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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.

(e) 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, commissioner'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) Intervenors 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 intervenors 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 received 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 witness 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 to 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**

- 1. Vehicle Leasing
- 2. Applications
- 3. Fees
- 4. Insurance and Bonds
- 5. Tariffs, Schedules and Shipping Documents
- 6. Contracts
- 7. Safety Regulations and Identification
- 8. General Provisions

**ARTICLE I. VEHICLE LEASING**

**Section**

- 10. Leasing
- 20. Written lease required
- 30. Written lease requirements
- 40. Period of leasing
- 50. Commission approval and authorization
- 60. Leases by common or contract carriers
- 70. Compensation
- 80. Termination of lease
- 90. Disposition of lease copies
- 100. Vehicle identification
- 110. Unauthorized leasing
- 120. Violations
- 130. Exemptions to leasing requirements
- 140. Existing leases
- 150. (Repealed)

**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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Public Relations Council



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## FOREWORD

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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

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## 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 these 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 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 Reebe 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 Reebe 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)*

Is 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.

*(approximately 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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## 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.

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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".<sup>1</sup>

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.<sup>2</sup>

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

<sup>1</sup> Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b.

<sup>2</sup> John M. Clark, *Competition as a Dynamic Process*, Brookings Institution, Washington, 1961, p. 45.

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

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.<sup>3</sup>

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.<sup>4</sup> 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.

<sup>3</sup> Bastiann de Gaay Fortman, *Theory of Competition Policy*, North-Holland Publishing Co., Amsterdam, 1966, pp. 244-246.

<sup>4</sup> 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.<sup>5</sup> 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 complex-

nities 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.

<sup>5</sup> 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."<sup>1</sup>

<sup>1</sup> *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. Antelison, 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,<sup>2</sup> 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.<sup>3</sup> An identical decision was handed down a year later in a case involving a similar rate-bureau

<sup>2</sup> 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.

<sup>3</sup> *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

agreement.<sup>4</sup>

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 ...<sup>5</sup>

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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.<sup>6</sup>

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.<sup>7</sup> 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."<sup>8</sup>

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

<sup>4</sup> Annual Report of the Interstate Commerce Commission, 1901, p. 16.

<sup>7</sup> "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).

<sup>8</sup> Annual Report of Interstate Commerce Commission, 1898, p. 22.

<sup>4</sup> United States v. Joint Traffic Association, 171 U.S. 505 (1898).

<sup>5</sup> Annual Report of the Interstate Commerce Commission, 1898, pp. 15-16.

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."<sup>9</sup>

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:

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.<sup>10</sup>

After extensive hearings marked by a great outpouring of

<sup>9</sup> In re Transcontinental Freight Bureau (1923), 77 ICC 252, 279.

<sup>10</sup> *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 ... <sup>11</sup>

<sup>11</sup> *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.<sup>12</sup>

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.

<sup>12</sup> 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,<sup>1</sup> that the public policy of unrestricted rate competition associated with the antitrust laws is the only means of protecting the public

<sup>1</sup> See, for example, George W. Hilton, *The Transportation Act of 1958*, Indiana University Press, Bloomington, Ind., 1969, and Robert Fellraeth, *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."<sup>2</sup>

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.<sup>3</sup> The Congressional rationale for the immunity

<sup>2</sup> *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.

<sup>3</sup> 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 manifesta-

tions", 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."<sup>4</sup>

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."<sup>5</sup>

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

<sup>4</sup> *State of New York v. United States*, 331 U.S. 284, 308 (1947).

<sup>5</sup> *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. Similarly, 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."<sup>6</sup> 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 conference, 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

<sup>6</sup> *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",<sup>7</sup> 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."<sup>8</sup> 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

<sup>7</sup> Arne C. Wiprud, *Justice in Transportation*, Ziff-Davis Publishing Co., Chicago and New York, 1948, p. 77.

<sup>8</sup> 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 inter-line 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."<sup>1</sup>

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 indus-

tries, 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

<sup>1</sup> 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 issues including issues relating to pricing and competition in air, 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 —

Bennett C. Whitlock, Jr., President  
American Trucking Associations  
1616 P Street, N.W., Washington, D. C. 20036

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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.

### ENDORSE- MENT 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  
REPRESENTA-  
TIVES  
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,  
MANUFAC-  
TURERS  
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



AMERICAN TRUCKING ASSOCIATIONS, INC. • 1616 P Street, N.W. • Washington, D.C. 20036  
NEWS SERVICE DEPARTMENT • (202) 757-5237 • Rupert Welch • Home Phone: (202) 332-3956

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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# TRAFFIC WORLD

THE WEEKLY NEWSMAGAZINE OF TRANSPORTATION MANAGEMENT

NEWSPAPER  
SECOND CLASS POSTAGE PAID AT WASHINGTON, D.C.

## 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 33**

## 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**

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## 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 existing 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 Application 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 carriers which, among other things, have performed service within 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—consistency 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 carrier 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 authority. 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 carrier 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 carrier 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—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 carrier 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 Commission'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 perform. 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 its 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 expertise, 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.<sup>7</sup>



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 L. Owens, 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. Borrer, 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 municipi-

7. We express no opinion with respect to Olimite's contentions of compliance, which it is free

pal 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

to assert in any further proceedings before the Board or this court arising from these orders.

court's denial of partial summary judgment, fact that trial court's determination that alleged in complaint though citing precedents tendered in requesting reversal nonetheless made no comment that they were judgment on that

#### 2. Federal Civil P

Summary proceeding in court where motive and proof is largely inattestors, and hostile trial by affidavit by jury. Sherman seq., 15 U.S.C.A.

#### 3. Federal Courts

On appeal from the Court of Appeals well-pleaded fact

#### 4. Municipal Cor

City park district government with substitution, deriving Illinois statutes, 7, § 1.

#### 5. Federal Civil

On appeal from filed by golf professionals been granted district to operate municipal golf courses, violations by park percent of gross requiring as condition that plaintiffs request Court of Appeals of facts that 19 provided for abolition and authorized to provide replacement local government General Assembly power to create local park district led park district

denial of plaintiffs' motion for summary judgment, notwithstanding that trial court's independent consideration of that motion was precluded by its termination that no cause of action was stated in complaint, where plaintiffs, although citing freely in their briefs to materials tendered in support of motion and requesting reversal of denial thereof, nevertheless made no contention at oral argument that they were entitled to summary judgment on that record.

#### Federal Civil Procedure ⇨2484

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, and fact is largely in hands of alleged conspirators, and hostile witnesses thicken plot; affidavit by affidavit is no substitute for trial by jury. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

#### Federal Courts ⇨797

On appeal from dismissal of complaint, Court of Appeals would assume truth of all pleaded facts alleged in complaint.

#### Municipal Corporations ⇨57

City park district was unit of local government within meaning of Illinois Constitution, deriving its powers from various Illinois statutes. S.H.A.Ill.Const.1970, art. 7, § 1.

#### Federal Civil Procedure ⇨1163

On appeal from dismissal of complaint filed by golf professionals who had formerly been granted concessions by city park district to operate pro golf shops at municipal golf courses, alleging federal antitrust violations by park district's demanding five percent of gross sales as concession fee and requiring as condition of concession renewal that plaintiffs raise and fix their prices, the Court of Appeals would take judicial notice of facts that 1970 Illinois Constitution provided for abolition of personal property taxes and authorized Illinois General Assembly to provide replacement revenue sources for local government units and that Illinois General Assembly had not exercised its power to create substitute revenues for local park districts, which facts apparently led park district in 1973 to consider possi-

bilities 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(h).

#### 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

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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.

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 sum-

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.<sup>1</sup> 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, reccredited as such by the Professional Golfers' Association. Defendant Pleasure Driveway and Park District of Peoria (the

primary judgment on this record. Moreover, "summary procedures should be used sparingly in complex antitrust 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.*, 369 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.

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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 23, 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

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.

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 4 1/2% 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.<sup>2</sup> 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 PARR DISTRICT.

[The Park District defendants] used the GSM proposal, with GSM agreement, to

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

3. The district judge characterized plaintiffs' motion as an attempt to re-litigate "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 com-

plaintiffs' allegedly wrongful holding over of possession of the pro shops, and a judgment in the Park District's favor in the amount of \$127,695 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.<sup>3</sup>

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.<sup>4</sup> Also, the district court's judgment

plaint be 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*

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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*, 371 U.S. 13, 81 S.Ct. 1051, 12 L.Ed.2d 98 (1961); *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,

*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 Sher-

either as a general matter of, at least, in the circumstances of this case. The district court based its conclusion on the "so-called state-action exemption,"<sup>5</sup> *Gohlfarb 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-

man 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 sov-

eign." *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.*, 423 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.<sup>6</sup>

*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.

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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 therefore 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 setled 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, *Elderman 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. Forster*, 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, 70 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 activi-

ties 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,<sup>7</sup> or by determining that the "corporate purposes" of the District would be best served by contracting with a single concessionaire for

*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.

7. *Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970); and

the operation of *Parker* defense here. That the concerned its pol- itory powers- surely does a- such powers- mandate to u- petitors to w-

[15] This the complain- District, in d- a concession- tion of conce- raise and fi- cover the 5% ing to impos- 5% hidden s- Illinois law- trict's reven- levying of a- Stat.1975, c- charging of- facilities, *id.* no authority- District offe- currently in- proven that- incidence v- sales tax, it- not impossi- derlying t- conduct? I- indicated, v- properly di- against the

The anal- opinion app- District. I- cases apply

8. *E. W. W- setts Part- 1966), cor- 17 L.Ed.2o- sonville, I- 1973), *Id.* Co., *supra* Although- *supra* we-*

the operation of the shops,<sup>8</sup> 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.<sup>9</sup> 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 gov-

ernmental 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.

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,

*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. 699, 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.<sup>10</sup> Perhaps more to the

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-

joint would be *Metro Cable Co. supra*, substantial where defendant cable television fully induced the a potential con that *Noerr* and trust liability.

[18] Neither rhetorical nor *Metro* what is alleged that GSM made "sham" proposal effect, in conce District officials would not be ac bid invitation by the Park Distri conduct violati these allegations must assume at *Noerr* doctrine This is so for

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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

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

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.<sup>11</sup> 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

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, 401 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

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.

even if that doctrine applied, which we have decided it does not.<sup>12</sup>

\* 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

For 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.

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