extending to points in Ohio, Kentucky, Wisconsin, Illinois, parts of Missouri, and parts of Michigan.

Acting in a decision served November 29 in MC-141600, Barker's School Bus Service, Inc., Common Carrier Application, the Commission also determined that a restriction limiting the authority to service in school buses was unnecessary. It withheld issuance of the certificate, however, subject to publication of the grant of authority in the *Federal Register*.

Commissioner George M. Stafford dissented from the majority on the ground that the potential financial harm to protestant carriers "far outweighs the need for an unenforceable and speculative 'economical' service."

Earlier in the proceeding, an ICC administrative law judge approved Barker's application to provide the service. But he restricted the authority service in school buses, in an apparent effort to protect the interests of protestant carriers. On appeal, Division 1 upheld the grant of authority but deleted the restriction.

The Commission, in the latest decision, ruled that the restriction is unenforceable, would make Barker's operations more difficult, does not

enforcement is not *de minimis*. The Board seeks enforcement of its entire order in each case, to which it is entitled.

Accordingly, a decree will be entered enforcing the Board's orders.[7]

William KUREK, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley, Plaintiffs-Appellants,

v.

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois political subdivision, George L. Luthy, John R. Canterbury, James A. Cummings, Bonnie W. Noble, Clyde West, Harold A. (Pete) Vonachen, Jr., Individually and as President and Members of the Pleasure Driveway and Park District of Peoria, Rhodell [illegible]vens, Individually and as Director of Parks and Recreation, Jack M. Fuller, Individually and as Administrative Assistant, Daniel B. Ohlemiller, Individually and as Business Administrator, Frank D. Borror, Individually and as Superintendent of Maintenance, William McD. Frederick, Individually and as Attorney of Pleasure Driveway and Park District of Peoria, Golf Shop Management, Inc., an Illinois corporation, and Gordon A. Ramsey, Defendants-Appellees.

No. 76-1791.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 20, 1977.

Decided May 26, 1977.

Rehearing and Rehearing En Banc Denied Aug. 11, 1977.

Golf professionals, whose concession rights to operate pro golf shops at municipal golf courses had been terminated by city park district, filed complaint against park district, president and members of park district's board of trustees, board attorney, administrative staff members, current concessionaire of pro shops, and concessionaire's sole incorporator, alleging violations of federal antitrust laws and deprivations of their federal rights under color of state law. The United States District Court for the Southern District of Illinois, Robert D. Morgan, Chief Judge, dismissed complaint, and plaintiffs appealed. The Court of Appeals, Pell, Circuit Judge, held that: (1) complaint, alleging that threat of monopolistic license and demand for uniformly increased concession fees were used by defendants as means in broader conspiracy to coerce plaintiffs into raising and fixing their retail prices and that award of monopolistic concession license to defendant current concessionaire was made to punish plaintiffs for refusing to be so coerced, and further alleging that current concessionaire made economically unrealistic "sham" proposal, not actually to be put into effect, in concert with at least some park district officials, knowing that proposal would not be acted upon as indicated in bid invitation but would, instead, be used by park district to coerce plaintiffs into conduct violative of antitrust laws, was sufficient to state cause of action and (2) with respect to count II of complaint alleging deprivation of plaintiffs' civil rights under color of state law, district court's judgment dismissing park district as defendant would be affirmed, but, district court erred in dismissing that count with respect to remaining park district officials, on basis of previous state court adjudication.

Affirmed in part; reversed and remanded in part.

1. Federal Courts ⇐932

Although the Court of Appeals reached different conclusion on sufficiency of plaintiffs' complaint, it would not disturb district

7. We express no opinion with respect to Ohmite's contentions of compliance, which it is free to assert in any further proceedings before the Board or this court arising from these orders.

...rt's denial of plaintiffs' motion for par... summary judgment, notwithstanding ... that trial court's independent consider... of that motion was precluded by its ...rmination that no cause of action was ...ged in complaint, where plaintiffs, al...gh citing freely in their briefs to mate...ls tendered in support of motion and ...esting reversal of denial thereof, never...ess made no contention at oral argu...nt that they were entitled to summary ...gment on that record.

Federal Civil Procedure ⇐2484

Summary procedures should be used ...ringly in complex antitrust litigation ...ere motive and intent play leading roles, ...of is largely in hands of alleged conspir...rs, and hostile witnesses thicken plot; ...l by affidavit is no substitute for trial ... jury. Sherman Anti-Trust Act, § 1 et ..., 15 U.S.C.A. § 1 et seq.

Federal Courts ⇐797

On appeal from dismissal of complaint, ... Court of Appeals would assume truth of ...ll-pleaded facts alleged in complaint.

Municipal Corporations ⇐57

City park district was unit of local ...ernment within meaning of Illinois Con...ution, deriving its powers from various ...ois statutes. S.H.A.Ill.Const.1970, art. ... 1.

Federal Civil Procedure ⇐1163

On appeal from dismissal of complaint ...t by golf professionals who had former...y been granted concessions by city park ...strict to operate pro golf shops at munici...l golf courses, alleging federal antitrust ...olations by park district's demanding five ...rcent of gross sales as concession fee and ...quiring as condition of concession renewal ...at plaintiffs raise and fix their prices, the ...urt of Appeals would take judicial notice ... facts that 1970 Illinois Constitution pro...ed for abolition of personal property tax... and authorized Illinois General Assembly ...o provide replacement revenue sources for ...al government units and that Illinois ...neral Assembly had not exercised its ...wer to create substitute revenues for ...al park districts, which facts apparently ...d park district in 1973 to consider possibilities of obtaining greater revenues from its golf course pro shop concessions. S.H.A. Ill.Const.1970, art. 9, § 5; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

6. Monopolies ⇐28(6.2)

Complaint filed by golf professionals, who had previously been granted concessions by city park district to operate pro shops at municipal golf courses, against city park district and individuals associated with park district, alleging federal antitrust violations by park district's demand for uniformly increased concession fees and threat of award of monopolistic license as alleged means in broader conspiracy to coerce plaintiffs into raising and fixing their retail prices, and further alleging that award of monopolistic license to another was made to punish them for refusing to be so coerced, was sufficient to allege cause of action. Sherman Anti-Trust Act, §§ 1 et seq., 2, 15 U.S.C.A. §§ 1 et seq., 2.

7. Federal Civil Procedure ⇐1773

Complaint should not be dismissed for failure to state claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

8. Monopolies ⇐12(1)

Acts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into conspiracy to restrain trade. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

9. Monopolies ⇐12(1)

City park district, which had substantially less than statewide jurisdiction, and its officials, had no state mandate or authority, for purposes of falling within "state-action exemption" to Sherman Act, to engage in activities whereby it allegedly demanded from its competing concession licensees increased concession fees for operation of pro golf shops at municipal golf courses and allegedly threatened award of monopolistic license to single concessionaire as alleged means of broader conspiracy to coerce concessionaires into raising and fixing their retail prices, in alleged attempt to

impose hidden sales tax, and whereby it subsequently awarded monopolistic concession license as alleged punishment to concessionaires for refusing to be so coerced. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

10. Municipal Corporations ⇐57

Subordinate units of government, notwithstanding that they derive their powers from state, are not entitled to all of federalistic deference that state would receive. U.S.C.A.Const. Amend. 11.

11. Monopolies ⇐12(1)

Where there are numerous subordinate units of government of a given type, each of same status under state law, it is more difficult to say that actions of any one of them are undertaken pursuant to state's command, or that state as sovereign imposed any anticompetitive restraints resulting from such actions; accordingly, subordinate governmental unit's "state-action" defense to alleged violation of federal antitrust laws is less obviously justified than is same claim made by state government, and antitrust "immunity" in former case cannot be automatic. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

12. Monopolies ⇐12(1)

For purposes of "state-action" defense to alleged violations of federal antitrust laws, adequate state mandates for anticompetitive activities of subordinate governmental units may be demonstrated by explicit language in state statutes, or may be inferred from nature of powers and duties given to a particular government entity. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

13. Municipal Corporations ⇐721

Illinois statutes empowering park districts to construct, equip and maintain golf courses, as well as necessary facilities pertinent thereto, and empowering them to contract in furtherance of any other corporate purposes, authorized city park district to operate pro shops at its municipal golf courses or to make contracts or leases allowing outside parties to operate such shops. S.H.A.Ill. ch. 105, §§ 8-1(a), 8-10, 8-16, 9.1-1.

14. Monopolies ⇐12(1)

Fact that city park district's conduct, with respect to its demand for increased concession fees for operation of pro golf shops at municipal golf courses from competing concession licensees and its subsequent award of monopolistic license in alleged violation of federal antitrust laws, concerned its golf courses and involved its statutory powers under Illinois law to contract and/or to lease did not convert state's grant of such powers into state authorization or mandate to use them to force private competitors to violate antitrust laws. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; S.H.A.Ill. ch. 105, §§ 8-1(a), 8-10, 8-16, 9.1-1.

15. Monopolies ⇐12(1)

If it could be proven that intended incidence of increased concession fees demanded from competing concessionaires for operation of pro golf shops at municipal golf courses by city park district, which demanded as condition to renewal of concessions that concessionaires raise and fix their prices, would have operated as illegal sales tax, it would be extremely difficult, if not impossible, to find state mandate underlying park district's alleged conduct, for purposes of falling within "state-action" exemption to alleged violations of federal antitrust laws; however such proof would add nothing directly to merits of antitrust claims against park district and would be germane only to question of state mandate. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; S.H.A.Ill. ch. 105, §§ 6-1 et seq., 8-1(b).

16. Monopolies ⇐28(6.2)

Complaint filed by golf professionals, who had previously been granted concessions by city park district for operation of pro golf shops at municipal golf courses, against party subsequently granted monopolistic concession license, alleging that defendant made economically unrealistic "sham" proposal, not actually to be put into effect, in concert with at least some park

district officials, knowing that proposal would not be acted upon as indicated in bid invitation but would, instead, be used by park district to coerce plaintiffs into conduct violative of federal antitrust laws, was sufficient to state cause of action. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

17. Monopolies ⇐12(1)

Successful bidding does not violate federal antitrust laws substantively. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

18. Monopolies ⇐28(1.5)

If current concessionaire, which was granted monopolistic concession license for operation of pro golf shops at park district's municipal golf courses, made economically unrealistic "sham" proposal not actually to be put in effect in concert with at least some park district officials, knowing that proposal would not be acted upon as indicated in bid invitation but would, instead, be used by park district to coerce concessionaires with existing licenses into conduct violative of antitrust laws, *Noerr* doctrine, under which no violation of Sherman Act can be predicated upon mere attempts to influence passage or enforcement of laws, would provide no defense to current concessionaire's alleged violations of federal antitrust laws. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

19. Monopolies ⇐28(1.5)

It could not be concluded, upon sole proof that proposal was economically unrealistic, that proposal to obtain concession for operation of pro golf shops at municipal golf courses was "mere sham" made in alleged concert with some officials of city park district in alleged effort to coerce concessionaires with existing licenses into conduct violative of federal antitrust laws. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

20. Federal Courts ⇐927

Where plaintiffs, golf professionals who had previously been granted concessions by city park district for operation of pro golf shops at municipal golf courses, attacked on appeal dismissal of second count of complaint alleging deprivation of their civil rights under color of state law only with respect to complaint's charge that they were summarily terminated from their public employment positions by park district because they asserted their rights of petition and to due process by litigating their defenses to park district's forcible entry and detainer action against them, and plaintiffs agreed that park district was properly dismissed as defendant as to that count, district court's judgment insofar as it dismissed other allegations in count and dismissed park district as defendant with respect to that count would be affirmed. 42 U.S.C.A. § 1983.

21. Judgment ⇐823(3.37)

Finding of circuit court judge, in state action for damages brought by park district for golf professionals' alleged wrongful holding over of possession of pro golf shops at municipal golf courses following termination of their concession rights, that golf professionals were terminated in their employment because they insisted on remaining in possession of shops did not preclude, on basis of prior adjudication, golf professionals' subsequent claim filed in federal district court against park district officials for alleged deprivation of their civil rights under color of state law based on their summary termination from their employment by park district allegedly because they asserted their rights of petition and to due process by litigating their defenses to park district's prior forcible entry and detainer action. 42 U.S.C.A. § 1983; S.H.A. Ill. ch. 57, § 1 et seq.

22. Judgment ⇐828(3.32)

If finding of circuit court judge in state court action had disposed of claim asserted by plaintiffs in federal action based on alleged deprivation of their civil rights under color of state law, or if state court judge had determined adversely to plaintiffs a fact critical to success of claim, relitigation in federal courts would be barred; fact that some defendants in federal action were not parties or privies in state

court suit would make doctrine of res judicata inapplicable, but it would not preclude defendants' defensive reliance on collateral estoppel. 42 U.S.C.A. § 1983.

23. Judgment ⇐663

Federal rule is that pendency of an appeal does not suspend operation of otherwise final judgment as collateral estoppel, unless appeal removes entire case to appellate court and constitutes proceeding de novo.

24. Federal Courts ⇐712

Where record on appeal from federal district court's dismissal of complaint did not reflect pendency of appeal from judgment in state court which defendants claimed precluded instant federal action, but brief of defendants represented that to be case, the Court of Appeals would take that representation as judicial admission of facts.

25. Federal Courts ⇐951

Plaintiffs' request that provisions of circuit rule governing reassignment of remanded cases be applied on remand to district court of their action for alleged federal antitrust violations and alleged deprivations of their federal rights under color of state law would be granted in interests of justice. U.S.Ct. of App. 7th Cir. Rule 18, 28 U.S.C.A.

John E. Cassidy, Jr., Peoria, Ill., for plaintiffs-appellants.

Daniel W. Hardy, Gary S. Clem, Peoria, Ill., William V. Altenberger, Wm. McD. Frederick, Peoria, Ill., for defendants-appellees.

Before FAIRCHILD, Chief Judge, PELL, Circuit Judge, and FOREMAN, District Judge.*

PELL, Circuit Judge.

[1, 2] The district court dismissed Count I of plaintiffs' complaint (alleging federal antitrust violations and invoking 15 U.S.C. §§ 1, 2, 15 and 26) on the authority of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 81 (1961), and their progeny.[1] Count II of the complaint (alleging deprivations of federal rights under color of state law and invoking 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343) was dismissed on the grounds that one defendant was not a "person" within the meaning of 42 U.S.C. § 1983 and that the remaining defendants were protected by a previous state court adjudication. This appeal followed.

I

[3, 4] We assume, of course, the truth of the well-pleaded facts alleged in plaintiffs' complaint, which are, in material part, as follows: Plaintiffs are five golf professionals, accredited as such by the Professional Golfers' Association. Defendant Pleasure Driveway and Park District of Peoria (the

* District Judge James L. Foreman of the Eastern District of Illinois is sitting by designation.

1. In its decision and order dismissing the complaint, the district court also denied plaintiffs' motion for partial summary judgment. The court's determination that no cause of action was alleged *a fortiori* precluded independent consideration of this motion. Although we reach a different conclusion on the sufficiency of plaintiffs' complaint, we see no reason to disturb the district court's denial of partial summary judgment. Plaintiffs did in their briefs cite freely to materials tendered in support of their summary judgment motion and requested reversal of the district court's denial of the motion, but they made no contention at oral argument that they were entitled to summary judgment on this record. Moreover, "summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury . . . ." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (footnote omitted). We do not foreclose the possibility that summary judgment against or in favor of some or all of the defendants may eventually be justified, but we may say with confidence that the present record does not establish that all of the facts material to plaintiffs' complaint are uncontested.

Park District) is a unit of local government within the meaning of Article VII, § 1 of the Illinois Constitution, deriving its powers from various Illinois statutes which will be referred to hereinafter. The Park District owns and operates five municipal golf courses in Peoria, Illinois. Plaintiffs were, for varying periods aggregating 83 years, employed by the Park District to perform combined duties as golf course managers, greenskeepers, and golf professionals at the Park District's courses. Each plaintiff, while so employed, was granted a concession to operate a proprietary retail business (pro shop) selling golfing equipment at his golf course. In this proprietary function each plaintiff competed with each of the others, and between them they constituted the entire public market in Peoria for high quality "pro line" equipment. Eleven individual defendants are and at pertinent times were the President and members of the Park District's Board of Trustees, the Board Attorney, and administrative staff members of the Park District. Also defendants are Golf Shop Management, Inc., the current concessionaire of the pro shops at all five courses, and Gordon Ramsey the concessionaire's sole incorporator. For present purposes, these last two defendants may be treated together (GSM).

On January 19, 1974, the Park District terminated plaintiffs' concession rights, and on February 20 of that year the Park District terminated plaintiffs' employment. On January 22, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. The reasons for these events, and the manner in which they came about, are at the heart of this lawsuit.

[5] The 1970 Illinois Constitution, Article IX, § 5, provided for the abolition of personal property taxes and authorized the Illinois General Assembly to provide replacement revenue sources for local government units. The General Assembly has not exercised its power to create substitute revenues for local park districts. These facts, which we may and do judicially notice, apparently led the Park District in 1973 to consider the possibilities of obtaining greater revenues from its golf course pro shop concessions.

Plaintiffs had, for some time, been paying small concession fees; each paid only $600 yearly, except for one who was assigned only a nine-hole golf course and who paid only $300. In the late summer and fall of 1973, the terms of the concession agreements for that calendar year were revised in a confusing and apparently less than harmonious series of negotiations, with the result that plaintiffs agreed to pay 1½% of their gross receipts as a fee.

Also during the fall of 1973, GSM and members of the Park District Board and Staff agreed that GSM would make an economically unrealistic "sham" proposal, which would not be performed, to pay $90,000 a year for concession rights at the five golf courses.[2] Public bidding specifications tailored exclusively for GSM's "sham" proposal were designed and advertised, and on December 17, 1973, GSM formalized its $90,000 proposal as a bid. A Park District Board meeting scheduled for December 19 for the purpose of acting on received bids was never held.

Instead, in the language of the complaint,

> [f]rom, and after, December 17, 1973, GSM's $90,000 per year proposal . . . was coercively laced with the threat of non-renewal of plaintiffs' 1973 "leases" and summary termination of their proprietary business rights and used to induce them to raise, fix and maintain their retail, rental and service prices and pay a 5% of gross concession or "lease" fee to the PARK DISTRICT.
>
> [The Park District defendants] used the GSM proposal, with GSM agreement, to

2. The plaintiffs do not explicitly allege an agreement or an understanding that GSM would not in fact pay an annual fee of $90,000. However, it is alleged that GSM would suffer net operating losses of at least $50,000 if it paid $90,000 yearly concession fees as promised. Also, the characterization of the proposal as being a "sham" would seem to imply a lack of bona fides insofar as an intent to carry out the terms and conditions of the proposal was concerned.

coerce plaintiffs into a 5% sales taxing and price raising/fixing scheme.

. . . . . .

On January 16, 1974 the PARK BOARD declared that unless plaintiffs agreed to raise their resale, rental and service prices and pay 5% of the gross receipts before 8 a. m., Saturday, January 19, 1974, their proprietary concession rights would be awarded to GSM, Inc.

. . . . . .

The plaintiffs and each of them were not summarily terminated from their proprietary business and local governmental employment rights because of the expiration of their 1973 "leases" but because, on January 19, 1974, they refused to be coercively induced into levying unlawful 5% sales tax levies on their business consumers and because they refused to contract, combine or conspire with the effect of raising, fixing and maintaining their proprietary resale, rental and service prices contrary to Illinois and Federal antitrust laws.

The complaint also alleges that plaintiffs, even after their proprietary terminations, remained in possession of the pro shops, that they litigated the Park District's state court forcible entry and detainer suit, and that this assertion of their "rights" was the cause of their employment terminations. The Illinois Appellate Court determined that plaintiffs' defenses in that suit were not germane to the narrow question of their right to possess the pro shops and that plaintiffs' rights of possession ended at the expiration of their concession agreements on December 31, 1973. *Pleasure Driveway and Park District of Peoria v. Kurek*, 27 Ill.App.3d 60, 325 N.E.2d 650 (1975). The Illinois Supreme Court denied leave to appeal. A subsequent state court damages action by the Park District sought redress for plaintiffs' allegedly wrongful holding over of possession of the pro shops, and a judgment in the Park District's favor in the amount of $127,605 is apparently pending on appeal.

As a result of the defendants' wrongful conduct, the golfing public of Peoria is alleged to have lost the benefits of competition, suffered increased prices and all of the evils of monopolistic practices without any corresponding governmental or other benefits. Substantial injury to plaintiffs is claimed. Count I (antitrust) seeks declaratory and injunctive relief against all defendants and treble damages from all defendants except the Park District. Count II (civil rights) seeks damages from all defendants except GSM.

. . . . . .

II

[6, 7] We turn to the question of whether Count I of the complaint fails to allege a cause of action under the antitrust laws. The standard we must apply is settled beyond dispute: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). This rule has particular force in this case, where plaintiffs' motion to amend their complaint by adding a third count, which refined their antitrust theories and made some additional factual allegations, was denied by the district judge in a short decision and order.[3]

Before considering the difficult questions which this case requires us to answer, we note briefly several background matters. First, of course, we intimate no views whatsoever on the likelihood that plaintiffs will be able to prove the allegations of the complaint.[4] Also, the district court's judgment

3. The district judge characterized plaintiffs' motion as an attempt to relitigate "antitrust and constitutional violations which simply do not exist" and dismissed the possibility that a conspiracy existed as "pure fancy," although a conspiracy is plainly alleged both in the complaint he dismissed and in the amended complaint he denied leave to file.

4. Nor do we consider the question of which, if any, of the asserted components of plaintiffs' damages will prove to be recoverable under the Supreme Court's recent decision in *Brunswick*

rests solely on the conclusion that the involvement of governmental action takes the case outside the scope of the antitrust laws. Without the benefit of a factual record, the district court's views, or briefing by the parties, we decline to address any broader question than that upon which the district court rested its decision.

[8] Moreover, this case does not present the question of whether a public agency may grant a monopolistic concession license without violating the antitrust laws, where no more is alleged or proved. Nor does the case simply involve a public agency's attempt to increase operating revenues by increasing concession fees uniformly to its competing concession licensees. The case does involve both of these elements, the defendants urge us to decide the case as if it involved no more, and the district court, in dismissing the case, apparently accepted this characterization of the issues raised. But more than this is alleged by the complaint, which charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants as means in a broader conspiracy to coerce plaintiffs into raising and fixing their retail prices and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced. Acts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade. *See Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964); *Poller v. Columbia Broadcasting System, Inc.*, *supra*, 368 U.S. at 468-69, 82 S.Ct. 486.

III

[9] We must initially determine whether the district court correctly stated the law to be that the activities of the Park District are outside the scope of the Sherman Act, either as a general matter or, at least, in the circumstances of this case. The district court based its conclusion on the "so-called state-action exemption,"[5] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), which was articulated in *Parker v. Brown*, *supra*, and its progeny.

In *Parker*, the state of California's program for prorating the state's raisin crop so as to reduce excess supply and stabilize prices, which program was found to be consistent with federal agricultural regulations and policy, was questioned as to its validity under the Sherman Act, 15 U.S.C. § 1 et seq. The defendants were some of those charged by law with operating the program. The Supreme Court, assuming that the program would violate the Act if it were implemented by private persons, concluded nonetheless that the Act was not intended to prohibit the prorate program, which

> derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find 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 in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

317 U.S. at 350-51, 63 S.Ct. at 313. The anticompetitive effects of California's pro-

Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

5. As the opinions of the Supreme Court, considered herein, have recognized, *Parker* announced no rule of antitrust *exemption* or *immunity*; rather, it determined that the Sherman Act was not intended to apply in the first place to the type of state-mandated activities there at issue. Other courts nevertheless have utilized the single-word shorthand references of "exemption" or "immunity."

rate program derived from "the state['s] command"; the state adopted, organized, and enforced the program "in the execution of a governmental policy." *Id.* at 352, 63 S.Ct. at 314. This fact was repeatedly emphasized by the Court in its brief discussion of the antitrust issue, and in its conclusion: "The state . . ., as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.*

Goldfarb v. Virginia State Bar, supra, presented the question "whether a minimum fee schedule for lawyers published by the Fairfax County [Virginia] Bar Association and enforced by the Virginia State Bar," 421 U.S. at 775, 95 S.Ct. at 2007, violated § 1 of the Sherman Act, 15 U.S.C. § 1. Because the Virginia State Bar was "a state agency by law," *id.* at 790, 95 S.Ct. 2004, (footnote omitted), the Supreme Court addressed the State Bar's claim, based on *Parker*, that the Sherman Act did not apply to it, and rejected the claim, without dissent. The Virginia legislature had empowered the Supreme Court of Virginia to regulate the practice of law and had authorized a role for the State Bar in that regulation as an administrative agency of the Supreme Court. The state Supreme Court had developed ethical rules for lawyers, and the State Bar was empowered to issue ethical opinions on the application of the rules. Two such opinions were an important part of the State Bar's role in enforcing minimum fee schedules.

An expansive reading of some of the language in *Parker* would have suggested that the Sherman Act could not be applied to the State Bar in these circumstances, but the Supreme Court took a closer look. Because no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum fee schedules, it could not be said that the anticompetitive effects of minimum fees were "compelled by direction of the State acting as a sovereign." *Id.* at 791, 95 S.Ct. at 2015. The State Bar, although it acted within the scope of its general powers, had "voluntarily joined in what [was] essentially a private anticompetitive activity," *id.* at 792, 95 S.Ct. at 2015, and was not executing the mandate of the state. The Court stated that the existence of sovereign compulsion was "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe" and there was, thus, no reason to take the matter any further. *Id.* at 790, 95 S.Ct. at 2015.

After the district court dismissed the present lawsuit, the Supreme Court decided *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), which also bears upon the issues in this case. In *Cantor*, an electric utility, regulated by the state of Michigan, operated a program which provided "free" light bulbs to electricity customers, the costs of the program being covered by the utility's general electricity rates. An independent seller of light bulbs charged antitrust violations, and the utility defended on the theory, based on *Parker*, that the light bulb program was included in its rate tariff filed with and approved by the state Public Service Commission and that state law required it to follow the terms of the tariff as long as it was in effect. Six Justices agreed that summary judgment for the utility, based on *Parker*, had been improperly entered.[6]

Cantor, of course, did not present the precise question addressed in *Parker* and at issue here, for in *Parker* state officials executing a state program were the defendants while in *Cantor* a private party sought to rely on state law to insulate its conduct from antitrust liability. The considerations applicable to each case are necessarily less than identical. While the Court did not develop a single opinion expressing the views of a majority of its members, *see* note 6 *supra*, a majority did agree that analysis of a private party's state law defense re-

6. Mr. Justice Stevens delivered the Court's opinion, joined in whole by Justices Brennan, White, and Marshall, and in substantial part by the Chief Justice. *Id.* at 603, 96 S.Ct. 3110; Mr. Justice Blackmun concurred in the result. *Id.* at 605, 96 S.Ct. 3110.

quires consideration of whether it would be fair to subject a party to antitrust liability when he may have been caught between inconsistent commands of his state and federal sovereigns, and of factors akin to those used to determine whether federal agency regulation of a business produces an implied antitrust immunity.

In deciding *Cantor*, the Court majority emphasized the facts that no Michigan statutes purported to regulate the light bulb industry, that neither the Michigan legislature nor the Public Service Commission had ever specifically looked into the question of the desirability of a "free" light bulb program, and that other utilities regulated by the Commission did not have such a program. The Court majority concluded therefrom that the Commission's approval of the utility's program did not "implement any statewide program relating to light bulbs" and that "the State's policy is neutral on the question whether a utility should, or should not, have such a program." 428 U.S. at 585, 96 S.Ct. at 3114. That conclusion was central to the Court's disposition of the case.

Because a private actor's state law defense is at least related to a governmental body's assertion of a "state action" defense, we think the *Cantor* Court's emphasis on the lack in that case of a "statewide program" or a state policy sheds some light on the present case. We also think that *Cantor*, read with *Goldfarb*, provides important general guidance on the question of what it means to find governmental action involved in the facts of an antitrust suit.

Cantor and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it ever was, to accept superficial and mechanical application of a *Parker*-based "rule" that antitrust inquiry ends upon such a finding of governmental actions or laws being involved. In the years after *Parker* and before *Goldfarb* and *Cantor*, there was a tendency in many of the reported decisions to apply *Parker* broadly and to use rather general language in so doing. For example, addressing the distinct question of whether persons may join together attempting to induce governmental action with anticompetitive effects, see part V of this opinion, *infra*, the Supreme Court stated as a building-block proposition that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, *supra*, 365 U.S. at 136, 81 S.Ct. at 529. In the same context, this court's opinion in *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 227 (7th Cir. 1975), used similarly broad language. Neither case involved a claim of governmental action violative of the Sherman Act, the facts of both cases were meaningfully different than those presented here, and we have, thus, no occasion to question whether the language used accurately stated the law as applied to those cases. We point out, however, that *Goldfarb* and *Cantor* undercut the validity of any such simple one-sentence "rule" as a general proposition.

[10, 11] We turn, then, to the instant complaint, and conclude that *Parker* and its progeny do not support the district court's dismissal thereof. The fact that the governmental body sued here is a park district, with substantially less than statewide jurisdiction, has significance. First, it is clear that subordinate units of government—notwithstanding that they derive their powers from a state—are not entitled to all of the federalistic deference that the state would receive. *See, e. g.*, in the area of the Eleventh Amendment to the Constitution, *Edelman v. Jordan*, 415 U.S. 651, 667 n.12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). More specifically, where there are numerous subordinate units of government of a given type, each of the same status under state law, it is more difficult to say that the actions of any one of them are undertaken pursuant to "the state['s] command," *Parker, supra*, 317 U.S. at 352, 63 S.Ct. 307, or that "[t]he state . . . ., as sovereign" imposed any anticompetitive restraints resulting from such actions. *Id. Goldfarb* established that Sherman Act suits against

state agencies may be maintained unless the conduct challenged is "compelled by direction of the State acting as a sovereign," 421 U.S. at 791, 95 S.Ct. at 2015, and the numerosity and potential variety of practices of subordinate units of government may often suggest that "the State's policy is neutral" on any given practice and that there is no "statewide program" which would require the sort of comity-based respect evident in *Parker*. *See Cantor, supra*, 428 U.S. at 585, 96 S.Ct. 3110.

We surely do not wish to be understood as saying that park districts and other subordinate governmental units may no longer avail themselves of a *Parker* defense to antitrust suits. Rather, we advert to the fact that a subordinate governmental unit's *Parker* claim is less obviously justified than is the same claim made by a state government, and we conclude that antitrust "immunity" in the former case cannot be automatic. Both the Third and the Fifth Circuits have recently so held. *City of Lafayette, Louisiana v. Louisiana Power & Light Company*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944, 97 S.Ct. 1577, 51 L.Ed.2d 791 (1977) (two cities); *Duke & Company Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975) (three municipal corporations and a county commissioner); and *cf. Hecht v. Pro-Football, Inc.*, 144 U.S.App. D.C. 56, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 707, 30 L.Ed.2d 736 (1972) (unincorporated instrumentality of the District of Columbia)

We realize that in the case of *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 370 n.15 (9th Cir. 1974), involving antitrust counterclaims against a state and some of its political subdivisions, the Ninth Circuit has held to the contrary. *State of New Mexico* was, however, decided before *Goldfarb* and *Cantor* and we do not believe its holding as to subordinate units of government survives the test of their analysis. We simply see little sense in automatically treating as state mandates the activities of local governmental units when these activities may vary substantially from unit to unit and may be wholly lacking in any express or implied state authorization or command.

[12] We agree with the Third and Fifth Circuits that an adequate state mandate for anticompetitive activities of subordinate governmental units "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Duke & Company Inc., supra*, 521 F.2d at 1280; *accord, City of LaFayette, supra*, 532 F.2d at 434-35. The latter case properly notes that "all evidence which might show the scope of legislative intent" should be considered. *Id.* at 435 (footnote omitted).

[13, 14] Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to attempt to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be plain violation of the Sherman Act. Park districts are, of course, empowered to "construct, equip and maintain . . . golf . . . courses," Ill.Rev.Stat.1975, ch. 105, § 8-10, as well as "necessary facilities pertinent thereto . . . ." *Id.*, § 9.1-1. Power is also given for park districts "to contract in furtherance of any of [their] corporate purposes," *id.*, § 8-1(a), and "to lease real estate," *id.*, § 8-16. We think these provisions fully authorize the Park District to operate pro shops at its golf courses or to make contracts or leases allowing outside parties to operate such shops. If the complaint in this lawsuit alleged no more than that the Park District had substantially reduced relevant competition by operating the shops itself, foreclosing others,[7] or by determining that the "corporate purposes" of the District would be best served by contracting with a single concessionaire for

7. *Ladue Local Lines, Inc. v. Bi State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970); and *Continental Bus System, Inc. v. City of Dallas*, 386 F.Supp. 359 (N.D.Tex.1974), both relied upon by defendants, are cases of this type.

the operation of the shops,[8] the case for a *Parker* defense would be stronger than it is here. That the Park District's conduct concerned its golf courses and involved its statutory powers to contract and/or to lease surely does not convert Illinois' grant of such powers into state authorization or mandate to use them to force private competitors to violate the antitrust laws.

[15] This conclusion is strengthened by the complaint's allegations that the Park District, in demanding 5% of gross sales as a concession fee and requiring as a condition of concession renewal that plaintiffs raise and fix their prices, presumably to cover the 5% fee, was effectively attempting to impose on the Peoria golfing public a 5% hidden sales tax that is illegal under Illinois law. We note that the Park District's revenue powers are limited to the levying of various property taxes, Ill.Rev. Stat.1975, ch. 105, § 6-1 et seq., and the charging of fees for the use of District facilities, *id.*, § 8-1(h), and we are aware of no authority that would authorize the Park District effectively to double the sales taxes currently in force in Illinois. If it can be proven that the concession fee's intended incidence would have operated as an illegal sales tax, it would be extremely difficult, if not impossible, to find a state mandate underlying the Park District's alleged conduct.[9] For this reason and the others indicated, we believe the district court improperly dismissed the antitrust claim against the Park District.

IV

The analysis set out in part III of this opinion applies directly only to the Park District. In *Parker*, *supra*, and in some cases applying it, however, officials of governmental units were sued, as is the case here, and it has generally and sensibly been held that where the activities of a governmental unit are outside the scope of the antitrust laws, the officials charged with performing those activities enjoy the same protections. *See Parker*, *supra*, 317 U.S. at 350-51, 63 S.Ct. 307; *E. W. Wiggins Airways, Inc.*, *supra*, 362 F.2d at 56; *Murdock v. City of Jacksonville, Florida*, *supra*, 361 F.Supp. at 1093-94. Even in such cases, however, it has sometimes been recognized that an official's actions ultra vires or in bad faith might present a different question. *Id.*

Neither in the district court nor in this court have the individual defendants associated with the Park District made any argument that they should be entitled to protection from antitrust liability even if the District was not. We see no *a priori* reason to determine, at this stage in the litigation, that such additional protection would or would not be justified. *See Duke & Company Inc.*, *supra*, where the Third Circuit reversed a dismissal in favor of three municipal corporations *and* a county commissioner after determining that *Parker* did not protect the governmental unit defendants. Accordingly, we reverse the district court's judgment in favor of the individual Park District defendants. We do not mean to imply thereby that some or all of these defendants may not be able to establish some sort of good faith defense, for neither facts nor legal argument in support of such a defense are before us. Nor do we suggest, even if some sort of good faith defense might be cognizable in appropriate cases, that proof in support of the complaint's allegations of bad faith and official actions illegal under state law might not operate to vitiate the defense in this case.

8. *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226, and *Murdock v. City of Jacksonville, Florida*, 361 F.Supp. 1083 (M.D.Fla. 1973), fall into this category, and *Metro Cable Co.*, *supra*, while distinguishable, is analogous. Although these cases and those cited in n. 7 *supra* were all decided before *Goldfarb* and *Cantor*, we may assume without deciding that the Sherman Act does not apply to these types of less-than-statewide governmental action.

9. Such proof, of course, would add nothing directly to the merits of plaintiffs' antitrust claims and would be germane only to the question of state mandate.

V

[16] We turn to GSM's contention, accepted by the district court, that its involvement with the facts of this case was limited to seeking the award of a governmental contract and accepting its benefits and obligations once awarded, and that the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, *supra*, and its progeny, protects GSM from antitrust liability. In *Noerr*, the Supreme Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135, 81 S.Ct. at 528. Three reasons for this rule were articulated. First, the Court found no Congressional purpose to regulate "political activity," and noted that an "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act" counseled against construing the Act to apply to the former case. *Id.*, at 136-37, 81 S.Ct. at 529. Second, antitrust liability in such a case could reduce the flow of information on which governments depend and could, thus, impair their ability to take actions that operate to restrain competition, which ability was recognized in *Parker*, *supra*. *Id.* at 137, 81 S.Ct. 523. Third, "such a construction of the Sherman Act would raise important constitutional questions" because it would impute to Congress an intent to invade the First Amendment right of petition. *Id.* at 138, 81 S.Ct. at 530. The Court recognized that Sherman Act liability might be justified where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Id.* at 144, 81 S.Ct. at 533. Because the *Noerr* defendants were "making a genuine effort to influence legislation and law enforcement practices," *id.*, no such argument was possible in that case.

Noerr was followed in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), where joint labor-management inducements to the Secretary of Labor and the Tennessee Valley Authority to take action injurious to small coal operators were involved. The Court stated that

> [j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Id. at 670, 85 S.Ct. at 1593.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Court extended the *Noerr-Pennington* rule to attempts to influence administrative agencies and judicial proceedings. Because, however, the motor carrier defendants used universal resistance to competitors' applications for new operating authority to achieve their primary purpose of deterring the making of such applications, thereby injuring competitors not through governmental action but directly, the case was held to fall within Noerr's "sham" exception.

[17] The district court accepted GSM's argument that its role in the case was solely that of the successful bidder for the Park District's pro shop concessions. We may assume arguendo that if the complaint alleged no more, GSM could not be found liable under the antitrust laws. We are inclined to the view that nonliability in such a case would flow from the fact that successful bidding does not violate the antitrust laws substantively, *cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975), rather than from the principles of *Noerr*, which seem to address a different question.[10] Perhaps more to the

10. *See Hecht v. Pro-Football, Inc.*, *supra*, 444 F.2d at 940-42; and *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32-34 (1st Cir. 1970), *cert. denied*, 400 U.S. 850, 91 S.Ct. 54, 27 L.Ed.2d 88, both of which take the position that the rationale of *Noerr* and progeny is directed to attempts to influence some significant governmental policy determi-

point would be the decision of this court in *Metro Cable Co. v. CATV of Rockford, Inc.*, *supra*, substantially relied upon by GSM, where defendant obtained the first granted cable television license in a city and successfully induced the city council not to license a potential competitor; this court found that *Noerr* and its progeny foreclosed antitrust liability.

[18] Neither the successful bidder hypothetical nor *Metro Cable*, however, involve what is alleged here. The complaint asserts that GSM made an economically unrealistic "sham" proposal, not actually to be put into effect, in concert with at least some Park District officials, knowing that the proposal would not be acted upon as indicated in the bid invitation but would, instead, be used by the Park District to coerce plaintiffs into conduct violative of the antitrust laws. If these allegations can be proved, and we must assume at this point that they can, the *Noerr* doctrine would provide no defense. This is so for several reasons.

First, except for the fact that GSM's agreement and conduct were in conjunction with governmental officials it cannot be said that there is an "essential dissimilarity" of the sort that troubled the Court in *Noerr*, 365 U.S. at 136-37, 81 S.Ct. 523, between GSM's conduct and activities traditionally held violative of the Sherman Act. *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), is illustrative.

In *Albrecht*, the defendant newspaper publisher had attempted to coerce plaintiff, one of its independent home delivery carriers, into compliance with a resale price fixing scheme violative of the Sherman Act. Defendant had argued, *inter alia*, that its actions, which included termination of the carrier, were wholly unilateral and did not establish any conspiracy or combination within the meaning of the Act. The Supreme Court disagreed, and overturned a jury verdict in defendant's favor because it was "clear that a combination in restraint of trade existed." *Id.* at 151, 88 S.Ct. at 874. The only combination presented by the record and considered by the Court is quite like that which, as pertinent to GSM, is alleged here. Specifically, to put pressure on the plaintiff carrier, the defendant hired a subscription solicitation company to seek customers from plaintiff's delivery route for a new route. Twenty-five percent of plaintiff's customers agreed to switch carriers. The defendant then gave these customers to another carrier who knew that he would have to follow defendant's resale price policies and that he might have to return the customers to plaintiff if plaintiff acceded to the policies. The defendant's combination with the solicitation company and the new carrier who lent their business efforts to defendant's attempts to coerce the plaintiff into an antitrust violation supported Sherman Act liability.[11] The parallel to this case is obvious, as is the conclusion that GSM's alleged conduct is not essentially dissimilar to activities the Sherman Act was meant to proscribe.

Nor is the fact that GSM combined or conspired with governmental officials dispositive, for both of *Noerr*'s premises with respect to that point are undercut by the factual setting of this case. Our determination that the Park District and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of *Noerr* to the degree it is based on the need of governmental units for citizen input in making decisions that *Parker* holds to be outside the scope of the Sherman Act. *See Duke & Company Inc., supra*, 521 F.2d at 1282. The *Noerr* decision also rests on a refusal to impute to Congress an intent to

nation and not a government's actions as a commercial entity.

11. Of course, only the newspaper publisher was sued in *Albrecht*, and it is at least possible that had the solicitation company and the new carrier been sued a defense based on their "insubstantial . . . connection with the restraint" might have been established. *See Goldfarb, supra*, 421 U.S. at 791 n. 21, 95 S.Ct. 2004. On the present complaint, there is no occasion for us to decide if such a defense might be developed in subsequent proceedings here.

invade the constitutional "right of the people . . . to petition the Government *for a redress of grievances.*" U.S.Const., Amendment I (emphasis added). We have some difficulty understanding how a contract proposal to a governmental unit falls within the ambit of that right, *see* note 10 *supra*, but even if it does, we think it clear that agreement with government officials to pressure others into an antitrust violation does not.

[19] Alternatively, another basis for finding *Noerr* protections inapplicable at this stage of the proceedings is that facts provable under the complaint could well establish that GSM's concession proposal was a "mere sham" within the meaning of that decision. 365 U.S. at 144, 81 S.Ct. 523. We are not prepared to say that this conclusion would inexorably follow upon the sole proof that the proposal was economically unrealistic, *see Noerr, supra*, 365 U.S. at 140-42, 81 S.Ct. 523; *Metro Cable, supra*, 516 F.2d at 231; *but see Woods Exploration & Producing Company, Inc. v. Aluminum Company of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), but the economically unrealistic nature of the proposal, alleged to have been known to Park District officials, might support an inference that GSM was not "making a genuine effort," *Noerr, supra*, 365 U.S. at 144, 81 S.Ct. 523, to obtain the concession rights but was instead lending its support to the Park District's attempted coercion of plaintiffs' pricing policies. The complaint is somewhat inconsistent in this regard, alleging as it does both that GSM's purpose was to obtain monopolistic concession rights and that GSM knowingly made its proposal to pressure plaintiffs into agreements which, if made, would have foreclosed the concession rights to GSM. Proof of the latter assertion, however, could establish a sham and take the case out of the *Noerr* doctrine even if that doctrine applied, which we have decided it does not.[12]

VI

[20, 21] Count II of the complaint alleges deprivations of the plaintiffs' civil rights under color of state law and is based on 42 U.S.C. § 1983. The district court dismissed Count II because, in its view, previous state court decisions based on the same operative facts had resolved dispositive facts adversely to plaintiffs. On appeal, plaintiffs attack this dismissal only with respect to the complaint's charge that plaintiffs were summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detainer action. Moreover, plaintiffs agree that the Park District was properly dismissed out as a defendant even as to this charge. Accordingly, we affirm the district court's judgment insofar as it dismisses the other allegations in Count II and dismisses the Park District as a Count II defendant.

With regard to the employment termination claim against the President, trustees, attorney, and staff of the Park District, we must reverse. The district court based its dismissal of this claim on the following finding of Illinois Circuit Court Judge Iben in the Park District's damages lawsuit against the golf professionals:

> [T]he reason for their termination clearly appears to have been the Defendant's [sic] [plaintiffs herein] insistence on remaining in the golf shop premises. There is abundant evidence that they stubbornly and intractably insisted through litigation, and other ways, on this claim, spurning other avenues. They can have no doubt about the reason for their discharge, i. e., their refusal to give up the premises.

Pleasure Driveway and Park District of Peoria v. Kurek et al., No. 75 L 2893 (10th

12. Defendants' suggestion that the "sham" exception operates only in a judicial setting is specious. The Supreme Court articulated the exception in the context of the *Noerr* facts, which in no way involved judicial settings. Nor does this court's determination in *Metro Cable, supra*, 516 F.2d at 228, that the existence of a judicial setting authorizes a somewhat broader inquiry into the "sham" issue even remotely support such a proposition.

Judicial Circuit, Peoria County, Nov. 14, 1975). This finding was made with reference to the golf professionals' counterclaim allegation that their employments were summarily and unlawfully terminated.

[22] We have no quarrel with the proposition that if Judge Iben's finding had disposed of the claim made here or had determined adversely to plaintiffs a fact critical to success on this claim, relitigation in the federal courts would be barred. *See Reich v. City of Freeport*, 527 F.2d 666 (7th Cir. 1975); *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971). The fact that the remaining defendants under Count II were not parties or privies in the state court suit would, of course, make the doctrine of res judicata inapplicable, but it would not preclude defendants' defensive reliance on collateral estoppel. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

[23, 24] Nor would it matter that Judge Iben's decision has apparently been appealed,[13] for

> the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as . . . collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo.

18 Moore's Federal Practice ¶ 0.416[3], at 2254 (2d ed. 1974); *Grantham v. McGraw-Edison Company*, 444 F.2d 210, 217 (7th Cir. 1971). Illinois follows the same rule. *Sixty-Third & Halsted Realty Co. v. Goldblatt Bros.*, 342 Ill.App. 389, 96 N.E.2d 838 (1951), *aff'd*, 410 Ill. 468, 102 N.E.2d 749.

We do not agree with the district court, however, that Judge Iben's finding disposed of plaintiffs' claim herein or of critical facts pertinent to it. Illinois' Forcible Entry and Detainer Act, Ill.Rev.Stat.1975, ch. 57, § 1 et seq., plainly gives a tenant the right to remain in possession of property while litigating the question of his possessory rights. Judge Iben's determination that plaintiffs were terminated in their employments because they insisted on remaining in possession of the pro shops implies, to some extent at least, that the employment terminations occurred because plaintiffs chose to litigate their rights to possession. In fact, the finding expressly refers to plaintiffs' insistence "through litigation, and other ways" on asserting their claims to possession. Nothing in this state court judgment supports the district court's conclusion that it had been previously adjudicated that "the exercise of the right to litigate issues" was not the reason for plaintiffs' employment discharges. No other issues pertinent to Count II of the complaint were decided below or asserted in this court, so we reverse the district court's judgment of dismissal insofar as it concerns the employment discharge claim against the individual Park District defendants.

[25] For the reasons stated herein, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiffs have requested that the provisions of Circuit Rule 18 be applied on remand. We believe that the interests of justice would best be served, in the circumstances of this case, by granting that request. It is so ordered.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

13. Our record does not reflect the pendency of an appeal in the state court case, but the brief of the defendants who seek to rely on the state judgment represents this to be the case, and we take that representation as a judicial admission of the fact.

MT. HOOD STAGES, INC., dba Pacific Trailways, Plaintiff-Appellee,

v.

The GREYHOUND CORPORATION and Greyhound Lines, Inc., Defendants-Appellants.

No. 74-1282.

United States Court of Appeals, Ninth Circuit.

June 9, 1977.

Rehearing and Rehearing En Banc Denied Aug. 3, 1977.

Bus company brought suit against a competitor for violation of the Sherman Act. The United States District Court for the District of Oregon, Alfred T. Goodwin, J., rendered judgment on a jury verdict awarding treble damages in the amount of $13,146,090, and competitor appealed. The Court of Appeals, Browning, Circuit Judge, held that: (1) where routes were granted by the Interstate Commerce Commission to competitor, over the bus company's objection, on its representation that it would not engage in the forms of predatory conduct which it subsequently engaged in, the competitor's conduct was not immune from the antitrust laws; (2) the evidence that there was fraudulent concealment of the existence of the antitrust cause of action sufficient to toll the four-year statute of limitations was sufficient for the jury; (3) the government's intervention in ICC proceedings initiated by the bus company to require the competitor to live up to its representations tolled the running of the limitations period on the bus company's antitrust cause of action, and (4) the evidence on the issue of damages was sufficient for the jury.

Affirmed.

1. Monopolies ⇐16(1)

Where routes were granted by Interstate Commerce Commission to common carrier, over competitor's objection, on representations that it would not engage in forms of predatory conduct which it subsequently engaged in, its conduct was not immune from antitrust laws. Interstate Commerce Act, § 5(11), 49 U.S.C.A. § 5(11).

2. Monopolies ⇐12(16)

Conduct is not immunized from antitrust laws merely because it falls within jurisdiction of regulatory agency, and immunity is not implied merely because applicable regulatory standard requires agency to give weight to antitrust policies. Interstate Commerce Act, § 5(11), 49 U.S.C.A. § 5(11).

3. Monopolies ⇐28(8)

In antitrust action by bus company against competitor, district court's jury instructions on monopolization in context of regulated industry were not erroneous.

4. Monopolies ⇐28(7.3)

Trial judge must be accorded wide latitude in determining relevance of evidence in antitrust cases.

5. Monopolies ⇐28(7.3)

In antitrust action, admissibility of consent decree is matter committed to district court's discretion.

6. Monopolies ⇐28(7.3)

In antitrust action by bus company against competitor, district court did not err in allowing jury to consider antitrust consent decrees entered into by competitor and United States and competitor's conduct with respect to obeying or disobeying them in determining issues of competitor's intent and purpose and reasonableness of competitor's conduct.

7. Monopolies ⇐28(8)

In antitrust action by bus company against competitor, evidence that competitor fraudulently concealed existence of antitrust cause of action tolling four-year statute of limitations was sufficient for jury. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

8. Monopolies ⇐28(4)

Statute of limitations on bus company's antitrust cause of action against competitor was tolled by government's intervention in Interstate Commerce Commission proceed-

ings in which bus company sought to compel competitor to live up to its representations that it would not engage in predatory conduct, which representations were made in obtaining routes from ICC. Interstate Commerce Act, § 5(9), 49 U.S.C.A. § 5(9); Clayton Act, § 5(i), as amended 15 U.S.C.A. § 16(i).

9. Monopolies ⇐28(7.6)

In antitrust action by bus company gainst competitor alleging that competitor acquired routes circling those of bus company and thereby deprived bus company of connecting traffic with purpose and effect of eliminating bus company as substantial competitor, evidence was sufficient to sustain jury award of treble damages in amount of $13,146,090. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

10. Monopolies ⇐28(9)

In antitrust action by bus company against competitor alleging that competitor acquired routes circling those of bus company and thereafter deprived bus company of connecting traffic with purpose and effect of eliminating bus company as substantial competitor, award of attorney's fees of $1,250,000 was not abuse of discretion.

William W. Schwarzer, San Francisco, Cal., argued, McColloch, Dezendorf, Spears & Lubersky, Portland, Or., for defendants-appellants.

Michael N. Khourie, argued, Broad, Khourie & Schulz, San Francisco, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING and WRIGHT, Circuit Judges, and LINDBERG,* District Judge.

* Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

BROWNING, Circuit Judge:

Greyhound Corporation and Greyhound Lines, Inc., appeal from a judgment entered on a jury verdict awarding damages to Mt. Hood Stages, Inc., for injuries resulting from violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1] We affirm.

I.

Immunity

Greyhound is the largest common carrier by bus of passengers and package express in the United States, moving more than 80 percent of this traffic in the western states and operating over routes throughout the country. Mt. Hood is one of Greyhound's small competitors, operating over routes in Oregon, Idaho, and Utah. The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or "bridge" traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor.

Greyhound does not deny the sufficiency of the evidence to establish a violation of sections 1 and 2 of the Sherman Act, assuming that statute applies. Its principal contention is that Mt. Hood bases its claim upon acquisitions approved by the Interstate Commerce Commission and implementation by Greyhound of control over the acquired companies, and that such activities are immune from antitrust attack by virtue of section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), applied in light of the Supreme Court's analysis in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides that one carrier may acquire another with Commission approval; the Commission is required to grant such approval, subject to any terms and conditions it deems reasonable, if the acquisition "will be consistent with the

1. The judgment was for $13,146,090 (after trebling) and attorneys' fees of $1,250,000, plus costs.

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...rom 1947 to 1956 Greyhound acquired ...t bus companies operating in the area ...vant here. Each acquisition was ap...ved by the Commission pursuant to sec...n 5(2). Mt. Hood opposed four of the ...isitions. It argued that if the acquisi...s were approved, Mt. Hood would be ...rcled and Greyhound could route traffic ...and it, depriving the public of the most ...venient service and Mt. Hood of reve...s necessary to its survival. Mt. Hood's ...ument to the Commission thus foreshad...ed its present antitrust claim.

Greyhound responded by representing to ... Commission that the acquisitions ...uld not adversely affect connecting car...s; that arrangements with such carri..., including interchange of traffic and ...n gateways, would be maintained; that ...s not the policy of Greyhound to route ...sengers over circuitous routes; that its ...nts were instructed to quote the direct ...te as well as one Greyhound route and ... passengers their choice; and that ...yhound had always carried [Mt. Hood's] ...edules in its folders and cooperated in ...ery way to acquaint the public with its ...vice and thus promote additional traffic ...d business for their lines."[2] Greyhound also represented to the Commission that Greyhound would continue a joint through-bus arrangement with Mt. Hood.[3] As the Commission later found, Greyhound intended the Commission to rely upon these representations in determining whether the proposed acquisitions were in the public interest, and the Commission did in fact rely upon them in approving the acquisitions.

In 1964 Mt. Hood filed a petition with the Commission pursuant to section 5(9) of the Act, 49 U.S.C. § 5(9),[4] asking it to reopen the acquisition proceedings and enter a supplemental order requiring Greyhound to live up to its representations. The allegations in Mt. Hood's petition to the Commission were essentially the same as those Mt. Hood later made in this antitrust suit—namely, that Greyhound had cancelled the through-bus connection, had scheduled connecting service so as to preclude reasonable connections with Mt. Hood, had directed Greyhound's agents and independent joint ticket agents to send traffic by longer routes around those of Mt. Hood, and had interfered in various ways with the distribution of Mt. Hood's schedules and the quotation of Mt. Hood's rates and services, all with the intent of injuring Mt. Hood. The United States intervened in support of Mt. Hood.

After an extensive evidentiary hearing, a hearing examiner resolved all issues against Greyhound and recommended entry of the order sought by Mt. Hood. In April, 1968, the Commission issued an opinion sustaining the examiner's findings that Greyhound had made the representations alleged, that Greyhound had intended the Commission to rely on them, that the Commission had re-

2. The quotation is from the Commission's opinion in the section 5(9) proceedings, described later. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 452 (1968).

3. This agreement, initiated in 1949, provided for a through-bus from San Francisco, California, to Spokane, Washington, using Mt. Hood's cutoff route between Klamath Falls and Biggs, Oregon. Revenue and expenses were shared according to the miles traveled over each company's route. The arrangement shortened the San Francisco-Spokane trip by 110 miles and several hours as compared with the all-Greyhound route via Portland. It provided better service to travelers and was profitable for both companies.

4. Section 5(9) reads:

> *Supplemental orders by Commission.*—The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

lied on them in approving the acquisitions, that Greyhound had not fulfilled the representations, and that Greyhound's actions "were inspired by a desire to stifle competition" and "injure or destroy" Mt. Hood. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 459–63 (1968). The Commission concluded that Greyhound's failure to abide by its commitment "constitutes destructive competition in contravention of the national transportation policy, is not consistent with the public interest, and provides good cause" for a supplemental order under section 5(9) of the Act. The Commission deferred entry of a supplemental order to allow voluntary negotiations between the parties. *Id.* at 462–63.

Two months later, in July, 1968, Mt. Hood filed this suit alleging violations of the antitrust laws and common law and statutory unfair competition. With respect to the antitrust violations the complaint alleged that, beginning in 1947 and continuing to the date of the complaint, Greyhound had restrained and monopolized commerce in the carriage of passengers and their luggage between points in Oregon, Idaho, and Utah by means essentially the same as those that were the subject of the Commission's proceeding; that is, the acquisition of independent bus lines with Commission consent obtained by the misrepresentations outlined by the Commission and thereafter engaging in the destructive competitive tactics found by the Commission. Greyhound sought, unsuccessfully, to eliminate these issues from the litigation on the ground that they fell within the exclusive jurisdiction of the Commission.

In the Commission proceedings, meanwhile, the efforts of the parties to agree upon an order failed. The Commission entered its own order requiring Greyhound to restore the practices and traffic patterns existing when the acquisitions at issue were authorized, and, specifically, to restore the joint through-bus service, to revise Greyhound's schedules to permit reasonable connections with Mt. Hood, to see that through routes and fares were quoted and quoted accurately, and to eliminate other destructive practices. *Greyhound Lines, Inc. v. United States*, 303 F.Supp. 1033, 1037 (N.D.Ill.1970). A three-judge district court affirmed the Commission and issued its own order in similar terms. *Id.* at 1040–41. Following entry of the district court order enforcing the Commission decision, Mt. Hood amended the complaint in this antitrust proceeding to eliminate the prayer for injunctive relief.

In June, 1971, the United States and the Commission filed petitions with the district court in the enforcement proceeding, asking that Greyhound be held in contempt for failing to comply with the court's order enforcing the Commission's decision. The court found Greyhound had willfully failed to comply with portions of the order and held Greyhound in criminal and civil contempt. *United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D.Ill.1973). The court imposed fines totaling $600,000, *United States v. Greyhound Corp.*, 370 F.Supp. 881, 883–85 (N.D.Ill.1974), ordered Greyhound to file semiannual reports of compliance efforts for five years, and granted members of the Department of Justice staff "visitorial and document examination rights . . . that they may further monitor Greyhound's compliance efforts," *id.* at 886. Because Greyhound appeared to be attempting to comply fully, no further injunctive relief was ordered.

While the proceeding to enforce the Commission's order was in progress, this antitrust case had come to trial and concluded with the verdict in Mt. Hood's favor. The opinion of the court in the enforcement proceeding noted that "many of Greyhound's actions that were found to be in violation of the order, were also found to be in violation of the antitrust laws" in this private suit. *Id.* at 884 n. 2. The enforcement court denied Mt. Hood's prayer for damages for expenses related to the contempt action and for injury to its business as a result of the contempt, on the ground that the damages awarded in this antitrust proceeding "will adequately compensate [Mt. Hood] for any damages it may have also suffered as a result of Greyhound's contempt. This is particularly true since

many of the same acts of Greyhound that were found to be contemptuous were also involved in the private antitrust case." *Id.* at 888. The court of appeals affirmed the criminal contempt convictions, stating, "the record of this case shows a flagrant disregard of a court order" that was intended "to insure that Greyhound would comply with representations it made at the acquisition hearings and cease its predatory practices toward Mt. Hood." *United States v. Greyhound Corp.*, 508 F.2d 529, 540-41 (7th Cir. 1974).

From this recital it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same. The Commission's authority to regulate this conduct is not challenged.

[1] Whether conduct Congress has made subject to administrative regulation is exempt from the antitrust laws depends upon Congress' intent. No direct evidence of a congressional intent relevant here has been cited.[5] The only applicable statutory language dealing with the question of antitrust immunity is that found in section 5(11), quoted above. The conduct charged in this action is not within the express exemption afforded by section 5(11), particularly because provisions of this kind are strictly construed.[6] Since the Commission approved the acquisitions in reliance upon Greyhound's commitment that the conduct underlying the antitrust complaint would not occur if the acquisitions were approved, it can hardly be argued that antitrust immunity for such conduct is "necessary" to enable Greyhound "to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired through such transaction."

The inclusion of this express exemption in the statute implies a congressional intention that conduct not within the exemption remains subject to the antitrust laws.[7] But this conclusion does not always follow; despite a grant of express immunity that does not cover the conduct charged, antitrust immunity may still be implied.[8]

[2] Because of the "fundamental national policies embodied in the antitrust laws," *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973), however, repeal of those laws is not lightly implied from congressional adoption of a regulatory scheme.[9] Conduct is not immunized merely because it falls within the jurisdiction of the regulatory

5. The subject of antitrust immunity was touched upon briefly during the House debates. 58 Cong.Rec. 8593-94 (1919). The scope of the immunity was not discussed. Representative Sanders assured other House members that the antitrust laws were not being "wiped out"—that a merger will only be allowed if it would benefit the public. *Id.*

6. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 100 L.Ed. 1209 (1956).

7. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216-17, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *United States v. Borden Co.*, 308 U.S. 188, 201, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

8. *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 918-19 & n. 24 (9th Cir. 1975). *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the decision relied upon most heavily by Greyhound, involved an express exclusion, and it is not entirely clear that the conduct that case held to be immunized from the antitrust laws was within the express exclusion, narrowly construed. The Court suggested as much when it noted, "a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances *by implication* grant immunity from an antitrust claim." *Id.* at 385 n. 14, 93 S.Ct. at 660 (emphasis added). The Supreme Court has twice cited *Hughes Tool* as a case in which immunity was implied. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734-35, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975).

9. *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

agency,[10] as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy,[11] as it did in this instance.[12]

The applicable interpretative standard was restated by the Supreme Court in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976): "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.'"[13] As the Court had written in the preceding term, "Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975).[14]

Applying these standards, we find no reason to imply immunity here. No "plain repugnancy" exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints "to make the [Interstate Commerce Act] work." This is evident from the course taken in the administrative and judicial proceedings under both statutes. Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. There has been initial resort to the Commission for an application of its expertise to the factual issues relevant to whether application of the antitrust laws would be incompatible with regulatory objectives, *see Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973), and the Commission has unqualifiedly indicated that it has not approved and continues to disapprove Greyhound's conduct under regulatory standards applied in the light of antitrust principles. *See Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 458, 460–63 (1968) (citing *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D.Cal.1966)).

The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. In assessing the penalty for contempt for violation of that injunction, the court was careful to avoid the possibility of double damages. *See United States v. Greyhound Corp., supra*, 370 F.Supp. at 888. The losses sustained by Mt. Hood during the contempt period (approximately February 5, 1970, to March 15, 1973, *see id.* at 884 n.2) were only a small part of the total damages Mt. Hood sustained from the inception of Greyhound's wrongful conduct in 1947. The remaining damages could be and were recovered only in the antitrust action. Trebling the damages—an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust

10. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-97 n. 36, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 692, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (Stewart, J., concurring); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

11. *Gulf States Util. Co. v. Federal Power Comm'n*, 411 U.S. 747, 758–60, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

12. *Port of Portland v. United States*, 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases*, 396 U.S. 491, 511–16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States*, 321 U.S. 67, 83–87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

13. *Quoting Silver v. New York Stock Exch.*, 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

14. *Quoting United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350–51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 918–19 (9th Cir. 1975).

proceeding. Since the transactions involved affected the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply.

Greyhound leans heavily upon *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). From this decision Greyhound draws the general principle that when antitrust immunity is conferred by a statute upon participants in an acquisition approved by a regulatory agency, the immunity extends to conduct made possible by the acquisition, whether or not the conduct itself was approved, at least where the agency considered the possibility such conduct might occur and retained continuing jurisdiction to regulate it in the public interest.

But antitrust exemption is implied "*only* to the *minimum* extent necessary" to make the regulatory scheme work (emphasis added). Quoting this principle, and citing *Hughes Tool* and *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court recently wrote, "[W]e have implied immunity *in particular and discrete instances* to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 734-35, 95 S.Ct. 2427, 2450, 45 L.Ed.2d 486 (1975) (emphasis added).

Greyhound's generalization may accommodate the facts of both *Hughes Tool* and the present case, but it omits the distinguishing particulars that made antitrust immunity appropriate in *Hughes Tool* and would make it inappropriate here. The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool*, the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest;[15] a successful antitrust suit therefore necessarily would have been repugnant to operation of the regulatory scheme. The opposite is true in this case; the Interstate Commerce Commission did not contemplate Greyhound's challenged conduct as likely to occur and thus did not approve such conduct when it approved the acquisitions.[16] The Commission also subsequently disapproved that conduct.

In *Hughes Tool* the Civil Aeronautics Board issued orders approving acquisition of control of TWA by Hughes Tool Co. The applicable statute relieved persons affected by such an order from operation of the antitrust laws so far as necessary "to do anything authorized, approved or required by such order." Section 414, Federal Aviation Act, 49 U.S.C. § 1384. The agency-authorized control later ended, and an antitrust suit was brought by TWA against Hughes Tool Co. based upon transactions between the two during the period of Hughes Tool Co.'s control. The antitrust complaint alleged, in effect, that the controlling company had exercised its control to dictate the completion of the transactions in a way that injured the controlled company.

Hughes Tool Co.'s control of TWA was acquired in two steps—an initial acquisition of 45.6 percent of TWA's stock, and a later acquisition increasing Hughes Tool Co.'s holdings to 80 percent. Both acquisitions were approved by the Board. In hearings relating to the second acquisition the Board examined the manner in which Hughes Tool Co. had exercised its *de facto* control over TWA in the earlier period, particularly with respect to the acquisition of new flight equipment, which was the subject matter of the transactions on which the antitrust suit was based. The Board conceded allegations

15. *See In re REA Express, Inc.*, 412 F.Supp. 1239, 1261 (E.D.Pa.1976); *Air Freight Haulage Co. v. Ryd-Air, Inc.*, 408 F.Supp. 446 (S.D.N.Y. 1976).

16. *See Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1131 (5th Cir. 1976).

of abuse of the kind alleged in the antitrust complaint. Nonetheless, the Board concluded that continuation and enhancement of Hughes Tool Co.'s control was in the public interest. Moreover, the Board's order required that all substantial sales transactions between the two companies be submitted to the Board for approval, and, pursuant to this requirement, the transactions upon which the antitrust complaint rested were submitted to the Board and approved as in the public interest.

The Supreme Court noted that the subject matter of the Board's approval had been the acquisition and exercise by Hughes Tool Co. of control over the same kind of transactions as those at issue. *Hughes Tool, supra*, 409 U.S. at 386, 93 S.Ct. 647. By its approval the Board had determined that such control was in the public interest and consistent with the regulatory statute's prohibitions against monopoly and restraining competition. Sections 102(e) and 408(b), Federal Aviation Act, 49 U.S.C. §§ 1302(e) and 1378(b).[17] The Court further noted that the Board had also approved the very transactions underlying the antitrust suit as meeting the same standard. 409 U.S. at 379, 387, 93 S.Ct. 647.

An antitrust suit challenging these transactions, the Court said, would seek "to negate what the Board, after full investigation, had found consistent with § 408's anti-monopoly provision, consistent with § 102's competition standard, and consistent with the public interest." *Id.* at 388, 93 S.Ct. at 661. TWA's antitrust suit sought "to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming." *Id.*[18] The Court concluded that the transactions were exempt from suit under the Sherman Act.[19]

17. Acquisition of control of one company by another necessarily contemplates exercise by the parent of control over the internal business operations of the subsidiary. When the agency has approved acquisition of control, exclusive agency jurisdiction over its exercise is more readily implied. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 355 86, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), *citing Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), as such a case.

18. *See also Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

19. The Court summarized its holding in almost identical language at two points in the opinion:

At pages 387-88, 93 S.Ct. at page 661, the Court said:

> We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws. . . . But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

And again at page 389, 93 S.Ct. at page 661-662:

> We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American*, 371 U.S., at 305, 83 S.Ct. at 482. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

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In sum, in *Hughes Tool*, the propriety under the regulatory statute of the activity challenged in the antitrust suit (control by Hughes Tool Co. of the manner in which its TWA subsidiary acquired new aircraft) was the central issue presented to the agency for consideration in the exercise of its regulatory authority, and the agency had resolved the issue by approving such control as in the public interest. Exemption from the antitrust laws was implied because a successful application of the antitrust laws to the conduct would have negated the regulatory agency's determination and faced the regulated carrier with inconsistent governmental commands. In the present case, as has been seen, the premise of inconsistent regulatory and antitrust demands is absent. Also unlike *Hughes Tool*, the instant suit is not brought by a subsidiary against its parent and does not challenge the effect on the acquired company of the daily intercompany control that was integral to the acquisition. *See also Pan American World Airways v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Rather, the instant suit is brought by a third party to the approved acquisitions, challenging conduct with regard to the third party that not only was not integral to the Commission's acquisition approvals but was violative of specific representations made by Greyhound at the acquisition hearings. In these circumstances, Greyhound's conduct is not immune from antitrust strictures.

20. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 688, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975).

21. For example, Greyhound requested an instruction that since the Commission had approved the acquisitions, "the manner in which defendants have used or exercised the control of these carriers" was within the exclusive jurisdiction of the Commission, and therefore the jury "must exclude from [its] consideration all conduct by defendants involving exercise of control over the acquired bus companies." Greyhound also requested instructions referring to the specific conduct the Commission had condemned, and telling the jury that regulation of such conduct was within the exclusive jurisdiction of the Commission and could not be the basis of any findings by the jury. In addition, Greyhound requested an instruction essentially in the words of the statute, telling the jury that the antitrust laws did not apply to the approved acquisitions "or to anything done by defendants which was necessary to hold, maintain or operate the properties or operating rights obtained in these approved transactions." Since the scope of the immunity conferred by the statute was a legal question for the court to decide, this instruction was properly refused. *See* note 20, *supra*, and related text. The court's decision as to the scope of the statutory immunity shaped and conditioned the court's instructions spelling out what facts the jury must find before Greyhound could be held liable.

II.

Jury Instructions and Admission of Evidence

Many of Greyhound's assertions of error in evidentiary rulings and instructions rest upon Greyhound's theory of antitrust immunity and fall with it.

Greyhound complains of the district court's "failure to instruct on Section 5(11)." It is not clear precisely what Greyhound has in mind. The extent to which Greyhound's conduct was exempt from the antitrust laws by the Interstate Commerce Act was a legal question, not an issue of fact for the jury.[20] The instructions proposed by Greyhound were properly rejected for this reason and because they reflected Greyhound's uncompromising position that the acquisitions approved by the Commission and all conduct involving exercise of control over the acquired carriers were exempt from the antitrust laws and were not to be considered by the jury for any purpose whatever.[21]

[3] The court was required to provide the jury with standards to apply in determining whether Greyhound was liable under the antitrust laws, and it did so. The court defined the elements of monopolization, attempt to monopolize and unreasonable restraint of trade in the usual way, and Greyhound does not object to these instructions in themselves. The court also told the jury that the fact that Greyhound was reg-

ulated affected what activities of Greyhound were subject to the antitrust laws; that in a regulated industry the existence of monopoly power was not evidence of monopolization, but "use of monopoly power even if lawfully acquired, to foreclose or restrain competition, to gain a competitive advantage or to eliminate a competitor" was such evidence.[22] Under these instructions the jury could not base a finding of monopolization on the approved acquisitions themselves; improper use of the acquired power was required. This was at least as favorable to Greyhound as the law warranted.

Greyhound objects to the admission of evidence regarding the administrative and related court proceedings, and to jury instructions that this evidence could be considered "in determining the issue of Greyhound's motive, intent and purpose and reasonableness of its behavior." Greyhound objects on several grounds, but primarily on the basis of Greyhound's immunity argument, which we have rejected. Greyhound's other objections are also without merit.[23] The evidence was properly used for the purpose stated by the court.

The lengthy instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Greyhound argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. Even considered alone, however, both passages also required the jury to find, as a condition of liability, that the fraud or abuse of process resulted in an administrative order that conferred a monopoly or an unreasonable competitive advantage upon Greyhound. At most, therefore, the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.

When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, we do not believe they present even this issue. Mt. Hood did not contend that the acquisitions themselves or the power Greyhound gained through them, standing alone, constituted a violation of the antitrust laws. Mt. Hood relied instead upon Greyhound's exclusionary practices made possible by the acquisitions. The instructions were generally to the same effect. The jury was not instructed on any theory that Greyhound's purchase of other carriers might constitute the unlawful acquisition of monopoly power. On the contrary, as we have seen, the jury was told that in such a

22. The quoted portion of the instruction is settled law. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). Indeed, section 2 is violated if exclusionary tactics are used to maintain a lawfully acquired monopoly. *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344–45 (9th Cir. 1970), *interpreting United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 343 (D.Mass.1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). *See also TV Signal Co. v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1261 (8th Cir. 1972).

23. One of these additional grounds of objection warrants brief comment. Greyhound argues that the instructions permitting use of evidence of the administrative proceedings in determining Greyhound's intent and the reasonableness of its conduct "infringe" Greyhound's constitutional privilege to seek relief before administrative agencies, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). But "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972). The antitrust laws have been applied in many factual contexts that included utilization of administrative processes by the antitrust violator. *See, e. g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203 (9th Cir. 1973).

regulated industry the mere possession of monopoly power did not violate the Sherman Act, and that abuse of monopoly power to eliminate competition was required. The only fraud or abuse of process presented by the evidence was that Greyhound represented to the Commission that it was not using and would not use any of the acquired routes to engage in the predatory practices we have outlined earlier, and that Greyhound nonetheless did so. Since these same predatory practices underlay Mt. Hood's antitrust claim, since the instructions also conditioned liability upon a finding of monopolization or unreasonable restraint of competition defined in the usual way, and since the judge properly ruled without submitting the issue to the jury that Greyhound's challenged conduct was not immunized from antitrust attack, the passages amounted to no more than a reiteration in another form of the general instruction that unreasonable restraint of competition or use by Greyhound of monopoly power to foreclose or restrain competition would violate the antitrust laws.[24]

Greyhound attacks the use made at trial of two antitrust consent decrees entered into by Greyhound and the United States. The decrees, which were admitted in evidence, prohibited Greyhound from refusing to establish through-routes with competitors and from continuing other practices the same as or similar to those charged in this suit. The jury was told it could consider the decrees and Greyhound's conduct with respect to obeying or disobeying them in determining the issues of Greyhound's intent and purpose and the reasonableness of Greyhound's behavior.

[4-6] A trial judge must be accorded "wide latitude" in determining the relevance of evidence in antitrust cases. *Gray v. Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972). The admissibility of a consent decree is a matter committed to the court's discretion. *See Control Data Corp. v. IBM Corp.*, 421 F.2d 323, 326 (8th Cir. 1970). *See also Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938). There was no abuse of discretion here. The court warned the jury of the limitations implicit in decrees entered into by consent, and confined their use to a proper purpose.

Greyhound's claim that the jury should not have been asked to determine whether Greyhound had a dominant share of the market because Greyhound's market share resulted from ICC-approved transactions is but another reflection of Greyhound's rejected theory of immunity.

Other objections to the instructions regarding the relevant market are without merit. While it is true that the court did not refer to the "interchangeability of services" in those terms, the court accomplished the same purpose by use of illustrations and by instructing the jury that a "relevant" market must be one for a "distinct service" with "peculiar characteristics," serving "distinctive purposes," with "dissimilar" price characteristics, and relatively "insensitive to price variations," so that an increase in bus fares would not result in large numbers of customers switching to other forms of intercity transportation. If these indices of distinctness were not found, the jury was told, intercity bus transportation would not constitute a relevant market for antitrust purposes.[25]

III.

Statute of Limitations

The jury awarded Mt. Hood damages for injuries sustained from 1953 to 1973. The applicable statute of limitations, 15 U.S.C. § 15b, bars all claims on which suit is not commenced within four years after they accrue—in this case, all claims that accrued

24. Thus even if appellant was entitled to an instruction that "fraud" must be proven by "clear and convincing" evidence, as Greyhound urges, failure to give it was harmless under Fed.R.Civ.P. 61.

25. Greyhound contends the jury was instructed as to several contentions for which there was no evidentiary support. We have examined the record with respect to each of these issues and conclude that either there was sufficient evidence to justify an instruction or the instruction was harmless under Fed.R.Civ.P. 61.

before July 5, 1964, since Mt. Hood's suit was filed on July 5, 1968. However, Mt. Hood asserts that the running of the limitations period was suspended from 1953 to 1960 by Greyhound's fraudulent concealment of its wrongdoing, and from 1964 to the date of suit by the intervention and participation of the United States in the section 5(9) proceedings brought by Mt. Hood before the Commission.[26]

[7] In accordance with the universal rule, our circuit holds that fraudulent concealment of the existence of an antitrust cause of action tolls the four-year statute of limitations provided by section 15b.[27] The jury found Greyhound had fraudulently concealed its antitrust violations from 1953 to December 14, 1960, and that Mt. Hood neither knew nor should have known of these violations prior to December 14, 1960.

Greyhound does not deny the sufficiency of the evidence to show it attempted to conceal its conduct. It argues, however, that Mt. Hood had notice of Greyhound's activities long before December 14, 1960.

The record shows that Mt. Hood complained about quoting and routing practices of Greyhound agents on various occasions during the 1953-1960 period. The record also shows, however, that Greyhound continuously represented to Mt. Hood and to the Commission that these were isolated incidents not countenanced by Greyhound's management.[28]

The record shows that Mt. Hood suspected Greyhound of unlawful conduct prior to December 14, 1960, but "[s]uspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred." *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

There was evidence that Mt. Hood's president expressed concern over Greyhound's expansion by acquiring other carriers, and that he also stated his belief that the consent decrees were being violated. Awareness of Greyhound's growing dominance of the market was not equivalent to notice of monopolization, however, for the acquisitions were approved by the Commission and presumably immunized from the antitrust laws. Nor was knowledge of violations of the consent decrees equivalent to such notice, for, as Greyhound itself is careful to point out, violations of consent decrees are not in themselves violations of the antitrust laws.

Greyhound asserts that Mt. Hood was charged with the duty to investigate once it became aware of facts from which antitrust violations should reasonably have been inferred.[29] But in the face of Greyhound's assurances and denials of responsibility, we cannot say as a matter of law that Mt. Hood's awareness of the growth of Greyhound's power through acquisitions and of the commission of predatory acts by some of Greyhound's agents amounted to notice

26. *See* note 4, *supra*, and related text. The period of fraudulent concealment and the government intervention tolling period can be "tacked" or "bridged" to suspend the statute for the entire period since the time between the two did not exceed four years, albeit short by only a day. *See, e. g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-61 (2d Cir. 1974); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567-72 (10th Cir. 1962); *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77, 84-86 (D.Ariz.1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970).

27. *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); *accord, Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Crummer Co. v. Du Pont*, 255 F.2d 425 (5th Cir. 1958).

28. Greyhound argues that such representations, denials, and other attempts at concealment are immaterial, citing such cases as *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936); *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir. 1936). But as these cases demonstrate, attempts at concealment lose their relevance only when they occur after plaintiff already knew or should have known of the unlawful conduct. In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew or should have known of Greyhound's antitrust violation.

29. *See* note 26, *supra*, and cases cited therein.

of potential antitrust claims against Greyhound.

We conclude, therefore, that the trial court properly refused to set aside the jury's determination that Greyhound fraudulently concealed its antitrust violation, and that Mt. Hood had neither actual nor constructive knowledge of the violation until December 14, 1960.

[8] Four years later, on December 14, 1964, one day before Mt. Hood's antitrust claim would have been barred, the United States intervened in the section 5(9) proceedings Mt. Hood had instituted before the Commission in October, 1964. The trial court held that, under the provisions of 15 U.S.C. § 16(i), the intervention and the subsequent participation by the United States in the Commission proceedings tolled the running of the statute of limitations until those proceedings terminated in 1974, well after the filing of the present suit.

Section 16(i) provides that running of the limitations period on a private cause of action is suspended during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws."[30] Greyhound argues that section 16(i) is inapplicable because the administrative proceedings were not "instituted by the United States" and because they were not proceedings "to prevent, restrain, or punish violations of any of the antitrust laws."

The literal wording of section 16(i) is not controlling. Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). The clearly expressed purpose of section 16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. *Id.* at 320, 85 S.Ct. 1473. This purpose would be served by interpreting section 16(i) to encompass the government's intervention and participation in the section 5(9) proceedings before the Commission—a reading the language readily permits.

The proceedings were of a kind likely to produce benefits to Mt. Hood as a plaintiff in a subsequent antitrust suit.[31] The issues, as we have seen, were largely the same. Governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues. The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity.

It would make form controlling to hold section 16(i) inapplicable merely because Mt. Hood rather than the United States instituted the proceedings. The United

30. 15 U.S.C. § 16(i) reads in part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

31. The question is not whether the government proceedings actually conferred benefits upon the private antitrust plaintiff, but whether the character of the proceedings was such that they were likely to do so. Thus in analyzing the issue the Supreme Court spoke of government action which "may aid the private litigant." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). If actual benefit were the test, it might be impossible to determine whether the government proceedings would toll the running of limitations until those proceedings were finally concluded. Private plaintiffs would be compelled to file their antitrust suits although government proceedings involving the same subject matter were still in progress.

States intervened little more than 60 days after the filing of Mt. Hood's petition and participated actively in all subsequent stages of proceedings that required nearly a decade to complete. Nothing would be gained, and a good deal of judicial and administrative time and efficiency would be lost, if the United States were compelled to institute a separate independent proceeding in district court under 15 U.S.C. § 26 to assure private treble damage litigants the benefits Congress intended they should have from the government's action. As the trial court concluded, "the Congressional intent behind [16(i)] is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them."

In addition to relying on the language of the statute, Greyhound argues that section 16(i) applies only when the United States initiates rather than intervenes in a proceeding because of the Supreme Court's statement in *Minnesota Mining* that the purpose of section 16(i) is to permit private parties the benefit of *"prior government actions."* 381 U.S. at 320, 85 S.Ct. 1473 (emphasis by Greyhound). Obviously, the Court was referring only to actions occurring before the antitrust suit was commenced. Greyhound's argument epitomizes the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives." *Id.*

When the substance of the government's intervention and participation before the Commission is examined, it fall's fairly within the class of proceedings "to prevent, restrain, or punish violations of any of the antitrust laws" to which section 16(i) applies. It is not controlling that the government's action was taken in an administrative rather than judicial setting, *Minnesota Mining, supra*, 381 U.S. at 320, 85 S.Ct. 1473, nor that the proceedings were not brought under the antitrust laws, *Luria Steel & Trading Corp. v. Ogden Corp.*, 484 F.2d 1016, 1020–21 (3d Cir. 1973); *Rader v. Balfour*, 440 F.2d 469. 473 (7th Cir. 1971). The government action suspends the running of the limitation period under section 16(i) if it "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws," *Rader v. Balfour, supra*, 440 F.2d at 473, for it is government participation in such a proceeding that is likely to produce the benefits that Congress intended plaintiffs in later private treble damage actions to have.

The government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct. To explain its interest in the proceedings and its desire to participate as a party, the government stated:

> The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8–9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business. . . .

The petition noted Mt. Hood's increasing vulnerability to and dependence on Greyhound. It referred to Greyhound's "predatory conduct" and to the possibility of Mt. Hood's "extinction at the hands of an infinitely more powerful rival." The petition concluded:

> Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not.

As Greyhound itself admitted before the district court in its motion to dismiss the complaint, a purpose of the Justice Department's intervention was "to assure the adequate consideration of antitrust issues."

Antitrust issues were an appropriate part of the proceedings. The Commission was required to consider the anticompetitive effects of the section 5(2) transactions in framing, and modifying, its order.[32] Early in the proceedings Greyhound was reminded "that the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding." *Mt. Hood Stages, Inc., supra*, 104 M.C.C. at 451. The Commission rested its decision upon the conclusion that Greyhound's conduct "constitutes destructive competition in contravention of the national transportation policy." *Id.* at 462.[33] In sustaining the Commission's order the district court wrote:

> It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's duty to take the antitrust policy of the United States into account in its decision making.

Greyhound Lines, Inc. v. United States, supra, 308 F.Supp. at 1038.

Because Congress' purpose in enacting section 16(i) will be served by this interpretation, and because the language of the section does not bar it, we conclude that the government's intervention in the section 5(9) proceedings on December 14, 1964, tolled the running of the limitations period from that date.[34] Accordingly, Mt. Hood's antitrust complaint was timely filed.

IV.

Damages and Attorneys' Fees

[9] Greyhound contends that Mt. Hood failed to offer adequate proof either that Mt. Hood was injured by Greyhound's conduct or of the amount of the damage. With respect to the fact of damage, Greyhound's claim is frivolous. The jury may infer the fact of damage if "plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Mt. Hood offered evidence that its bridge traffic declined sharply during the relevant period.[35] Greyhound's conduct found to violate the antitrust laws was directed at creating precisely this kind of loss.[36] There was no indication of an alternative source of loss sufficient to negate an inference that Greyhound's violation was a material cause. *Zenith Radio Corp. v. Hazeltine Research,*

32. *Port of Portland v. United States*, 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases*, 396 U.S. 491, 511-16, 90 S.Ct. 705, 24 L.Ed.2d 709 (1970); *McLean Trucking Co. v. United States*, 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

33. The Commission rejected Greyhound's argument that Greyhound's practices were not in themselves unlawful on the basis of the antitrust principle that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 458 (1968). The Commission cited the Sherman Act case of *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391 (S.D.Cal.1966).

34. We need not reach Mt. Hood's contention that the statute was tolled to December 14, 1960, by virtue of Mt. Hood's commencement of the section 5(9) proceedings.

35. Mt. Hood offered evidence, for example, that Mt. Hood's bridge traffic consisted of 25,258 passenger trips, or approximately 44 percent of the total relevant bridge traffic, in 1963 and had fallen to 930 passenger trips, or approximately three percent of the total, by 1969.

36. As described previously, Mt. Hood alleged and offered substantial evidence to prove that Greyhound had cancelled the north-south through-bus connection arrangement on which Mt. Hood depended for a substantial portion of its traffic, scheduled its services so as to preclude reasonable connections with Mt. Hood, directed independent and joint ticket agents to long-haul traffic around Mt. Hood, and interfered with distribution of Mt. Hood schedules.

Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Mt. Hood's proof of the amount of damage was less certain, and necessarily so. What Mt. Hood's business volume and profits would have been except for Greyhound's antitrust violation is inescapably uncertain. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957). In such a case, the amount of damages may be shown "as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 249, 75 L.Ed. 544 (1931).

The premise of Mt. Hood's calculation of lost profits was that 95 percent of bus passengers would have traveled Mt. Hood's shorter bridge routes if they had had that choice. Greyhound asserts that Mt. Hood's premise "defies the record as well as common sense and is untenable," and therefore the entire calculation of damage fails. There was ample evidence from which the jury could reasonably infer that the shortest bus route is generally fastest, including studies comparing Greyhound's and Mt. Hood's schedules from 1950 to 1970 with regard to mileage and time.[37] Mt. Hood also introduced evidence from which the jury could reasonably infer that as a general rule 95 percent of bus passengers would take the fastest route when given a choice.[38] It is of course true that the evidence did not demonstrate to a certainty that 95 percent of passengers would have traveled Mt. Hood's shorter routes absent the restraints imposed by Greyhound's violation, but in the nature of the case proof to a certainty is not possible and is not required.

Greyhound challenges virtually every other facet of Mt. Hood's proof of damage. We have examined each of Greyhound's objections in light of Mt. Hood's response and the evidence in the record. No useful purpose would be served by a tedious recapitulation of these materials. We are satisfied that the evidence offered by Mt. Hood permitted the jury to make a reasonable and just inference of the amount of Mt. Hood's damage.[39]

[10] We also sustain the award of attorneys' fees. Greyhound objects that the amount of the award divided by the number of hours devoted to the litigation by plaintiff's attorneys yields an exorbitant hourly rate. But as the experienced trial judge stated, "compensation at an hourly rate would be inadequate in a case of this kind," which "is, in many ways, unusual, . . . its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." The trial court based the award upon knowledge gained in four years' involvement in all aspects of the case, the evidence presented by the parties on this issue, and the factors prescribed in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964). The award represented an appropriate exercise of the district court's discretion.

Affirmed.

37. These studies were part of a larger damage study commissioned by Mt. Hood. The study was supplemented by the testimony of three expert witnesses over a two-week period. The study was based on statistical computations verified by Arthur D. Little & Co., an independent management consulting firm. Mr. Jizmagian, Arthur D. Little & Co.'s representative who supervised the study, testified that maximum use was made of all available data supplied by Greyhound, and where such data was not available every assumption and method "and every use of statistics and every use of ratios was done . . . with standard statistical techniques and there was, in my opinion, no speculative use of numbers." He concluded that the study accurately reflected Mt. Hood's damages.

38. For example, Mt. Hood's damage study, *see* note 37, *supra*, included a comparison of passenger utilization of three available "'All Greyhound' routes from Oregon and Washington points to Los Angeles," showing that more than 95 percent of the bus passengers chose the shortest of the three available routes.

39. This holding also encompasses the damage awards for express traffic Mt. Hood lost between 1964 and 1971, and for local traffic it lost between 1964 and 1970.

from —

Bennett C. Whitlock, Jr., President
American Trucking Associations
1616 P Street, N.W., Washington, D. C. 20036

No. 4
January 23, 1979

truck line

KENNEDY TO SEEK ABOLITION OF COLLECTIVE RATEMAKING

Senator Ted Kennedy is going to introduce legislation to abolish collective ratemaking in the trucking industry.

At a jammed press conference on Capitol Hill January 22, Senators Kennedy (D-Mass.) and Howard Metzenbaum (D-Ohio), along with a host of supporters, announced plans to seek an amendment bringing truck and freight forwarder ratemaking under the Clayton Antitrust Act, and subsequently repeal the industry's exemption from the antitrust laws.

ATA responded immediately with a statment blasting the bill, saying that it "demonstrates a complete lack of understanding of the complexities of the system of freight transportation." Our full statement is attached.

QUESTIONS ON CARTER POSITION, COMMITTEE JURISDICTION

Two aspects of this development are exceedingly important. One is the apparent waffling of the Carter administration on whether it should support the Kennedy bill. The other is that Kennedy's initiative has precipitated a fight in the Senate over committee jurisdiction.

CONFLICTING STATEMENTS

The confusion over President Carter's position stems from conflicting statements from the administration and Kennedy. Just hours before the Kennedy press conference, President Carter told a delegation of motor carrier executives that he has not made up his mind on truck deregulation. At the same time, two top Carter advisors, Ambassador-at-large Robert Strauss and assistant to the President for Domestic Affairs and Policy Stuart Eisenstat, told the executives that the administration had no position on the Kennedy bill. But at his press conference later that day, Kennedy said Carter has endorsed the bill.

(more)

ATA TELEGRAM

ATA has telegrammed President Carter a summary of the conflicting statements, saying that if he does support the bill, then continued discussion on the administration's position is moot since effective regulation is not possible without collective ratemaking. A copy of the telegram is attached.

KENNEDY, CANNON FIGHT OVER JURISDICTION

The jurisdiction fight is between Kennedy, who is chairman of the Judiciary Committee, and Senator Howard Cannon (D-Nev.), chairman of the Commerce Committee. Each thinks the issue belongs in his own committee, and Cannon has told Senate Majority Leader Robert Byrd (D-W. Va.) that he will object to joint referral and will appeal sole referral to the Judiciary Committee.

Cannon told Byrd that no matter how the bill is drafted it will go to the heart of truck regulation and thus clearly falls into the jurisdiction of the Commerce Committee. He pointed out that the Reed-Bulwinkle Act of 1948, which exempts regulated trucking from the antitrust laws, originated in the Commerce Committee, and that it would be unprecedented for legislation passed by one committee be referred to a different committee for repeal. Asked about this, Kennedy said the bill belongs in his committee because it initially addresses a provision of the Clayton Antitrust Act rather than the Interstate Commerce Act or Reed-Bulwinkle.

CANNON COMMITTEE BEST FOR TRUCKING

The industry's best hope in this is that the matter gets referred to the Commerce Committee. Cannon may wind up supporting the bill, but at least his mind is open. Kennedy has already decided that trucking should be deregulated and any hearing conducted by him would be a stacked deck.

KENNEDY SUPPORTERS

A wide range of interests were represented by supporters of the bill at Kennedy's press conference. Among them were: Alfred Kahn, the President's counsellor on inflation, who said the bill is an important plank in the administration's fight against inflation; Esther Peterson, the President's consumer affairs advisor; John Shenefield, assistant attorney general for antitrust; Rep. Parren Mitchell (D-Md.), who endorsed the bill on behalf of minority interests; Rep. Millicent Fenwick (R-N.J.); Ralph Nader, who called for legal action against the "entrenched corruption" in trucking that is protected by the "puppet" ICC; and representatives of groups such as the National Association of Manufacturers, the American Conservative Union and the American Farm Bureau.

(more)

Kennedy said this bill is a first step in a larger effort to restore genuine competition to trucking. He laid the groundwork for his proposal over the last 16 months with extensive hearings on collective ratemaking and entry.

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NEWS

AMERICAN TRUCKING ASSOCIATIONS, INC. • 1616 P Street, N.W. • Washington, D.C. 20036
NEWS SERVICE DEPARTMENT • (202) 79 5237 • Rupert Welch • Home Phone: (202) 332-3859

FOR IMMEDIATE RELEASE

AMERICAN TRUCKING ASSOCIATIONS STATEMENT

WASHINGTON, Jan. 22 -- The American Trucking Associations, Inc., has issued the following statement on the proposal made by Sen. Edward M. Kennedy (D-Mass.):

Introduction of legislation to repeal the antitrust exemption which permits shippers and truckers to openly discuss rate proposals and which allows truckers to collectively vote on rate proposals to be considered by the Interstate Commerce Commission demonstrates a complete lack of understanding of the complexities of the system of freight transportation.

Collective ratemaking is at the very heart of carrying out the National Transportation Policy under which we have developed the finest freight transportation system in the world. It is only through collective ratemaking that the ICC can exercise effective rate regulation. Without the present basic ratemaking procedures, there will be discrimination, preference and prejudice between communities, regions, shippers and commodities.

It will be an impossible task for the shipping public to know with any degree of certainty the transportation charges on thousands of commodities which the 16,000 ICC carriers regularly transport among 125,000 communities throughout the country. Chaos and confusion will be the result.

-more-

It's unfortunate that Senator Kennedy advocating his position, is misleading the American people into believing that elimination of collective ratemaking would save the consumers billions of dollars. To the contrary, his legislation will increase the inflationary pressures facing the nation's economy.

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22/1/79

Telegram Sent to President Carter

We wish to express our appreciation for your taking time from your busy schedule to meet with us on the issues involved in truck regulation. We also appreciated your indication that although your Staff had made recommendations concerning truck regulation, you and your Administration had not reached a final position. Prior to your joining our meeting, the subject of the legislation which Senator Kennedy was to announce later in the day came up for discussion. Senator Kennedy's legislation which would repeal the antitrust exemption which permits truckers and shippers to discuss rate proposals and which gives truckers the right to collectively propose rates to the Interstate Commerce Commission goes to the very heart of effective truck regulation. Ambassador Strauss and Assistant to the President for Domestic Affairs and Policy Stuart E. Eisenstat assured us that the Administration would take no position on the Kennedy legislation at this time. Yet less than one hour after the conclusion of our meeting at which you assured us you had taken no position on truck regulation and two of your top advisors told us the Administration would not take a position on the Kennedy legislation, Senator Kennedy announced Administration support for the measure. In addition, two of your advisors, Dr. Alfred Kahn and Ester Peterson, who were present throughout our meeting with you, attended the Kennedy press conference. Dr. Kahn publicly announced that the legislation was a key plank in the Administration's program. At a subsequent press conference we stated we did not feel this was the White House position but press reports indicate that the statements

made by Senator Kennedy and Dr. Kahn were checked with the White House and the Administration does support the Kennedy legislation.

Mr. President, this either represents a complete lack of understanding of the import of Senator Kennedy's legislation by some of your advisors or a complete breach of faith with the statements which you and your advisors made to us at our meeting. We feel it is incumbent that this matter be reconciled. We would hope you would reaffirm the position which you took with us and the position which Ambassador Strauss and Stuart Eisenstat took as to the Administration's position on the Kennedy legislation. However, if indeed the Administration supports the legislation which Senator Kennedy has introduced, then continued discussion on the Administration's position on truck deregulation would be moot. Effective truck regulation is not possible without collective ratemaking.

from:
Bennett C. Whitlock, Jr., President
American Trucking Associations
1616 P Street, N.W., Washington, D. C. 20036

No. 153
December 28, 1978

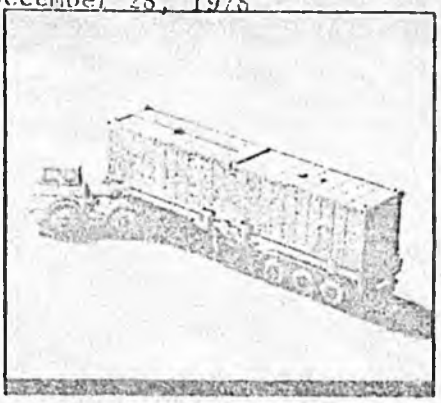
truck line

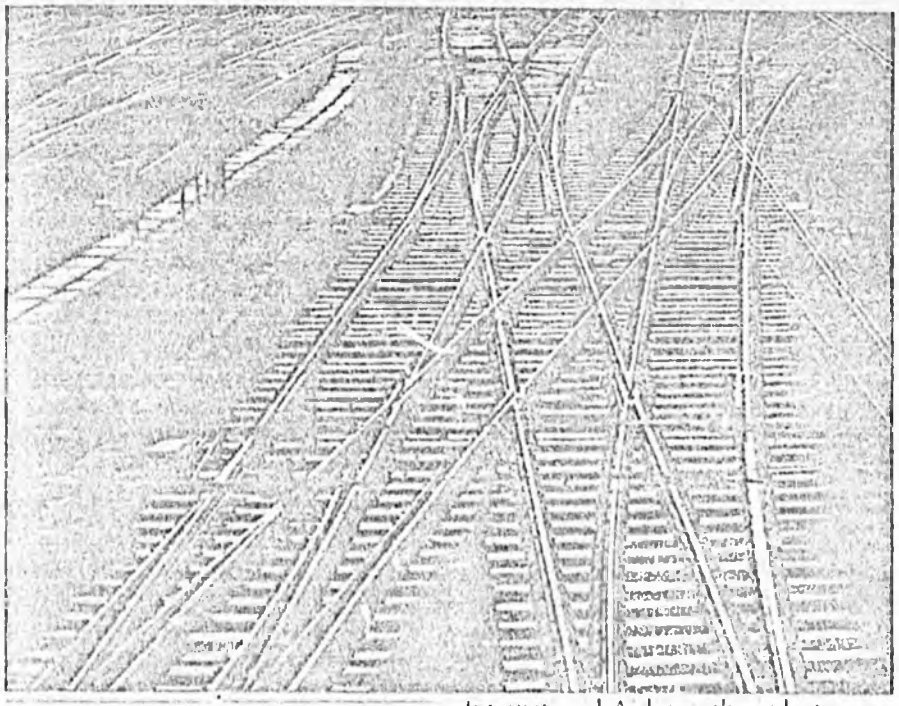
The attached article, from the January 8 edition of Forbes, presents a forceful defense of economic regulation of trucking. This is the kind of cogent, unbiased support for the regulatory system that should be distributed far and wide. We have obtained permission to reprint the piece, and we urge you to contact us for copies to send to your shippers, chambers of commerce and congressional delegates.

For reprints contact: Public Realtions Department, American Trucking Associations, Inc., 1616 P Street, N. W., Washington, D. C. 20036 (202) 797-5243.

Anyone who thinks deregulation will bring prosperity to the railroads and truckers as it did to the airlines had better think again.

Transportation





By James Cook

IT WAS A seemingly revolutionary, but in reality, almost stupefyingly elementary notion: What if you ended those controls on market entry and pricing the government had imposed on transportation for generations, and let carriers go about their business as they pleased? Cut prices or raise them, enter new markets or withdraw from old ones as sound business judgment would dictate? In short, what if you let competition do the job that regulation had attempted and never really succeeded very well in doing?

Academicians had talked of such things for years, but on taking over as chairman of the Civil Aeronautics Board 18 months ago, Alfred Kahn, Cornell University's regulatory guru, put them into effect. A good half of the airline industry was appalled. The result would be chaos: cutthroat price competition, sagging profits, disaster. But Kahn persisted, and before he moved on to become Carter's chief inflation fighter, the airlines were propelled—some of them kicking and screaming—into a new age.

Led by a maverick Texas outfit, Texas International Airlines, the industry was encouraged to offer sharply reduced fares to passengers who were prepared to fly at times when the industry's traditional customers didn't want to. One discount fare promptly followed another. Far from bankrupting the industry, competition proceeded to transform it. Air travel turned out to be an almost classically price-elastic market. And as the airlines began offering tickets at discounts of 50% and more, depending upon the circumstances, and filling planes that had long flown empty, they found themselves tapping a vast new market for low-priced, nonessential passenger service. Overall, demand boomed, soaring 18% in the first nine months of last year, profits expanded spectacularly and an industry that only a few years ago seemed nearly bankrupt found itself being deregulated into the biggest and best year in its history. The Forbes yardsticks make clear the impact: a breathtaking 24.8% return on equity in the latest 12 months, *vs.* a 10.5% five-year average.

From Kahn's point of view, the industry's newfound prosperity was really secondary. "One reason we wanted to move toward competition," he told Forbes, not long before taking his new job last November, "is that it will be beneficial to consumers. The other proviso is the implicit premise on our part that a competitive industry is capable of being financially healthy. It is entirely conceivable that deregulation will force people to become leaner, more efficient, more careful. They're not free to overacquire, enter markets that might not be logical for them to enter, secure in the knowledge the government will bail them out."

Congress was so impressed by Kahn's argument and the industry's performance that last fall it passed a bill enacting Kahn's notions into law—freeing the industry from control over its routes by 1982 and over fares, mergers and acquisitions by 1984. In the meantime the carriers were free to enter one new market a year, pull out of an old market on 90 days' notice, cut fares in noncompetitive markets by as much as 50% or raise them as much as 5% without CAB approval or 10% in markets where there were four or more carriers competing.

The airlines are understandably uneasy sometimes, because in slashing fares, they become vulnerable to a recessionary traffic slump. But in deregulating the industry Kahn never promised them a rose garden. Deregulation wasn't supposed to spare the industry the consequences of poor business judgment, any more than regulation itself had been able to protect it from the ruinous excess capacity poor management created twice in less than two decades.

Of course, the merits of airline deregulation haven't been proved by one summer's boom, but the first results were so spectacular that the Administration and Congress promptly began talking about doing the same thing for the rest of the carriers. President Carter hoped airline deregulation would be the precursor of deregulation in other overregulated industries, and deregulator Kahn argued there was even less reason to regulate trucking than airlines.

Maybe so, but success in airline deregulation doesn't guarantee success in the rest of the transportation business. For one thing, real reform is difficult in Washington. Airline deregulation was politically popular. The public loved the

lower fares, and the public votes. However, the general public does not much use trucks and railroads—except indirectly—and therefore, deregulation of these industries does not have the same political constituency.

And politics is only half the difference. By cutting prices, the airlines have induced more people to fly. But truckers and railroads move goods, mostly, not people. Cutting freight rates is not going to expand the size of the market. Cheaper shipping rates are unlikely to cause the appliance industry to produce more refrigerators, say, or the steel mills, more steel. Instead of expanding the market and lowering unit costs in transportation, lower prices are simply going to come out of the hides of the truckers and railroads. The ultimate result could be less competition, not more, as the weaker companies are forced under.

Congress had earlier attempted to deregulate the railroads' ratemaking in the so-called 4R Act of 1976, only to be thwarted by the Interstate Commerce Commission, which interpreted the act's market dominance provisions so narrowly as to leave a good 50% of the industry's traffic still under rigid control. The free market advocates are almost certain to try again, only this time with trucking. Senator Edward Kennedy expects to introduce legislation deregulating trucking later this year, and in November 1978 the ICC's Chairman Daniel O'Neal came up with a group of proposals that would in effect deregulate all but the common carrier truckers, ease entry even there and establish a range within which price changes would not be subject to ICC review.

The other members of the Commission greeted O'Neal's proposals with a notable lack of enthusiasm, but in November, ostensibly in the interest of saving fuel, the ICC took a major step toward deregulation by authorizing private carriers to solicit backhaul traffic from other shippers for the first time. By such means, the ICC could deregulate much of the trucking industry without any need for congressional action, just as the CAB had the airlines, but the American Trucking Association denied that the ICC had the option and took the matter to court.

Cheaper shipping rates are unlikely to cause the appliance industry to produce more refrigerators, or the steel mills, more steel. Instead of expanding the market and lowering costs, lower prices are going to come out of the hides of the truckers and railroads. The result could be less competition, not more.

Trucking will be a tough nut to crack. You would be hard put to find anybody in the regulated surface transport business who thinks that truck deregulation is a good idea—not the railroads certainly, who face the prospect of their unregulated truck competition growing worse; not the common carrier truckers, who long since have found the unregulated truckers the common enemy of all regulated carriers; and not the Teamsters Union, which wants to keep the trucking rates high so as to have a healthy cow to milk.

The airlines basically compete with each other and only to a small degree with buses and Amtrak. But the trucks, barges and railroads compete not only with one another but also with other trucks, rails and barges.

Regulation has kept the trucks and water carriers healthy and prosperous, but it has helped to bankrupt a good portion of the railroad industry—not simply the seven companies absorbed by Conrail, but the Boston & Maine, the Rock Island and the Milwaukee as well—and threatens such once-prosperous carriers as the Illinois Central Gulf and conceivably even the Seaboard Coast Line. The 5.3% five-year return on capital the railroads average on the Fortune yardsticks, as against the 13.1% of the motor carriers, understates the disparity. As the ICC calculates it, the railroads last year earned only 1.3% on their net investment, *vs.* 23.8% for the truckers, 21.07% for the water carriers.

That's why Kahn and Kennedy chose the trucks as their next target.

Deregulation is never going to bring any new competitors into the railroad

Transportation—Air:
Yardsticks of Management Performance

	Profitability							Growth			
	Return on Equity				Return on Total Capital			Sales		Earnings Per Share	
company	5-year average	5-year rank	latest 12 months	debt/equity ratio	latest 12 months	5-year rank	5-year average	net profit margin	5-year average	5-year rank	5-year average	5-year rank
Emery Air Freight	36.9%	1	38.6%	0.0	38.4%	1	36.6%	5.4%	18.8%	2	17.8%	5
Braniff Intl	17.8	2	21.3	1.1	10.5	3	8.9	5.1	14.6	6	23.9	4
Delta Air Lines	17.6	3	20.2	0.2	11.5	2	9.2	6.3	17.3	4	14.0	7
Western Air Lines	16.3	4	32.8	0.5	14.0	4	7.7	5.4	13.6	6	33.7	2
UAL	11.6	5	31.1	0.7	14.2	6	6.0	7.6	11.4	11	50.6	1
Tiger International	10.9	6	16.8	2.0	6.7	9	5.4	6.9	18.9	1	4.1	9
Allegheny Airlines	10.7	7	28.5	1.8	12.6	7	5.9	4.3	16.4	5	D-P	
Northwest Airlines	10.3	8	9.7	0.1	6.8	5	7.0	8.8	14.3	7	11.1	8
Continental Airlines	10.2	9	29.5	1.4	12.5	8	5.8	7.3	12.4	9	26.7	3
American Airlines	7.6	10	15.6	0.5	8.8	10	4.8	4.5	10.5	12	D-P	
National Airlines	7.6	11	8.6	0.2	5.4	12	4.2	2.8	8.8	13	2.5	10
Eastern Air Lines	6.3	12	21.0	1.4	10.3	11	4.5	3.2	11.9	10	D-P	
Trans World Airlines	3.9	13	21.7	1.2	10.0	13	3.6	3.0	17.6	3	16.1	6
Pan Am World Airways	0.8	14	29.2	3.1	10.4	14	2.4	5.3	7.8	14	D-P	
Industry Medians	10.5		21.5	0.9	10.5		5.9	5.4	14.0		17.0	
All-Industry Medians	13.9		15.4	0.4	10.5		10.2	5.0	12.9		12.6	

Note: Explanation of Yards[illegible] calculations on page 40. D-P Deficit to profit; not ranked.

busin.ss--it costs too much. Who would invest new capital in an industry where its largest and most successful companies average less than 6% on their capital? But trucking is a different matter. In an industry where a driver can buy a $60,000 rig for maybe $9,000 down and go into business for himself, open entry could conceivably transform the industry. Thus deregulation will bring a rash of new competition into the trucking business: competitors who will price-cut their way into the market and set off a wave of mergers that will transform trucking into a far more concentrated business than it is now. The short haul and regional truckers may well be squeezed out, and the big national companies—outfits like Yellow Freight, Roadway Express, Consolidated Freightways and McLean Trucking—will come to dominate the industry. And it is likely that the same will happen with the entrenched companies in freight forwarding (Transway International) or contract leasing (Leaseway International).

Deregulating the truckers while leaving the railroads regulated could, in addition to disrupting trucking, come close to being fatal to the railroads, with newly deregulated truckers price-cutting into the railroads' remaining markets.

"I think," says ICC Chairman Daniel O'Neal, "the government will have to be concerned about the disruptive effect of changes in the system. Actions we take as far as motor carriers are concerned should be read in conjunction with how they affect the railroads. Some commodities carried by the railroads are vulnerable to motor carrier competition—agricultural commodities, anything that moves in full trucks. There's one reason for regulating the motor carriers: because of their threat to the railroad industry."

Sad to say, O'Neal has a point.

Deregulation isn't likely to produce anything like the boom conditions that airline regulation has. Freight transportation, unlike passenger traffic, is basically price inelastic. The volume of freight traffic is determined by the level of the economy. So what you may do by deregulating ratemaking is to divert traffic from one carrier or mode of transport to another.

All you really may accomplish is to reduce the general rate level of the carriers involved, a reduction that the railroads at least no longer have the financial resources to withstand.

And the truth is that, in terms of their costs, transportation rates are in general probably too low. Veteran rail analyst, Isabel Benham, head of Princeton, Kane Research, calculates that since the end of the 19th century the U.S. government has spent nearly $130 billion developing U.S. highways and waterways, as against $2 billion on railroads, and this indirect subsidy has enabled barges and truckers to price their services for less than they would have otherwise and to force the railroads, in competing with them, to underprice their services as well. The result has been a progressive dissipation of railroad capital and a corresponding inability to provide the service that in many transportation markets is far more important than costs. "The motor carriers," says ICC Chairman O'Neal, "are doing well because they provide pretty darned good service."

"Actions we take as far as motor carriers are concerned," says ICC Chairman O'Neal, "should be read in conjunction with how they affect railroads. Some railroad commodities are vulnerable to motor carrier competition. There's one reason for regulating motor carriers: because of their threat to the railroad industry."

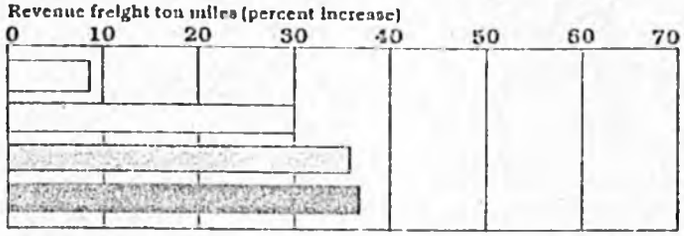
And they do. So good, in fact, that even with a rate level nearly five times that of the railroads they have easily walked off with the market. Transportation is a volume business, and the volume—the most profitable volume at that—has increasingly gone to the truckers and water carriers, leaving the railroads particularly vulnerable to the cost inflation of the Seventies. Railroad freight traffic has admittedly expanded 8% since 1970 but that compares with a 36% gain for the truckers, 37% for the barges. And the railroads, squeezed for the profits they need to keep going, have responded by increasing their rates far more rapidly than the truckers have—increasing them, over the past eight years, 60% on average *vs.* 40% for the truckers—a move that has probably cost them even more of the growth they might otherwise have been entitled to.

What the railroads obviously need is still higher rates—to restore their basic earning power—and greater flexibility in adjusting them up or down to suit the competitive environment. But ratemaking freedom is probably no longer enough. What the railroads need even more is the imposition of user charges on their competitors to even out the inequities created by government subsidized highways and waterways, and this would almost certainly mean that the rate level in both railroads and trucking would rise.

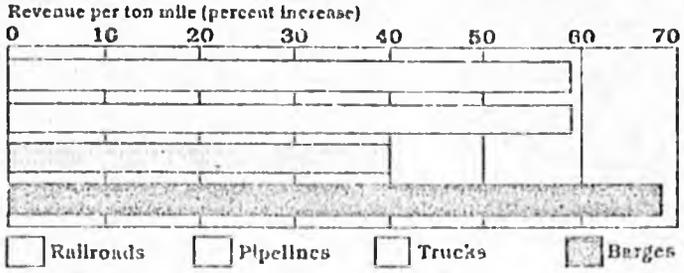
But even without user charges, Morgan Stanley's transportation expert Andras Peterey argues, long-term deregulation of trucks and rails is unlikely to produce the lower prices across the board the politicians dream about. It would only lessen competition in trucking, encourage prices to rise and could further weaken the railroad industry. "The curious effect," he says, "would probably mean many increases rather than decreases in freight rates. Once the weaker firms are squeezed out, prices will go up again." Deregulation in the air cargo in-

Growth rates & rate growth

Transportation may be a growth industry, but not everyone in it is growing at the same pace. Between 1970 and 1977, revenue ton miles increased only modestly for the once dominant railroads, but boomed for the competing oil pipelines, truckers and barges.



Over the same period the railroads magnified their competitive disadvantage by increasing their rates far faster than the truckers and increasing them nearly as fast as the lower cost barges and oil pipelines. The disadvantage is growing.



dustry may have got the air cargo business booming at last, but the result so far has been higher, not lower, fares. Kahn explains the anomaly by suggesting that fares were probably too low—just as they probably are throughout the surface transportation industry. So in the end deregulation may prove to be not the deflationary device some of its proponents suggest but an inflationary one—or if not that, one which encourages transportation to reflect its true costs for the first time in generations.

Deregulation is popular in Washington these days and *that* is good news for those who believe in free enterprise. But Congress would be wise to go slow on deregulating trucks and railroads because lower prices are not what the railroads need to survive. As things now stand, because freight rates may already be too low, the taxpayer subsidizes trucks and barges, and railroad stockholders and bondholders subsidize most railroads. If the aim of deregulation is to bring freight rates down, the result may be to increase the need for subsidies and to reduce rather than enhance competition. That's a sad thing to say but probably true.

If the politicians and bureaucrats still dream of the benefits of trucking deregulation, hardly anyone seriously suggests that this offers any solution for ocean shipping. Companies like Alexander & Baldwin (Matson Lines), Transway (Waterman Steamships), Seatrain Lines or Moore-McCormack have suffered too long at the hands of cut-rate foreign, and largely Russian, competition. What these carriers want is regulation in order to stay alive: rigid rate regulation in exchange for a secured market position. "You can't have a staunch allegiance to antitrust," says Transway's vice president-law, Lawrence Berman, "when the rules of the game are not controlled by the U.S. So pooling arrangements are the name of the game."

In short, there is no easy answer to the question of deregulation. Can one opt for inconsistency? Favor deregulation for the railroads, favor only restricted deregulation for the truckers? One probably can. What transportation needs is pragmatic, not ideological, solutions. The basic problem, of course, is how do you unscramble eggs. And the answer is, of course, you can't do it. All you can hope to do is stir them around so they don't get too lumpy.

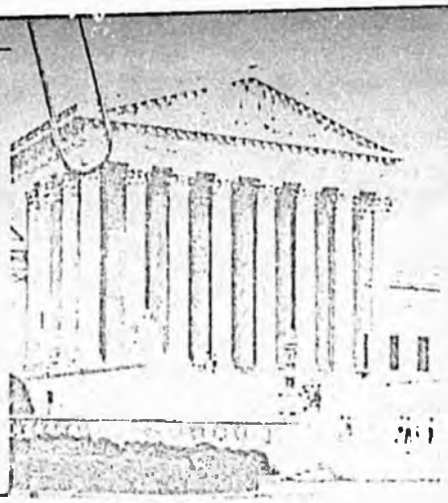
Transportation—Surface:
Yardsticks of Management Performance

	Profitability							Growth			
	Return on Equity				Return on Total Capital			Sales		Earnings Per Share	
company	5-year average	5-year rank	latest 12 months	debt/ equity ratio	latest 12 months	5-year rank	5-year average	net profit margin	5-year average	5-year rank	5-year average	5-year rank
RAILROADS												
Missouri Pacific Corp	29.3%	1	25.2%	1.4	11.1%	1	9.5%	7.7%	13.5%‡‡	3	21.8%‡‡	3
Chic & North Western	21.2	2	21.5	3.4	5.7	8	5.2	1.9	7.9‡‡	8	13.6‡‡	7
Southern Railway	11.2	3	12.0	0.6	6.9	3	6.4	9.6	9.2	7	13.1	8
Norfolk & Western Ry	10.4	4	8.4	0.4	5.1	5	5.8	9.0	3.0	13	20.5	4
Union Pacific	9.9	5	11.7	0.3	7.8	2	7.1	6.8	17.0	1	16.5	5
Santa Fe Industries	8.4	6	8.7	0.4	6.1	4	6.0	7.6	11.8	5	14.7	6
IC Industries	8.0	7	8.8	0.6	5.8	6	5.4	3.7	14.6	2	8.7	9
Chessie System	7.7	8	4.6	0.7	3.5	9	5.0	3.6	6.6	11	22.7	2
Seaboard Coast Line	7.3	9	5.7	0.9	4.5	7	5.3	3.8	13.3	4	6.3	11
St Louis-San Fran Ry	6.0	10	2.2	0.8	4.9	11	4.6	5.0	7.9	9	6.5	10
Southern Pacific	5.6	11	4.8	0.4	3.6	10	4.0	4.1	7.3	10	1.4	12
Burlington Northern	4.8	12	6.8	0.5	4.7	12	3.8	4.8	11.3	6	34.2	1
Chicago Rock Island	def	13	def	0.9	def	13	def	def	3.7	12	D-D	13
Medians	8.0		8.4	0.6	5.1		5.3	4.8	9.2		13.6	
TRUCKERS												
Yellow Freight System	26.1%	1	22.0%	0.2	16.4%	2	17.4%	5.2%	19.0%	2	20.6%	1
Roadway Express	24.5	2	21.6	0.0	20.5	1	23.1	5.7	16.4	4	20.0	2
Leaseway Transportn	24.0	3	24.3	1.7	10.6	5	9.7	4.7	13.1	5	18.4	4
Consol Freightways	21.6	4	23.6	0.2	19.1	3	16.2	4.5	12.3	6	19.1	3
McLean Trucking	19.2	5	14.2	0.5	10.7	4	13.1	2.8	17.6	3	13.1	5
Ryder System	12.9	6	25.1	1.6	9.8	7	6.6	4.9	20.1	1	6.9	6
Allied Van Lines	9.9	7	7.1	3.7	4.6	6	7.5	0.3	9.9	7	3.1	7
Medians	21.6		22.0	0.6	10.7		13.1	4.7	16.4		18.4	
OTHER TRANS												
Moore McCormack Res	20.2%	1	12.3%	0.8	7.4%	3	11.7%	7.0%	28.8%	2	221.5%	1
Transway Intl	19.1	2	20.0	0.3	15.8	1	15.6	3.6	8.9	6	13.4	4
Gelco	18.9	3	25.1	4.4	6.4	5	5.9	5.8	62.9	1	32.5	2
Alexander & Baldwin	16.7	4	9.2	0.4	6.9	2	13.6	5.9	11.3	4	28.0	3
Greyhound	11.2	5	8.6	0.5	7.0	4	8.3	1.4	8.9	5	0.7	5
Seatrain Lines	7.5	6	21.7	8.4	4.3	6	2.5	1.6	19.4	3	D-P	
Medians	17.8		16.2	0.7	7.0		10.0	4.7	15.4		28.0	
Industry Medians	11.2		11.9	0.6	6.7		6.5	4.8	12.1		14.7	
All-Industry Medians	13.9		15.4	0.4	10.5		10.2	5.0	12.9		12.6	

Note: Explanation of Yardstick calculations on page 40. ‡‡Three-year growth. D-D Deficit to deficit. D-P Deficit to profit; not ranked. def Deficit.

Supreme Court Report

by Rowland L. Young



ON JULY 6, a divided Court announced what appears to be a substantial limitation on the doctrine of *Parker* v. *Brown*, a 1943 decision holding that the Sherman Act does not apply to restraints on trade imposed by state law. The new decision seems to have narrowed *Parker* to a holding that only state officials, acting under state legislation, are exempt. The decision leaves the law in doubt, because only three justices joined in Justice Stevens's plurality opinion, with Chief Justice Burger and Justice Blackmun concurring only in the result. Justice Stewart's strong dissent, in which Justices Powell and Rehnquist join, points out that the new decision is not entirely consistent with some of the language in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

This month's report covers two other antitrust law cases, one holding that an allegation of a conspiracy to prevent the expansion of a proprietary hospital was closely enough connected with interstat commerce to raise a Sherman Act que tion, and the other dealing with the app' cation of the Robinson-Patman Act drugs sold to nonprofit hospitals at lower prices than to retail druggists.

On May 24, the Court refused to find an "act of state" in the refusal of Cuban authorities to return money mistakenly paid to confiscated Cuban businesses instead of to the former owners. The case is curious, both because of the complex factual situation and because only three justices (Chief Justice Burger, Justices Powell and Rehnquist) join in the major premise of Justice White's opinion for the Court—namely, that the act of state doctrine does not apply to commercial obligations of governments.

On June 21, the Court upheld a city ordinance that required voter approval of any changes in zoning restrictions. It also upheld a local school board's right to fire teachers who struck in defiance of state law. Other cases include one involving the constitutionality of a referendum on a zoning change and another on the validity of presidentially imposed licenses for the importation of crude oil.

State Sanction No Excuse for Sherman Act Violation

The first antitrust case was *Cantor* v. *Detroit Edison Company*, ___ U.S. ___, 49 L.Ed. 2d 1141, 96 S.Ct. 3110, 44 U.S.L.W. 5357, decided July 6. The decision held that action by a regulated public utility was not immune from Sherman Act liability even though the action in question was required by a state regulatory board.

Detroit Edison supplies the electricity for southeastern Michigan. It also furnishes about half of the light bulbs used in that area. Customers are billed for their electricity and are entitled to light bulbs at no additional charge. The bulb exchange program is included in the co. pany's tariff and could not be changed without the approval of the Michigan Public Service Commission.

Cantor, a druggist who also sells light bulbs, brought this Sherman Act suit against Detroit Edison, alleging that Edison's providing light bulbs was an unreasonable restraint of trade in violation of the Sherman Act. Both the district court and the Sixth Circuit held that the practice was exempt from federal antitrust laws under *Parker* v. *Brown*, 317 U.S. 341 (1943), a case that held that action by state officials under state legislation d.. not violate the Sherman Act. See 513 F. 2d 630 (1975).

In the new case, the Court reversed and remanded on the ground that the exemption created in *Parker* is limited to official action taken by state officials, and that here the only defendant was a private utility. The opinion of the Court was written by Justice Stevens. The Court reasoned that, while Detroit Edison could not maintain its lamp exchange program without the approval of the state commission and could not abandon it without permission, the option of having such a program was primarily the company's. "There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law," the Court said.

The Court also rejected the argument that federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies: "... [M]erely because certain conduct may be subject both to state regulation and to the fe leral antitrust laws does not necessarily mean that it must satisfy inconsistent standards," the Court declared. "second, even assuming inconsistency, we would not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs." Enforcement of the Sherman Act here would not interfere with Michigan's regulation of its electric utilities, the Court added.

The Court added that *Eastern Railway Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961), was not applicable. That case held that lobbying by railroads against legislation favorable to motor carriers was not a violation of the Sherman Act. *Noerr*, said the Court, "did not involve any question of either liability or exemption for private action taken in compliance with state law."

To grant an exemption here, the Court contended, would "give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest."

The chief justice concurred in the judgment and in Parts I and III of Justice Stevens's opinion. He disagreed, however, with the plurality's assertion that the *Parker* exemption is limited to suits against state officials.

Justice Blackmun concurred in the judgment in an opinion that took the position that the Sherman Act generally supersedes inconsistent state laws and

that "at least for now" a "rule of reason" should be applied that "state-sanctioned anti-competitive activity must fall like any other if its potential harms outweigh its benefits."

Justice Stewart, joined by Justices Powell and Rehnquist, dissented, arguing that the Court was "trivializing" *Parker* to the point of overruling that decision. The dissent took the position that *Parker* had held that the Sherman Act did not undertake to prohibit restraints of trade imposed by a state and that the Court's distinction between "the exemptive force of mandatory state rules adopted at the behest of private parties and those adopted pursuant to the State's unilateral decision is flatly inconsistent with the rationale of *Noerr*." "Today's holding will not only penalize the right to petition but may very well strike a crippling blow at state utility regulation," the dissent asserted.

Conspiracy against Hospital Covered by Sherman Act

In another antitrust case, *Hospital Building Company* v. *Trustees of Rex Hospital*, 425 U.S. 738, 48 L.Ed. 2d 338, 96 S.Ct. 1848, 44 U.S.L.W. 4683, decided May 24, a unanimous Court held that a complaint of a conspiracy to prevent the expansion and relocation of a propriety hospital was a complaint upon which relief could be granted under the Sherman Act. Both the district court and the Fourth Circuit dismissed on the ground that the complaint did not adequately allege a "substantial effect" on interstate commerce. See 511 F. 2d 678 (1975).

The complaint was filed by a proprietary hospital in Raleigh, North Carolina, alleging that the trustees and officers of a private, tax-exempt hospital, along with the executive secretary of the local agency responsible for making recommendations on the need for additional hospital facilities, had acted together to block a planned relocation and expansion of the proprietary hospital. The petitioner's complaint alleged that it purchased 80 per cent of its medicines and supplies from out-of-state sellers, spending $112,000 in this manner in 1972. It also stated that a substantial number of its patients come from out of state and that a large proportion of its revenue comes from out-of-state insurance companies or from the federal government.

The Supreme Court reversed and remanded in an opinion by Justice Marshall. The Court cited prior cases holding that "[W]holly local business restraints can produce the effects condemned by the Sherman Act," that, as long as the restraint in question "substantially and adversely affects interstate commerce," the nexus required for Sherman Act coverage is established. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze," the Court declared.

The Court said that, "The complaint, fairly read, alleges that if respondents and their coconspirators were to succeed in blocking petitioner's planned expansion, petitioner's purchases of out-of-State medicines and supplies as well as its revenues from out-of-State insurance companies would be thousands and perhaps hundreds of thousands of dollars less than they would otherwise be."

Robinson-Patman Covers Drugs Purchased by Hospitals

Abbott Laboratories v. *Portland Retail Druggist Association*, 425 U.S. 1, 47 L.Ed. 2d 537, 96 S.Ct. 1305, 44 U.S.L.W. 4394, decided March 24, was a third antitrust case. The decision dealt with the construction of the phrase "purchases of their supplies for their own use" in the Nonprofit Institutions Act, which exempts purchases by hospitals and other charitable institutions from the Robinson-Patman Act.

The Robinson-Patman Act makes it unlawful to discriminate in price between different purchasers of like commodities when "the effect of such discrimination may be substantially to lessen competition." The Nonprofit Institutions Act exempts from Robinson-Patman some purchases made by hospitals and other charitable institutions. The issue before the Court was the meaning of "purchases of their supplies for their own use" in the case of medicines purchased by hospitals.

The suit was brought by an Oregon nonprofit corporation against twelve manufacturers of pharmaceutical products, alleging, among other counts not before the Court, that they had discriminated between nonprofit hospitals and retail druggists. The pharmaceutical manufacturers pleaded the exemption granted by the Nonprofit Institutions Act as an affirmative defense. The district court ruled that the medicines in question were purchases by nonprofit hospitals "for their own use," which were covered by the exemption. On an interlocutory appeal the Ninth Circuit vacated and remanded. 510 F. 2d 486 (1974).

The Supreme Court vacated and remanded in an opinion by Justice Blackmun. The Court found ten categories of dispensation of drugs by hospitals, three of which it said were clearly for the hospital's "own use" and therefore within the exemption: drugs for inpatient use, for emergency room use, and for outpatients for use on hospital premises. The Court decided that drugs for inpatients' personal use upon release and for outpatients' personal use away from the hospital premises also fell within the exemption, but not refills of such prescriptions. Drugs for the personal use of hospital employees and students and for physicians were held to be within the exemption so long as they were for the personal use of the employee, student, or physician, or their dependents, but not when they were to be used by anyone else. The Court said that drugs sold to the so-called "walk-in" buyer at the hospital pharmacy were not within the exemption.

Justice Marshall wrote a concurring opinion to emphasize his view that he did not read the Court's opinion "as foreclosing hospitals—or other exempted institutions—from expanding their charitable activities in highly untraditional ways and still qualifying for the exemption."

Justice Stewart, joined by Justice Brennan, dissented, arguing that the decision of the Ninth Circuit was correct.

No "Act of State" in Repudiation of Debts

On May 24, the Court held that there was no "act of state" in the failure of Cuban authorities to return to an American-based firm funds mistakenly paid for cigars sold to it by Cuban firms whose businesses were appropriated by the Cuban government. The case was *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 48 L.Ed. 2d 301, 96 S.Ct. 1854, 44 U.S.L.W. 4665.

In 1960, the Communist Cuban government seized five Cuban cigar manufacturing firms whose owners fled to the United States. The Cuban government appointed "interventors" to run the businesses, and the interventors continued to ship cigars to foreign purchasers. At the time of intervention, three firms owed some $477,600 for cigars shipped before the intervention.

The suit began when both the former owners of the seized businesses and the interventors asserted the right to some $700,000 due from the importers for shipments made after the intervention. The district court held that the act of state doctrine required it to give full effect to the 1960 confiscation and that the interventors were entitled to the postintervention sales proceeds. It held, however, that the situs of the preintervention sale proceeds was the United States and that the 1960 seizures did not reach those accounts, even though they had been mistakenly paid to the interventors. The district court held that the importers were entitled to set off the amounts they had mistakenly paid against the amounts due for their postintervention purchases. Two of the importers owed more than the interventors were obligated to them, and so they were satisfied, but Dunhill was

from—

Bennett C. Whitlock, Jr., President
American Trucking Associations
1616 P Street, N.W., Washington, D. C. 20036

No. 35
March 15, 1978

truck line

ALASKA TRUCKING
ASSOCIATION, INC.

MOTOR CARRIERS, RATE BUREAU MANAGERS DEFEND COLLECTIVE RATE MAKING BEFORE SENATE SUBCOMMITTEE

Eliminating the trucking industry's antitrust immunity for collective rate making would force freight transportation costs up for hundreds of towns and destroy the coordinated shipping network the nation enjoys, witnesses told the Senate Judiciary Subcommittee on Antitrust earlier this week.

TWO DAYS OF HEARINGS

Testifying before the subcommittee on March 10 and 13 were panels of motor carrier executives and rate bureau managers as well as representatives of other trucking organizations and the Teamsters Union.

KENNEDY QUESTIONS RATE MAKING

Since last fall the subcommittee, chaired by U.S. Sen. Ted Kennedy, D-Mass., has been conducting an inquiry into the trucking industry's collective rate making practices.

RATES SET IN "CLOSED MEETINGS"

"We know that most trucking companies charge the same rates for their services," Kennedy said at the opening of Friday's hearing. "We know that these rates are set in closed meetings by the carriers themselves. And we know that the Interstate Commerce Commission can give only minimal scrutiny to the thousands of rates filed with it every day."

COMPETITION AN ISSUE

According to Kennedy, concentration in the trucking industry is accelerating, and it's not clear that ICC regulation has had a marked effect in stemming this concentration in a "naturally competitive industry.

"By allowing carriers to set rates collectively and by authority, the ICC may well have made matters worse," Kennedy suggested.

(over)

RATE MAKING NEEDED FOR "EQUAL TREATMENT"

However, Gene T. West of Consolidated Freightways Corp., Menlo Park, Cal., disputed Kennedy's allegation and said that without collective rate making "there could be no such thing as a fair, nondiscriminatory, nonpreferential rate structure under which shippers could receive equal treatment in the transportation of their supplies, materials, goods and products" regardless of location.

TRANSPORT SYSTEM WOULD FALL APART

Noting that fully one-third of Consolidated Freightways' shipments involve joint-line service with over 1,200 connecting carriers, West said the "voluntary, integrated system of transportation which exists today" would fall apart without collective rate making.

Shippers would have to work out arrangements with all the separate carriers that move their freight, West said.

SHEER LOGISTICS DEMAND RATE MAKING

"Sheer logistics," said James T. Hite, III, of Interstate Motor Freight System, Grand Rapids, Mich., is another reason why collective rate making can't be eliminated without altering many other facets of the society and the economy.

BILLIONS OF INDIVIDUAL RATES

He said the collective rate making process "maintains and organizes in a structured manner rate information that is a multiple of thousands of carriers, tens of thousands of geographical points, and literally billions of individual rates."

It would be logistically impossible, he continued, for the ICC or some federal agency to approve literally billions of prices or rates on an individual basis every time one was changed for whatever the reason.

SMALL FIRMS HELPED

Danville, N. Y., motor carrier Timothy L. Shay of Shay's Service Inc., also told the subcommittee that rate making on a collective basis makes it possible for smaller trucking firms to compete.

LACK EXPERTISE TO FIGURE RATES

Small firms simply don't have the time, the financial resources and the expertise to cost out all of their own rates, and as a result they rely on rate bureaus, he explained.

NOT A ONE-WAY STREET

Collective rate making is not a one-way street oriented for motor carriers, Gerald Cole of Coles Express said. Cole, whose company operates out of Bangor, Me., said: "All shippers or receivers, or for that matter, any interested parties, are afforded adequate opportunity to participate in the rate making process."

Another panelist, William J. Jones of Wilson Trucking Co. in Fisherville, Va., charged that small carriers would suffer most from the loss of collective rate making. "Large carriers don't dominate rate bureaus, as the experience of my company shows," he said.

PROTECTS SMALL SHIPPERS TOO

Shay added that rate bureaus help small trucking firms price their services yet "we have no problem setting an independent rate." He also said his participation in a rate bureau helps protect small shippers who aren't sophisticated enough to know if rates are fair.

TOWNS RECEIVE SERVICE

Answering a question from Sen. Kennedy about a 1975 DOT study that shows fifty percent of small towns are not served by carriers who have authority, Hite explained that just because every carrier with authority to serve a town doesn't provide that service still doesn't mean the town isn't served by regulated carriers through interlining or other arrangements.

EXEMPT TRANSPORTATION DEBATED

West also refuted an allegation about the stability of exempt transportation by pointing out that the U.S. Department of Agriculture is considering some form of regulation to save small companies hauling agricultural commodities.

TEAMSTERS SUPPORT

Testifying for the Teamsters Union was Lucien Boutin of Boston, Mass., who said that eliminating collective ratemaking would seriously affect the union's wage base because it is the only protection they appear to have.

RATE BUREAUS PARTICIPATE

In addition to James Harkins, who testified on behalf of the National Classification Board, four rate bureau executives appeared to testify on how rate bureaus operate. They were Vernon Farriba, Southern Motor Carriers Rate Conference; John Womack, Central and Southern Motor Freight Tariff Association; James T. Henry, Eastern Central Motor Carriers Association; and Samuel Herold, Middle Atlantic Conference.

(over)

IMMUNITY IS NOT TO FIX PRICES

They explained that "the immunity granted to carriers by the commission is not an immunity to fix transportation rates and prices. It is strictly limited to an immunity from the antitrust laws to permit carriers to initiate, discuss and agree upon proposals which will be submitted to the commission for its regulatory review."

Additional hearings are planned by the subcommittee March 23 in Chicago and March 24 in Denver, and April 4 and 18 in Washington, D. C.

Yet to be heard from in the hearings are shipper groups, several of which are scheduled to testify April 18.

# # # # # # # #

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January 27, 1978

P. W. Benediktsson
3915 Lacarno Drive
Anchorage, AK 99504

Re: Anit-trust legal developments

Dear Ben:

I was unable to find in the printed law reports, the Court of Appeals case which I mentioned to you, but I think that I did find two others that I think are very significant. One is Mount Hood Stages v. Greyhound which deals with the implied anti-trust exemption for regulatory activities and Kurek v. Pleasure Driveway and Park District of Peoria which again limits the imply exemption under the state anti-trust laws. Both of these cases I think should be kept by you and illustrate the importance of further clarifying the exemption that I believe the Alaska Carriers presently have a third case is Motor Carriers Traffic Assn. v. United States which decides the appropriateness of Ex Parte 297. Undoubtedly, Wayne has this although I am sending him a copy of this letter for his information. I think it is apparent that there is going to continue to be a concentrated effort to reduce the anti-trust immunity extended to various motor carrier rate bureaus. It behooves us to get a clear statement, if possible, by the Alaska Legislature or by the Transportation Commission of the status of these agreements.

Very truly yours,

Andrew E. Hoge

Andrew E. Hoge

AEH/pfm
Enclosures
cc: Wayne Lucore

that the pilferage was from penalize stealage from an interstate movement or interstate storage, but the *presumption* would not apply to any taking save one from a pipeline system.

The 1966 amendments, as discussed by the majority, sharply make the differentiation. They did not even purport to enlarge the presumption; they simply expanded the types of container embraced in the enactments. In this addition Congress was careful to enumerate each of them separately, manifesting that the legislators were preserving their several identities. With these identifications in mind, "pipeline system" was included for the first time and the presumption was confined to a pipeline system. Obviously, it was not intended to apply elsewhere.

The reason for this inclusion is obvious: a pipeline system runs for thousands of miles and Congress needed to cover every foot of it. It wished protect transportation by pipeline, a somewhat recent utility. Interestingly, the presumption provision was written by the Department of Justice and engrossed ipsissimis verbis within the law.

The Federal Government has no reason for being here.

MOTOR CARRIERS TRAFFIC ASSOCIATION, INC., Petitioner,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents,

and

Drug & Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, National Industrial Traffic League, Intervening Respondents.

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., Petitioners,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents,

and

Drug & Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, National Industrial Traffic League, Intervening Respondents,

and

Bulk Carrier Conference, Inc., Intervening Respondent.

ALL ISLAND DELIVERY SERVICE, INC., Feuer Transportation, Inc., John A. Jungerman Son, Inc., Pinter Bros., Inc., Troiano Express Co., Inc., Petitioners,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents,

and

Drug & Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, National Industrial Traffic League, Intervening Respondents.

Nos. 76-1329, 76-1425 and 76-1426.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 7, 1976.

Decided July 21, 1977.

Proceedings were instituted to review Interstate Commerce Commission's approval of agreements establishing transportation industry rate bureaus. The Commission entered order directing that rate bureau agreements would not be accorded antitrust immunity under certain specified conditions, and various motor carrier rate bureaus and carrier members of rate bureaus appealed. The Court of Appeals, Mr. Justice Clark, sitting by designation, held that: (1) motor carrier rate bureaus did not have constitutional right to file protests

with respect to independent action proposals of any of their member carriers, and Commission was authorized to reverse itself and prohibit rate bureaus from making such protests as a precondition to granting bureaus immunity from antitrust laws; (2) Commission had authority to enter order prohibiting carriers that were in any way affiliated with a shipper from serving on rate bureau's board of directors, general rate committee or any other committee having an effect, either direct or indirect, upon rate-making function of bureau, without specific prior Commission approval, and (3) Commission had authority to prohibit motor carrier rate bureaus from operating as profit-making entities.

Affirmed.

Widener, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Commerce ⇐85.33

Motor carrier rate bureaus did not have constitutional right to file protests with respect to independent action proposals of any of their member carriers, and Interstate Commerce Commission was authorized to reverse itself and prohibit rate bureaus from making such protests as a precondition to granting bureaus immunity from antitrust laws. Interstate Commerce Act, §§ 5a(2, 7), 216, 216(e), 49 U.S.C.A. §§ 5b(2, 7), 316, 316(e); U.S.C.A.Const. Amend. 1.

2. Commerce ⇐85.33

Interstate Commerce Commission had authority to enter order prohibiting motor carriers that were in any way affiliated with a shipper from serving on a rate bureau's board of directors, general rate committee or any other committee having an effect, either direct or indirect, upon rate-making function of the bureau, without specific prior Commission approval; such order had rational basis, and was valid. Interstate Commerce Act, §§ 5a, 5a(7), 49 U.S.C.A. §§ 5b, 5b(7).

3. Commerce ⇐85.33

Action of Interstate Commerce Commission in proceeding to review its prior approval of agreements establishing transportation industry rate bureaus constituted rule making. 5 U.S.C.A. § 551(4); Interstate Commerce Act, §§ 5a, 5a(7), 49 U.S.C.A. §§ 5b, 5b(7).

4. Commerce ⇐85.33

Interstate Commerce Commission had authority to prohibit motor carrier rate bureaus from operating as profit-making entities. Interstate Commerce Act, §§ 5a, 5a(7), 49 U.S.C.A. §§ 5b, 5b(7).

J. Raymond Clark, Washington, D. C. and A. W. Flynn, Jr., York, Boyd & Flynn, Greensboro, N. C., for petitioner in No. 76-1329.

Bryce Rea, Jr., Washington, D. C., Counsel for petitioners in No. 76-1426.

Donald I. Baker, Asst. Atty. Gen., Lloyd John Osborn, Dept. of Justice, Washington, D. C., for the United States of America, respondent.

Robert S. Burk, Acting Gen. Counsel, and Hanford O'Hara, Associate Gen. Counsel, Interstate Commerce Commission, Washington, D. C., for the Interstate Commerce Commission, respondents in Nos. 76-1329, 76-1425 and 76-1426.

John F. Donelan, John M. Cleary and Frederic L. Wood, Washington, D. C., for the National Industrial Traffic League, intervening respondent in Nos. 76-1329, 76-1425 and 76-1426.

Daniel J. Sweeney, Belnap, McCarthy, Spencer, Sweeney & Harkaway, Washington, D. C., for intervenor, Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League and National Small Shipments Traffic Conference, in Nos. 76-1329, 76-1425 and 76-1426.

William E. Kenworthy, Denver, Colo., and Bryce Rea, Jr., Washington, D. C., for petitioner Rocky Mountain Motor Tariff Bureau, Inc. in No. 76-1425.

Leonard A. Jaskiewicz and Edward J. Kiley, Washington, D. C., for intervenor Bulk Carrier Conference, Inc. in No. 76-1425.

Before CLARK, Associate Justice*, BUTZNER and WIDENER, Circuit Judges.

* Tom C. Clark, Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

MOTOR CARRIERS

Mr. Justice CLARK:

These three consolidated ap the Interstate Commerce Comm to set aside, in part, Orders th tered by the Commission in E 297, *Rate Bureau Investigation*, a broad scale study of the regu portation industry's various coll making organizations, known a reaus".

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1. 49 U.S.C. §§ 5b(4), (5), and (6) proval of agreements which:

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Mr. Justice CLARK:

These three consolidated appeals from the Interstate Commerce Commission seek to set aside, in part, Orders that were entered by the Commission in Ex Parte No. 297, *Rate Bureau Investigation*, which was a broad scale study of the regulated transportation industry's various collective rate-making organizations, known as "rate bureaus".

The history of collective rate-making efforts by surface transportation carriers in the United States is both long and controversial. See: *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897); *United States v. Joint Traffic Association*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); *Western Traffic Assn.—Agreement*, 276 I.C.C. 183 (1949). The Congressional action took the form of the Reed-Bulwinkle Act of 1948, 62 Stat. 472, Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b). Congress decided that the problem was one of reconciling the demands of the Nation's transportation system with the policies of the antitrust laws. This Act left "the antitrust laws to apply with full force and effect to carriers . . . except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted." H.R.Rep.No.1100, 80th Cong., 1st Sess., at 5, U.S.Code Cong.Serv.1948, pp. 1844, 1848. Surface carriers that are parties to agreements concerning rates and related matters can submit such agreements to the Commission for approval and, if approved, the parties to the agreements are relieved from the operation of the antitrust laws with regard to the same. 49 U.S.C. § 5b(2). The Act mandates the Commission to approve the agreement only if it finds that the agreement is in furtherance of the national transportation policy and is not prohibited by 49 U.S.C. §§ 5b(4), (5), and (6).[1] The Commission, in carrying out this directive of Congress is the creator of the rate bureau since without immunity from the antitrust laws, it cannot operate. Indeed, the Act requires that rate bureaus operating under approved agreements must maintain and keep open for inspection accounts and records and to file such reports as the Commission requires. 49 U.S.C. § 5b(3). The Commission is also given authority to investigate and determine whether any previously approved agreement, or any terms or conditions upon which the approval was granted, are in conformity with the standards of 49 U.S.C. § 5b(2), and further, the Commission is given the power to terminate or modify its prior approval in order to insure compliance with the standards of the Act. 49 U.S.C. § 5b(7).

Pursuant to 49 U.S.C. § 5b, the Commission has from time to time approved rate bureau agreements. See, e.g., *Western Traffic Assn.—Agreement, supra; Rocky Mountain Carriers—Agreement*, 302 I.C.C. 569 (1958); *Motor Carriers Traffic Assn., Inc.—Agreement*, 301 I.C.C. 781 (1957); *Eastern Tank Carriers—Agreement*, 301 I.C.C. 359 (1957); *Middle Atlantic Conference—Agreement*, 283 I.C.C. 683 (1951).

It was to review its approval of such prior Agreements that Ex Parte No. 297 was instituted in 1973, posing twenty-eight areas of inquiry, as specifically authorized by 49 U.S.C. § 5b(7). Numerous parties indicated an intention to participate in the proceedings; consequently, by Order dated November 15, 1973, the Commission directed the Bureau of Enforcement "to file and

1. 49 U.S.C. §§ 5b(4), (5), and (6) prohibit approval of agreements which:

(1) are among carriers of different specified classes and are not limited to matters relating to transportation under joint rates or over through routes;

(2) which involve "pooling" under § 5(1) of the Act (49 U.S.C. § 5(1)); or

(3) which do not accord to each party the "free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."

serve a statement of verified facts and of argument setting forth the matters developed in the field investigations, as well as from other sources, regarding the conduct of the carrier rate bureau as a catalyst for the subsequent submission of initial statements of facts, arguments and opinion by the respondents and other interested parties." *First Report*, 349 I.C.C. at 816. Several hundred initial and reply statements were filed in response. The Orders of the Commission arising out of this survey directed that the agreements of rate bureaus would not thereafter be accorded antitrust immunity under 49 U.S.C. § 5b; (1) if such bureaus protest the independent action proposals of any of their member carriers; (2) if such carrier members are affiliated with shippers, unless the agreements of the bureau prohibit such carriers from serving on the bureau's Board of Directors, general rate committees or any other committees which have an effect directly or indirectly upon the rate-making function of the bureau, without prior Commission approval; and, finally, (3) if the bureaus involved are operating as profit-making entities.

The petitioners include Motor Carrier Traffic Association, Inc. (MCTA), a motor carrier rate bureau operating for profit, which challenges the withdrawal of antitrust immunity from bureaus which operate for profit; Rocky Mountain Motor Traffic Bureau, Inc. (Rocky Mount), a motor carrier rate bureau challenging the restrictions on carrier members of bureaus affiliated with shippers; and All Island Delivery Service, Inc., Pinter Bros., Inc., Troiano Express Co., Inc., Feuer Transportation, Inc., and John A. Jungerman Son, Inc., individual carrier members of the Middle Atlantic Conference, a rate bureau, challenging the provisions of Ex Parte 297 which withdraw antitrust immunity from rate bureaus protesting independent action proposals of member carriers before the Commission. Additionally, several organizations interested in the outcome have intervened. Respondents are the Interstate Commerce Commission and the United States (statutory respondent under 28 U.S.C. § 2344). This court's jurisdiction to review lies under 28 U.S.C. §§ 2321 and 2341 *et seq.*

The questions raised by the petitioners range from First Amendment rights to a charge of "arbitrary and capricious conduct" on the part of the Commission. None of the claims are meritorious, as we will briefly show below. In so finding, we uphold the Orders of the Commission.

[1] 1. At the outset we note that Section 5a(2) of the Act (49 U.S.C. § 5b(2)) authorizes the Commission to approve an agreement made under the provisions of the Section "if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) . . . . should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied." The Commission followed this procedure and, in approving the applications, provided that they were subject to "such [general] terms and conditions as the Commission may prescribe". In addition we note that Section 5a(7) of the Act (49 U.S.C. § 5b(7)) specifically authorizes the Commission "to investigate and determine whether any agreement previously approved by it under this section . . . is not or are not in conformity with the standards set forth in paragraph [5a(2), 49 U.S.C. § 5b(2)]"—in "furtherance of the national transportation policy." In addition, Section 5a(7) provides:

> . . . after such investigation, the Commission shall by order terminate or modify its approval of such an agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard . . .

Despite these clear and unequivocal words, petitioners say that under the First Amendment and Section 216 of the Act, 49 U.S.C. § 316, the rate bureaus have a constitutional right to file such protests. Section 216(c) of the Act, 49 U.S.C. § 316(c), does provide that "Any person, State board, organization, or body politic may make com-

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plaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this Section or of Section 217 (49 U.S.C. § 317). . . ." It may be that under Section 216 or 217 individual protests may be filed but, strangely enough, only Section 5a deals with "agreements concerning rates and related matters", and it requires prior approval of the Commission in order for the parties to the agreements to escape the penalties of the antitrust laws. To permit a rate bureau to protest the proposals of a member individually so chills the individual proposal that it stands little chance of adoption, while providing the opportunity for misuse of the bureaus as policing agencies against individual action. We agree with the Commission that "it is necessary to limit the bureaus' right to protest in order to foster independent action. The right of independent action is paramount to maintaining the integrity of the grant of antitrust immunity." The interpretation pressed by the petitioners would operate to repeal Section 5a, the very heart of the Act, leaving the bureaus without statutory authorization as well as antitrust immunity.

Petitioners urge that the Commission cannot reverse itself and now impose restrictions on the bureaus and that such action is arbitrary and capricious. The short answer is, of course, that reversal of views is no anomaly in democratic societies. In fact, it is the principal tool by which improvement is effected. The Supreme Court itself not only engages in the practice but has approved of its use by the Commission. See: *American Trucking Assns., Inc. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967). Further, there is nothing irrational about the new rule that the Commission intends to put into effect. In fact, the new rule is in the true tradition of our free enterprise system which has been the keystone of our economic accomplishment for nearly a century. The Commission, in so acting, exercises its legislative function, and, as the Fifth Circuit has said: "may look beyond [the record] and draw upon its own expertise and experience." *General Telephone Co. v. United States*, 449 F.2d 846, 862 (1971). Based upon its experience, the Commission found that, as usual, more goes on than meets the eye. The paucity of formal bureau protests does not adequately reflect the number of threatened protests, nor has the mere existence of the right to protest had a significant anti-competitive impact, both Commission findings. Certainly the purpose of the Commission was to stimulate competition by removing the inhibitions against the filing of independent actions, a move not only in the spirit of Section 5a of the Act but in furtherance of the national transportation policy which is the essence of this case.

[2] 2. We now reach the challenge to the order prohibiting carriers that are in any way affiliated with a shipper from serving on a bureau's board of directors, general rate committee or any other committee which has an effect, either directly or indirectly, upon the rate-making function of the bureau, without specific prior Commission approval. It is said that this requirement is beyond the Commission's statutory authority and is also arbitrary and capricious. As we have already indicated, Section 5a(7) of the Act, 49 U.S.C. § 5b(7), grants the Commission full and complete authority to act as it did, and we shall not discuss the point further. See: *United States v. Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (decided June 17, 1976); *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742, 755, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972). Nor does the Commission's Order violate a legislative policy favoring rate bureau organizations. The Order does not destroy the basic purpose of the bureaus, contrary to the bureaus' claim, as the restrictions are not absolute—the Order itself permits exceptions. Moreover, we note that the Congress directed that the Commission should weigh the conflicting demands of the antitrust laws and the surface transportation system, resolving the same by the application of a standard involving the National Transpor-

tation Policy. H.R.Rep.No.1100, 80th Cong. 1st Sess. at 5, U.S.Code Cong.Serv.1948, p. 1844. Such a resolution requires consideration, not only of efficiency but of competitive impact. See: *McLean Trucking Co. v. United States*, 321 U.S. 67, 87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

Nor do we believe that the action of the Commission in this regard lacked a rational basis. Our study of the problem shows that the possibility of a conflict of interest is self-evident, although none was actually shown. In such a state of the record, it appears rational for the Commission to prohibit shipper-affiliated carrier participation in those activities where the possibility of a conflict of interest is high, but to permit exemptions through Commission approval of bureau applications. The Commission adopted a stance which in effect, is a case by case disposition, rather than a general rule. We find that this procedure overcomes the petitioners' objection.

The remaining contentions regarding this rule are frivolous and require no discussion.

[3] 3. The final issue presented is the question of rate bureau profit-making activities. It is contended that prohibiting profit-making is beyond the power of the Commission and that the action involved here should be classified as adjudication, rather than rule-making. As we have indicated, *supra*, we consider the action of the Commission in Ex Parte 297 to constitute rule making—and, we add, all of the petitioners, save one, agree. Under the Administrative Procedure Act "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). Petitioner points to no applicable provision of law which requires a full-dress hearing here, nor have we found any.

[4] The petitioner finally claims that the Commission has no power to prohibit profit-making and to do so is an unconstitutional deprivation of property, but does not support this view with authority. In fact, to the contrary, the Commission found the rate bureaus to be service organizations "financed by fee assessments of the members, and not entrepreneurial. As such, the element of profit has been attacked as not compatible with the strict service function of organizations operating with antitrust immunity." *First Report*, 349 I.C.C. at 826. The bureaus act as agents for the carriers and would be in violation of the antitrust laws without the immunity bath furnished by the Commission. All of the expenses of the bureaus are passed on to the shippers and ultimately to the public. If there are services to the public, reimbursement should be on a compensatory basis. The cost of the bureaus as profit-making organizations chargeable to the shipper and the public is inconsistent with the public interest. If this drives the bureaus out of business, so be it. The public will not be saddled with their profits and at the same time afford them antitrust immunity. The orders of the Commission are

Affirmed.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in the opinion of the court in Nos. 76-1329 and 76-1425. But, in No. 76-1426, I respectfully dissent.

In deciding to prohibit rate bureaus from protesting independent action proposals of member carriers, the Interstate Commerce Commission quotes language from *Arbet Truck Lines, Inc. v. Central States Motor Freight*, 321 I.C.C. 460, 471, stating that "[i]t is necessary to harmonize Section 5a [49 U.S.C. § 5b] and Sections 216(e) and (g) [49 U.S.C. §§ 316(e) and (g)] of the Act."

49 U.S.C. § 5b relieves parties to an approved agreement (rate bureaus) from the operation of the antitrust laws. 49 U.S.C. § 316(e) provides in pertinent part:

"Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title."

For a number of years th effect to both parts of the ed by Congress. *Central Common Carriers—Agree* 773 (1957); *Southern M Agreement*, 297 I.C.C. 6 *Atlantic Conference—A* I.C.C. 683, 689 (1951).

In *Southern Motor Carri* monized the two sections in way:

"The right to take indepe conference members i from, and does not co equally established right ence, or any other perso to protest or complain of After a carrier takes ind the action taken stands o same footing with respe ence, in its efforts to foste stable rate structure in th members as a whole, as taken by a carrier not a m ber. To interpret sectio would not only contraven of section 216, paragraph stated, and of the national policy, but would jeopardi free hearing so necessary the development of comp proceedings before the Co the foregoing reasons, we cord with the protestants i that the agreement be m hibit the conference from the suspension of member participating in complai before the Commission." 616.

But now, in spite of its fin practice of rate bureaus in has been conducted in a m generally fair and devoid of and in spite of its statem have not found evidence of abuse by rate bureaus in the right to protest," the ICC de rate bureaus' right to protest ordinated" to the right of i tion.

For a number of years the ICC has given effect to both parts of the statute as enacted by Congress. *Central States Motor Common Carriers—Agreement*, 299 I.C.C. 773 (1957); *Southern Motor Carriers—Agreement*, 297 I.C.C. 603 (1956); *Middle Atlantic Conference—Agreement*, 283 I.C.C. 683, 689 (1951).

In *Southern Motor Carriers*, the ICC harmonized the two sections in the following way:

> "The right to take independent action by conference members is distinguished from, and does not conflict with, the equally established right of the conference, or any other person or body politic to protest or complain of any such action. After a carrier takes independent action, the action taken stands upon exactly the same footing with respect to the conference, in its efforts to foster a sound and stable rate structure in the interest of its members as a whole, as any such action taken by a carrier not a conference member. To interpret section 5a otherwise would not only contravene the provisions of section 216, paragraphs (e) and (g), as stated, and of the national transportation policy, but would jeopardize the full and free hearing so necessary and essential to the development of complete records in proceedings before the Commission. For the foregoing reasons, we are not in accord with the protestants in their request that the agreement be modified to prohibit the conference from petitioning for the suspension of member-carrier rates or participating in complaint proceedings before the Commission." 297 I.C.C. at 616.

But now, in spite of its findings that "the practice of rate bureaus in protesting rates has been conducted in a manner that is generally fair and devoid of base motives," and in spite of its statement that "[w]e have not found evidence of any flagrant abuse by rate bureaus in the exercise of the right to protest," the ICC declares that the rate bureaus' right to protest must be "subordinated" to the right of independent action.

The statistical background, however, which in this case must speak with more authority than mere feelings, does not show a threat to independent action; indeed I submit the contrary is shown. Of the 7,468 independent actions in 1973, the seven bureaus protested 199, only 2.66 percent. Middle Atlantic, for example, protested 46 of 1,064 independent actions in its tariffs in the twelve months ending May 31, 1973. Thirty-four of the 46 protested tariffs were rejected, suspended, or withdrawn. In 1973, Rocky Mountain Tariff Bureau protested 6 of 320 independent actions in its tariffs. Four of the six protested tariffs were suspended or withdrawn. Southern Motor Carriers Rate Conference protested 26 of the 2,914 independent actions in its tariffs. Thirteen of the 26 protested tariffs were suspended. The low percentage of bureau protests and the high percentage of their success indicate to me that the system is working as Congress intended, that is, as an "advantage and aid to the Commission in the administration of the act and the prevention of destructive rate cutting" in a situation where "[i]t is manifestly impossible, as a practical matter, for the Commission to scrutinize each and all of the multiplicity of tariffs and rate changes that are constantly being filed." *Middle Atlantic Conference*, 283 I.C.C. at 689.

For these reasons, I would preserve the rate bureaus' right to protest as Congress established it in code §§ 316(e) and (g).

Because I rely on the statutory provisions, I find no need to discuss, and express no opinion on, the first amendment issues raised in this appeal and somewhat persuasively presented under the *Noerr-Pennington* doctrine. *Ashwander v. T.V.A.*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1935) (Brandeis, J., concurring). See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1971).

lowing deductions for income tax, is a step in the direction of creating a true divorce between ownership and control and of undermining the basic nature and character of our society. It is a step away from an individualistic society and toward the corporate state.

By: Milton Friedman

Chapter IX

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Occupational Licensure

THE OVERTHROW OF the medieval guild system was an indispensable early step in the rise of freedom in the Western world. It was a sign of the triumph of liberal ideas, and widely recognized as such, that by the mid-nineteenth century, in Britain, the United States, and to a lesser extent on the continent of Europe, men could pursue whatever trade or occupation they wished without the by-your-leave of any governmental or quasi-governmental authority. In more recent decades, there has been a retrogression, an increasing tendency for particular occupations to be restricted to individuals licensed to practice them by the state.

These restrictions on the freedom of individuals to use their

resources as they wish are important in their own right. In addition, they provide still a different class of problems to which we can apply the principles developed in the first two chapters.

I shall discuss first the general problem and then a particular example, restrictions on the practice of medicine. The reason for choosing medicine is that it seems desirable to discuss the restrictions for which the strongest case can be made—there is not much to be learned by knocking down straw men. I suspect that most people, possibly even most liberals, believe that it is desirable to restrict the practice of medicine to people who are licensed by the state. I agree that the case for licensure is stronger for medicine than for most other fields. Yet the conclusions I shall reach are that liberal principles do not justify licensure even in medicine and that in practice the results of state licensure in medicine have been undesirable.

UBIQUITY OF GOVERNMENTAL RESTRICTIONS ON ECONOMIC ACTIVITIES MEN MAY ENGAGE IN

Licensure is a special case of a much more general and exceedingly widespread phenomenon, namely, edicts that individuals may not engage in particular economic activities except under conditions laid down by a constituted authority of the state. Medieval guilds were a particular example of an explicit system for specifying which individuals should be permitted to follow particular pursuits. The Indian caste system is another example. To a considerable extent in the caste system, to a lesser extent in the guilds, the restrictions were enforced by general social customs rather than explicitly by government.

A widespread notion about the caste system is that every person's occupation is completely determined by the caste into which he is born. It is obvious to an economist that this is an impossible system, since it prescribes a rigid distribution of persons among occupations determined entirely by birthrates and not at all by conditions of demand. Of course, this is not the way the system worked. What was true, and to some measure still is, was that a limited number of occupations were reserved to members of certain castes, but not every member of those

castes followed those occupations. There were some general occupations, such as general agricultural work, which members of various castes might engage in. These permitted an adjustment of the supply of people in different occupations to the demand for their services.

Currently, tariffs, fair-trade laws, import quotas, production quotas, trade union restrictions on employment and so on are examples of similar phenomena. In all these cases, governmental authority determines the conditions under which particular individuals can engage in particular activities, which is to say, the terms on which some individuals are permitted to make arrangements with others. The common feature of these examples, as well as of licensure, is that the legislation is enacted on behalf of a producer group. For licensure, the producer group is generally a craft. For the other examples, it may be a group producing a particular product which wants a tariff, a group of small retailers who would like to be protected from competition by the "chiseling" chain stores, or a group of oil producers, of farmers, or of steel workers.

Occupational licensure is by now very widespread. According to Walter Gellhorn, who has written the best brief survey I know, "By 1952 more than 80 separate occupations exclusive of 'owner-businesses,' like restaurants and taxicab companies, had been licensed by state law; and in addition to the state laws there are municipal ordinances in abundance, not to mention the federal statutes that require the licensing of such diverse occupations as radio operators and stockyard commission agents. As long ago as 1938 a single state, North Carolina, had extended its law to 60 occupations. One may not be surprised to learn that pharmacists, accountants, and dentists have been reached by state law as have sanitarians and psychologists, assayers and architects, veterinarians and librarians. But with what joy of discovery does one learn about the licensing of threshing machine operators and dealers in scrap tobacco? What of egg graders and guide dog trainers, pest controllers and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers? And what of the hypertrichologists who are licensed in Connecticut, where they remove excessive and

unsightly hair with the solemnity appropriate to their high sounding title?"[1] In the arguments that seek to persuade legislatures to enact such licensure provisions, the justification is always said to be the necessity of protecting the public interest. However, the pressure on the legislature to license an occupation rarely comes from the members of the public who have been mulcted or in other ways abused by members of the occupation. On the contrary, the pressure invariably comes from members of the occupation itself. Of course, they are more aware than others of how much they exploit the customer and so perhaps they can lay claim to expert knowledge.

Similarly, the arrangements made for licensure almost invariably involve control by members of the occupation which is to be licensed. Again, this is in some ways quite natural. If the occupation of plumbing is to be restricted to those who have the requisite capacity and skills to provide good service for their customers, clearly only plumbers are capable of judging who should be licensed. Consequently, the board or other body that grants licenses is almost invariably made up largely of plumbers or pharmacists or physicians or whatever may be the particular occupation licensed.

Gellhorn points out that "Seventy-five per cent of the occupational licensing boards at work in this country today are composed exclusively of licensed practitioners in the respective occupations. These men and women, most of whom are only part-time officials, may have a direct economic interest in many of the decisions they make concerning admission requirements and the definition of standards to be observed by licensees. More importantly, they are as a rule directly representative of organized groups within the occupations. Ordinarily they are nominated by these groups as a step toward a gubernatorial or other appointment that is frequently a mere formality. Often the formality is dispensed with entirely, appointment being made directly by the occupational association—as happens, for example, with the embalmers in North Carolina, the den-

[1] Walter Gellhorn, *Individual Freedom and Governmental Restraints* (Baton Rouge: Louisiana State University Press, 1956). Chapter entitled "The Right to Make a Living," p. 106.

tists in Alabama, the psychologists in Virginia, the physicians in Maryland, and the attorneys in Washington."[2]

Licensure therefore frequently establishes essentially the medieval guild kind of regulation in which the state assigns power to the members of the profession. In practice, the considerations taken into account in determining who shall get a license often involve matters that, so far as a layman can see, have no relation whatsoever to professional competence. This is not surprising. If a few individuals are going to decide whether other individuals may pursue an occupation, all sorts of irrelevant considerations are likely to enter. Just what the irrelevant considerations will be, will depend on the personalities of the members of the licensing board and the mood of the time. Gellhorn notes the extent to which a loyalty oath was required of various occupations when the fear of communist subversion was sweeping the country. He writes, "A Texas statute of 1952 requires each applicant for a pharmacist's license to swear that 'he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is neither a member of nor supports any group or organization that believes in, furthers or teaches the overthrow of the United States Government by force or any illegal or unconstitutional methods.' The relationship between this oath on the one hand and, on the other, the public health which is the interest purportedly protected by the licensing of pharmacists, is somewhat obscure. No more apparent is the justification for requiring professional boxers and wrestlers in Indiana to swear that they are not subversive . . . A junior high school teacher of music, having been forced to resign after being identified as a Communist, had difficulty becoming a piano tuner in the District of Columbia because, forsooth, he was 'under Communist discipline.' Veterinarians in the state of Washington may not minister to an ailing cow or cat unless they have first signed a non-Communist oath."[3]

Whatever one's attitude towards communism, any relationship between the requirements imposed and the qualities

[2] Ibid. pp. 140–41.
[3] *Ibid.*, pp. 129–30.

which the licensure is intended to assure is rather far-fetched. The extent to which such requirements go is sometimes little short of ludicrous. A few more quotations from Gellhorn may provide a touch of comic relief.[4]

One of the most amusing sets of regulations is that laid down for barbers, a trade that is licensed in many places. Here is an example from a law which was declared invalid by Maryland courts, though similar language can be found in statutes of other states which were declared legal. "The court was depressed rather than impressed by a legislative command that neophyte barbers must receive formal instruction in the 'scientific fundamentals for barbering, hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerves, structure of the head, face and neck, elementary chemistry relating to sterilization and antiseptics, disease of the skin, hair, glands and nails, haircutting, shaving and arranging, dressing, coloring, bleaching, and tinting of the hair'."[5] One more quotation on the barbers: "Of eighteen representative states included in a study of barbering regulations in 1929, not one then commanded an aspirant to be a graduate of a 'barber college,' though apprenticeship was necessary in all. Today, the states typically insist upon graduation from a barbering school that provides not less (and often much more) than one thousand hours of instruction in 'theoretical subjects' such as sterilization of instruments, and this must still be followed by apprenticeship."[6] I trust these quotations make it clear that the problem of licensing of occupations is something more than a trivial illustration of the problem of state intervention, that it is already in this country a serious infringement on the freedom of individuals to pursue activities of their own choice, and that it threatens to become a much more serious one with the continual pressure upon legislatures to extend it.

Before discussing the advantages and disadvantages of licensing, it is worth noting why we have it and what general political problem is revealed by the tendency for such special legislation to be enacted. The declaration by a large number of different state legislatures that barbers must be approved by a committee of other barbers is hardly persuasive evidence that there is in fact a public interest in having such legislation. Surely the explanation is different; it is that a producer group tends to be more concentrated politically than a consumer group. This is an obvious point often made and yet one whose importance cannot be overstressed.[7] Each of us is a producer and also a consumer. However, we are much more specialized and devote a much larger fraction of our attention to our activity as a producer than as a consumer. We consume literally thousands if not millions of items. The result is that people in the same trade, like barbers or physicians, all have an intense interest in the specific problems of this trade and are willing to devote considerable energy to doing something about them. On the other hand, those of us who use barbers at all, get barbered infrequently and spend only a minor fraction of our income in barber shops. Our interest is casual. Hardly any of us are willing to devote much time going to the legislature in order to testify against the iniquity of restricting the practice of barbering. The same point holds for tariffs. The groups that think they have a special interest in particular tariffs are concentrated groups to whom the issue makes a great deal of difference. The public interest is widely dispersed. In consequence, in the absence of any general arrangements to offset the pressure of special interests, producer groups will invariably have a much stronger influence on legislative action and the powers that be than will the diverse, widely spread consumer interest. Indeed from this point of view, the puzzle is not why we have so many silly licensure laws, but why we don't have far more. The puzzle is how we ever succeeded in getting the relative freedom from government controls over the productive activities of individuals that we have had and still have in this country, and that other countries have had as well.

[4] In fairness to Walter Gellhorn, I should note that he does not share my view that the correct solution to these problems is to abandon licensing. On the contrary, he thinks that while licensing has gone much too far it has some real functions to perform. He suggests procedural reforms and changes that in his view would limit the abuse of licensure arrangements.

[5] *Ibid.*, pp. 121–22.

[6] *Ibid.*, p. 146.

[7] See, for example, Wesley Mitchell's famous article on the "Backward Art of Spending Money," reprinted in his book of essays carrying that title (New York: McGraw-Hill, 1937), pp. 3–19.

The only way that I can see to offset special producer groups is to establish a general presumption against the state undertaking certain kinds of activities. Only if there is a general recognition that governmental activities should be severely limited with respect to a class of cases, can the burden of proof be put strongly enough on those who would depart from this general presumption to give a reasonable hope of limiting the spread of special measures to further special interests. This point is one we have adverted to time and again. It is of a piece with the argument for the Bill of Rights and for a rule to govern monetary policy and fiscal policy.

POLICY ISSUES RAISED BY LICENSURE

It is important to distinguish three different levels of control: first, registration; second, certification; third, licensing.

By registration, I mean an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities. There is no provision for denying the right to engage in the activity to anyone who is willing to list his name. He may be charged a fee, either as a registration fee or as a scheme of taxation.

The second level is certification. The governmental agency may certify that an individual has certain skills but may not prevent, in any way, the practice of any occupation using these skills by people who do not have such a certificate. One example is accountancy. In most states, anybody can be an accountant, whether he is a certified public accountant or not, but only those people who have passed a particular test can put the title CPA after their names or can put a sign in their offices saying they are certified public accountants. Certification is frequently only an intermediate stage. In many states, there has been a tendency to restrict an increasing range of activities to certified public accountants. With respect to such activities there is licensure, not certification. In some states, "architect" is a title which can be used only by those who have passed a specified examination. This is certification. It does not prevent anyone else from going into the business of advising people for a fee how to build houses.

The third stage is licensing proper. This is an arrangement under which one must obtain a license from a recognized authority in order to engage in the occupation. The license is more than a formality. It requires some demonstration of competence or the meeting of some tests ostensibly designed to insure competence, and anyone who does not have a license is not authorized to practice and is subject to a fine or a jail sentence if he does engage in practice.

The question I want to consider is this: under what circumstances, if any, can we justify the one or the other of these steps? There are three different grounds on which it seems to me registration can be justified consistently with liberal principles.

First, it may assist in the pursuit of other aims. Let me illustrate. The police are often concerned with acts of violence. After the event, it is desirable to find out who had access to firearms. Before the event, it is desirable to prevent firearms from getting into the hands of people who are likely to use them for criminal purposes. It may assist in the pursuit of this aim to register stores selling firearms. Of course, if I may revert to a point made several times in earlier chapters, it is never enough to say that there *might* be a justification along these lines, in order to conclude that there *is* justification. It is necessary to set up a balance sheet of the advantages and disadvantages in the light of liberal principles. All I am now saying is that this consideration might in some cases justify overriding the general presumption against requiring the registration of people.

Second, registration is sometimes a device to facilitate taxation and nothing more. The questions at issue then become whether the particular tax is an appropriate method to raise revenue for financing government services regarded as necessary, and whether registration facilitates the collection of taxes. It may do so either because a tax is imposed on the person who registers, or because the person who registers is used as a tax collector. For example, in collecting a sales tax imposed on various items of consumption, it is necessary to have a register or list of all the places selling goods subject to the tax.

Third, and this is the one possible justification for registration which is close to our main interest, registration may be a means to protect consumers against fraud. In general, liberal principles

assign to the state the power to enforce contracts, and fraud involves the violation of a contract. It is, of course, dubious that one should go very far to protect in advance against fraud because of the interference with voluntary contracts involved in doing so. But I do not think that one can rule out on grounds of principle the possibility that there may be certain activities that are so likely to give rise to fraud as to render it desirable to have in advance a list of people known to be pursuing this activity. Perhaps one example along these lines is the registration of taxicab drivers. A taxicab driver picking up a person at night may be in a particularly good position to steal from him. To inhibit such practices, it may be desirable to have a list of names of people who are engaged in the taxicab business, to give each a number, and to require that this number be put in the cab so that anyone molested need only remember the number of the cab. This involves simply the use of the police power to protect individuals against violence on the part of other individuals and may be the most convenient method of doing so.

Certification is much more difficult to justify. The reason is that this is something the private market generally can do for itself. This problem is the same for products as for people's services. There are private certification agencies in many areas that certify the competence of a person or the quality of a particular product. The *Good Housekeeping* seal is a private certification arrangement. For industrial products there are private testing laboratories that will certify to the quality of a particular product. For consumer products, there are consumer testing agencies of which Consumer's Union and Consumer's Research are the best known in the United States. Better Business Bureaus are voluntary organizations that certify the quality of particular dealers. Technical schools, colleges, and universities certify the quality of their graduates. One function of retailers and department stores is to certify the quality of the many items they sell. The consumer develops confidence in the store, and the store in turn has an incentive to earn this confidence by investigating the quality of the items it sells.

One can however argue that in some cases, or perhaps even in many, voluntary certification will not be carried as far as individuals would be willing to pay for carrying it because of the difficulty of keeping the certification confidential. The issue is essentially the one involved in patents and copyrights, namely, whether individuals are in a position to capture the value of the services that they render to others. If I go into the business of certifying people, there may be no efficient way in which I can require you to pay for my certification. If I sell my certification information to one person, how can I keep him from passing it on to others? Consequently, it may not be possible to get effective voluntary exchange with respect to certification, even though this is a service that people would be willing to pay for if they had to. One way to get around this problem, as we get around other kinds of neighborhood effects, is to have governmental certification.

Another possible justification for certification is on monopoly grounds. There are some technical monopoly aspects to certification, since the cost of making a certification is largely independent of the number of people to whom the information is transmitted. However, it is by no means clear that monopoly is inevitable.

Licensure seems to me still more difficult to justify. It goes still farther in the direction of trenching upon the rights of individuals to enter into voluntary contracts. Nonetheless, there are some justifications given for licensure that the liberal will have to recognize as within his own conception of appropriate government action, though, as always, the advantages have to be weighed against the disadvantages. The main argument that is relevant to a liberal is the existence of neighborhood effects. The simplest and most obvious example is the "incompetent" physician who produces an epidemic. Insofar as he harms only his patient, that is simply a question of voluntary contract and exchange between the patient and his physician. On this score, there is no ground for intervention. However, it can be argued that if the physician treats his patient badly, he may unleash an epidemic that will cause harm to third parties who are not involved in the immediate transaction. In such a case, it is conceivable that everybody, including even the potential patient and physician, would be willing to submit to the restriction of the practice of medicine to "competent" people in order to prevent such epidemics from occurring.

In practice, the major argument given for licensure by its proponents is not this one, which has some appeal to a liberal, but rather a strictly paternalistic argument that has little or no appeal. Individuals, it is said, are incapable of choosing their own servants adequately, their own physician or plumber or barber. In order for a man to choose a physician intelligently, he would have to be a physician himself. Most of us, it is said, are therefore incompetent and we must be protected against our own ignorance. This amounts to saying that we in our capacity as voters must protect ourselves in our capacity as consumers against our own ignorance, by seeing to it that people are not served by incompetent physicians or plumbers or barbers.

So far, I have been listing the arguments for registration, certification, and licensing. In all three cases, it is clear that there are also strong social costs to be set against any of these advantages. Some of these social costs have already been suggested and I shall illustrate them in more detail for medicine, but it may be worth recording them here in general form.

The most obvious social cost is that any one of these measures, whether it be registration, certification, or licensure, almost inevitably becomes a tool in the hands of a special producer group to obtain a monopoly position at the expense of the rest of the public. There is no way to avoid this result. One can devise one or another set of procedural controls designed to avert this outcome, but none is likely to overcome the problem that arises out of the greater concentration of producer than of consumer interest. The people who are most concerned with any such arrangement, who will press most for its enforcement and be most concerned with its administration, will be the people in the particular occupation or trade involved. They will inevitably press for the extension of registration to certification and of certification to licensure. Once licensure is attained, the people who might develop an interest in undermining the regulations are kept from exerting their influence. They don't get a license, must therefore go into other occupations, and will lose interest. The result is invariably control over entry by members of the occupation itself and hence the establishment of a monopoly position.

Certification is much less harmful in this respect. If the certified "abuse" their special certificates; if, in certifying newcomers, members of the trade impose unnecessarily stringent requirements and reduce the number of practitioners too much, the price differential between certified and non-certified will become sufficiently large to induce the public to use non-certified practitioners. In technical terms, the elasticity of demand for the services of certified practitioners will be fairly large, and the limits within which they can exploit the rest of the public by taking advantage of their special position will be rather narrow.

In consequence, certification without licensure is a half-way house that maintains a good deal of protection against monopolization. It also has its disadvantages, but it is worth noting that the usual arguments for licensure, and in particular the paternalistic arguments, are satisfied almost entirely by certification alone. If the argument is that we are too ignorant to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business; we cannot complain that we did not have the information. Since arguments for licensure made by people who are not members of the occupation can be satisfied so fully by certification, I personally find it difficult to see any case for which licensure rather than certification can be justified.

Even registration has significant social costs. It is an important first step in the direction of a system in which every individual has to carry an identity card, every individual has to inform authorities what he plans to do before he does it. Moreover, as already noted, registration tends to be the first step toward certification and licensure.

MEDICAL LICENSURE

The medical profession is one in which practice of the profession has for a long time been restricted to people with licenses. Offhand, the question, "Ought we to let incompetent physicians practice?" seems to admit of only a negative answer. But I want to urge that second thought may give pause.

In the first place, licensure is the key to the control that the medical profession can exercise over the number of physicians. To understand why this is so requires some discussion of the structure of the medical profession. The American Medical Association is perhaps the strongest trade union in the United States. The essence of the power of a trade union is its power to restrict the number who may engage in a particular occupation. This restriction may be exercised indirectly by being able to enforce a wage rate higher than would otherwise prevail. If such a wage rate can be enforced, it will reduce the number of people who can get jobs and thus indirectly the number of people pursuing the occupation. This technique of restriction has disadvantages. There is always a dissatisfied fringe of people who are trying to get into the occupation. A trade union is much better off if it can limit directly the number of people who enter the occupation — who ever try to get jobs in it. The disgruntled and dissatisfied are excluded at the outset, and the union does not have to worry about them.

The American Medical Association is in this position. It is a trade union that can limit the number of people who can enter. How can it do this? The essential control is at the stage of admission to medical school. The Council on Medical Education and Hospitals of the American Medical Association approves medical schools. In order for a medical school to get and stay on its list of approved schools it has to meet the standards of the Council. The power of the Council has been demonstrated at various times when there has been pressure to reduce numbers. For example, in the 1930's during the depression, the Council on Medical Education and Hospitals wrote a letter to the various medical schools saying the medical schools were admitting more students than could be given the proper kind of training. In the next year or two, every school reduced the number it was admitting, giving very strong presumptive evidence that the recommendation had some effect.

Why does the Council's approval matter so much? If it abuses its power, why don't unapproved medical schools arise? The answer is that in almost every state in the United States, a person must be licensed to practice medicine, and to get the license, he must be a graduate of an approved school. In almost every

state, the list of approved schools is identical with the list of schools approved by the Council on Medical Education and Hospitals of the American Medical Association. That is why the licensure provision is the key to the effective control of admission. It has a dual effect. On the one hand, the members of the licensure commission are always physicians and hence have some control at the step at which men apply for a license. This control is more limited in effectiveness than control at the medical school level. In almost all professions requiring licensure, people may try to get admitted more than once. If a person tries long enough and in enough jurisdictions he is likely to get through sooner or later. Since he has already spent the money and time to get his training, he has a strong incentive to keep trying. Licensure provisions that come into operation only after a man is trained therefore affect entry largely by raising the costs of getting into the occupation, since it may take a longer time to get in and since there is always some uncertainty whether he will succeed. But this rise in cost is nothing like so effective in limiting entry as is preventing a man from getting started on his career. If he is eliminated at the stage of entering medical school, he never comes up as a candidate for examination; he can never be troublesome at that stage. The efficient way to get control over the number in a profession is therefore to get control of entry into professional schools.

Control over admission to medical school and later licensure enables the profession to limit entry in two ways. The obvious one is simply by turning down many applicants. The less obvious, but probably far more important one, is by establishing standards for admission and licensure that make entry so difficult as to discourage young people from ever trying to get admission. Though most state laws require only two years of college prior to medical school, nearly 100 per cent of the entrants have had four years of college. Similarly, medical training proper has been lengthened, particularly through more stringent internship arrangements.

As an aside, the lawyers have never been as successful as the physicians in getting control at the point of admission to professional school, though they are moving in that direction. The reason is amusing. Almost every school on the American Bar

Association's list of approved schools is a full time day school; almost no night schools are approved. Many state legislators, on the other hand, are graduates of night law schools. If they voted to restrict admission to the profession to graduates of approved schools, in effect they would be voting that they themselves were not qualified. Their reluctance to condemn their own competence has been the main factor that has tended to limit the extent to which law has been able to succeed in imitating medicine. I have not myself done any extensive work on requirements for admission to law for many years but I understand that this limitation is breaking down. The greater affluence of students means that a much larger fraction are going to full time law schools and this is changing the composition of the legislatures.

To return to medicine, it is the provision about graduation from approved schools that is the most important source of professional control over entry. The profession has used this control to limit numbers. To avoid misunderstanding let me emphasize that I am not saying that individual members of the medical profession, the leaders of the medical profession, or the people who are in charge of the Council on Medical Education and Hospitals deliberately go out of their way to limit entry in order to raise their own incomes. That is not the way it works. Even when such people explicitly comment on the desirability of limiting numbers to raise incomes they will always justify the policy on the grounds that if "too" many people are let in, this will lower their incomes so that they will be driven to resort to unethical practices in order to earn a "proper" income. The only way, they argue, in which ethical practices can be maintained is by keeping people at a standard of income which is adequate to the merits and needs of the medical profession. I must confess that this has always seemed to me objectionable on both ethical and factual grounds. It is extraordinary that leaders of medicine should proclaim publicly that they and their colleagues must be paid to be ethical. And if it were so, I doubt that the price would have any limit. There seems little correlation between poverty and honesty. One would rather expect the opposite; dishonesty may not always pay but surely it sometimes does.

Control of entry is explicitly rationalized along these lines only at times like the Great Depression when there is much unemployment and relatively low incomes. In ordinary times, the rationalization for restriction is different. It is that the members of the medical profession want to raise what they regard as the standards of "quality" of the profession. The defect in this rationalization is a common one, and one that is destructive of a proper understanding of the operation of an economic system, namely, the failure to distinguish between technical efficiency and economic efficiency.

A story about lawyers will perhaps illustrate the point. At a meeting of lawyers at which problems of admission were being discussed, a colleague of mine, arguing against restrictive admission standards, used an analogy from the automobile industry. Would it not, he said, be absurd if the automobile industry were to argue that no one should drive a low quality car and therefore that no automobile manufacturer should be permitted to produce a car that did not come up to the Cadillac standard. One member of the audience rose and approved the analogy, saying that, of course, the country cannot afford anything but Cadillac lawyers! This tends to be the professional attitude. The members look solely at technical standards of performance, and argue in effect that we must have only first-rate physicians even if this means that some people get no medical service—though of course they never put it that way. Nonetheless, the view that people should get only the "optimum" medical service always lead to a restrictive policy, a policy that keeps down the number of physicians. I would not, of course, want to argue that this is the only force at work, but only that this kind of consideration leads many well-meaning physicians to go along with policies that they would reject out-of-hand if they did not have this kind of comforting rationalization.

It is easy to demonstrate that quality is only a rationalization and not the underlying reason for restriction. The power of the Council on Medical Education and Hospitals of the American Medical Association has been used to limit numbers in ways that cannot possibly have any connection whatsoever with quality. The simplest example is their recommendation to various

states that citizenship be made a requirement for the practice of medicine. I find it inconceivable to see how this is relevant to medical performance. A similar requirement that they have tried to impose on occasion is that examination for licensure must be taken in English. A dramatic piece of evidence on the power and potency of the Association as well as on the lack of relation to quality is proved by one figure that I have always found striking. After 1933, when Hitler came to power in Germany, there was a tremendous outflow of professional people from Germany, Austria and so on, including of course, physicians who wanted to practice in the United States. The number of physicians trained abroad who were admitted to practice in the United States in the five years after 1933 was the same as in the five years before. This was clearly not the result of the natural course of events. The threat of these additional physicians led to a stringent tightening of requirements for foreign physicians that imposed extreme costs upon them.

It is clear that licensure is the key to the medical profession's ability to restrict the number of physicians who practice medicine. It is also the key to its ability to restrict technological and organizational changes in the way medicine is conducted. The American Medical Association has been consistently against the practice of group medicine, and against prepaid medical plans. These methods of practice may have good features and bad features, but they are technological innovations that people ought to be free to try out if they wish. There is no basis for saying conclusively that the optimum technical method of organizing medical practice is practice by an independent physician. Maybe it is group practice, maybe it is by corporations. One ought to have a system under which all varieties can be tried.

The American Medical Association has resisted such attempts and has been able effectively to inhibit them. It has been able to do so because licensure has indirectly given it control of admission to practice in hospitals. The Council on Medical Education and Hospitals approves hospitals as well as medical schools. In order for a physician to get admission to practice in an "approved" hospital, he must generally be approved by his county medical association or by the hospital board. Why

can't unapproved hospitals be set up? Because under present economic conditions, in order for a hospital to operate it must have a supply of interns. Under most state licensure laws, candidates must have some internship experience to be admitted to practice, and internship must be in an "approved" hospital. The list of "approved" hospitals is generally identical with that of the Council on Medical Education and Hospitals. Consequently, the licensure law gives the profession control over hospitals as well as over schools. This is the key to the AMA's largely successful opposition to various types of group practice. In a few cases, the groups have been able to survive. In the District of Columbia, they succeeded because they were able to bring suit against the American Medical Association under the federal Sherman antitrust laws, and won the suit. In a few other cases, they have succeeded for special reasons. There is, however, no doubt that the tendency toward group practice has been greatly retarded by the AMA's opposition.

It is interesting, and this is an aside, that the medical association is against only one type of group practice, namely, prepaid group practice. The economic reason seems to be that this eliminates the possibility of engaging in discriminatory pricing.[8]

It is clear that licensure has been at [illegible] of the restriction of entry and that this involves a heavy [illegible] cost, both to the individuals who want to practice medicine but are prevented from doing so and to the public deprived of the medical care it wants to buy and is prevented from buying. Let me now ask the question: Does licensure have the good effects that it is said to have?

In the first place, does it really raise standards of competence? It is by no means clear that it does raise the standards of competence in the actual practice of the profession for several reasons. In the first place, whenever you establish a block to entry into any field, you establish an incentive to find ways of getting around it, and of course medicine is no exception. The rise of the professions of osteopathy and of chiropractic is not unrelated to the restriction of entry into medicine. On the contrary, each of these represented, to some extent, an attempt to find a

[8] See Reuben Kessel, "Price Discrimination in Medicine," *The Journal of Law and Economics*, Vol. I (October, 1958), 20–53.

way around restriction of entry. Each of these, in turn, is proceeding to get itself licensed, and to impose restrictions. The effect is to create different levels and kinds of practice, to distinguish between what is called medical practice and substitutes such as osteopathy, chiropractic, faith healing and so on. These alternatives may well be of lower quality than medical practice would have been without the restrictions on entry into medicine.

More generally, if the number of physicians is less than it otherwise would be, and if they are all fully occupied, as they generally are, this means that there is a smaller total of medical practice by trained physicians—fewer medical man-hours of practice, as it were. The alternative is untrained practice by somebody; it may and in part must be by people who have no professional qualifications at all. Moreover, the situation is much more extreme. If "medical practice" is to be limited to licensed practitioners, it is necessary to define what medical practice is, and featherbedding is not something that is restricted to the railroads. Under the interpretation of the statutes forbidding unauthorized practice of medicine, many things are restricted to licensed physicians that could perfectly well be done by technicians, and other skilled people who do not have a Cadillac medical training. I am not enough of a technician to list the examples at all fully. I only know that those who have looked into the question say that the tendency is to include in "medical practice" a wider and wider range of activities that could perfectly well be performed by technicians. Trained physicians devote a considerable part of their time to things that might well be done by others. The result is to reduce drastically the amount of medical care. The relevant average quality of medical care, if one can at all conceive of the concept, cannot be obtained by simply averaging the quality of care that is given; that would be like judging the effectiveness of a medical treatment by considering only the survivors; one must also allow for the fact that the restrictions reduce the amount of care. The result may well be that the average level of competence in a meaningful sense has been reduced by the restrictions.

Even these comments do not go far enough, because they consider the situation at a point in time and do not allow for

changes over time. Advances in any science or field often result from the work of one out of a large number of crackpots and quacks and people who have no standing in the profession. In the medical profession, under present circumstances, it is very difficult to engage in research or experimentation unless you are a member of the profession. If you are a member of the profession and want to stay in good standing in the profession, you are seriously limited in the kind of experimentation you can do. A "faith healer" may be just a quack who is imposing himself on credulous patients, but maybe one in a thousand or in many thousands will produce an important improvement in medicine. There are many different routes to knowledge and learning and the effect of restricting the practice of what is called medicine and defining it as we tend to do to a particular group, who in the main have to conform to the prevailing orthodoxy, is certain to reduce the amount of experimentation that goes on and hence to reduce the rate of growth of knowledge in the area. What is true for the content of medicine is true also for its organization, as has already been suggested. I shall expand further on this point below.

There is still another way in which licensure, and the associated monopoly in the practice of medicine, tend to render standards of practice low. I have already suggested that it renders the average quality of practice low by reducing the number of physicians, by reducing the aggregate number of hours available from trained physicians for more rather than less important tasks, and by reducing the incentive for research and development. It renders it low also by making it much more difficult for private individuals to collect from physicians for malpractice. One of the protections of the individual citizen against incompetence is protection against fraud and the ability to bring suit in the court against malpractice. Some suits are brought, and physicians complain a great deal about how much they have to pay for malpractice insurance. Yet suits for malpractice are fewer and less successful than they would be were it not for the watchful eye of the medical associations. It is not easy to get a physician to testify against a fellow physician when he faces the sanction of being denied the right to practice in an

"approved" hospital. The testimony generally has to come from members of panels set up by medical associations themselves, always, of course, in the alleged interest of the patients.

When these effects are taken into account, I am myself persuaded that licensure has reduced both the quantity and quality of medical practice; that it has reduced the opportunities available to people who would like to be physicians, forcing them to pursue occupations they regard as less attractive; that it has forced the public to pay more for less satisfactory medical service, and that it has retarded technological development both in medicine itself and in the organization of medical practice. I conclude that licensure should be eliminated as a requirement for the practice of medicine.

When all this is said, many a reader, I suspect, like many a person with whom I have discussed these issues, will say, "But still, how else would I get any evidence on the quality of a physician. Granted all that you say about costs, is not licensure the only way of providing the public with some assurance of at least minimum quality?" The answer is partly that people do not now choose physicians by picking names at random from a list of licensed physicians; partly, that a man's ability to pass an examination twenty or thirty years earlier is hardly assurance of quality now; hence, licensure is not now the main or even a major source of assurance of at least minimum quality. But the major answer is very different. It is that the question itself reveals the tyranny of the status quo and the poverty of our imagination in fields in which we are laymen, and even in those in which we have some competence, by comparison with the fertility of the market. Let me illustrate by speculating on how medicine might have developed and what assurances of quality would have emerged, if the profession had not exerted monopoly power.

Suppose that anyone had been free to practice medicine without restriction except for legal and financial responsibility for any harm done to others through fraud and negligence. I conjecture that the whole development of medicine would have been different. The present market for medical care, hampered as it has been, gives some hints of what the difference would have been. Group practice in conjunction with hospitals would

have grown enormously. Instead of individual practice plus large institutional hospitals conducted by governments or eleemosynary institutions, there might have developed medical partnerships or corporations—medical teams. These would have provided central diagnostic and treatment facilities, including hospital facilities. Some presumably would have been prepaid, combining in one package present hospital insurance, health insurance, and group medical practice. Others would have charged separate fees for separate services. And of course, most might have used both methods of payment.

These medical teams—department stores of medicine, if you will—would be intermediaries between the patients and the physician. Being long-lived and immobile, they would have a great interest in establishing a reputation for reliability and quality. For the same reason, consumers would get to know their reputation. They would have the specialized skill to judge the quality of physicians; indeed, they would be the agent of the consumer in doing so, as the department store is now for many a product. In addition, they could organize medical care efficiently, combining medical men of different degrees of skill and training, using technicians with limited training for tasks for which they were suited, and reserving highly skilled and competent specialists for the tasks they alone could perform. The reader can add further flourishes for himself, drawing in part, as I have done, on what now goes on at the leading medical clinics.

Of course, not all medical practice would be done through such teams. Individual private practice would continue, just as the small store with a limited clientele exists alongside the department store, the individual lawyer alongside the great many-partnered firm. Men would establish individual reputations and some patients would prefer the privacy and intimacy of the individual practitioner. Some areas would be too small to be served by medical teams. And so on.

I would not even want to maintain that the medical teams would dominate the field. My aim is only to show by example that there are many alternatives to the present organization of practice. The impossibility of any individual or small group conceiving of all the possibilities, let alone evaluating their merits,

is the great argument against central governmental planning and against arrangements such as professional monopolies that limit the possibilities of experimentation. On the other side, the great argument for the market is its tolerance of diversity; its ability to utilize a wide range of special knowledge and capacity. It renders special groups impotent to prevent experimentation and permits the customers and not the producers to decide what will serve the customers best.

Chapter X

The Distribution of Income

A CENTRAL ELEMENT IN the development of a collectivist sentiment in this century, at least in Western countries, has been a belief in equality of income as a social goal and a willingness to use the arm of the state to promote it. Two very different questions must be asked in evaluating this egalitarian sentiment and the egalitarian measures it has produced. The first is normative and ethical: what is the justification for state intervention to promote equality? The second is positive and scientific: what has been the effect of the measures actually taken?

THE ETHICS OF DISTRIBUTION

The ethical principle that would directly justify the distribution of income in a free market society is, "To each according to

INDEPENDENT VIEW

Carl Smiley

Deregulation: Safety's Role

The objectives of government planners in different agencies are often so varied that a single policy can't meet the goals of all concerned. A prime example is the call for deregulation of the trucking industry by some members of the Council of Economic Advisors and officials of some past administrations. While these people have been mainly concerned with operation of the free enterprise system and the lowest possible consumer prices, other branches of government have been spending a lot of time—and truck buyers' dollars—trying to make highways safer.

A recent study by Dr. D. Daryl Wyckoff of the Harvard Graduate School of Business indicates that these two philosophies are not compatible in actual practice. Dr. Wyckoff distributed an extensive four-page questionnaire to drivers last December, and about 10,500 were filled out and returned. About half the responses were made by company drivers for private and common carriers and the balance were from independent contractors and exempt independents.

□ □ □

For those familiar with the trucking industry, the answers contain few surprises. They only support the contention that truckers with the least assurance of an adequate income drive faster and have more accidents and moving violations. In all three of those categories, company or independent carriers of exempt commodities vied for the doubtful distinction of ranking first. Here are some results of the survey:

Type of Operation	Cruising Speed mph	Moving Violations 100,000 mi. per yr.	Reportable Accidents 100,000 mi. per yr.
exempt, company	63.00	1.32	0.24
exempt, contractor	62.55	1.33	0.70
private	61.72	0.87	0.24
contract, contractor	60.95	0.74	0.33
common, contractor	60.26	0.77	0.31
contract, company	59.39	0.76	0.26
common, company	58.85	0.41	0.19

The number of moving violations almost perfectly parallels the average speed of various types of drivers. The number of reportable accidents is not necessarily an indication that drivers for private carriers and exempt haulers have fewer accidents. The Bureau of Motor Carrier Safety has repeatedly charged that those truckers do not report accidents unless they are major crashes.

The data in this survey supports that charge; exempt contractors admitted to having a greater number of reportable accidents than any of the regulated carrier drivers, whether on payroll or under lease. BMCS statistics, based on voluntary reports of accidents where damage exceeds $200, indicate that regulated carriers have a much higher number of accidents in relation to miles driven.

Cheating on hours of service also follows a common pattern in the survey. Here are survey results in that category:

Type of Operation	% Using Multiple Logs	% Falsifying Logs	% Driving Over 10 hrs.
exempt, company	32.74	39.28	45.98
exempt, contractor	27.37	44.94	43.87
private	9.56	29.36	25.06
contract, contractor	10.22	33.56	27.23
common, contractor	11.89	33.91	11.30
contract, company	1.87	29.26	13.05
common, company	4.90	4.27	2.48

It seems clear from the results of this survey that many exempt carriers pay little or no attention to safety regulations. Whether this is a matter of economics or simply a "Go-to-hell" attitude isn't clear. But exempt carriers as a group tend to resist rate regulation.

"Picky, picky, picky . . ."

Interestingly enough, some major rule changes have been made or are pending that coincide closely with the results of the survey. One is the new detention rule. A few days ago a common carrier executive told me: "I can't argue with the intent of the rule. But it simply doesn't take reality into account. We have a long, profitable run to our eastern terminus but only one authority on the return trip. Contractors loved it because it paid well both ways. But they often have to lay over 12 to 24 hours to get loaded out. None ever minded because the haul was profitable even considering the lost time.

"Now comes the new detention rule," he said, "and we charge the customer $18 per hour detention. He calls us and says that while he likes our service two local carriers will drop him trailers at no cost. Our contractors are perfectly willing to go on as they have. After all, they're making money on the round trip. But we can't afford to lose a certificate by waiving detention.

"We have two choices: drop the account and deadhead our contractors back, or set up a trailer pool so we can drop trailers. Problem is about 60% of our contractors own their own trailers so they aren't happy about that either."

This is one of those instances where a well-intentioned rule can hurt more than it helps. The carrier is urged by contractors to forget detention—just get them the loads. But he points out that becoming the first case in court under the new rule is hardly one of his goals.

The pending changes in the hours of service regulation are another example of the same type of situation. The survey of Dr. Wyckoff indicates that only common carrier company drivers pay any attention to hours of service as regulations are now written. Most flagrant violators are those hauling exempt commodities. If nearly half the latter can't live with present hours of service, why are they not protesting the still more stringent hours of service regulations sought by the Teamsters?

□ □ □

In a sense of the word this thumbing the nose at regulations has contributed to the chaos of the trucking industry. If a shipper doesn't like rates or delivery schedules of legitimate carriers, he only has to contact a hot freight artist who will take it across the country non-stop at half the cost. But the same people who accept those types of loads are the ones who cry loudest about the restrictions of regulation and the difficulties of surviving in the business.

The carrier who called me probably reflects a widespread opinion among legitimate carriers when he said, "All these new regulations are placing a burden of enforcement on the carrier. I for one am not going to tolerate falsified logs because BMCS will think of auditing regulated carriers first. It's about time contractors and independents either fight rule changes that take money out of their pockets or learn to live with them. I think we may be headed toward an enforcement situation that gives them no other choice."

The record of compliance with safety regulations has such a direct bearing on the amount of economic regulation that truckers live with that I begin to suspect there are two worlds in trucking: those who largely obey the law and are reasonably well rewarded for their efforts, and those who have trouble surviving even though they break every safety regulation on the books.

That fact alone is mute testimony that independents and contractors need to make their opinions heard. The attitude that BMCS safety regulations were only written to be broken is bringing on an enforcement attitude that could spell disaster for many in trucking.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

POUCH Z
JUNEAU, ALASKA 99811
(TELEX 45-328)

RE: Senate Bill 60,
Relating to Enforcement Authority

Honorable Brad Bradley
Chairman, Senate Commerce Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Bradley:

The Department of Transportation and Public Facilities offers the following comments on Senate Bill 60.

The amendments proposed by this bill are in consonance with actions by National and other States' regulatory authorities for surface and air carriers, to reduce safety violations and other infractions of carrier regulations.

The debate on carrier deregulation, especially for the trucking industry, is intense at the National and State levels. Attached for your information are reports on the subject. Please note the report by the American Trucking Association, Inc., "Against Deregulation".

As discussed with the Alaska Transportation Commission, the amendments will provide the legal authority needed for enforcement of the ATC's regulations.

Sincerely,

Richard A. Holden
Deputy Commissioner

Attachment

cc: Robert W. Ward
Keith Specking

25A-71LH

Attachment

AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS

THOMAS D. MORELAND, President
Commissioner and State Highway Engineer
Georgia Department of Transportation

HENRIK E. STAFSETH, Executive Director
444 N. Capitol Street, N.W., Suite 225
Washington, D.C. 20001
Telephone: (202) 624-5800

January 8, 1979

To Members of the Policy Committee
of the American Association of State
Highway and Transportation Officials

Dear Members:

Enclosed are three reports done by the Task Force on Trucking Deregulation under the Highway Subcommittee on Highway Transport. These are being supplied for your review prior to the Policy Committee meeting in Forth Worth, Texas on January 23rd.

Sincerely,

H. J. Rhodes
Deputy Director

HJR:dk

Enclosure

Mississippi
State Highway Department
Jackson

John R. Tabb
Director

P.O. Box 1850
Zip Code 39205

January 5, 1979

Mr. Bill Bulley, Secretary
Chairman, Highway Transport Subcommittee
Washington Department of Transportation
Transportation Building
Olympia, Washington 98504

Dear Mr. Bulley:

The Task Force on Trucking Deregulation met on December 28, 1978, at which time we reviewed and discussed the material we had been able to accumulate at that time.

Enclosed are three reports which we feel give accurate views on the pros, cons and middle ground to this issue. Although we do not feel we will have a draft position paper prior to the Policy Committee meeting in Fort Worth on January 23, we do feel it would be most helpful if the enclosed material were reviewed by the Policy Committee prior to our meeting.

One important matter we believe must be addressed by the Policy Committee prior to our position on this issue is Section III of the AASHTO National Transportation Policy as adopted by the Policy Committee, November 16, 1975, St. Louis, Missouri. It appears that a position toward deregulation would be in conflict with the present policy.

Sincerely,

John R. Tabb

John R. Tabb, Chairman
Task Force on Trucking Deregulation

JRT:lb
Enclosures
CC: Mr. H. J. Rhodes, AASHTO
Mr. Verdi Adams, Louisiana
Mr. Marcus Yancey, Texas
Mr. Billy Cooper, Arkansas

FOR DEREGULATION

Regulation of Entry and Pricing in Truck Transportation

Edited by Paul W. MacAvoy
and John W. Snow

Ford Administration Papers on
Regulatory Reform

American Enterprise Institute for Public Policy Research
Washington, D.C.

As Analyzed and Edited
By
Task Force Committee on Trucking Deregulation

INTRODUCTION

- Motor Carrier Industry - large, complex.
- Exact number of intercity trucking firms is unknown.
  - Best total estimate in excess of 100,000 individual firms.
  - 15,000 motor carriers are regulated by ICC.
    18,000
- Trucking Industry hauls literally thousands of commodities to tens of thousands of U. S. communities.
- Total expenditures of industry in 1974 - $48.8 Billion.
- Accounts for 23% of all intercity freight transport measured in ton-miles or 64% measured in terms of transportation expenditures.
- Industry employs approximately 1.2 million people.
- Labor force heavily organized - principally by Teamsters Union.
- Despite large number of carriers, individual shipper of regulated commodities has limited choice available to him.
- No ICC-regulated carrier authorized to carry freight to any place in the U.S.
- Shipments between large cities - perhaps dozen or more carriers available.
- For smaller cities - particularly in growth areas since regulation of motor carriers began - perhaps one or two.
- In most instances - no carrier has authority to serve both the shipping and receiving points.
- Thus, two or more carriers must combine efforts to provide service required.
- Regulated carrier profits comparable with the rest of the U. S. economy.
- No information on exempt carriers - apparently good since that portion of industry continues to attract new capital. Operate good equipment - provide reliable service.
- Corporate turnover rate comparable to similar industries.
- All sectors of industry - regulated and unregulated - are affected by the regulatory system.
  - Common carriers must provide service to anyone, but cannot enter into contracts with their customers and are limited to certain commodity hauling and places served.

- Contract carriers - service by contract only and to a limited number of customers.

- Private carrier may haul goods for own company, but not for any other company - including its own corporate affiliates and subsidiaries.

- Agricultural carriers exempt from federal regulations, but are limited to unprocessed agricultural products - wheat, cabbage, corn, livestock, etc.

REGULATED CARRIERS

- Common and Contract Carriers.

  - Account for about 40% of total intercity truck freight in ton-miles.

  - ICC regulates rates of common carriers - commodities carried and routes of operation.

- Entry by new firms - limited.

- Most ICC operating authorities referred to as "grandfather rights" - in existence before 1935 Act.

- New entry granted, generally, only when ICC determines existing carriers not adequate to serve demands for truck transport.

- Expansion of existing carriers into new routes generally requires purchase of another carrier's operating authority.

- Firms regulated in one of two ways -

  - As to commodities carried, but latitude as to routes - "Specialized Commodity Carriers."

  - As to where they may operate, but latitude as to commodities carried - "General Freight Carriers."

- Specialized Commodity Carriers - generally smaller firms - specialize in truckload shipments, but do not require use of terminals.

- General Freight Carriers - 2/3 of total revenue of ICC - regulated industry.

- Truckload shipment carriers compete with railroads.

- Rates apply to both truckload (TL) and less than truckload (LTL), but affects general freight most.

- Rates determined by rate bureaus sanctioned by ICC.

- Result - LTL shippers have only one rate available - no competition.

- Private carriers and railroads provide competition for truckload rates. In fact, most TL rates are negotiated individually between shipper and carrier.

UNREGULATED CARRIERS

- Nonregulated sector of trucking industry accounts for 60% of all traffic.

- Consists for most part of exempt and private carriers.

- Unregulated carriers must not carry regulated commodities on a for-hire basis.

- Though not directly subject to economic regulation, they are severely restricted by it.

  - Example: A carrier hauling wheat to a flour mill cannot haul processed flour back to wheat growing area.

  - Example: A private trucking company may not haul goods on a for-hire basis for another company, even though it is entirely owned by the other company.

  - Example: Private carriers may not lease their trucks and drivers to regulated carriers for periods of less than thirty days. Thus, they cannot lease their trucks on a back-haul basis. Result - unnecessary empty truck mileage - higher costs to consumers.

PASSENGER CARRIERS

- Intercity Bus Industry subject to economic regulation like trucking industry.

- 1067 regulated intercity bus firms in 1973 with $884 Million in revenue.

- Bus industry dominated by two firms which account for 70% of total revenue.

- Most routes dominated by one carrier.

- Most heavily traveled routes have two to no more than three carriers at best.

- Entry tightly restricted and rates tightly regulated.

MOTOR CARRIER RATES - Description of Present System

- Rate regulation particularly affects LTL general freight traffic.
- LTL rates initiated by associations of carriers called Rate Bureaus and are granted antitrust immunity by ICC.
- Almost all LTL shipments move under these rates.
- Individual carriers permitted to file independent rates - but the important rates are almost always set by rate bureaus. If an important rate is set by independent rate filing, the ICC routinely suspends the rate pending a hearing on ultimate lawfulness of the rate.
- ICC has broad powers to supervise rates through authority to find a rate unlawful. But instead, its powers usually exercised in enforcing the price-fixing of rate bureaus - rather than promoting price competition in rate making.
- Most LTL traffic moves under Categorical Class Rates. Commodities grouped into broad classes and rates are average rates based on average costs which are published for each class.
- Placement of a commodity in a class can substantially affect the shipping rate. Not unusual for several commodities with same transportation characteristics to move under different rates because of artificial grouping into different classes.
- Classification of Commodity based on characteristics of transportation and value of the commodity.
  - Example: A product may be placed in different classes based on the method of production.
- Class rates loosely related to industry-wide or system-wide average costs.
- No allowance made for the quality of the service provided under a rate.
- Rates not affected by balance of traffic or seasonal factors.
- Fronthaul and backhaul rates; peak and off-peak rates are same. Result - little inducement to utilize space on backhaul or to ship in off-peak time.
- TL (truckload) shipments frequently move under contract based on rates reflecting actual costs of required movements.

ECONOMIC EFFECTS OF RATE MAKING

- Rates are:
  - Too high.
  - Too inflexible.

- Irrational.
- Discriminatory.

Rates too High

- Unnecessary regulatory restrictions cause less efficient operation than when based on competition.

- Regulation causes carriers to use circuitous routes and empty backhauls.

- Costs are inflated by regulation, thus rates must be higher than otherwise to compensate for such costs.

- Since LTL rates are collectively set by rate bureaus, there is no incentive for competition.

- Firms will use power to set rates to their own advantage and therefore, price-fixing is illegal in almost all other industries.

- Nothing unique about the physical or economic attributes of trucking industry to justify anti-competitive practices such as collective pricing.

- In mid-1950's fresh and frozen poultry and frozen fruits and vegetables were changed from regulated to exempt commodities. Result - "before" and "after" studies by U. S. Dept. of Agriculture showed rates dropped by 33% on poultry and 19% on fruits and vegetables. Service improved dramatically as well.

- The same study found private carriage dropped significantly after commodities were exempted.

- The ATA (American Trucking Association) states that operating rights have great value and that value increases with time. The ATA statement to the ICC indicated that recent acquisitions in the motor carrier industry indicate that amounts paid for operating authorities amount to 15% to 20% of the annual revenues produced by those authorities. This is strong evidence that the present regulatory system works to the disadvantage of the consumers.

- Operating rights would only have value if carriers were able to earn higher than competitive returns on motor carrier service.

- Studies on why firms turn from common to private carriers show they do so because they (private carriers) can provide the same service at lower cost. This can be true only if common carriers were inflated or otherwise distorted, since private carrier costs are essentially the same as common carrier costs for the same operation - and private carriers are not allowed to solicit traffic for backhauls.

- Because regulated carrier rates are too high, shippers' distribution costs are too high. Result - consumers pay more for goods than they should.

- In certain markets, carriers with stifled price competition engage in wasteful service competition. Since they are unable to compete for traffic by lowering

rates, they compete by adding more frequent service than they otherwise would. This results in increased truck costs because the trucks run less fully loaded than they otherwise would. This fuels higher rates, because rates are based on average costs.

RATES AND SERVICE INFLEXIBLE

- Since rates are not allowed to vary, service quality is constrained. Carriers are prevented from charging premium rates to offset costs of superior service.

- Considerable evidence that users of motor carrier services want a diversity of price and service-quality alternatives, but they are prevented from it by the rate regulation system.

- A DOT survey showed that about 50% of industrial shippers used private carriers.

- Reasons given by 70% of those shippers cited dissatisfaction with common carrier service.

- There are numerous examples of shippers who are willing to pay premium prices for superior service, but unable to obtain such service from common carriers.

Rates are Irrational

- No rational relation between rates charged and service rendered.

- Rates for groups of towns further from a point of origin may be charged less than those nearer. (Example: Dallas & Houston to Colorado towns).

- Rates may be different even if traveling the same route. (Rocky Mountain Study - Nine States).

Rates are Discriminatory

- ICC requires all carrier rates be reasonable and not unjustly discriminatory. ICC has decided this means the same rates apply to all shippers moving similar traffic between specific points. When costs differ, the concept of equal is actual discrimination. Some shippers are charged more than the cost of their traffic and some charged less. Result - inequitable discrimination which breeds economic inefficiencies.

- Where traffic is greater in one direction than in the other, rates should be higher on the prime haul and lower on the backhaul. This is true simply because of lower costs associated with availability of excess capacity. ICC and the industry have resisted application of lower backhaul rates because such action inevitably leads to opening most of U. S. shipping to competitive pricing.

- A serious consequence is that shippers' long-run locational decisions are distorted. Were rates related to costs, manufacturers would have economic incentives to locate in the direction of the prevailing backhaul.

Rate Structure too Complex

- Endless artificial distinctions are strictly a product of regulatory systems.

- Given a choice, customers would not tolerate present system.

- Industry claims complexity results from needs to develop rates for so many different commodities traveling to so many destinations. But many other industries, unregulated, offer product lines to millions of customers. They do so without creating demand for specialized services such as rate audit firms to "ensure that customers receive the correct price", etc.

Restrictions on Entry

- Must have a certificate from ICC.

- Obtained in one of two ways:

  - Grandfather clause of 1935 Act - 18,000 plus firms in existence at time of passage of the Act.

  - Statutory test of "Public convenience and necessity."

- PC&N tough to meet since ICC has decided statute means new carriers should not be certified as long as existing carriers have "potential" to provide adequate service for traffic under consideration. (The inequity of denying individuals the opportunity to engage in the business of their choice in order to protect the interests of existing carriers is not considered at all.)

- In recent years approximately 80% of all applications have been granted, but few of the certificates were for new carriers, and of this small number very few were for authority broader than one commodity or one place.

Economic Effects

- Market Concentration and Monopoly Power.

  - One result of severe limits on new entry is to convert a naturally competitive industry into one in which there are numerous instances of monopoly (or oligopoly) power.

  - Best evidence is market value of operating rights.

  - In 1972 the top four of the top eight firms' shares of total operating income were 17% and 23% respectively. This is low compared to most manufacturing industries, but it must be viewed in the view of individual routes. Since even the largest firms have limited authority and are unable to serve the entire market, concentration on individual routes is much higher.

- Operating Inefficiencies

  - Certificate restrictions not only limit competition, they cause regulated carriers to operate less efficiently than they could if they were free to manage their own internal operations.

  - About 30% of all commodity-restricted authorities provide only one-way authority. Result - wasted resources.

  - Route-restricted authorities specify the route carriers must travel. Result - unnecessary mileage - wasted resources.

  - No single carrier able to carry a shipment its entire journey.

- Inequities

  - Grandfathered firms were awarded, free of charge, valuable property rights. ATA estimated that by 1970 about $300 Million in operating rights had been transacted. This represents a small fraction of total because only those authorities that have actually been sold are in the figure.

  - Other individuals have been prevented from engaging in the business of their choice.

  - Others, wanted to enter or to expand, have been forced to pay huge sums to those who already possessed operating rights.

Service to Rural Communities

- Supporters of present regulatory system contend that unless competition is restricted, motor carrier service to small rural communities will deteriorate. Without the "obligation" to serve, it is contended that small rural towns would not receive service because there would be no incentive to serve them.

- A U. S. DOT study concludes that the current regulatory policies actually impair rural motor carrier service. Rural towns would be better served by a regulatory program which placed greater reliance on competitive market forces and which eliminated unnecessary and wasteful operating restrictions - lower costs result in lower rates for service.

Myths Used to Oppose Motor Carrier Regulatory Reform

- Market Chaos

  - It is argued that any reduction in regulation will result in chaotic motor carrier service. Carriers, it is said, will rush around without direction, entering and leaving markets, or concentrating on large, high-density markets. Most markets are unregulated and these markets function in a generally efficient way. Firms make long-range commitments and customers are able to secure services. It is the supplier's interest to give orderly and dependable service

While it is true that a product needs transportation, transportation without products to transport would be useless - the supplier has a deep interest in planning.

- Regulatory Reform will Lead to Monopoly.

  - For industry concentration to lead to monopoly abuses, surviving firms would have to bar new entrants. Other than by regulatory barriers, there are no effective ways to bar entry in open competition. No unusual management skills are required. Trucks and drivers are available. Capital needs are modest compared to manufacturing industries. Currently, the exempt sector of the industry has thousands of carriers with no evidence of dominance by a few large carriers.

- Predatory Practices.

  - Some opponents to regulatory reform contend it will lead to predatory price cutting as firms try to drive their competitors out of the market. Predatory competition, at best, is a short-term risk. A rational firm would engage in such a practice only where there was a likely prospect of obtaining monopoly profits by reduction of the number of competitors or by disciplining the market. The predator firm would need superior resources and real staying power. There would need to be strict barriers to entry to enable the predator firm to recoup its loss. Where entry or reentry can occur relatively easily whenever prices return to levels at or above cost, the incentive in such behavior is eliminated. Experience in the exempt sector confirms the absence of predatory behavior in an unregulated environment. Besides, other laws that operate in other industries are available to protect against predatory behavior.

- Motor Carriers are Like Public Utilities.

  - The traditional argument for public utility regulation is the industry is a natural monopoly. This argument requires there be long-run economies of scale in the industry. If this is true, the industry will inevitably become concentrated in one or a few large firms unless there are legal constraints against that. Increasing returns to scale will give larger firms a competitive advantage over others in the industry. Unit costs will be lower so that they can underprice smaller firms, thus driving those out of the market. This argument is not applicable as justification for regulation of the motor carrier industry because motor carriers are not subject to increasing returns to scale. Large firms have no competitive advantage simply from being large. There is no tendancy toward natural monopoly. A related argument is regulation is justified for the industry because, like a public utility, the industry has an obligation to provide service. To balance the burdens of this obligation, it is argued the industry should be sheltered from competition by restricting entry. This argument is based on the "cart before the horse" theory. Public utilities are regulated because they <u>are</u> natural monopolies. Because of this monopoly they are required to provide service to all customers and prices are regulated. Saying it another way, utilities are not regulated because they are required to serve; they are regulated <u>and</u> required to serve because they are monopolies.

- Price Discrimination.

  - Without safeguards under the existing system, it is argued that carriers would practice price discrimination against shippers. Under the system all shippers are charged the same rate for the same movement.

    Only a monopoly is equipped to practice price discrimination. The current system causes price discrimination against shippers because rates are not based on the specific costs of service.

- How Can Rates Drop if Costs Do Not Drop?

  - Rates will decrease with regulatory reform, not because the costs of inputs will go down, but because resources will be used more efficiently. Costs will increase if inflation continues, but not inconsistent with the rest of the economy.

- Liberalized Entry Will Lead to Increased Truck Traffic on the Highways.

  - It is argued that regulation holds down the number of trucks on the highways. This argument confuses an increase in the number of firms with increased numbers of trucks on the highways. The latter is determined by the amount of cargo to be shipped. Regulatory reform should increase efficiency in the use of resources. Result - slower increase in total number of trucks necessary to provide service - thus, less truck traffic increase on highways.

- Impact on Railroads.

  - Regulatory system applies to LTL carriers - railroads do not compete in this field.

- Recreate the Conditions of the 1930's.

  - The 1930's was a period of severe depression and not a representative period in American life. The principal proponents of motor carrier regulation in the 1930's were the railroads who wanted to impose restrictions on a growing competitor. The "chaos" of the 30's were small truckers in a severe depression seeking to stay employed.

Paul W. MacAvoy is professor of economics at Yale University and an adjunct scholar at the American Enterprise Institute.

John W. Snow is a visiting fellow at the American Enterprise Institute.

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BACKGROUND

A Series of White Papers on Vital Transportation Issues

AMERICAN TRUCKING ASSOCIATIONS, INC., 1616 P Street, N.W., Washington, DC 20036

AGAINST DEREGULATION

Motor Carrier Regulation — The Issue in Perspective

To: Newspaper and Magazine Editors
Radio and Television News Directors and Assignment Editors
Columnists
Commentators
News Analysts
Reporters

Since 1935, the interstate motor carrier freight system in the United States has been subject to economic regulation under the jurisdiction of the Interstate Commerce Commission.

Basically, this regulation has set controls over entry into the field and has established supervision over the rates charged.

When the regulation first went into effect, there were those who said it would never work. It has, but still over the years there have been voices raised against it — few in number and representing for the most part the isolated, detached views of economists, academic theorists and Justice Department attorneys, plus a few of the largest shippers in the country.

Lately, however, what began as a few whispers now has become a more persistent campaign, though one still supported in the main by a handful of theoreticians, whether they be in government, a university or an editorial office.

For our part, we have always believed — and still want to believe — that the vast majority of those working in the news media take their responsibilities to the public seriously and want, always, to be on the side of truth, fairness and justice.

We also believe that it is virtually impossible to know the truth about this complicated subject without first acquiring some basic knowledge and understanding about the forces that brought about this regulation in the first place and knowledge and understanding about the forces at work that make this regulation just as necessary and valid today.

In the interest of fairness, objectivity and truth, we ask you to take a few minutes to read this Background material, prepared especially for you who work in the news media. You are free, of course, to use all or any part of it, if you desire, but our purpose is to give you background.

If you have any questions concerning this report, the regulatory issue or any other matters relating to the trucking industry, we at American Trucking Associations will be pleased to assist you.

Bennett C. Whitlock, Jr.

Bennett C. Whitlock, Jr.
President

March 13, 1978

Table of Contents

On August 9, 1935, President Franklin D. Roosevelt signed into law the Motor Carrier Act, a landmark in transportation legislation which placed the interstate motor carrier freight business under economic regulation by the Interstate Commerce Commission.

Today, despite more than forty years of phenomenal growth and progress by what is universally hailed as the finest transportation network in history, this legislation is under attack by a small but influential assortment of critics.

Certain Senators and Congressmen, a few economists, a handful of government figures, some segments of the news media and a few big shippers have been assailing the regulatory system with a barrage that is virtually all heat and no light.

"We need more competition in trucking," they say.

"Regulation is costing American taxpayers billions of dollars a year," they say.

"Trucks are forced to run around empty because of regulation," they say.

"Trucking is a closed industry that won't allow in new blood," they say.

That is what they say — but the facts show otherwise.

Generally, three basic premises underlie the deregulation rhetoric:

(1) There is a terrible mess in truck transportation that needs correcting.

(2) The solution is simple.

(3) The trucking industry is no different than manufacturing or any other industry and should be subject to the same economic ground rules.

The first premise — that there is a terrible mess in our motor carrier system — is an essential tenet for all who favor deregulation. One could not possibly cry out for "meaningful motor carrier reform," unless one actually believed that such reform was necessary; ergo, things must be in a pretty sad state of affairs.

But are they?

When is the last time you were personally inconvenienced by a breakdown in the surface freight transportation system? If you are a member of the news media, you may give the subject of freight transportation some thought on occasion in the context of a news issue — you may comment on it, you may criticize it, you may report on it. But off the job you probably don't give it a moment's consideration. You just go through your daily routine, buying what you want to buy when you want to buy it, taking for granted it will be there, and thus in your personal life giving the lie to the charge that there is a "mess" that needs correction.

In making your purchases do you ever concern yourself with the cost of transportation that is built into the retail price? Most likely you do not. The general public does not. In fact, the average consumer in the United States takes freight transportation for granted. That is the highest tribute that can be paid to the regulatory system. But if there were a mess, as the critics contend, nobody would be taking the system for granted, and truck transportation would be the butt of the same kind of jokes comedians tell about the mail service.

The second premise — that the solution is simple — points up the lack of understanding of the freight transportation system and regulation. Every critic of the regulatory transportation system has oversimplified the matter.

And finally, the oversimplification always takes the form of comparing the trucking industry with other industries, with the clear implication that there is something unethical or un-American about any industry that can avoid what is referred to as "the competition of the market place."

The plain fact is the trucking industry is *not* the auto industry; the trucking industry is *not* the steel industry; the trucking industry is *not* the chemical industry. Transportation is *not* manufacturing and is not subject to the same economic laws as manufacturing.

Transportation is as special as telephone or electric power service and cannot be left completely to "the competition of the market place," without jeopardizing the public right to such service at an equitable rate. This is not to say there is not competition in trucking. In fact competition within the regulated trucking industry is intense. But admittedly, it is competition within the limits of a federally supervised structure. But it works and it works well.

Why Regulation?

The establishment of economic regulation of surface freight transportation was no accident. Nor was it something introduced in a hasty or cavalier fashion. Economic regulation of America's surface freight system was established by an Act of Congress only after a lengthy and deliberate investigation brought on by a torrent of complaints from the shipping public.

(It is significant that such complaints are not being heard today. General R. Rosen brought out this point in the August, 1977, issue of Dun's Review. ". . . there is no grassroots pressure for it," Rosen wrote referring to trucking deregulation. ". . . freight rates do not interest the average voter.")

Back in 1885, following complaints about inadequate or discriminatory freight service, a Senate Committee, the Cullom Committee, conducted hearings in various parts of the country, taking more than 2,000 pages of testimony. This Committee, whose members all would have been labeled "economic conservatives," finally reported:

"It is the deliberate judgment of the Committee that upon no public question are the people so nearly unanimous as upon the proposition that Congress should undertake in some way the regulation of interstate commerce."

The Committee Report zeroed in on the need for regulation, a necessity that still is valid today and will be valid so long as there is a general public need for freight transportation service:

"The paramount evil chargeable against the operation of the transportation system of the United States, as now conducted, is unjust discrimination between persons, places, commodities and particular descriptions of traffic."

Thus, the seller of transportation service had it within his power to favor this shipper to the detriment of that shipper, to serve this locality and ignore that locality, to carry this freight and refuse that freight.

". . . it was a common observation," the Cullom Report said, "even among those who might hope for special favors, that a system of rates, open to all and fair as between localities, would be far preferable to a system of special contracts in which so large a personal element entered or was commonly supposed to enter. Permanence of rates was also seen to be of very high importance to every man engaging in business enterprises, since without it business contracts were lottery ventures."

The report said that not only were manufacturers ruined by transportation discrimination, but even whole towns disappeared because of it.

And thus the Interstate Commerce Commission was established, not to protect the railroads, but to protect the shipper and to assure the small community of equitable service. The Interstate Commerce Act was the public's response to the retort, "The public be damned." Anyone wishing to understand the complexities of transportation regulation must first of all understand that this federal control was born of consumerism, not special interest lobbying.

Those favoring the elimination of these controls contend that times have changed, that the railroads had a monopoly on transportation in the 1880's and that there is no longer any need for regulation.

A half a century after the railroads were brought under the ICC, the Congress found it necessary to bring in the burgeoning motor carrier industry also. The Supreme Court referred to the pre-regulation era of the trucking industry while rendering a decision on leasing regulations in 1953 in this manner:

"Then (prior to 1935) the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility."

Moreover, the great competitive spirit seen rising between railroads and trucks in a deregulated system is more myth than reality. Such competition is limited to begin with. Under a non-regulated system, rails could charge whatever they'd like for hauling trainloads of coal from the mine to the generating plant hundreds of miles distant. No trucking company could handle that job at *any* rate. On the other hand, rails are not suitable for hauling the less-than-carload freight, the smaller shipments they long ago abandoned to the motor carriers.

Truck-rail competition has other natural limits, including the limited number of localities served by rails. According to the Rand McNally Commercial Atlas and Marketing Guide, of the 61,000 communities in the United States, 64 percent or virtually two out of three have no rail service whatsoever. Even those which do have rail service are dependent on trucks for most of the goods imported and for door-to-door transportation on those commodities brought in by rails.

We emphasize this difference between truck and rail service because there is a noted tendency among the uninitiated to think of these modes as generally interchangeable and thus offering the public a competitive choice not known in pre-trucking days.

Why, then, one might ask, is economic regulation necessary in the freight transportation industry? Why is the New York Times in error when it states flatly, "There is no more economic justification for restricting entry or allowing price-fixing in trucking than there is in the auto or steel or chemical industry?"

The reason is that trucking has more in common with telephone service, electric power service, and natural gas service than manufacturing. Like these other regulated service industries, freight transportation has the following properties not found in the auto, steel, chemical or other manufacturing industries:

1. It is a service, not a manufactured object, and is basically the same for everyone.

2. It is essential to the public welfare and must be available on an uninterrupted basis. Just as we need continuous water service and electric power, we need continuous freight service. The major reason these services are regulated is to see that we get them under fair and equitable conditions.

3. It has a limited demand. The demand for freight service is dependent on the amount of freight to be moved. Bringing in new trucking companies will not create one additional pound of freight.

4. It entails the movement from place of origin to consumer. Thus, an entirely new dimension is introduced, one of movement across fixed lines, be they pipelines, electric wires, rail lines, air routes, air frequencies (as in the case of radio and television), or highways. Experience shows that such movements require some kind of supervision to avoid confusion and even chaos, of which the public at large would be the chief victim.

So the greatest mistake being made by those favoring deregulation is to place freight transportation in the same category as manufacturing. It is a mistake the Justice Department has been making for years in its relentless drive to place trucking under anti-trust laws, even though Congress specifically exempted the motor carrier industry from certain anti-trust restrictions in 1948 by passing the Reed-Bulwinkle amendment, which become Section 5(a) of the Interstate Commerce Act.

It is ironic that of all the public-utility type of industries, only freight transportation is broad enough and variable enough to allow for meaningful competition. Yet freight transportation is the only one singled out for attack on the grounds that it is not competitive.

Not one deregulator has suggested that regulation be removed from electric power so as to allow free entry and price competition into that business.

Lack of competition is one of three major charges levied at the regulated motor carrier system. The other two are high costs and unnecessary empty mileage. Not one of the charges can stand up to close scrutiny, as we shall see.

Truck Competition: How Many Is Enough?

Competition thrives in trucking.

This statement flies in the face of the oft-repeated charge that a relaxation of entry is needed to bring in more competition. How much competition are these critics talking about? How many trucking companies would be enough to satisfy their definition of competion? And once a number is arrived at, how do they propose to maintain it without some kind of regulation?

It is highly ironic that the Department of Justice has been arguing for years that more competition is needed in trucking and the best way to get it is to do away with entry and rate controls and let the Justice Department's Antitrust Division take over.

Let's take a look at some numbers:

There are now more than 18,000 transportation companies of all kinds under ICC regulation. More than 16,000 of these are trucking companies. Of these 16,000 motor carriers regulated by the ICC, more than 12,000 — three out of four — are small businesses, having annual gross revenues of less than $500,000.

The four largest motor carriers account for just 10 percent of the total revenue volume; and the eight largest companies account for only 14 percent. For the most part, trucking is made up of small, family-owned and operated businesses.

By contrast, let's take a look at the competition in three of America's most prominent industries — motor vehicle manufacturing, steel manufacturing and cigarette manufacturing — all of which come under the jurisdiction of the Justice Department's Antitrust Division.

In the motor vehicle manufacturing industry, the four largest companies account for 91 percent of the volume; the eight largest for 97 percent!

In steel manufacturing, the four largest companies account for 47 percent of the volume; the eight largest for 65 percent!

In the cigarette manufacturing industry, the four largest companies account for 84 percent of the total; the eight largest for virtually all of the business!

In trucking, the business is spread out among 16,000 regulated interstate carriers, not to mention the tens of thousands of companies hauling freight within the borders of a single state.

Only two industries can show a better competitive picture than ICC-regulated trucking. Of the top 35 major industries in terms of value added by manufacture, the only ones with a greater distribution of the business than trucking are the manufacturers of miscellaneous machinery and the makers of women's clothing.

Within the regulated trucking industry, competion among carriers is as fierce as in any field of endeavor. An executive of a motor carrier hauling forzen foods out of Texas says: "Not one pound of freight we move is not in competition with some other carrier."

The head of a general commodities carrier operating in the Northeast says: "We have got to be on our toes all the time. If we don't give the service, there's three or four other companies ready to jump in and take it away from us."

Phil Cochran, President of Lyons Transportation Lines, a carrier of common commodities out of Erie, Pa., put it this way at a recent symposium sponsored by the Traffic Club of Cleveland:

"The concept of easy entry creating lower rates and, therefore, reducing costs to the general public is a myth. The competitive forces within the regulated industry accomplish this purpose . . .

"There are 42 major carriers in Erie, Pennsylvania, a city of some 200,000. When I was new in this business there were probably 5 or 6 major carriers serving Erie and we've watched them come in year after year. Believe me, folks, the economy of Erie isn't growing that fast. We're all taking less. But we're competing. No competition in the trucking industry? Those guys aren't talking to the right people."

The myth of a lack of competition in the trucking industry springs from the fact that there is a control over entry. Anyone wishing to enter the business of hauling freight across state lines must make an application for authority with the Interstate Commerce Commission. The traditional criteria for the granting of this authority has been public convenience and necessity — in short, a demonstrated need for the service.

The ICC for some years has been approving applications for new operating authority at the rate of 80 percent or more.

To abolish such control would leave the reliable existent carriers fair game for the destructive competition that would inevitably follow. As the ICC put it in its White Paper on regulation in September, 1974:

"To have a sound and growing transportation system, capable of meeting challenges of our times, there must be substantial carrier investment in operating equipment and fixed property.

The costs of purchasing and maintaining both equipment and facilities are extremely high; and, properly, the industry must be given some economic inducement to invest its monies in the expansion of its facilities. This inducement comes from the knowledge that to the extent they serve the public on a reasonably satisfactory basis, carriers will not have their profits drained by unwarranted or destructive competition. This was a major reason why regulation was necessary in the 1920s and 1930s and why it remains that way today.

"Here it must be emphasized that we do not stifle competition. We promote productive competition and foster growth of strong competitors. Indeed, it would be hard to find a significant shipper or sizable area anywhere in the country dependent on only one carrier licensed to haul its traffic."

If there were a lack of competition in freight transportation, then there also would be poor service. And yet the regulated motor carrier system has an enviable reputation among America's shippers and the general public for good, reliable, efficient service.

In a survey conducted by the Department of Transportation in 1973 and 1974 among industrial shippers, 66 percent of the shippers surveyed — two out of three — labeled motor carrier service either excellent or quite good, while another 31 percent rated it adequate. The study was extensive, involving the responses of 193 industrial manufacturers in 19 major metropolitan areas, each employing more than 100 persons.

The results of that survey were not surprising. Time and again, shippers have publicly supported ICC regulation of trucking because they know it assures them of good service at reasonable rates. Here are just a few comments by shipper representatives on the subject:

"The closer people are to the transportation business, the less likely they are to support total deregulation." — Frederick W. West, Jr., President, Bethlehem Steel Corporation.

"Total deregulation would result in chaos where only the large and powerful companies would survive. Like atomic warfare, there would be only survivors, not winners." — George C. Bush, General Traffic Manager, Youngstown Sheet and Tube Company.

"Under the right of free entry, there appears to be nothing that would prevent large shippers getting together for joint enterprises on round trip truck load movements. With complete balance achieved, their costs would be lowered to the point where the most attractive tonnage would be lost to the common carrier. With the cream gone, what would be the survival rate for those who would try to exist on the skim milk?" — Edwin P. Mundy, Vice President-Traffic, National Biscuit Company.

"This economic regulation of rates and services became necessary way back in 1887 simply to protect the public against railroads' discriminatory practices. Later it was found necessary to include trucking, barge companies, express operations and pipelines. Airplanes were also regulated under the C.A.B.

"After all these years, are we now saying discriminatory practices would disappear? Does anyone believe antitrust laws can provide protection to the public? Does this mean a shipper or receiver of freight must go to the courts every time he feels he has been discriminated against? What a cumbersome, time consuming and costly system this would be is anybody's guess." — D. G. Ploetz, General Traffic Manager, Harnischfeger Corporation, Milwaukee.

The shippers — with the exception of a few giants who could make deregulation work to their advantage -- have every reason to fear the dismantling of the system that has served them so well. The few giants who would benefit from deregulation (and whose private fleets rival some of the large common carriers) have been very active on the deregulation front. Numbering only about a dozen in all, they banded together in an organization set up expressly to help bring about the lessening of regulatory controls. The organization now goes by the name of CURRENT — for the Committee Urging Regulatory Reform for Efficient National Trucking — and its members include such conglomerates as General Mills, Green Giant and Carnation. Sears, Roebuck and Company, once the driving force behind the organization, recently dropped out, believing it could be more effective operating through other channels.

The feelings of the general public, the consumers, toward the trucking industry were made clear in a survey conducted by U.S. News and World Report. According to the survey, conducted in 1976, the public ranked the trucking industry third behind the airlines and banking (also under some form of economic regulation) in service among 30 industries.

It is the need of all shippers, particularly the smaller ones, for dependable service at an equitable cost that is at the heart of economic regulation of trucking.

Regulation does not bestow on the trucker the unfettered right to carry the goods he wants to carry for the shippers he wants to serve to the locations he chooses. To the contrary: Regulation imposes on the trucker the obligation to serve all of the public within the limits of his authority without discrimination.

And if the obligation were to be removed (and how could one expect established carriers to continue to transport the less profitable freight while incoming carriers were not so obligated?) then service would deteriorate. Small towns in particular would suffer.

This was brought home recently in a number of studies. An independent study commissioned by the Department of Transportation and conducted by a research team at George Washington University showed that small-town residents regard their truck service as adequate and are concerned that such service would suffer under deregulation. That came as a revelation to the researchers who said they had expected to find truck service to small towns to be poor.

In another independent study, three University of Miami professors concluded: "If free entry and free exit is made the public policy, the result will be cessation of for-hire motor carrier service at reasonable rates to thousands of small communities and other places or routes of light traffic density. The general pattern of what was formerly common carrier service in medium density markets will become unstable; the service pattern will oscillate widely, and the oscillation will be continuous, extensive, quite erratic, and will exact a severe penalty in terms of shipper uncertainty and associated problems of shipper inventory levels and related problems."

(Shipper inventories are another key to understanding how well the regulated motor carrier service works. Thanks to this dependable service, industrial America has no need to stockpile large inventories, which has given trucking the title of "warehouses on wheels.")

Regulated motor carriers, themselves, were asked if they would suspend service to one or more points if no longer obligated to serve them, and 62 percent of those responding said they would.

This survey, conducted by American Trucking Associations among more than 3,000 Class I and II carriers, showed that on the average, carriers, relieved of the obligation to serve, would reduce the average number of towns they serve from the present 84 to an estimated 58.

As noted by the University of Miami team — Drs. Nicholas A. Glaskowsky, Jr., Brian F. O'Neil and Donald R. Huddleson — common carriage is dependent on some kind of entry control. "We also note that the concept of permitting uncontrolled entry into and exit from common carriage is a contradiction in terms," their report said. "The moment there is free entry and free exit of carriers there will no longer be common carriage because common carriage includes the obligation to serve in a reliable, constant, and consistent manner."

The inescapable conclusion is that the weakening or elimination of entry control will not enhance competition — which is already plentiful — but will instead destroy the common carrier system, disrupt service to the smaller towns, open the gates to widespread discrimination and, in the long run, eliminate all but the largest and most powerful carriers.

Then, the very people now calling for deregulation will be in the forefront of a movement to impose regulation. It may then be too late.

Transportation Cost: The Price Is Right

While the lack of competition is a charge frequently leveled at the regulated motor carrier industry, the second charge — regulation increases costs — is one that has a natural appeal.

It is equally groundless.

But groundless or not, it has been repeated often enough over the last few years to take on the aura of undisputed economic fact.

Critics, some of them respected economists, have thrown out such outlandish figures as $10 billion . . . $15 billion . . . and $16 billion. The Ford Administration made a flat statement that was given wide, supportive publicity, that government regulation (of all kinds, not just transportation) was costing Americans $2,000 per family a year, but when asked to substantiate the figure, a White House spokesman admitted the figure was not to be taken literally. On another occasion, a well-known economist conceded that the multi-billion-dollar figure he liked to use regarding the "cost" of transportation regulation had no basis in fact either.

Just what are the facts and how does one arrive at them?

For one thing, the total freight revenue for all Class I, II and III motor carriers, railroads, along with all ICC-regulated water carriers and pipelines, plus the airlines, for 1975 was an estimated $41 billion.

To suggest that deregulation would cut that bill by $16 billion, or even $10 billion, is an absurdity.

But the allegations are more than just exaggerations; they are absolute distortions. Because, far from costing consumers an excessive amount of money, the regulated transportation service in America is a real bargain in today's marketplace.

Consider that from 1972 through the third quarter of 1977, the wholesale price index rose 64 percent, while the cost of motor carrier transportation, based on revenues per mile, went up only 41 percent.

To get things in perspective, let us take a look at some typical transportation costs:

A hammer retails in a Chicago hardware store for $8.23. Total cost for transportation by motor carrier from manufacturer in Farmington, Connecticut, to Chicago — 6 cents.

A washing machine retails in Butte, Montana, for $311.78. Cost for shipment by motor carrier from Columbus, Ohio, for this heavy, expensive appliance — $18.37.

A stove retails in Los Angeles for $398.88. Cost of transportation by motor carrier from Mansfield, Ohio: $17.32.

A portable electric typewriter retails in a Chicago store for $249.47. It was manufactured in New York. Cost for motor carrier transportation from New York to Chicago — $1.74, or 7/10 of 1 percent of the total price.

A man's suit retails in Indianapolis for $94.01. Cost of transportation by motor carrier from Atlanta, Georgia — 28 cents, or 20/100 of 1 percent.

(Note: These are truckload rates. Transportation charges are slightly higher for less than truckload shipments, based on a graduating scale dependent on weight of shipment.)

And what about food, life's basic essential and a product that has been particularly affected by inflation? According to a Department of Agriculture study, the cost of intercity transport of 17 common foods making up a typical market basket is just 5.3 percent of the total retail cost.

And what should be paramount to any consideration of the regulatory question is the fact that this reasonable cost for transporting goods is extended to all, regardless of location. Thus, a resident of Spearville, Kansas, can purchase the things he or she needs and wants for the same relative price paid by the resident of downtown Manhattan or uptown Chicago.

Example: A 25-inch color television console, manufactured in Indianapolis, retails in Spearville for $629.00. Cost of transportation by motor carrier from Indianapolis to Spearville: $29.90 — less than 5 percent of the total and only 2 percent more than the Kansas state sales tax. That comes to less than 4 cents a mile for a distance of 800 miles for a bulky, space consuming, delicate luxury item. An that is in Spearville, Kansas, population 742, more than 125 miles from the nearest population center of at least 20,000.

The Spearville resident does not pay a higher rate for the transportation of that set than the resident of Wichita (population 300,000) or of Kansas City (1.5 million).

That is what regulation is all about.

Rate Bureaus

There is a gross misunderstanding among those promoting motor carrier deregulation concerning rate bureaus, what they do, and how they operate. The charge most often leveled against rate bureaus is that they allow motor carriers to arbitrarily set rates in a secret and collusive manner and that rates, therefore, are on the high side.

Actually, there is nothing secretive or collusive about rate bureaus, and the net result of their activities is to keep rates low, not high, and to keep rates from being used in a discriminatory way to the benefit of certain shippers, localities and kinds of freight and to the detriment of others.

There are ten major regional rate bureaus in the United States. Ted B. Alfriend, a transportation consultant and former head of the Middle Atlantic rate bureau, described the operation of a rate bureau before a house Subcommittee as follows:

"Any person may propose an increase or a reduction in any rate or rates. Public notice of the proposal is given either in a trade journal such as Traffic World, or in weekly bulletins of the bureau to which anyone may subscribe. Thereafter, there is a public hearing on the proposal at which any person may make his views known, orally or in writing. Following the public hearing the proposal is either approved or disapproved or modified and public notice of the action taken is given. If this process results in a decision to change a rate or rates, the change is published in a tariff which is filed with the ICC.

"Section 217(a) of the Interstate Commerce Act provides that changes in rates published in tariffs filed with the ICC cannot be made effective sooner than 30 days following the filing of the tariff absent special permission by the ICC . . . Any person may protest any changed rate to the ICC. In the event protests are filed they are referred to the Board of Suspension of the ICC. The board analyzes the changed rate, considers the facts in the protests and in any replies thereto. If the board cannot conclude that the changed rate is in fact just, reasonable and otherwise lawful, it suspends the use of the rate for a period of seven months and institutes a formal investigation of its lawfulness. If the board declines to issue an order of suspension and investigation any protestant may appeal to Division 2 of the commission itself. Division 2, which consists of three commissioners, reviews the matter and if it disagrees with the board, issues an order of suspension and investigation."

Such collective rate making does not preclude any carrier from making its own rates. Such independent actions are common. For example, the Middle Atlantic Conference reported that for the year ending May 31, 1977, 1,138 rate change proposals were independent actions — 28 percent of the total.

Here are some other most significant data covering that period of activity at the Middle Atlantic bureau, as described by the bureau's general manager, Christian A. Henriott:

"In the 12 months ended May 31, 1977, the Standing Rate Committee acted on 2,859 proposals: 31 percent were reductions in LTL (Less Than Truckload) rates and 56 percent were reductions in truckload rates. The balance or 13 percent involved various types of territorial adjustments such as changes in rules, grouping of places, distance factors, etc., the majority of which were reductions. It approved, in whole or in part, 2,641 proposals, or 92 percent of those acted on, thereby reducing thousands of rates and charges.

"In the same period there were 1,138 independent actions: 26 percent were reduced LTL rates; 57 percent were reduced truckload rates; and 17 percent were changes in rules, such as allowances and arbitraries, or exceptions ratings, most of which were reductions.

"Again, the result was the establishment of thousands of reduced rates and charges. Committee approval of practically all the proposed reductions demonstrates that the collective ratemaking process neither stifles rate reductions nor is confined to increases such as is typical of a cartel."

Congress, by passage of the Reed-Bulwinkle Amendment now known as Section 5(a) of the Interstate Commerce Act, authorized this collective ratemaking and made it immune from antitrust laws. Congress took the action in 1948 following extensive hearings which were marked by a great outpouring of support for the measure from shipper and community organizations across the country.

In a recent study of collective ratemaking, Jesse J. Friedman, an economic consultant, made this observation:

"The principal economic benefits which are achieved by collective ratemaking in trucking relate to the avoidance of damaging forms of economic discrimination which, because of the structure and character of motor freight transport, would be inevitable under unrestrained competition. In the absence of collective

rate differences which are not justified by any difference in cost or any other relevant economic consideration. It would be impossible to assure that all shippers, large and small, are treated in a nondiscriminatory way by carriers as a group, or to assure treatment among competitively-related commodities. Not only shippers, but communities and employees as well, would suffer unjustifiable economic hardship, economic resources would be misallocated, and economic efficiency would be impaired. With collective ratemaking, there exists the opportunity and the machinery for averting these consequences."[1]

And here is what the Supreme Court said about discriminatory rates while rendering a decision in 1947:

"Discriminatory rates are one form of trade barrier. Their effect is not only to impede established industries but to prevent the establishment of new ones . . . Nondiscriminatory class rates remove that barrier by offering that equality which the law was designed to afford. They insure prospective shippers not only that rates are just and reasonable per se but they are related to those of their competitors . . ."

Collective rate making reduces the chaotic to the manageable. Consider the hundreds of thousands of commodities, now reduced to 23 classification ratings, traveling between more than 117,000 points and places in the United States, and the need for some kind of stabilizing system becomes apparent. The alternative would be thousands of separate carriers setting rates for hundreds of thousands of commodities between 13.7 billion combinations of places.

No shipper would know one day to the next what his rates or the rates of his competition would be. The paperwork would be overwhelming. In short, business would be reduced to a lottery.

As the House Committee on Interstate and Foreign Commerce put, it in explaining its support of the Reed-Bulwinkle Act:

"It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder, and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent. The public interest will not be served if there is permitted to continue the existing state of uncertainty as to the extent to which carriers may engage in joint activity without risk of violating the antitrust laws . . . The carriers cannot effectively meet the requirements of the law, or provide the type of transportation that the public has come to expect and demand of them, if each is to be compelled to go it alone without a reasonable degree of consultation and agreement with other carriers."

[1] Jesse J. Friedman, "Collective Ratemaking in Trucking: The Public Interest Rationale," a study commissioned by 11 rate bureaus, 1977.

The Empty Mileage Argument

While the accusations that economic regulation of the motor carrier industry stifles competition and runs up costs are error-ridden from start to finish, the allegations concerning empty backhauls or empty mileage are downright ludicrous.

The charge, "trucks are forced to run around the country empty because of ICC regulations," has a simplistic, emotional appeal. When the charge is made by someone in authority, the tendency is to believe it without question.

But a moment's reflection makes it quite clear that only in some kind of fantasy world, where the impossible becomes the rule, could we find a transportation system where all vehicles could travel loaded at all times.

The plain fact is that empty mileage is nothing more than a simple fact of transportation life. What little there is, is for the most part unavoidable.

In a recent study, made jointly by the ICC, the Productivity Commission, the Office of Management and Budget, and the Council on Wage and Price Stability, it was found that only 20.4 percent of truck miles are empty. (The figure is substantially lower for regulated motor carriers of common commodities.) The study found that the chief reasons for empty trucks are the regional traffic imbalances inherent in our society and the use of specialized equipment such as auto carriers and tank trucks. Only about 3 percent of the empty miles appeared to be avoidable, according to the study.

Picture, if you will, the freight going into Michigan's automobile manufacturing and assembly plants — ore, metal, hardware, etc. Then picture what comes back out — completed motor vehicles being hauled on special carriers.

Naturally, those trucks carrying nuts and bolts and rubber gaskets in will not be carrying automobiles out; while the autmobile carriers will not be carrying anything in.

You would not haul heating oil in a tank truck from Oklahoma City to Milwaukee and then haul milk back to Oklahoma City in the same tanker.

Some places, like Washington, D.C., import virtually everything that is needed and export practically nothing. Florida exports orange juice and frozen meats, but imports most of its manufactured goods.

There has been great sympathy expressed lately for the exempt hauler, who carries exempt agricultural products to metropolitan centers but must return empty to his home base. Critics of regulation say he should be allowed to pick up regulated freight for his return haul.

But while one may sympathize with the problem of the exempt hauler, the question persists: Just where is he going to get that regulated freight for his return haul? As was mentioned earlier, you cannot increase the amount of freight available to be carried. One man's backhaul is another man's front haul.

To create a society in which all trucks would move into all areas with full loads and would also come out of those areas with full loads is an impossible dream. It might be easier to create a society in which every community grew and manufactured everything it needed and wanted, thus eliminating the need for transportion altogether.

Motor carriers are well aware of their empty mileage and work constantly at keeping it to a minimum. They recognize — more so than anyone outside the business — that empty mileage does not bring in revenue. But they can also distinguish between reality and idealistic fantasy. Motor carriers have to operate in the real world.

Regulation Means Conservation

In this particular era, when the Nation acutely needs to conserve energy, there is an additional reason for maintaining economic regulation of the motor carrier industry: Regulation saves energy.

Under regulation, the motor carrier industry has proven itself to be an efficient user of fuel in terms of freight carried and service performed. Deregulation and the weakening of entry controls would lead to inefficient operations, greater empty truck mileage, more trucks on the highways and a waste of fuel.

As more and more carriers entered the field, there would be a general breakdown in all-around efficiency. Empty mileage would increase greatly. Many of the new companies, operating on shoestrings, could not afford even minimal investment in maintenance, which at present is a major facet of the regulated trucking industry. And a good part of that maintenance effort is directed at fuel savings.

Regulation Means Safety

An economically regulated motor carrier system is a safe motor carrier system.

Though accidents continue to happen and some involving trucks are the sensational, headline-grabbing variety, the record clearly shows that the regulated motor carrier industry is a responsible user of the nation's highways.

But that safety record is no accident.

Millions of dollars are spent annually — by American Trucking Associations, its member state associations and conferences, and individual carriers — on safety. Proper vehicle maintenance, an extensive safety program under the direction of a safety director or supervisor, road patrols, driver training and incentive programs all are important parts of the regulated motor carrier's operation.

The regulated motor carrier industry has given its support to the national speed limit of 55 mph and has backed up that support with intense public relations and industry relations programs aimed at bringing about driver compliance.

The savings in lives, injuries and property damage resulting from the safety efforts of the regulated trucking industry cannot even be estimated, but they must be tremendous.

But such a large investment would not — and could not — be made under a non-regulated system. Deregulation would mean excessive competition, much of it from economically disadvantaged and irresponsible entrepreneurs; a loss of the effective safety controls inherent in a government licensing system, and an overall dissolution of the stability that now marks the regulated industry. There would most certainly be a substantial lessening of safety investment.

There would no winners — only losers.

Motor Carrier Regulation— A Red Herring?

The economic regulation of the motor carrier industry is under particular fire these days because of the general dissatisfaction with Big Government and Big Government Regulation.

Motor carrier executives share that dissatisfaction.

Presidents, one after another, have decried the bureaucratic Big Brotherism that is threatening to smother business under an avalanche of red tape and paperwork. Everyone has heard of the bizarre lengths to which some bureaucracies have gone under the misguided belief they are carrying out their particular mandates.

And with the growing bureaucracy has come a growing fear that the basic freedoms that have made America the envy of the world are being snuffed out by all of this Big Brother concern for health, safety and welfare.

Dr. Milton Friedman, the highly reputable economist from Chicago, voiced the fear in these words following a meeting of concerned business and finance leaders and scholars:

"Too many of us tend to think the threat to our freedom is somewhere in the indefinite future. It's not in the future, it's here! A large fraction of our freedom has already been eroded, and to a large extent ours is already a controlled society."

And so the executive of a regulated motor carrier cannot help but be particularly frustrated and outraged when he sees the economic regulation of trucking under the ICC being placed in the category of this mushrooming Big Brotherism, which also victimizes him.

If overregulation by government is a serious problem in this country — and we agree that it is — then, the ICC doesn't even belong on a list of agencies needing investigation for exercising too much authority.

And yet, the ICC is frequently singled out as an example — sometimes as the primary example — of such Big Brotherism, though strangely enough, few complaints are being heard from the 16,000 motor carriers under ICC jurisdiction.

One can only conclude that those linking the economic regulation of trucking to the problem of excessive government regulation either are operating from sheer ignorance or are throwing a red herring into the issue to keep the public's mind off the true threats to freedom — the agencies operating in the fields of social welfare.

[illegible] professor and writer, is one who understands the distinction, as he made clear in one of his columns in The Wall Street Journal:

"The movement for 'de-regulation' may seem to be a healthy reaction against what Walter Lippman called 'the sickness of an over-governed society.' But in actuality it is not really anthing of the sort. It is a movement directed almost exclusively against *some* of the activities of the *older* regulatory agencies — e.g., the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Power Commission, the Securities and Exchange Commission, et al. Not *all* such agencies, it is interesting to note. There seems to be little urge to dismantle the Food and Drug Administration or the Federal Trade Commission. And there appears to be no impulse whatsoever to apply 'deregulation' to the activities of the *newer* regulatory bodies — the Environmental Protection Agency, the Occupational Safety and Health Administration, or the Consumer Products Safety Commission. On the contrary: the bureaucracy and red tape of these other agencies calmly and inexorably multiply, attracting little controversy, even as the movement for 'de-regulation' grows more popular.

"So, while 'de-regulation' sounds as if it means debureaucratization, it turns out not to have that meaning at all. Or, more precisely: it is a very selective kind of debureaucratization. And there is reason to believe that it is the wrong kind — one whose ultimate consequences will be more government control over the economy rather than less."

Agencies which are continuously expanding their control over the people are marked by a corresponding expansion of their own facilities as seen in the increasing numbers of their workforces.

The Environmental Protection Agency had more than 11,000 employees in 1976 — up 2,000 in just three years. The Equal Employment Opportunity Commission, which was organized in 1965, had an authorized staff in 1970 of 579. Seven years later, in 1977, that staff had quadrupled to 2,300. The Occupational Safety and Health Administration, created in 1971, had in 1973 a total of 1,239 employees. Four years later it had doubled its size to 2,565 employees.

These, like the ICC, are agencies and do not begin to reflect the growth of Big Government as more clearly shown in the burgeoning of the big departments, like the Department of Health, Education and Welfare, which in 17 years has expanded from 61,641 to 141,213 employees.

But these mushrooming agencies do give an accurate comparison with the ICC, which at end of 1977 had only 2,044 employees — 300 fewer than in 1960!

In fact, unlike any federal agency working in the social welfare fields, the ICC has been marked over the years by a stability in numbers employed and monies spent. It is not and never has been an agency seeking to exercise more and more control over the public; in fact, its lines of authority are clearly drawn in the IC Act, are restricted to interstate surface transportation and to the relatively narrow economic segment of that area.

To attempt to hold up this innocuous area of limited regulation as an example of Big Brotherism run rampant is far more than an injustice to the ICC and the regulated trucking industry; it is a serious distortion that takes away the heat and the light from where they rightfully should be directed. While the movement to deregulate trucking picks up more momentum, the real culprits in the expanding authoritarianism continue to grow unimpeded.

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

FINANCE DIVISION
POUCH WF—STATE CAPITOL

JUNEAU, ALASKA 99811

October 24, 1978

SUMMARY OF: A Performance Review of the Alaska Transportation Commission.

PURPOSE OF THE REVIEW

In accordance with the provisions of Alaska Statutes 24.20.271(1), 44.66.010, and 44.66.050 (sunset legislation), a review of the Alaska Transportation Commission (ATC) was conducted to determine if the Commission has been operating in an effective and efficient manner. The functions reviewed included the Commission's executive, administrative, enforcement, rates/tariff analysis, and records/docketing functions.

REPORT CONCLUSION

In our opinion, the Alaska Transportation Commission should continue to regulate the transportation industry pending a comprehensive transportation study. The economic consequences of regulation or deregulation need to be determined in order to fully evaluate the public need for this agency.

However, certain changes need to be implemented in order for the Alaska Transportation Commission to effectively accomplish its statutory purposes which are: (1) to provide shippers and receivers with a stabilized rate structure; (2) to foster sound economic conditions among the carriers which will guarantee transportation in the public interest; and (3) to promote adequate, economic services and reasonable charges.

The Commission has been hampered by the following problems in meeting these purposes. The statutes and regulations which affect the Commission are overdue for revision in many areas. The Commission staff is burdened with additional work due to obsolete legislation such as the Ferry Act as well as dump truck and recreational air carrier regulatory sections.

Improvement is needed in the manner in which ATC approaches its economic regulation mandate and its enforcement responsibilities. Operating data must be obtained from a regulated carrier and properly audited and analyzed. ATC must enforce the provisions of the various transportation acts. Consistently suspending civil penalties levied against carriers is not a useful deterrent in that connection.

Applications for authority have not been processed in a timely fashion which is a disservice to the public. Moreover, communicating operating authority to carriers by telegram, before findings of fact and conclusions of law have been drafted, is contrary to statute and has been successfully appealed to the Superior Court.

The ATC Commissioners have not complied with the statutory requirement for providing notice and opening their meetings to the public. Further, the meetings have not been held weekly as is required. In addition we have recommended both Commissioners and the staff decline any future free offers of transportation from regulated carriers.

There has been a serious disregard of the prohibitions against ex parte communication by both the Commissioners and the staff. This is evidenced by phone calls to Commissioners from attorneys representing parties to a case before the Commission and orders written by staff members on cases to which they were a party. Also, it appears the Governor, through the Commissioner of Administration, has attempted to influence the judgement of the Commissioners.

Improvements in the efficiency of order writing and decision making would result from compiling a complete and accurate index of all prior orders and court decisions. Improvements in attorney and tariff analyst services should result from a transfer to ATC of the assistant attorney general and tariff analyst currently assigned to the Department of Law.

The primary goals of the Commission are to regulate air and motor commerce to ensure economically sound carriers and a stabilized rate structure. In general, the ATC does not have the necessary information on carriers' profit, volume or growth of traffic, or trends in population, to make informed decisions on applications for authority or rate changes. ATC is mandated by statute to complete a statewide air commerce study and such a study, including all modes of transportation, has been started by the Department of Transportation in Southeast Alaska. The results of this study, as well as a similar study of other areas in the State should enhance ATC's ability to accomplish their primary goals.

In conclusion, the Alaska Transportation Commission should analyze and evaluate the methods of the Commission and take the necessary actions needed to perform and fulfill their responsibilities to the public.

STATE OF ALASKA

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

FINANCE DIVISION
POUCH W—STATE CAPITOL

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

JUNEAU, ALASKA 99811

January 22, 1979

To: Presiding Officer of Both Houses

From: Legislative Budget and Audit Committee
George Hohman, Chairman

Subject: Forwarding of Sunset Audits with Discussion of Legislative Oversight Responsibilities

Enclosed are Sunset Audit Reports of 13 boards and commissions that will terminate June 30, 1979. We are forwarding these reports to you so that they may be distributed to the appropriate standing committees you will designate to perform the legislative oversight function.

According to AS 44.66.050 the standing committee of legislative jurisdiction, as provided in Rule 20 of the Uniform Rules of the Legislature, shall hold one or more hearings to receive testimony from the public and other parties that have associated responsibilities or interests. In addition the Committee shall consider Legislative Audit's report, the agencies proposed budget, the agencies program performance report and any other tools that might assist them in evaluating the conduct and activities of the agency being terminated.

It is important to note that the terminating agency shall have the burden of demonstrating a public need for its continued existence during the public hearings.

The determination of "public need" for continued existence shall take into consideration the following factors set out in AS 44.66.050(c):

(1) the extent to which the board, commission or program has operated in the public interest;

(2) the extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters;

31-GILH

(3) the extent to which the board, commission or agency has recommended statutory changes which are generally of benefit to the public interest;

(4) the extent to which the board, commission or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided;

(5) the extent to which the board, commission or agency has encouraged public participation in the making of its regulations and decisions;

(6) the efficiency with which public inquiries or complaints regarding the activities of the board, commission or agency filed with it, with the department to which a board or commission is administratively assigned, or with the office of the ombudsman have been processed and resolved;

(7) the extent to which a board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public;

(8) the extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission or agency to its own activities and the area of activity or interest; and

(9) the extent to which statutory, regulatory, budgeting or other changes are necessary to enable the agency, board or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

The Legislative Audit reports have addressed these issues individually but only to the extent allowed by restricted audit scopes detailed within the reports.

The Law further states that the committee of reference shall, not later than the 60th day of the legislative session, submit a report to the presiding officer of each house. The report is to include a summary of findings as to compliance with the "public need" factors enumerated above together with recommendations as to each of the following:

(1) an identification of the problems or the needs that the programs and activities of the board, commission or agency are intended to address;

(2) a statement, to the extent practicable, of the objectives of the program of the board, commission, or agency program, and its anticipated accomplishments;

(3) an identification of any other programs having similar, conflicting or duplicate objectives;

(4) an assessment of alternative methods of achieving the purposes of the program;

(5) an assessment of the consequences of eliminating the board, commission or program and consolidating its activities with another program, or of funding it at a lower level;

(6) a justification for the recommended continuation or extension of the board, commission or program, and an explanation of the manner in which it avoids duplication of or conflict with other efforts; and

(7) any other information which, in the opinion of the committee, would improve the performance of the board, commission or agency with respect to its representation of and responsiveness to the public interest.

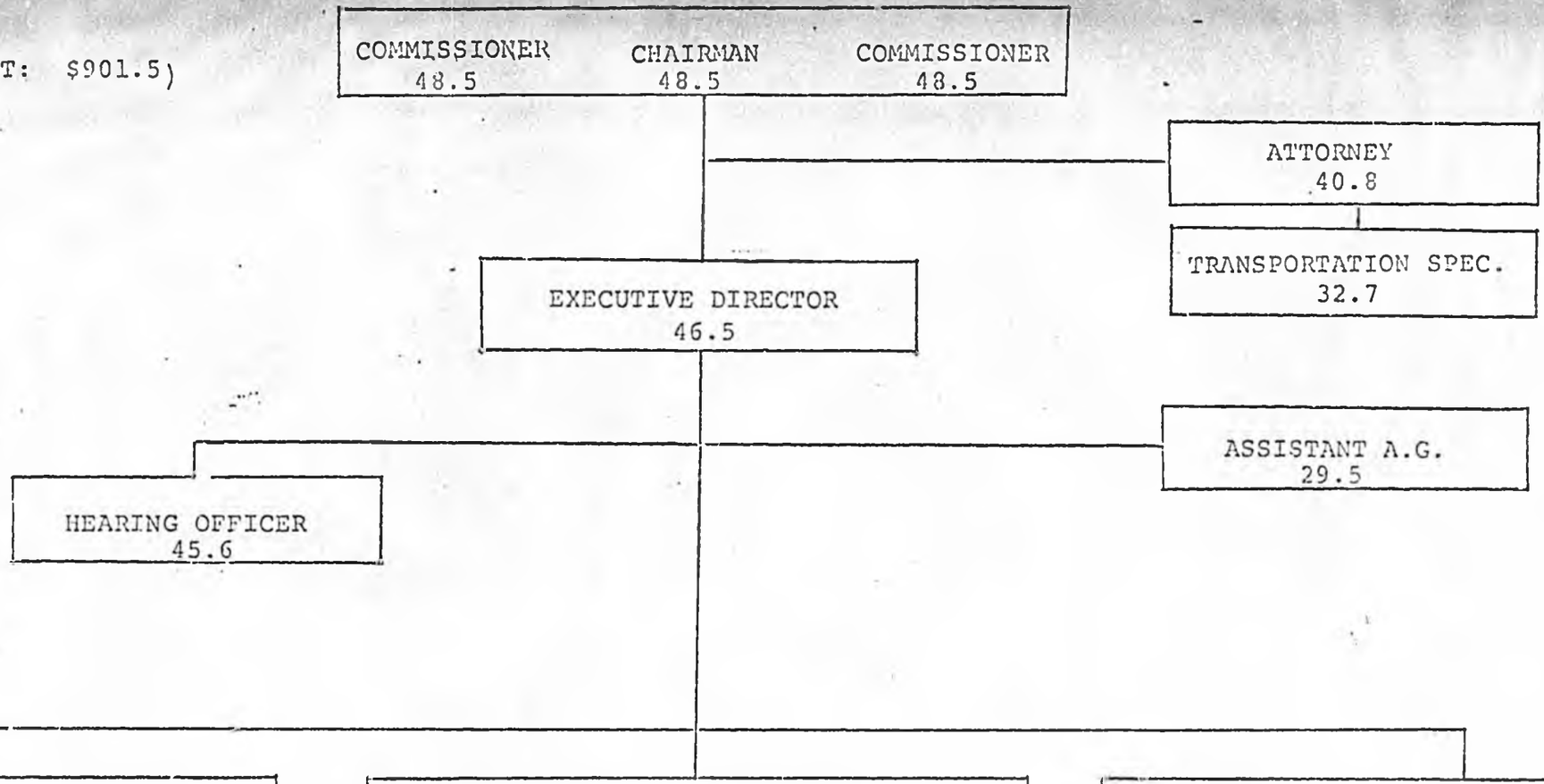
The committee of reference may introduce a bill providing for the reorganization or continuation of the agency being terminated as stipulated in AS 44.66.050(e).

In addition, the Law requires the Legislative Budget and Audit Committee to designate, not later than March 1, 1979, programs or activities in the general government, public protection and administration of justice budget categories, which shall be subject to termination in the next fiscal year. It is anticipated that the Legislative Budget and Audit Committee will be recommending six to nine programs for termination which will be submitted to you in the form of bills by the required deadline.

cc: Members of the Legislature

ALASKA TRANSPORTATION COMMISSION ORGANIZATIONAL CHART & FINANCIAL CONDITION--PROPOSED

AND TOTAL 100 ACCOUNT: $901.5)
(S NOT INCLUDE BENEFITS)



RATE & AUDIT SECTION

Transportation Spec.	44.0
Transportation Spec.	42.3
Financial Analyst IV	35.2
Financial Analyst III	30.0
Tariff Analyst III	30.0
Accounting Technician II	21.0
	202.5

ADMINISTRATIVE SUPPORT SECTION

Administrative Support Center Supervisor	20.7
Commission Recorder	18.3
Administrative Support Technician	17.7
Administrative Support Technician	17.7
Administrative Support Technician	17.1
Document Processing Clerk III	16.5
Clerk II	15.2
Correspondence Secretary	18.3
Correspondence Secretary	13.7
Correspondence Secretary	13.7
Correspondence Secretary	13.7
	182.6

ENFORCEMENT

Transportation Field Agent IV 32.3

ANCHORAGE		FAIRBANKS
Field Agent I	28.3	Field Agent III
Field Agent I	26.2	Field Agent I

JUNEAU

Field Agent II 24.4

total: 175.8

GRAND TOTAL 100 ACCOUNT: $910.0)
DOES NOT INCLUDE BENEFITS)

COMMISSIONER 48.5 | CHAIRMAN 48.5 | COMMISSIONER 48.5

EXECUTIVE DIRECTOR 46.5

ASSISTANT A.G. 29.5

HEARING OFFICER 53.8

HEARING OFFICER 45.6

RATE & AUDIT SECTION

Tariff Specialist	42.3
Tariff Specialist	44.0
Tariff Specialist	35.2
Tariff Specialist	32.7
	154.2

ADMINISTRATIVE SUPPORT SECTION

Administrative Support Center Supervisor	20.7
Commission Recorder	18.3
Administrative Support Technician	20.3
Administrative Support Technician	17.7
Administrative Support Technician	17.7
Administrative Support Technician	17.1
Document Processing Clerk III	16.5
Clerk II	15.2
Correspondence Secretary	18.3
Correspondence Secretary	13.7
Correspondence Secretary	13.7
	189.2

ENFORCEMENT

Transportation Field Agent IV 32.3

ANCHORAGE

Field Agent I	28.3
Field Agent I	26.2
Field Agent I	27.2

FAIRBANKS

Field Agent III	
Field Agent I	
Field Agent I	
Clerk Typist II	

JUNEAU

Field Agent II 24.4

total: 247.7

42.10.050
42 10 391

STATE OF ALASKA

ALASKA TRANSPORTATION COMMISSION

In the Matter of Wrecker or Tow-truck Operations subject to AS 42.10) Ruling No. 2

DECLARATORY RULING

Upon request of the Alaska Transportation Commission's staff the Commission hereby renders this Declaratory Ruling with respect to the operations of wreckers and tow-trucks when such operations are conducted on the public highways of the State of Alaska, and are subject to the provisions of the Alaska Motor Freight Carrier Act.

1. A motor carrier permit is not required for the operations of a wrecker or tow-truck when such operations are being performed as a private carrier as defined in AS 42.10.420(7).1/

Examples of such operations are as follows:

(a) No permit is required for the operations of a wrecker or tow-truck which is owned and operated by a automotive repair shop or service station wherein he transports disabled vehicles to his place of business for service or repair.

+ Ambiguous why call no permit when permitted is available

(b) No permit is required to assist or move a wrecked, damaged, or disabled vehicle which is on the roadway creating a traffic hazard to the nearest location at which the vehicle may be placed off the traveled portion of the roadway in a safe position.

SAME AS ABOVE

(c) No permit is required to assist or move a vehicle back onto the roadway from a point alongside the roadway.

2. A motor carrier permit is required when wreckers or tow-trucks are used to transport the property of others for compensation and not in connection with some other established private primary business. AS 42.10.130 2/

1/ No common carrier, contract carrier, or temporary carrier may operate for the transportation of property in intrastate commerce for compensation in the state without a permit . . .

2/ "private carrier" is:
(A) a person who transports by motor vehicle, with or without compensation, property which is owned or is being bought or sold by him, or property of which he is the seller, purchaser, lessee or bailee, and the transportation is incidental to and in furtherance of some other primary business conducted by the person in good faith.

Examples of such operations are as follows:

(a) A permit is required when a wrecker or tow-truck is used to transport an impounded or repossessed vehicle whether or not such vehicles are wrecked, damaged, or disabled.

(b) A permit is required when a wrecker or tow-truck is used to transport vehicles whether or not such vehicles are wrecked, damaged or disabled to a destination other than the wrecker or tow-truck operators own place of business.

DATED at ANCHORAGE, ALASKA this 21st day of October, 1974.

BY THE COMMISSION

ALASKA TRANSPORTATION COMMISSION

Robert C. Rocker, Chairman

Jake Johnson, Commissioner

Quentin L. DeBoer, Commissioner

Jim Duncan
FREEMAN
Wilson S+K
Pede

NOTICE OF PROPOSED ADOPTION IN THE REGULATIONS

OF THE ALASKA TRANSPORTATION COMMISSION

Notice is hereby given that the Alaska Transportation Commission, under authority vested in AS 42.07.141(a) and (b) proposes to adopt, regulations in Title 3 of the Alaska Administrative Code to implement AS 42.07.121 and AS 42.10.110 as follows:

Section 420(2) in Chapter 10 of Title 42 (The Alaska Motor Freight Carrier Act) includes "Forwarder" as a common carrier, but no further descriptions have been made and published and no regulations have been published to afford guidelines under which this class of carrier may operate.

The Proposed Regulation:

3 AAC 64.546 FORWARDERS

Provides for concise definition, the basis for rates and charges, billing and collecting procedures, the class of service in which the carrier may operate and requirement for filing a bond.

Notice is also given that any person interested may present written statements or arguments relevant to the action proposed at the Alaska Transportation Commission, 1000 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501 before 4:30 p.m. on March 12, 1979.

Copies of the Proposed Regulation are available at the offices of the Alaska Transportation Commission in Anchorage, Fairbanks and Juneau.

ATC
1000 MacKay Building
338 Denali Street
Anchorage, Alaska 99501

ATC
P. O. Box 2172
Juneau, Alaska 99803

ATC
675 Seventh Avenue
Station A
Fairbanks, Alaska 99701

Thereafter, the Alaska Transportation Commission, upon its own motion or at the instance of any interested persons, may thereafter adopt the proposals substantially as described above without further notice or may decide to take no action on them.

DATED AT ANCHORAGE, ALASKA, this 1st day of February, 1979.

ALASKA TRANSPORTATION COMMISSION

Jake Johnson
Chairman

REFER TO DOCKET NO. 77-9-RR/A

State of Alaska
Alaska Transportation Commission
1000 Mackay Building
338 Denali Street
Anchorage, Alaska 99501

C E R T I F I C A T I O N

I HEREBY CERTIFY that I have this date mailed a true and correct copy of NOTICE OF PROPOSED ADOPTION IN THE REGULATIONS OF THE ALASKA TRANSPORTATION COMMISSION, in Docket No. 77-9-RR/A, postage prepaid to the following parties:

Southeast Alaska Empire
138 Main Street
Juneau, Alaska 99801

Fairbanks Daily News Miner
P. O. Box 710
Fairbanks, Alaska 99701

Anchorage Daily Times
P. O. Box 40
Anchorage, Alaska 99501

Alaska Carriers Association
3443 Minnesota Drive
Anchorage, Alaska 99503

All Senators
Alaska State Senate
Pouch V
Juneau, Alaska 99811

All Representatives
State House of Representatives
Pouch V
Juneau, Alaska 99811

Jack Starbird, Project Manager
Haines Sewer & Water
National Mechanical Cont.
P. O. Box 1972
Anchorage, Alaska 99510

Charles & Beverly Jones
P. O. Box 401
Haines, Alaska 99827

Mr. and Mrs. John Aske
P. O. Box 12
Craig, Alaska 99921

James M. Dodson
Executive Director
Alaska Air Carriers Assn.
P. O. Box 1608
Juneau, Alaska 99802

Mr. and Mrs. Walter E. Short
Box 531
Haines, Alaska 99827

Mrs. Richard Jackson
P. O. Box 401
Haines, Alaska 99827

Mrs. Richard Jackson
P. O. Box 401
Haines, Alaska 99827

Elizabeth Paddock
P. O. Box 106
Pelican, Alaska 99832

Mr. Malcolm A. Menzies
R & M Consultants, Inc.
P. O. Box 1786
Juneau, Alaska 99801

Martin A. Cordes, V.P.
Schnabel Lumber Co.
P. O. Box 129
Haines, Alaska 99827

Lew & Rene Rieth
P. O. Box 385
Moose Pass, Alaska 99631

Tom Owens, President
Owens Drilling Co., Inc.
P. O. Box 842
Wrangell, Alaska 99929

Tom O. Paddock, President
T. O. Paddock Co.
P. O. Box 850
Juneau, Alaska 99801

Gerald H. Grove
P. O. Box 130
Craig, Alaska 99921

Riley Pleas, President
Riley Pleas, Inc.
2404 Boyer Avenue East
Seattle Washington 98112

Mr. and Mrs. Al Dennis
P. O. Box 31
Craig, Alaska 99921

Eugene T. McNamara
P. O. Box 262
Haines, Alaska 99827

Bob and Davis Walker
Copper River Fly-Fishing Lodge
Pope Vannay Landing
Iliamna, Alaska 99606

Jerry L. Honousek
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Skagway, Alaska 99840

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Sears, Roebuck and Co.
P. O. Box 291
Haines, Alaska 99827

Velma Knapp
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Skagway, Alaska 99840

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Stikine Air Service
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L. Ingle, V.P. and Manager
Alaska Wood Products
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Wrangell, Alaska 99929

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City of Klawock
Klawock, Alaska 99925

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P. O. Box 63
Klawock, Alaska 99925

Martin J. Fabry
Log Cabin Sports Rentals
P. O. Box 54
Klawock, Alaska 99925

Mr. and Mrs. Don Thomas
P. O. Box 98
Craig, Alaska 99921

Stanley N. Jones, MD
Haines, Alaska 99827

Robert L. Syre, Sup.
Excursion Inlet Packing Co.
Excursion Inlet, Alaska 99850

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Alaska Legal Services Corp.
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Anchorage, Alaska 99501

Mr. Ian Newman
Craig, Alaska 99921

Dave L. Murdey, Consultant
Alaska Pulp America, Inc.
P. O. Box 621
Wrangell, Alaska 99929

Wrangell Chamber of Commerce
P. O Box 49
Wrangell, Alaska 99929

Alaska Dept. of Public Safety
Pouch N
Juneau, Alaska 99811

Director
Division of Motor Vehicles
Alaska Dept. of Public Safety
P. O. Box 960
Anchorage, Alaska 99510

DATED AT ANCHORAGE, ALASKA, this 1st day of February, 1979.

ALASKA TRANSPORTATION COMMISSION

Carolyn J. Homme

(Mrs.) Carolyn J. Homme
Secretary

Findings, effect upon operation in public interest.

the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration: *Provided*, That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2) (a), the provisions of paragraph (2) shall be applicable thereto in addition to the provisions of this paragraph: *And provided further*, That no such authorization shall be necessary if the carrier having the ownership, lease, operation, control, or interest has, prior to the date this section as amended becomes effective, obtained an order of extension under the provisions of paragraph (21) of this section, as in effect prior to such date, and such order is still in effect.

—effect on competition on water route.

Applicability of sec. 5 (2). Saving clause, when order of extension obtained.

AGREEMENTS BETWEEN CARRIERS

62 Stat. 472.

SEC. 5a. [*June 17, 1948.*] [*49 U. S. C. § 5b.*]

(1) For purposes of this section—

"Carrier" defined.

(A) The term "carrier" means any common carrier subject to part I, II, or III, or any freight forwarder subject to part IV, of this Act; and

"Antitrust laws" defined.

(B) The term "antitrust laws" has the meaning assigned to such term in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914.

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval therof is not prohibited by paragraph (4), (5), or (6) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

Application for approval of agreements.

Terms and conditions of approval.

(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

Accounts, records, files, inspection.

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipe-line companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

Carriers of different classes.

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this Act is applicable.

Pooling, division.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take

Sec. 5a

Independent action.

independent action either before or after any determination arrived at through such procedure.

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2), or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

Investigation.

Approval modified or terminated.

Effective date.

Hearing.

(8) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

Antitrust laws, relief from.

(10) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9).

Limitation.

Sec. 5a–6

NOTE.—Clayton Antitrust Act, see Title 15, infra.

Quotations, tenders, of rates, for United States Government, agreement approved under § 5a, see § 22 (2), infra.

Section 204 of the Emergency Railroad Transportation Act, 1933, 49 U. S. C. § 5a, June 16, 1933, provides: "The provisions of the Interstate Commerce Act, as amended, and of all other applicable Federal statutes, as in force prior to the enactment of this title, shall remain in force, as though this title had not been enacted, with respect to the acquisition by any carrier, prior to the enactment of this title, of the control of any other carrier or carriers." The U. S. Code renumbers § 5a of the act of June 17, 1918, as § 5b.

SCHEDULES AND STATEMENTS OF RATES, ETC., JOINT RAIL AND WATER TRANSPORTATION

SEC. 6. [*Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, August 9, 1935, September 18, 1940, August 2, 1949.*] [*49 U. S. C. § 6.*] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the pas-

24 Stat. 380.
25 Stat. 855.
34 Stat. 386.
37 Stat. 568.
41 Stat. 483.
49 Stat. 543.
54 Stat. 910.
63 Stat. 486.

Schedules, printing and filing; open to public.

Components applicable when no joint rate established.

What schedules shall show.

and findings set forth in the prior report, as clarified in this report on reconsideration, within 90 days of the date of service of this report and order.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Ex Parte No 297

APPENDIX A

Ultimate conclusions and findings of prior report, 349 I.C.C. 811

1. Rate bureaus assist the making of appropriate rates.
2. Procedural changes would foster actions more favorable to bureau members, shippers, and the general public; such changes being contained in the body of the report.
3. The right of independent action does not adversely affect the rate structure.
4. A system need not be established by the Commission to monitor public hearings before rate bureaus, but that formal minutes, and not verbatim transcripts, are required of rate committee proceedings.
5. Commission representatives may attend all rate bureau meetings; but that copies of correspondence and documents concerning all rate bureau meetings need not be filed with the Commission.
6. A uniform system of accounts for rate bureaus will be promulgated.
7. Rate bureaus are not prohibited from furnishing technical and professional services to other bureaus or nonmembers provided that the limitations expressed in the report are observed.
8. Rate bureaus may not invest in another commercial business, whether related or unrelated to its primary function of processing and publishing rates and related matters for member carriers.
9. Rate bureaus are prohibited from acquiring other rate bureaus without prior Commission approval.
10. Rate bureaus should not be profitmaking enterprises.
11. A carrier member of a bureau, which carrier is affiliated in any way with a shipper, may not serve on a bureau's board of directors, general rate committee, or any other committee which has an effect, either directly or indirectly, on the ratemaking function of the bureau without specific prior Commission approval.
12. A maximum period of 120 days should be prescribed for the processing of proposals to final disposition.
13. Public notice of proposals need not identify the proponent.
14. Rate bureaus are prohibited from broadening the territorial or commodity scope of an individual rate proposal without prior adequate notice.
15. Adoption of shortened special procedures involving proposals covering special docket applications are not warranted in this proceeding.

16. Section 22 quotations require special bureau procedures limiting notification to members and the governmental agency.
17. Docketing of rate bureau proceedings with respect to general rate increase proposals need not be mandatory.
18. The Commission need not obtain and publish reports of the deliberations within the industry concerning the matter of general increases.
19. The various rate bureaus need not join in seeking general rate increases.
20. The various rail rate bureaus are not required to substantiate general increases on a regional basis only, but their regional costs should be presented in a more explicit manner.
21. Rate bureaus are prohibited entirely from protesting proposals of carrier members, and are not merely limited to instances in which the proposed rate is less than long-term variable cost or any other specific instance.
22. Rate bureaus should be prohibited from discouraging independent action proposals of member carriers in any way, including the protesting of the filing of any rates pursuant to such action.
23. Rate bureaus should be prohibited from discouraging members from publishing individual tariffs.
24. Immunity from antitrust laws shall be continued.
25. Immunity from the antitrust laws shall continue to be extended to agreements with respect to proposals of single-line movements.
26. Additional legislation is not necessary, and need not be sought, to better effect the goals for which section 5a was enacted.

APPENDIX B

List of petitioners and replicants on reconsideration

Petitioners

Carrier interests:
AAA Trucking Corporation
Association of American Railroads
Bulk Carrier Conference, Inc.
Central & Southern Motor Freight Tariff Association, Inc., individually, and joint with:
  Central States Motor Freight Bureau,
  Middle Atlantic Conference,
  Middlewest Motor Freight Bureau,
  The New England Motor Rate Bureau, Inc., and
  Pacific Inland Tariff Bureau, Inc.
Cowan, W. T., Inc.
Friedman's Express
Holmes Transportation, Inc.
Household Goods Carriers' Bureau, Inc.
Household Goods Forwarders Tariff Bureau
Jones Motor
Motor Carriers Tariff Bureau, Inc.
Motor Carriers' Traffic Association, Inc.
Movers' & Warehousemens' Association of America, Inc.
Mushroom Transportation Company, Inc.

FEBRUARY 2, 1977 ACA - TARIFFS W.E. LUCORE

ICC UNIFORM SYSTEM OF ACCOUNTS FOR RATE BUREAUS

1. EFFECTIVE FOR YEAR BEGINNING JANUARY 1, 1977.

2. ALL RATE BUREAUS OR ORGANIZATIONS SUBJECT TO SECTION 5A AND 5B OF INTERSTATE COMMERCE ACT WITH ANNUAL OPERATING REVENUES OF $100,000 OR OVER ARE REQUIRED TO COMPLY.

3. ANY REQUEST FOR EXCEPTIONS TO REGULATIONS SHALL BE IN WRITING SPECIFYING THE CONDITIONS JUSTIFYING AN EXCEPTION.

4. BOOKS SHALL BE KEPT ON THE BASIS OF EITHER (1) AN ACCOUNTING YEAR OF 12 MONTHS ENDING DECEMBER 31, OR (2) AN ACCOUNTING YEAR OF THIRTEEN 4 WEEK PERIODS ENDING AT THE CLOSE OF THE LAST 7 DAYS OF EACH CALENDAR YEAR.

5. CHARGES TO BE JUST AND REASONABLE. ALL CHARGES TO THE ACCOUNTS PRESCRIBED IN THIS SYSTEM OF ACCOUNTS FOR BUREAUS OPERATING REVENUES, OPERATING EXPENSES, AND OTHER EXPENSES, SHALL BE JUST, REASONABLE AND NOT EXCEED AMOUNTS NECESSARY TO THE HONEST AND EFFICIENT OPERATIONS AND MANAGEMENT OF THE BUREAU. PAYMENTS SHALL NOT EXCEED THE FAIR MARKET VALUE OF GOODS AND SERVICES, ACQUIRED IN AN ARM'S-LENGTH TRANSACTION. ANY PAYMENTS IN EXCESS OF SUCH JUST AND REASONABLE CHARGES SHALL BE INCLUDED IN OTHER REVENUES OR EXPENSES.

6. A CHANGE IN ACCOUNTING PRINCIPLE OR ACCOUNTING ENTITY SHOULD BE REFERRED TO THE COMMISSION FOR APPROVAL.

7. OPERATING REVEUNE CATEGORIES PRESCRIBED:
   a. Member assessments
   b. Admission fees
   c. Bulletin fees
   d. Tariff fees
   e. Participation fees
   f. Quotation fees
   g. Other
   h. Interest
   i. Gains on asset dispositions
   j. Extraordinary, unusual items and accounting changes

8. OPERATING EXPENSE CATEGORIES PRESCRIBED
   a. Salaries and wages
   b. Payroll taxes
   c. Employee benefits
   d. Professional services
   e. Depreciation
   f. Amortization
   g. Outside printing
   h. Operating supplies
   i. Postage and mailing
   j. Filing fees
   k. Utilities and communication services
   l. Rent (offices, vehicles or equipment)
   m. Travel and entertainment
   n. Uncollectible accounts
   o. Insurance
   p. Property and other taxes
   q. Miscellaneous
   r. Interest
   s. Loss on asset disposition
   t. Extraordinary, unusual or infrequent items and accounting ch...

NEW RATE MAKING AGREEMENTS

ICC Administrative Law Judge has specified issues to be considered in each of three Section 5 agreements for collective agreements. The following issues posed as questions were listed for consideration and in my opinion probably foretells the issues which any revised 5A agreement by ACA will have to face.

1. Do the amended articles of organization and procedure comply with all applicable provisions of Section 5 of the interstate commerce act.

2. Does the agreement comply with all applicable requirements in Ex Parte 297, Rate Bureau Investigation, 349 ICC 811, and 351 ICC 437.

3. What is the anti-trust immunity for a member of a rate bureau of committee, and the rail members representatives, in discussing proposals with respect to which the member cannot vote or agree under section 5b(5)(a) of the act.

4. What is the meaning of the statutory language which provides that only carriers which can "practicably participate in a particular interline movement" are permitted to vote.

5. What procedural requirements are necessary to insure compliance with the restrictions on rate bureau agreements contained in section 5b. E.g., should the Commission require that rate bureaus keep verbatim transcripts of all meetings. Should each carrier voting on a rate proposal be requried to show that it can practicably participate in the movement under question.

6. Does the Agreement properly limit the scope of participation by members with respect to matters relating to interline movements.

7. What is meaning of the statutory language "general rate increase or decreases".

8. Is not the provision in the Agreement which limits a carrier's right to withdraw from a filed joint rate inconsistent with a carrier's right of independent action.

9. Does the Commission's statement in Ex Parte 297, that "public notice of recommended final dispositions should contain the reasons for the action taken", apply to conference ratemaking .

10. Is seven days sufficient notice to the public with respect to any proposed rule, rate, or change.

11. Should any party proposing a rate increase or decrease be identified.

12. Should the members be permitted to collectively protest any rate, fare or charge.

13. Does the Agreement contain provisions for which no anti-trust immunity can lawfully be given.

14. Should two or more carriers who are not members of the same section 5b ratemaking agreement be permitted to discuss and establish rates on independent notice without section 5b arrangements.

15. What is the appropriate role of a rate bureau discussing, agreeing to or voting on intra-state rates.

16. Should Agreement be amended or modified.

March 14, 1979

The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. Speaker:

Your House Commerce Committee has had under consideration for "Sunset" review the Alaska Transportation Commission, pursuant to your referral under AS 44.66.010 and 44.66.050.

In accordance with the statutory requirements, a public hearing was held on the review of this commission. The hearing extended over a period of three days, during March 1-3, 1979 and included over twenty hours of hearings and deliberations by the committee. During that time, testimony was heard from the Deputy Commissioner of the Department of Commerce and Economic Development representing the Commissioner (in accordance with the statute), from all members of the commission itself, and substantial public testimony from interested individuals and from representatives of the private sector affected by the regulatory scheme, representing all aspects of Alaskan transportation. The last few hours of the March 3 hearing extended into the early hours of March 4, during which members of the committee asked extensive questions of the members of the commission about various matters that came to light during the "Sunset" review. Extensive use was made of the Legislative teleconferencing network, which allowed the participation by witnesses and observers in Fairbanks, Barrow, Nome, Kotzebue, Anchorage, Kodiak, Sitka and Ketchikan. Other stations may have had listeners or observers on the line but did not check in.

The committee considered the proposed budget of the Alaska Transportation Commission for FY 1980, and particularly examined the performance audit of the activities of the commission prepared by the Legislative Audit Division. Representatives of the Audit Division were present at all hearings and participated in the considerations with the committee and followed up inquiries that had begun during the audit.

Guided in part by the report prepared by the Legislative Audit Division, the committee took into consideration the factors required under AS 44.66.050(c).

Your Commerce Committee thereby makes the following findings:

The committee concurs in the nine findings made by the Division of Legislative Audit in considering the factors required under 44.66.050(c), as they appear on pages 23-25 of the Performance Review of the Alaska Transportation Commission prepared by the Division of Legislative Audit, dated October 24, 1978, which are hereby incorporated by reference as though fully set out herein. However, to the extent that the findings stated there refer to report conclusions or recommendations made within the audit, the committee drew some, but not all of the same conclusions, and will make somewhat different recommendations. However, the findings of fact anticipated by 44.66.050(c) contained within pages 23-25 of the audit report, without regard to those recommendations, are justified by our hearings and are reaffirmed by the committee. In fact, the members of the commission indicated that they had no major disagreements with the findings of the Legislative Audit Division.

The Alaska Transportation Commission exists to provide certain protections to the public with regard to the conduct of the transportation industry in the state of Alaska and to assure a viable economic climate for those parties who participate within that industry. The objective or goal is, theoretically, to have a stable and reliable private transportation system, both surface and air, available to Alaskans, with services provided at prices that are not unreasonable according to certain familiar and traditional regulatory standards. There are not any other State programs which have similar, conflicting, or duplicating objectives, in short of arguable deregulation, there appear no alternative methods of achieving the purposes of the program. This excludes consideration of relevant Federal regulation which does impact upon the transportation industry in Alaska. Some Alaskan surface carriers are certificated and regulated by the Interstate Commerce Commission, and some Alaskan air carriers are regulated by the Civil Aeronautics Board. All Alaskan air carriers are subject to the regulations of the Federal Aviation Agency, particularly as to air safety and flying practices.

During our hearings, substantial questions were raised about the need for regulation of certain industries in light of competitive factors which would normally exist and the predominant Federal regulatory scheme, particularly as it relates to air commerce. In light of these considerations, it appears that some reduction in the jurisdiction of the Alaska Transportation Commission is appropriate. This deregulation of certain areas of transportation, tied to a two-year renewal of the Alaska Transportation Commission under the "Sunset" law, will give Alaskans and their public officials an opportunity to compare certain branches of the transportation industry which remain regulated with those which become deregulated under State law. This and only this, in the opinion of the committee, can fully answer the questions raised by the Alaskan "Sunset" law and by the current inquiries into deregulation which are popular on a national level.

The above recommendations and summary comply with the requirements of 44.66.050(d), to the extent that they relate to the Alaska Transportation Commission.

The Committee on Commerce of the Alaska State House of Representatives will soon be introducing a bill which will provide for a limited two-year extension of the life of the Alaska Transportation Commission; accomplish certain reforms in the practices of the Alaska Transportation Commission as recommended by the Division of Legislative Audit in its report and as recommended by some of the witnesses who testified before the committee; provide for partial deregulation of one or more elements of the Alaskan transportation industry; provide for total State deregulation of other elements of the Alaska transportation industry. Consideration will be given to the resources of the commission, possible inclusion of a staff lawyer or law member of the commission, and consideration of the relationship of the Alaska Transportation Commission's regulatory jurisdiction to other relevant State law.

It is hoped that some of the (apparently valid) criticisms of the Alaska Transportation Commission by the Division of Legislative Audit and the witnesses can be addressed if the commission's resources are applied in more limited and concentrated areas of regulation after deregulation of certain activities. This may give the commission an opportunity to demonstrate that it can function in the public interest and that the regulatory scheme is working and is not antiquated or inappropriate.

The two-year continuation (rather than the four-year continuation anticipated by the "Sunset" law) is dictated by the questionable nature of the commission's present activities and by the substantial questions about its public justification which were raised in the committee hearings and in the report of the Division of Legislative Audit.

The committee is particularly concerned with the conduct of some of the commissioners, both as related in the report of the Audit Division and as it appeared to the committee during the hearings. The commissioners should remember that, like judges, they must not only be acting properly, they must appear to be acting properly. The confidence of the public should not be lost on the basis of some extraordinary action of a commissioner (whether accepting a free ride from a certificated carrier, or using unusual lobbying practices during "Sunset" review), even if there is available a justification or an adequate explanation. The appearance remains the same and undermines the confidence of the public in the regulatory scheme, to the same extent that it would undermine the confidence of the public in the judiciary if such actions were to be taken by a judge. Admittedly, because of the large economic stakes involved in the regulation of an industry such as the transportation industry in Alaska, the pressures upon the members of the commission are no doubt severe, and their present regulatory load is substantial. However, these pressures should not result in conduct which, even though thoroughly explainable,

might by its mere appearances call into question the integrity of the commission and of the regulatory scheme. The commission is not a political body under the law: It is a quasi-judicial regulatory agency.

Corresponding legislation will be introduced soon to accomplish the goals of this report.

Respectfully submitted,

Rep. Fred Brown
Chairman
House Commerce Committee

Rep. Hugh Malone

Rep. Joyce Munson

Rep. Alvin Osterback

Rep. Richard Halford

Rep. Robert Bettisworth

Rep. Richard Randolph

FB:kfw