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Judicial Circuit, Peoria County, Nov. 14, 1975). This finding was made with reference to the golf professionals' counterclaim allegation that their employments were summarily and unlawfully terminated.

[22] We have no quarrel with the proposition that if Judge Iben's finding had disposed of the claim made here or had determined adversely to plaintiffs a fact critical to success on this claim, relitigation in the federal courts would be barred. *See Reich v. City of Freeport*, 527 F.2d 666 (7th Cir. 1975); *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971). The fact that the remaining defendants under Count II were not parties or privies in the state court suit would, of course, make the doctrine of res judicata inapplicable, but it would not preclude defendants' defensive reliance on collateral estoppel. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

[23, 24] Nor would it matter that Judge Iben's decision has apparently been appealed,[13] for

> the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as . . . collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo.

1B Moore's Federal Practice ¶ 0.416[3], at 2254 (2d ed. 1974); *Grantham v. McGraw-Edison Company*, 444 F.2d 210, 217 (7th Cir. 1971). Illinois follows the same rule. *Sixty-Third & Halsted Realty Co. v. Goldblatt Bros.*, 342 Ill.App. 389, 96 N.E.2d 838 (1951), *aff'd*, 410 Ill. 468, 102 N.E.2d 749.

We do not agree with the district court, however, that Judge Iben's finding disposed of plaintiffs' claim herein or of critical facts pertinent to it. Illinois' Forcible Entry and Detainer Act, Ill.Rev.Stat.1975, ch. 57, § 1 et seq., plainly gives a tenant the right to remain in possession of property while litigating the question of his possessory rights. Judge Iben's determination that plaintiffs were terminated in their employments because they insisted on remaining in possession of the pro shops implies, to some extent at least, that the employment terminations occurred because plaintiffs chose to litigate their rights to possession. In fact, the finding expressly refers to plaintiffs' insistence "through litigation, and other ways" on asserting their claims to possession. Nothing in this state court judgment supports the district court's conclusion that it had been previously adjudicated that "the exercise of the right to litigate issues" was not the reason for plaintiffs' employment discharges. No other issues pertinent to Count II of the complaint were decided below or asserted in this court, so we reverse the district court's judgment of dismissal insofar as it concerns the employment discharge claim against the individual Park District defendants.

[25] For the reasons stated herein, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiffs have requested that the provisions of Circuit Rule 18 be applied on remand. We believe that the interests of justice would best be served, in the circumstances of this case, by granting that request. It is so ordered.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

13. Our record does not reflect the pendency of an appeal in the state court case, but the brief of the defendants who seek to rely on the state judgment represents this to be the case, and we take that representation as a judicial admission of the fact.

MT. HOOD STAGES, INC., dba Pacific Trailways, Plaintiff-Appellee,

v.

The GREYHOUND CORPORATION and Greyhound Lines, Inc., Defendants-Appellants.

No. 74-1282.

United States Court of Appeals, Ninth Circuit.

June 9, 1977.

Rehearing and Rehearing En Banc Denied Aug. 3, 1977.

Bus company brought suit against a competitor for violation of the Sherman Act. The United States District Court for the District of Oregon, Alfred T. Goodwin, J., rendered judgment on a jury verdict awarding treble damages in the amount of $13,146,090, and competitor appealed. The Court of Appeals, Browning, Circuit Judge, held that: (1) where routes were granted by the Interstate Commerce Commission to competitor, over the bus company's objection, on its representation that it would not engage in the forms of predatory conduct which it subsequently engaged in, the competitor's conduct was not immune from the antitrust laws; (2) the evidence that there was fraudulent concealment of the existence of the antitrust cause of action sufficient to toll the four-year statute of limitations was sufficient for the jury; (3) the government's intervention in ICC proceedings initiated by the bus company to require the competitor to live up to its representations tolled the running of the limitations period on the bus company's antitrust cause of action, and (4) the evidence on the issue of damages was sufficient for the jury.

Affirmed.

1. Monopolies ⇐16(1)

Where routes were granted by Interstate Commerce Commission to common carrier, over competitor's objection, on representations that it would not engage in forms of predatory conduct which it subsequently engaged in, its conduct was not immune from antitrust laws. Interstate Commerce Act, § 5(11), 49 U.S.C.A. § 5(11).

2. Monopolies ⇐12(16)

Conduct is not immunized from antitrust laws merely because it falls within jurisdiction of regulatory agency, and immunity is not implied merely because applicable regulatory standard requires agency to give weight to antitrust policies. Interstate Commerce Act, § 5(11), 49 U.S.C.A. § 5(11).

3. Monopolies ⇐28(8)

In antitrust action by bus company against competitor, district court's jury instructions on monopolization in context of regulated industry were not erroneous.

4. Monopolies ⇐28(7.3)

Trial judge must be accorded wide latitude in determining relevance of evidence in antitrust cases.

5. Monopolies ⇐28(7.3)

In antitrust action, admissibility of consent decree is matter committed to district court's discretion.

6. Monopolies ⇐28(7.3)

In antitrust action by bus company against competitor, district court did not err in allowing jury to consider antitrust consent decrees entered into by competitor and United States and competitor's conduct with respect to obeying or disobeying them in determining issues of competitor's intent and purpose and reasonableness of competitor's conduct.

7. Monopolies ⇐28(8)

In antitrust action by bus company against competitor, evidence that competitor fraudulently concealed existence of antitrust cause of action tolling four-year statute of limitations was sufficient for jury. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

8. Monopolies ⇐28(4)

Statute of limitations on bus company's antitrust cause of action against competitor was tolled by government's intervention in Interstate Commerce Commission proceed-

ings in which bus company sought to compel competitor to live up to its representations that it would not engage in predatory conduct, which representations were made in obtaining routes from ICC. Interstate Commerce Act, § 5(9), 49 U.S.C.A. § 5(9); Clayton Act, § 5(i), as amended 15 U.S.C.A. § 16(i).

9. Monopolies ⇐28(7.6)

In antitrust action by bus company against competitor alleging that competitor acquired routes circling those of bus company and thereby deprived bus company of connecting traffic with purpose and effect of eliminating bus company as substantial competitor, evidence was sufficient to sustain jury award of treble damages in amount of $13,146,090. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

10. Monopolies ⇐28(9)

In antitrust action by bus company against competitor alleging that competitor acquired routes circling those of bus company and thereafter deprived bus company of connecting traffic with purpose and effect of eliminating bus company as substantial competitor, award of attorney's fees of $1,250,000 was not abuse of discretion.

William W. Schwarzer, San Francisco, Cal., argued, McColloch, Dezendorf, Spears & Lubersky, Portland, Or., for defendants-appellants.

Michael N. Khourie, argued, Broad, Khourie & Schulz, San Francisco, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING and WRIGHT, Circuit Judges, and LINDBERG,* District Judge.

* Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

BROWNING, Circuit Judge:

Greyhound Corporation and Greyhound Lines, Inc., appeal from a judgment entered on a jury verdict awarding damages to Mt. Hood Stages, Inc., for injuries resulting from violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1] We affirm.

I.

Immunity

Greyhound is the largest common carrier by bus of passengers and package express in the United States, moving more than 80 percent of this traffic in the western states and operating over routes throughout the country. Mt. Hood is one of Greyhound's small competitors, operating over routes in Oregon, Idaho, and Utah. The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or "bridge" traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor.

Greyhound does not deny the sufficiency of the evidence to establish a violation of sections 1 and 2 of the Sherman Act, assuming that statute applies. Its principal contention is that Mt. Hood bases its claim upon acquisitions approved by the Interstate Commerce Commission and implementation by Greyhound of control over the acquired companies, and that such activities are immune from antitrust attack by virtue of section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), applied in light of the Supreme Court's analysis in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides that one carrier may acquire another with Commission approval; the Commission is required to grant such approval, subject to any terms and conditions it deems reasonable, if the acquisition "will be consistent with the

1. The judgment was for $13,146,090 (after trebling) and attorneys' fees of $1,250,000, plus costs.

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...rom 1947 to 1956 Greyhound acquired ...t bus companies operating in the area ...vant here. Each acquisition was ap...ved by the Commission pursuant to sec...n 5(2). Mt. Hood opposed four of the ...uisitions. It argued that if the acquisi...s were approved, Mt. Hood would be ...rcled and Greyhound could route traffic ...und it, depriving the public of the most ...venient service and Mt. Hood of reve...s necessary to its survival. Mt. Hood's ...ument to the Commission thus foreshad...ed its present antitrust claim.

Greyhound responded by representing to ... Commission that the acquisitions ...uld not adversely affect connecting car...s; that arrangements with such carri..., including interchange of traffic and ...n gateways, would be maintained; that ...was not the policy of Greyhound to route ...sengers over circuitous routes; that its ...nts were instructed to quote the direct ...te as well as the Greyhound route and ... passengers their choice; and that ...eyhound had always carried [Mt. Hood's] ...edules in its folders and cooperated in ...ery way to acquaint the public with its ...vice and thus promote additional traffic ...d business for their lines."[2] Greyhound also represented to the Commission that Greyhound would continue a joint through-bus arrangement with Mt. Hood.[3] As the Commission later found, Greyhound intended the Commission to rely upon these representations in determining whether the proposed acquisitions were in the public interest, and the Commission did in fact rely upon them in approving the acquisitions.

In 1964 Mt. Hood filed a petition with the Commission pursuant to section 5(9) of the Act, 49 U.S.C. § 5(9),[4] asking it to reopen the acquisition proceedings and enter a supplemental order requiring Greyhound to live up to its representations. The allegations in Mt. Hood's petition to the Commission were essentially the same as those Mt. Hood later made in this antitrust suit—namely, that Greyhound had cancelled the through-bus connection, had scheduled connecting service so as to preclude reasonable connections with Mt. Hood, had directed Greyhound's agents and independent joint ticket agents to send traffic by longer routes around those of Mt. Hood, and had interfered in various ways with the distribution of Mt. Hood's schedules and the quotation of Mt. Hood's rates and services, all with the intent of injuring Mt. Hood. The United States intervened in support of Mt. Hood.

After an extensive evidentiary hearing, a hearing examiner resolved all issues against Greyhound and recommended entry of the order sought by Mt. Hood. In April, 1968, the Commission issued an opinion sustaining the examiner's findings that Greyhound had made the representations alleged, that Greyhound had intended the Commission to rely on them, that the Commission had re-

...The quotation is from the Commission's opin...n in the section 5(9) proceedings, described later. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 452 (1968).

...This agreement, initiated in 1949, provided ...r a through-bus from San Francisco, Califor...nia, to Spokane, Washington, using Mt. Hood's ...ridge route between Klamath Falls and Biggs, Oregon. Revenue and expenses were shared according to the miles traveled over each company's route. The arrangement shortened the San Francisco-Spokane trip by 110 miles and several hours as compared with the all-Greyhound route via Portland. It provided better service to travelers and was profitable for both companies.

4. Section 5(9) reads:

> *Supplemental orders by Commission.*—The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

lied on them in approving the acquisitions, that Greyhound had not fulfilled the representations, and that Greyhound's actions "were inspired by a desire to stifle competition" and "injure or destroy" Mt. Hood. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 459–63 (1968). The Commission concluded that Greyhound's failure to abide by its commitment "constitutes destructive competition in contravention of the national transportation policy, is not consistent with the public interest, and provides good cause" for a supplemental order under section 5(9) of the Act. The Commission deferred entry of a supplemental order to allow voluntary negotiations between the parties. *Id.* at 462–63.

Two months later, in July, 1968, Mt. Hood filed this suit alleging violations of the antitrust laws and common law and statutory unfair competition. With respect to the antitrust violations the complaint alleged that, beginning in 1947 and continuing to the date of the complaint, Greyhound had restrained and monopolized commerce in the carriage of passengers and their luggage between points in Oregon, Idaho, and Utah by means essentially the same as those that were the subject of the Commission's proceeding; that is, the acquisition of independent bus lines with Commission consent obtained by the misrepresentations outlined by the Commission and thereafter engaging in the destructive competitive tactics found by the Commission. Greyhound sought, unsuccessfully, to eliminate these issues from the litigation on the ground that they fell within the exclusive jurisdiction of the Commission.

In the Commission proceedings, meanwhile, the efforts of the parties to agree upon an order failed. The Commission entered its own order requiring Greyhound to restore the practices and traffic patterns existing when the acquisitions at issue were authorized, and, specifically, to restore the joint through-bus service, to revise Greyhound's schedules to permit reasonable connections with Mt. Hood, to see that through routes and fares were quoted and quoted accurately, and to eliminate other destructive practices. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1037 (N.D. Ill.1970). A three-judge district court affirmed the Commission and issued its own order in similar terms. *Id.* at 1040–41. Following entry of the district court order enforcing the Commission decision, Mt. Hood amended the complaint in this antitrust proceeding to eliminate the prayer for injunctive relief.

In June, 1971, the United States and the Commission filed petitions with the district court in the enforcement proceeding, asking that Greyhound be held in contempt for failing to comply with the court's order enforcing the Commission's decision. The court found Greyhound had willfully failed to comply with portions of the order and held Greyhound in criminal and civil contempt. *United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D.Ill.1973). The court imposed fines totaling $600,000, *United States v. Greyhound Corp.*, 370 F.Supp. 881, 883–85 (N.D.Ill.1974), ordered Greyhound to file semiannual reports of compliance efforts for five years, and granted members of the Department of Justice staff "visitorial and document examination rights so that they may further monitor Greyhound's compliance efforts," *id.* at 886. Because Greyhound appeared to be attempting to comply fully, no further injunctive relief was ordered.

While the proceeding to enforce the Commission's order was in progress, this antitrust case had come to trial and concluded with the verdict in Mt. Hood's favor. The opinion of the court in the enforcement proceeding noted that "many of Greyhound's actions that were found to be in violation of the order, were also found to be in violation of the antitrust laws" in this private suit. *Id.* at 884 n. 2. The enforcement court denied Mt. Hood's prayer for damages for expenses related to the contempt action and for injury to its business as a result of the contempt, on the ground that the damages awarded in this antitrust proceeding "will adequately compensate [Mt. Hood] for any damages it may have also suffered as a result of Greyhound's contempt. This is particularly true since

many of the same acts of Greyhound that were found to be contemptuous were also involved in the private antitrust case." *Id.* at 888. The court of appeals affirmed the criminal contempt convictions, stating, "the record of this case shows a flagrant disregard of a court order" that was intended "to insure that Greyhound would comply with representations it made at the acquisition hearings and cease its predatory practices toward Mt. Hood." *United States v. Greyhound Corp.*, 508 F.2d 529, 540–41 (7th Cir. 1974).

From this recital it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same. The Commission's authority to regulate this conduct is not challenged.

[1] Whether conduct Congress has made subject to administrative regulation is exempt from the antitrust laws depends upon Congress' intent. No direct evidence of a congressional intent relevant here has been cited.[5] The only applicable statutory language dealing with the question of antitrust immunity is that found in section 5(11), quoted above. The conduct charged in this action is not within the express exemption afforded by section 5(11), particularly because provisions of this kind are strictly construed.[6] Since the Commission approved the acquisitions in reliance upon Greyhound's commitment that the conduct underlying the antitrust complaint would not occur if the acquisitions were approved, it can hardly be argued that antitrust immunity for such conduct is "necessary" to enable Greyhound "to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired through such transaction."

The inclusion of this express exemption in the statute implies a congressional intention that conduct not within the exemption remains subject to the antitrust laws.[7] But this conclusion does not always follow; despite a grant of express immunity that does not cover the conduct charged, antitrust immunity may still be implied.[8]

[2] Because of the "fundamental national policies embodied in the antitrust laws," *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973), however, repeal of those laws is not lightly implied from congressional adoption of a regulatory scheme.[9] Conduct is not immunized merely because it falls within the jurisdiction of the regulatory

5. The subject of antitrust immunity was touched upon briefly during the House debates. 58 Cong.Rec. 8593–94 (1919). The scope of the immunity was not discussed. Representative Sanders assured other House members that the antitrust laws were not being "wiped out"—that a merger will only be allowed if it would benefit the public. *Id.*

6. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 100 L.Ed. 1209 (1956).

7. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216–17, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *United States v. Borden Co.*, 308 U.S. 188, 201, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

8. *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 918–19 & n. 24 (9th Cir. 1975). *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the decision relied upon most heavily by Greyhound, involved an express exclusion, and it is not entirely clear that the conduct that case held to be immunized from the antitrust laws was within the express exclusion, narrowly construed. The Court suggested as much when it noted, "a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances *by implication* grant immunity from an antitrust claim." *Id.* at 385 n. 14, 93 S.Ct. at 660 (emphasis added). The Supreme Court has twice cited *Hughes Tool* as a case in which immunity was implied. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734–35, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975).

9. *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719–20, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350–51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

agency,[10] as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy,[11] as it did in this instance.[12]

The applicable interpretative standard was restated by the Supreme Court in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976): "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' "[13] As the Court had written in the preceding term, "Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed 2d 463 (1975).[14]

Applying these standards, we find no reason to imply immunity here. No "plain repugnancy" exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints "to make the [Interstate Commerce Act] work." This is evident from the course taken in the administrative and judicial proceedings under both statutes. Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. There has been initial resort to the Commission for an application of its expertise to the factual issues relevant to whether application of the antitrust laws would be incompatible with regulatory objectives, *see Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973), and the Commission has unqualifiedly indicated that it has not approved and continues to disapprove Greyhound's conduct under regulatory standards applied in the light of antitrust principles. *See Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 458, 460–63 (1968) (citing *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D.Cal.1966)).

The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. In assessing the penalty for contempt for violation of that injunction, the court was careful to avoid the possibility of double damages. *See United States v. Greyhound Corp., supra*, 370 F.Supp. at 888. The losses sustained by Mt. Hood during the contempt period (approximately February 5, 1970, to March 15, 1973, *see id.* at 884 n.2) were only a small part of the total damages Mt. Hood sustained from the inception of Greyhound's wrongful conduct in 1947. The remaining damages could be and were recovered only in the antitrust action. Trebling the damages—an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust

10. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596–97 n. 36, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 692, 95 S.Ct. 2598, 45 L.Ed 2d 463 (1975) (Stewart, J., concurring); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

11. *Gulf States Util. Co. v. Federal Power Comm'n*, 411 U.S. 747, 758–60, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

12. *Port of Portland v. United States*, 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases*, 396 U.S. 491, 511–16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States*, 321 U.S. 67, 83–87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

13. *Quoting Silver v. New York Stock Exch.*, 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

14. *Quoting United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350–51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 918–19 (9th Cir. 1975).

proceeding. Since the transactions involved affected the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply.

Greyhound leans heavily upon *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). From this decision Greyhound draws the general principle that when antitrust immunity is conferred by a statute upon participants in an acquisition approved by a regulatory agency, the immunity extends to conduct made possible by the acquisition whether or not the conduct itself was approved, at least where the agency considered the possibility such conduct might occur and retained continuing jurisdiction to regulate it in the public interest.

But antitrust exemption is implied "*only* to the *minimum* extent necessary" to make the regulatory scheme work (emphasis added). Quoting this principle, and citing *Hughes Tool* and *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court recently wrote, "[W]e have implied immunity *in particular and discrete instances* to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 734-35, 95 S.Ct. 2427, 2450, 45 L.Ed.2d 486 (1975) (emphasis added).

Greyhound's generalization may accommodate the facts of both *Hughes Tool* and the present case, but it omits the distinguishing particulars that made antitrust immunity appropriate in *Hughes Tool* and would make it inappropriate here. The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool*, the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest;[15] a successful antitrust suit therefore necessarily would have been repugnant to operation of the regulatory scheme. The opposite is true in this case; the Interstate Commerce Commission did not contemplate Greyhound's challenged conduct as likely to occur and thus did not approve such conduct when it approved the acquisitions.[16] The Commission also subsequently disapproved that conduct.

In *Hughes Tool* the Civil Aeronautics Board issued orders approving acquisition of control of TWA by Hughes Tool Co. The applicable statute relieved persons affected by such an order from operation of the antitrust laws so far as necessary "to do anything authorized, approved or required by such order." Section 414, Federal Aviation Act, 49 U.S.C. § 1384. The agency-authorized control later ended, and an antitrust suit was brought by TWA against Hughes Tool Co. based upon transactions between the two during the period of Hughes Tool Co.'s control. The antitrust complaint alleged, in effect, that the controlling company had exercised its control to dictate the completion of the transactions in a way that injured the controlled company.

Hughes Tool Co.'s control of TWA was acquired in two steps—an initial acquisition of 45.6 percent of TWA's stock, and a later acquisition increasing Hughes Tool Co.'s holdings to 80 percent. Both acquisitions were approved by the Board. In hearings relating to the second acquisition the Board examined the manner in which Hughes Tool Co. had exercised its *de facto* control over TWA in the earlier period, particularly with respect to the acquisition of new flight equipment, which was the subject matter of the transactions on which the antitrust suit was based. The Board conceded allegations

15. *See In re REA Express, Inc.*, 412 F.Supp. 1239, 1261 (E.D.Pa.1976); *Air Freight Haulage Co. v. Ryd-Air, Inc.*, 403 F.Supp. 446 (S.D.N.Y. 1976).

16. *See Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1131 (5th Cir. 1976).

of abuse of the kind alleged in the antitrust complaint. Nonetheless, the Board concluded that continuation and enhancement of Hughes Tool Co.'s control was in the public interest. Moreover, the Board's order required that all substantial sales transactions between the two companies be submitted to the Board for approval, and, pursuant to this requirement, the transactions upon which the antitrust complaint rested were submitted to the Board and approved as in the public interest.

The Supreme Court noted that the subject matter of the Board's approval had been the acquisition and exercise by Hughes Tool Co. of control over the same kind of transactions as those at issue. *Hughes Tool, supra*, 409 U.S. at 386, 93 S.Ct. 647. By its approval the Board had determined that such control was in the public interest and consistent with the regulatory statute's prohibitions against monopoly and restraining competition. Sections 102(c) and 408(b), Federal Aviation Act, 49 U.S.C. §§ 1302(c) and 1378(b).[18] The Court further noted that the Board had also approved the very transactions underlying the antitrust suit as meeting the same standard. 409 U.S. at 379, 387, 93 S.Ct. 647.

An antitrust suit challenging these transactions, the Court said, would seek "to negate what the Board, after full investigation, had found consistent with § 408's antimonopoly provision, consistent with § 102's competition standard, and consistent with the public interest." *Id.* at 388, 93 S.Ct. at 661. TWA's antitrust suit sought "to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming." *Id.*[18] The Court concluded that the transactions were exempt from suit under the Sherman Act.[19]

17. Acquisition of control of one company by another necessarily contemplates exercise by the parent of control over the internal business operations of the subsidiary. When the agency has approved acquisition of control, exclusive agency jurisdiction over its exercise is more readily implied. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385–86, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), *citing Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), as such a case.

18. *See also Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

19. The Court summarized its holding in almost identical language at two points in the opinion:

At pages 387–88, 93 S.Ct. at page 661, the Court said:

We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws. . . . But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

And again at page 389, 93 S.Ct. at page 661–662:

We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American*, 371 U.S., at 305, [83 S.Ct. at 482]. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

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In sum, in *Hughes Tool*, the propriety under the regulatory statute of the activity challenged in the antitrust suit (control by Hughes Tool Co. of the manner in which its TWA subsidiary acquired new aircraft) was the central issue presented to the agency for consideration in the exercise of its regulatory authority, and the agency had resolved the issue by approving such control as in the public interest. Exemption from the antitrust laws was implied because a successful application of the antitrust laws to the conduct would have negated the regulatory agency's determination and faced the regulated carrier with inconsistent governmental commands. In the present case, as has been seen, the premise of inconsistent regulatory and antitrust demands is absent. Also unlike *Hughes Tool*, the instant suit is not brought by a subsidiary against its parent and does not challenge the effect on the acquired company of the daily intercompany control that was integral to the acquisition. *See also Pan American World Airways v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Rather, the instant suit is brought by a third party to the approved acquisitions, challenging conduct with regard to the third party that not only was not integral to the Commission's acquisition approvals but was violative of specific representations made by Greyhound at the acquisition hearings. In these circumstances, Greyhound's conduct is not immune from antitrust strictures.

II.

Jury Instructions and Admission of Evidence

Many of Greyhound's assertions of error in evidentiary rulings and instructions rest upon Greyhound's theory of antitrust immunity and fall with it.

Greyhound complains of the district court's "failure to instruct on Section 5(11)." It is not clear precisely what Greyhound has in mind. The extent to which Greyhound's conduct was exempt from the antitrust laws by the Interstate Commerce Act was a legal question, not an issue of fact for the jury.[20] The instructions proposed by Greyhound were properly rejected for this reason and because they reflected Greyhound's uncompromising position that the acquisitions approved by the Commission and all conduct involving exercise of control over the acquired carriers were exempt from the antitrust laws and were not to be considered by the jury for any purpose whatever.[21]

[3] The court was required to provide the jury with standards to apply in determining whether Greyhound was liable under the antitrust laws, and it did so. The court defined the elements of monopolization, attempt to monopolize and unreasonable restraint of trade in the usual way, and Greyhound does not object to these instructions in themselves. The court also told the jury that the fact that Greyhound was reg-

20. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 688, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975).

21. For example, Greyhound requested an instruction that since the Commission had approved the acquisitions, "the manner in which defendants have used or exercised the control of these carriers" was within the exclusive jurisdiction of the Commission, and therefore the jury "must exclude from [its] consideration all conduct by defendants involving exercise of control over the acquired bus companies." Greyhound also requested instructions referring to the specific conduct the Commission had condemned, and telling the jury that regulation of such conduct was within the exclusive jurisdiction of the Commission and could not be the basis of any findings by the jury. In addition, Greyhound requested an instruction essentially in the words of the statute, telling the jury that the antitrust laws did not apply to the approved acquisitions "or to anything done by defendants which was necessary to hold, maintain or operate the properties or operating rights obtained in these approved transactions." Since the scope of the immunity conferred by the statute was a legal question for the court to decide, this instruction was properly refused. *See* note 20, *supra*, and related text. The court's decision as to the scope of the statutory immunity shaped and conditioned the court's instructions spelling out what facts the jury must find before Greyhound could be held liable.

ulated affected what activities of Greyhound were subject to the antitrust laws; that in a regulated industry the existence of monopoly power was not evidence of monopolization, but "use of monopoly power even if lawfully acquired, to foreclose or restrain competition, to gain a competitive advantage or to eliminate a competitor" was such evidence.[22] Under these instructions the jury could not base a finding of monopolization on the approved acquisitions themselves: improper use of the acquired power was required. This was at least as favorable to Greyhound as the law warranted.

Greyhound objects to the admission of evidence regarding the administrative and related court proceedings, and to jury instructions that this evidence could be considered "in determining the issue of Greyhound's motive, intent and purpose and reasonableness of its behavior." Greyhound objects on several grounds, but primarily on the basis of Greyhound's immunity argument, which we have rejected. Greyhound's other objections are also without merit.[23] The evidence was properly used for the purpose stated by the court.

The lengthy instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Greyhound argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. Even considered alone, however, both passages also required the jury to find, as a condition of liability, that the fraud or abuse of process resulted in an administrative order that conferred a monopoly or an unreasonable competitive advantage upon Greyhound. At most, therefore, the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.

When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, we do not believe they present even this issue. Mt. Hood did not contend that the acquisitions themselves or the power Greyhound gained through them, standing alone, constituted a violation of the antitrust laws. Mt. Hood relied instead upon Greyhound's exclusionary practices made possible by the acquisitions. The instructions were generally to the same effect. The jury was not instructed on any theory that Greyhound's purchase of other carriers might constitute the unlawful acquisition of monopoly power. On the contrary, as we have seen, the jury was told that in such a

regulated indust[...] monopoly power [...] man Act, and th[...] er to eliminate [...] The only fraud o[...] ed by the evid[...] represented to t[...] not using and [...] acquired routes t[...] practices we hav[...] Greyhound nonet[...] same predatory [...] Hood's antitrust [...] tions also conditi[...] ing of monopoliz[...] straint of compe[...] way, and since [...] without submitti[...] that Greyhound's [...] not immunized f[...] passages amount[...] eration in anothe[...] struction that [...] competition or us[...] oly power to fore[...] tion would violat[...]

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[4-6] A trial j[...] "wide latitude" i[...] vance of evidence [...] *v. Shell Oil Co.*, 46[...] 1972). The admis[...]

22. The quoted portion of the instruction is settled law. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). Indeed, section 2 is violated if exclusionary tactics are used to maintain a lawfully acquired monopoly. *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344–45 (9th Cir. 1970), *interpreting United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 343 (D.Mass.1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). *See also TV Signal Co. v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1261 (8th Cir. 1972).

23. One of these additional grounds of objection warrants brief comment. Greyhound argues that the instructions permitting use of evidence of the administrative proceedings in determining Greyhound's intent and the reasonableness of its conduct "infringe" Greyhound's constitutional privilege to seek relief before administrative agencies, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). But "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972). The antitrust laws have been applied in many factual contexts that included utilization of administrative processes by the antitrust violator. *See, e. g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203 (9th Cir. 1973).

24. Thus even if a[...] instruction that "[...] "clear and convinci[...] urges, failure to g[...] Fed.R.Civ.P. 61.

25. Greyhound cont[...] as to several conte[...]

regulated industry the mere possession of monopoly power did not violate the Sherman Act, and that abuse of monopoly power to eliminate competition was required. The only fraud or abuse of process presented by the evidence was that Greyhound represented to the Commission that it was not using and would not use any of the acquired routes to engage in the predatory practices we have outlined earlier, and that Greyhound nonetheless did so. Since these same predatory practices underlay Mt. Hood's antitrust claim, since the instructions also conditioned liability upon a finding of monopolization or unreasonable restraint of competition defined in the usual way, and since the judge properly ruled without submitting the issue to the jury that Greyhound's challenged conduct was not immunized from antitrust attack, the passages amounted to no more than a reiteration in another form of the general instruction that unreasonable restraint of competition or use by Greyhound of monopoly power to foreclose or restrain competition would violate the antitrust laws.[24]

Greyhound attacks the use made at trial of two antitrust consent decrees entered into by Greyhound and the United States. The decrees, which were admitted in evidence, prohibited Greyhound from refusing to establish through-routes with competitors and from continuing other practices the same as or similar to those charged in this suit. The jury was told it could consider the decrees and Greyhound's conduct with respect to obeying or disobeying them in determining the issues of Greyhound's intent and purpose and the reasonableness of Greyhound's behavior.

[4-6] A trial judge must be accorded "wide latitude" in determining the relevance of evidence in antitrust cases. *Gray v. Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972). The admissibility of a consent decree is a matter committed to the court's discretion. *See Control Data Corp. v. IBM Corp.*, 421 F.2d 323, 326 (8th Cir. 1970). *See also Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938). There was no abuse of discretion here. The court warned the jury of the limitations implicit in decrees entered into by consent, and confined their use to a proper purpose.

Greyhound's claim that the jury should not have been asked to determine whether Greyhound had a dominant share of the market because Greyhound's market share resulted from ICC-approved transactions is but another reflection of Greyhound's rejected theory of immunity.

Other objections to the instructions regarding the relevant market are without merit. While it is true that the court did not refer to the "interchangeability of services" in those terms, the court accomplished the same purpose by use of illustrations and by instructing the jury that a "relevant" market must be one for a "distinct service" with "peculiar characteristics," serving "distinctive purposes," with "dissimilar" price characteristics, and relatively "insensitive to price variations," so that an increase in bus fares would not result in large numbers of customers switching to other forms of intercity transportation. If these indices of distinctness were not found, the jury was told, intercity bus transportation would not constitute a relevant market for antitrust purposes.[25]

III.

Statute of Limitations

The jury awarded Mt. Hood damages for injuries sustained from 1953 to 1973. The applicable statute of limitations, 15 U.S.C. § 15b, bars all claims on which suit is not commenced within four years after they accrue—in this case, all claims that accrued

24. Thus even if appellant was entitled to an instruction that "fraud" must be proven by "clear and convincing" evidence, as Greyhound urges, failure to give it was harmless under Fed.R.Civ.P. 61.

25. Greyhound contends the jury was instructed as to several contentions for which there was no evidentiary support. We have examined the record with respect to each of these issues and conclude that either there was sufficient evidence to justify an instruction or the instruction was harmless under Fed.R.Civ.P. 61.

before July 5, 1964, since Mt. Hood's suit was filed on July 5, 1968. However, Mt. Hood asserts that the running of the limitations period was suspended from 1953 to 1960 by Greyhound's fraudulent concealment of its wrongdoing, and from 1964 to the date of suit by the intervention and participation of the United States in the section 5(9) proceedings brought by Mt. Hood before the Commission.[26]

[7] In accordance with the universal rule, our circuit holds that fraudulent concealment of the existence of an antitrust cause of action tolls the four-year statute of limitations provided by section 15b.[27] The jury found Greyhound had fraudulently concealed its antitrust violations from 1953 to December 14, 1960, and that Mt. Hood neither knew nor should have known of these violations prior to December 14, 1960.

Greyhound does not deny the sufficiency of the evidence to show it attempted to conceal its conduct. It argues, however, that Mt. Hood had notice of Greyhound's activities long before December 14, 1960.

The record shows that Mt. Hood complained about quoting and routing practices of Greyhound agents on various occasions during the 1953–1960 period. The record also shows, however, that Greyhound continuously represented to Mt. Hood and to the Commission that these were isolated incidents not countenanced by Greyhound's management.[28]

The record shows that Mt. Hood suspected Greyhound of unlawful conduct prior to December 14, 1960, but "[s]uspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred." *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

There was evidence that Mt. Hood's president expressed concern over Greyhound's expansion by acquiring other carriers, and that he also stated his belief that the consent decrees were being violated. Awareness of Greyhound's growing dominance of the market was not equivalent to notice of monopolization, however, for the acquisitions were approved by the Commission and presumably immunized from the antitrust laws. Nor was knowledge of violations of the consent decrees equivalent to such notice, for, as Greyhound itself is careful to point out, violations of consent decrees are not in themselves violations of the antitrust laws.

Greyhound asserts that Mt. Hood was charged with the duty to investigate once it became aware of facts from which antitrust violations should reasonably have been inferred.[29] But in the face of Greyhound's assurances and denials of responsibility, we cannot say as a matter of law that Mt. Hood's awareness of the growth of Greyhound's power through acquisitions and of the commission of predatory acts by some of Greyhound's agents amounted to notice

26. *See* note 4, *supra*, and related text. The period of fraudulent concealment and the government intervention tolling period can be "tacked" or "bridged" to suspend the statute for the entire period since the time between the two did not exceed four years, albeit short by only a day. *See, e. g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460–61 (2d Cir. 1974); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567–72 (10th Cir. 1962); *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77, 84–86 (D.Ariz.1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970).

27. *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); *accord, Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Crummer Co. v. Du Pont*, 255 F.2d 425 (5th Cir. 1958).

28. Greyhound argues that such representations, denials, and other attempts at concealment are immaterial, citing such cases as *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936); *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir. 1936). But as these cases demonstrate, attempts at concealment lose their relevance only when they occur after plaintiff already knew or should have known of the unlawful conduct. In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew or should have known of Greyhound's antitrust violation.

29. *See* note 28, *supra*, and cases cited therein.

of potential antitrust claims against Greyhound.

We conclude, therefore, that the trial court properly refused to set aside the jury's determination that Greyhound fraudulently concealed its antitrust violation, and that Mt. Hood had neither actual nor constructive knowledge of the violation until December 14, 1960.

[8] Four years later, on December 14, 1964, one day before Mt. Hood's antitrust claim would have been barred, the United States intervened in the section 5(9) proceedings Mt. Hood had instituted before the Commission in October, 1964. The trial court held that, under the provisions of 15 U.S.C. § 16(i), the intervention and the subsequent participation by the United States in the Commission proceedings tolled the running of the statute of limitations until those proceedings terminated in 1974, well after the filing of the present suit.

Section 16(i) provides that running of the limitations period on a private cause of action is suspended during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws."[30] Greyhound argues that section 16(i) is inapplicable because the administrative proceedings were not "instituted by the United States" and because they were not proceedings "to prevent, restrain, or punish violations of any of the antitrust laws."

The literal wording of section 16(i) is not controlling. Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). The clearly expressed purpose of section 16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. *Id.* at 320, 85 S.Ct. 1473. This purpose would be served by interpreting section 16(i) to encompass the government's intervention and participation in the section 5(9) proceedings before the Commission—a reading the language readily permits.

The proceedings were of a kind likely to produce benefits to Mt. Hood as a plaintiff in a subsequent antitrust suit.[31] The issues, as we have seen, were largely the same. Governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues. The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity.

It would make form controlling to hold section 16(i) inapplicable merely because Mt. Hood rather than the United States instituted the proceedings. The United

30. 15 U.S.C. § 16(i) reads in part:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statue of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

31. The question is not whether the government proceedings actually conferred benefits upon the private antitrust plaintiff, but whether the character of the proceedings was such that they were likely to do so. Thus in analyzing the issue the Supreme Court spoke of government action which "may aid the private litigant." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). If actual benefit were the test, it might be impossible to determine whether the government proceedings would toll the running of limitations until those proceedings were finally concluded. Private plaintiffs would be compelled to file their antitrust suits although government proceedings involving the same subject matter were still in progress.

States intervened little more than 60 days after the filing of Mt. Hood's petition and participated actively in all subsequent stages of proceedings that required nearly a decade to complete. Nothing would be gained, and a good deal of judicial and administrative time and efficiency would be lost, if the United States were compelled to institute a separate independent proceeding in district court under 15 U.S.C. § 26 to assure private treble damage litigants the benefits Congress intended they should have from the government's action. As the trial court concluded, "the Congressional intent behind [16(i)] is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them."

In addition to relying on the language of the statute, Greyhound argues that section 16(i) applies only when the United States initiates rather than intervenes in a proceeding because of the Supreme Court's statement in *Minnesota Mining* that the purpose of section 16(i) is to permit private parties the benefit of *"prior government actions."* 381 U.S. at 320, 85 S.Ct. 1473 (emphasis by Greyhound). Obviously, the Court was referring only to actions occurring before the antitrust suit was commenced. Greyhound's argument epitomizes the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives." *Id.*

When the substance of the government's intervention and participation before the Commission is examined, it falls fairly within the class of proceedings "to prevent, restrain, or punish violations of any of the antitrust laws" to which section 16(i) applies. It is not controlling that the government's action was taken in an administrative rather than judicial setting, *Minnesota Mining, supra*, 381 U.S. at 320, 85 S.Ct. 1473, nor that the proceedings were not brought under the antitrust laws, *Luria Steel & Trading Corp. v. Ogden Corp.*, 484 F.2d 1016, 1020–21 (3d Cir. 1973); *Rader v. Balfour*, 440 F.2d 469, 473 (7th Cir. 1971). The government action suspends the running of the limitation period under section 16(i) if it "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws," *Rader v. Balfour, supra*, 440 F.2d at 473, for it is government participation in such a proceeding that is likely to produce the benefits that Congress intended plaintiffs in later private treble damage actions to have.

The government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct. To explain its interest in the proceedings and its desire to participate as a party, the government stated:

> The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8–9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business. . . .

The petition noted Mt. Hood's increasing vulnerability to and dependence on Greyhound. It referred to Greyhound's "predatory conduct" and to the possibility of Mt. Hood's "extinction at the hands of an infinitely more powerful rival." The petition concluded:

> Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not.

As Greyhound itself admitted before the district court in its motion to dismiss the complaint, a purpose of the Justice Department's intervention was "to assure the adequate consideration of antitrust issues."

Antitrust issues were an appropriate part of the proceedings. The Commission was required to consider the anticompetitive effects of the section 5(2) transactions in framing, and modifying, its order.[32] Early in the proceedings Greyhound was reminded "that the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding." *Mt. Hood Stages, Inc., supra*, 104 M.C.C. at 451. The Commission rested its decision upon the conclusion that Greyhound's conduct "constitutes destructive competition in contravention of the national transportation policy." *Id.* at 463.[33] In sustaining the Commission's order the district court wrote:

> It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's duty to take the antitrust policy of the United States into account in its decision making.

Greyhound Lines, Inc. v. United States, supra, 308 F.Supp. at 1038.

Because Congress' purpose in enacting section 16(i) will be served by this interpretation, and because the language of the section does not bar it, we conclude that the government's intervention in the section 5(9) proceedings on December 14, 1964, tolled the running of the limitations period from that date.[34] Accordingly, Mt. Hood's antitrust complaint was timely filed.

IV.

Damages and Attorneys' Fees

[9] Greyhound contends that Mt. Hood failed to offer adequate proof either that Mt. Hood was injured by Greyhound's conduct or of the amount of the damage. With respect to the fact of damage, Greyhound's claim is frivolous. The jury may infer the fact of damage if "plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Mt. Hood offered evidence that its bridge traffic declined sharply during the relevant period.[35] Greyhound's conduct found to violate the antitrust laws was directed at creating precisely this kind of loss.[36] There was no indication of an alternative source of loss sufficient to negate an inference that Greyhound's violation was a material cause. *Zenith Radio Corp. v. Hazeltine Research,*

32. *Port of Portland v. United States*, 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases*, 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States*, 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

33. The Commission rejected Greyhound's argument that Greyhound's practices were not in themselves unlawful on the basis of the antitrust principle that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 458 (1968). The Commission cited the Sherman Act case of *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D.Cal.1966).

34. We need not reach Mt. Hood's contention that the statute was tolled to December 14, 1960, by virtue of Mt. Hood's commencement of the section 5(9) proceedings.

35. Mt. Hood offered evidence, for example, that Mt. Hood's bridge traffic consisted of 25,258 passenger trips, or approximately 44 percent of the total relevant bridge traffic, in 1963 and had fallen to 930 passenger trips, or approximately three percent of the total, by 1969.

36. As described previously, Mt. Hood alleged and offered substantial evidence to prove that Greyhound had cancelled the north-south through-bus connection arrangement on which Mt. Hood depended for a substantial portion of its traffic, scheduled its services so as to preclude reasonable connections with Mt. Hood, directed independent and joint ticket agents to long-haul traffic around Mt. Hood, and interfered with distribution of Mt. Hood schedules.

Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Mt. Hood's proof of the amount of damage was less certain, and necessarily so. What Mt. Hood's business volume and profits would have been except for Greyhound's antitrust violation is inescapably uncertain. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957). In such a case, the amount of damages may be shown "as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 249, 75 L.Ed. 544 (1931).

The premise of Mt. Hood's calculation of lost profits was that 95 percent of bus passengers would have traveled Mt. Hood's shorter bridge routes if they had had that choice. Greyhound asserts that Mt. Hood's premise "defies the record as well as common sense and is untenable," and therefore the entire calculation of damage fails. There was ample evidence from which the jury could reasonably infer that the shortest bus route is generally fastest, including studies comparing Greyhound's and Mt. Hood's schedules from 1950 to 1970 with regard to mileage and time.[37] Mt. Hood also introduced evidence from which the jury could reasonably infer that as a general rule 95 percent of bus passengers would take the fastest route when given a choice.[38] It is of course true that the evidence did not demonstrate to a certainty that 95 percent of passengers would have traveled Mt. Hood's shorter routes absent the restraints imposed by Greyhound's violation, but in the nature of the case proof to a certainty is not possible and is not required.

Greyhound challenges virtually every other facet of Mt. Hood's proof of damage. We have examined each of Greyhound's objections in light of Mt. Hood's response and the evidence in the record. No useful purpose would be served by a tedious recapitulation of these materials. We are satisfied that the evidence offered by Mt. Hood permitted the jury to make a reasonable and just inference of the amount of Mt. Hood's damage.[39]

[10] We also sustain the award of attorneys' fees. Greyhound objects that the amount of the award divided by the number of hours devoted to the litigation by plaintiff's attorneys yields an exorbitant hourly rate. But as the experienced trial judge stated, "compensation at an hourly rate would be inadequate in a case of this kind," which "is, in many ways, unusual, . . . its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." The trial court based the award upon knowledge gained in four years' involvement in all aspects of the case, the evidence presented by the parties on this issue, and the factors prescribed in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964). The award represented an appropriate exercise of the district court's discretion.

Affirmed.

37. These studies were part of a larger damage study commissioned by Mt. Hood. The study was supplemented by the testimony of three expert witnesses over a two-week period. The study was based on statistical computations verified by Arthur D. Little & Co., an independent management consulting firm. Mr. Jizmagian, Arthur D. Little & Co.'s representative who supervised the study, testified that maximum use was made of all available data supplied by Greyhound, and where such data was not available every assumption and method "and every use of statistics and every use of ratios was done . . . with standard statistical techniques and there was, in my opinion, no speculative use of numbers." He concluded that the study accurately reflected Mt. Hood's damages.

38. For example, Mt. Hood's damage study, *see* note 37, *supra*, included a comparison of passenger utilization of three available " 'All Greyhound' routes from Oregon and Washington points to Los Angeles," showing that more than 95 percent of the bus passengers chose the shortest of the three available routes.

39. This holding also encompasses the damage awards for express traffic Mt. Hood lost between 1964 and 1971, and for local traffic it lost between 1964 and 1970.

from —

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

No. 4
January 23, 1979

truck line

KENNEDY TO SEEK ABOLITION OF COLLECTIVE RATEMAKING

Senator Ted Kennedy is going to introduce legislation to abolish collective ratemaking in the trucking industry.

At a jammed press conference on Capitol Hill January 22, Senators Kennedy (D-Mass.) and Howard Metzenbaum (D-Ohio), along with a host of supporters, announced plans to seek an amendment bringing truck and freight forwarder ratemaking under the Clayton Antitrust Act, and subsequently repeal the industry's exemption from the antitrust laws.

ATA responded immediately with a statment blasting the bill, saying that it "demonstrates a complete lack of understanding of the complexities of the system of freight transportation." Our full statement is attached.

QUESTIONS ON CARTER POSITION, COMMITTEE JURISDICTION

Two aspects of this development are exceedingly important. One is the apparent waffling of the Carter administration on whether it should support the Kennedy bill. The other is that Kennedy's initiative has precipitated a fight in the Senate over committee jurisdiction.

CONFLICTING STATEMENTS

The confusion over President Carter's position stems from conflicting statements from the administration and Kennedy. Just hours before the Kennedy press conference, President Carter told a delegation of motor carrier executives that he has not made up his mind on truck deregulation. At the same time, two top Carter advisors, Ambassador-at-large Robert Strauss and assistant to the President for Domestic Affairs and Policy Stuart Eisenstat, told the executives that the administration had no position on the Kennedy bill. But at his press conference later that day, Kennedy said Carter has endorsed the bill.

(more)

ATA TELEGRAM

ATA has telegrammed President Carter a summary of the conflicting statements, saying that if he does support the bill, then continued discussion on the administration's position is moot since effective regulation is not possible without collective ratemaking. A copy of the telegram is attached.

KENNEDY, CANNON FIGHT OVER JURISDICTION

The jurisdiction fight is between Kennedy, who is chairman of the Judiciary Committee, and Senator Howard Cannon (D-Nev.), chairman of the Commerce Committee. Each thinks the issue belongs in his own committee, and Cannon has told Senate Majority Leader Robert Byrd (D-W. Va.) that he will object to joint referral and will appeal sole referral to the Judiciary Committee.

Cannon told Byrd that no matter how the bill is drafted it will go to the heart of truck regulation and thus clearly falls into the jurisdiction of the Commerce Committee. He pointed out that the Reed-Bulwinkle Act of 1948, which exempts regulated trucking from the antitrust laws, originated in the Commerce Committee, and that it would be unprecedented for legislation passed by one committee be referred to a different committee for repeal. Asked about this, Kennedy said the bill belongs in his committee because it initially addresses a provision of the Clayton Antitrust Act rather than the Interstate Commerce Act or Reed-Bulwinkle.

CANNON COMMITTEE BEST FOR TRUCKING

The industry's best hope in this is that the matter gets referred to the Commerce Committee. Cannon may wind up supporting the bill, but at least his mind is open. Kennedy has already decided that trucking should be deregulated and any hearing conducted by him would be a stacked deck.

KENNEDY SUPPORTERS

A wide range of interests were represented by supporters of the bill at Kennedy's press conference. Among them were: Alfred Kahn, the President's counsellor on inflation, who said the bill is an important plank in the administration's fight against inflation; Esther Peterson, the President's consumer affairs advisor; John Shenefield, assistant attorney general for antitrust; Rep. Parren Mitchell (D-Md.), who endorsed the bill on behalf of minority interests; Rep. Millicent Fenwick (R-N.J.); Ralph Nader, who called for legal action against the "entrenched corruption" in trucking that is protected by the "puppet" ICC; and representatives of groups such as the National Association of Manufacturers, the American Conservative Union and the American Farm Bureau.

(more)

Kennedy said this bill is a first step in a larger effort to restore genuine competition to trucking. He laid the groundwork for his proposal over the last 16 months with extensive hearings on collective ratemaking and entry.

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news

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NEWS SERVICE DEPARTMENT • (202) 79 -5237 • Rupert Welch • Home Phone: (202) 332-3958

FOR IMMEDIATE RELEASE

AMERICAN TRUCKING ASSOCIATIONS STATEMENT

WASHINGTON, Jan. 22 -- The American Trucking Associations, Inc., has issued the following statement on the proposal made by Sen. Edward M. Kennedy (D-Mass.):

Introduction of legislation to repeal the antitrust exemption which permits shippers and truckers to openly discuss rate proposals and which allows truckers to collectively vote on rate proposals to be considered by the Interstate Commerce Commission demonstrates a complete lack of understanding of the complexities of the system of freight transportation.

Collective ratemaking is at the very heart of carrying out the National Transportation Pol cy under which we have developed the finest freight transportation system in the world. It is only through collective ratemaking that the ICC can exercise effective rate regulation. Without the present basic ratemaking procedures, there will be discrimination, preference and prejudice between communities, regions, shippers and commodities.

It will be an impossible task for the shipping public to know with any degree of certainty the transportation charges on thousands of commodities which the 16,('0 ICC carriers regularly t sport among 125,000 communities throughout the country. Chaos and confusion will be the result.

-more-

It's unfortunate that Senator Kennedy advocating his position, is misleading the American people into believing that elimination of collective ratemaking would save the consumers billions of dollars. To the contrary, his legislation will increase the inflationary pressures facing the nation's economy.

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22/1/79

Telegram Sent to President Carter

We wish to express our appreciation for your taking time from your busy schedule to meet with us on the issues involved in truck regulation. We also appreciated your indication that although your Staff had made recommendations concerning truck regulation, you and your Administration had not reached a final position. Prior to your joining our meeting, the subject of the legislation which Senator Kennedy was to announce later in the day came up for discussion. Senator Kennedy's legislation which would repeal the antitrust exemption which permits truckers and shippers to discuss rate proposals and which gives truckers the right to collectively propose rates to the Interstate Commerce Commission goes to the very heart of effective truck regulation. Ambassador Strauss and Assistant to the President for Domestic Affairs and Policy Stuart E. Eisenstat assured us that the Administration would take no position on the Kennedy legislation at this time. Yet less than one hour after the conclusion of our meeting at which you assured us you had taken no position on truck regulation and two of your top advisors told us the Administration would not take a position on the Kennedy legislation, Senator Kennedy announced Administration support for the measure. In addition, two of your advisors, Dr. Alfred Kahn and Ester Peterson, who were present throughout our meeting with you, attended the Kennedy press conference. Dr. Kahn publicly announced that the legislation was a key plank in the Administration's program. At a subsequent press conference we stated we did not feel this was the White House position but press reports indicate that the statements

made by Senator Kennedy and Dr. Kahn were checked with the White House and the Administration does support the Kennedy legislation.

Mr. President, this either represents a complete lack of understanding of the import of Senator Kennedy's legislation by some of your advisors or a complete breach of faith with the statements which you and your advisors made to us at our meeting. We feel it is incumbent that this matter be reconciled. We would hope you would reaffirm the position which you took with us and the position which Ambassador Strauss and Stuart Eisenstat took as to the Administration's position on the Kennedy legislation. However, if indeed the Administration supports the legislation which Senator Kennedy has introduced, then continued discussion on the Administration's position on truck deregulation would be moot. Effective truck regulation is not possible without collective ratemaking.

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

No. 153
December 28, 1978

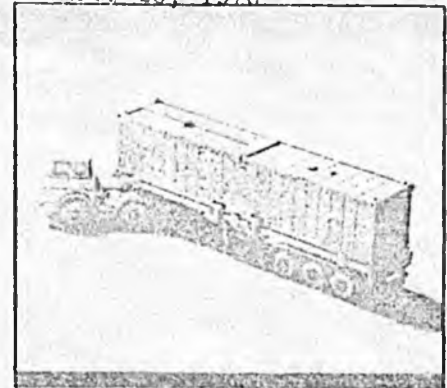
truck line

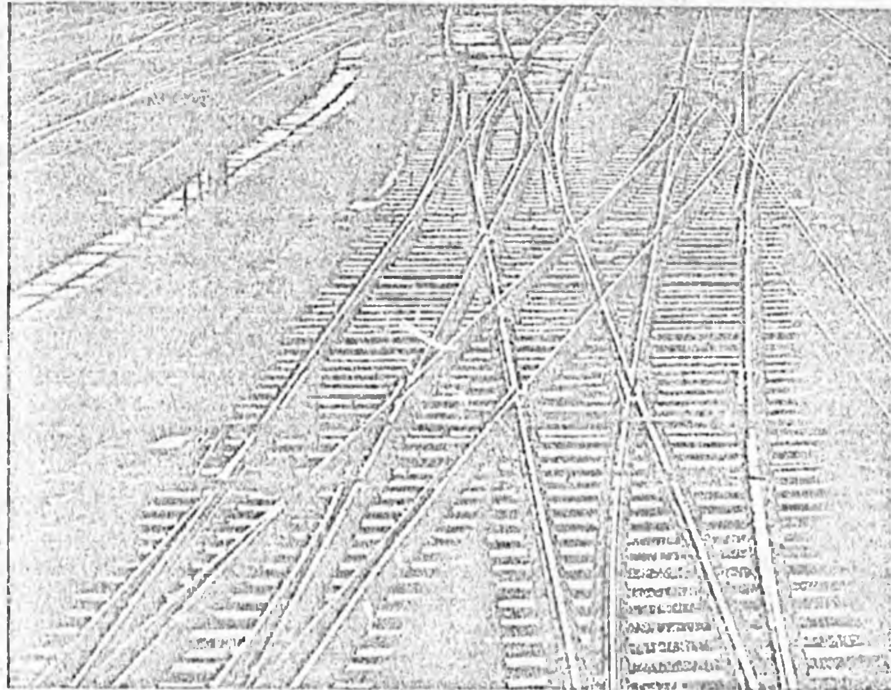
The attached article, from the January 8 edition of Forbes, presents a forceful defense of economic regulation of trucking. This is the kind of cogent, unbiased support for the regulatory system that should be distributed far and wide. We have obtained permission to reprint the piece, and we urge you to contact us for copies to send to your shippers, chambers of commerce and congressional delegates.

For reprints contact: Public Realtions Department, American Trucking Associations, Inc., 1616 P Street, N. W., Washington, D. C. 20036 (202) 797-5243.

Anyone who thinks deregulation will bring prosperity to the railroads and truckers as it did to the airlines had better think again.

Transportation





By James Cook

IT WAS A seemingly revolutionary, but in reality, almost stupefyingly elementary notion: What if you ended those controls on market entry and pricing the government had imposed on transportation for generations, and let carriers go about their business as they pleased? Cut prices or raise them, enter new markets or withdraw from old ones as sound business judgment would dictate? In short, what if you let competition do the job that regulation had attempted and never really succeeded very well in doing?

Academicians had talked of such things for years, but on taking over as chairman of the Civil Aeronautics Board 18 months ago, Alfred Kahn, Cornell University's regulatory guru, put them into effect. A good half of the airline industry was appalled. The result would be chaos: cutthroat price competition, sagging profits, disaster. But Kahn persisted, and before he moved on to become Carter's chief inflation fighter, the airlines were propelled—some of them kicking and screaming—into a new age.

Led by a maverick Texas outfit, Texas International Airlines, the industry was encouraged to offer sharply reduced fares to passengers who were prepared to fly at times when the industry's traditional customers didn't want to. One discount fare promptly followed another. Far from bankrupting the industry, competition proceeded to transform it. Air travel turned out to be an almost classically price-elastic market. And as the airlines began offering tickets at discounts of 50% and more, depending upon the circumstances, and filling planes that had long flown empty, they found themselves tapping a vast new market for low-priced, nonessential passenger service. Overall, demand boomed, soaring 18% in the first nine months of last year, profits expanded spectacularly and an industry that only a few years ago seemed nearly bankrupt found itself being deregulated into the biggest and best year in its history. The FORBES yardsticks make clear the impact: a breathtaking 24.8% return on equity in the latest 12 months, vs. a 10.5% five-year average.

From Kahn's point of view, the industry's newfound prosperity was really secondary. "One reason we wanted to move toward competition," he told FORBES, not long before taking his new job last November, "is that it will be beneficial to consumers. The other proviso is the implicit premise on our part that a competitive industry is capable of being financially healthy. It is entirely conceivable that deregulation will force people to become leaner, more efficient, more careful. They're not free to overacquire, enter markets that might not be logical for them to enter, secure in the knowledge the government will bail them out."

Congress was so impressed by Kahn's argument and the industry's performance that last fall it passed a bill enacting Kahn's notions into law—freeing the industry from control over its routes by 1982 and over fares, mergers and acquisitions by 1984. In the meantime the carriers were free to enter one new market a year, pull out of an old market on 90 days' notice, cut fares in noncompetitive markets by as much as 50% or raise them as much as 5% without CAB approval or 10% in markets where there were four or more carriers competing.

The airlines are understandably uneasy sometimes, because in slashing fares, they become vulnerable to a recessionary traffic slump. But in deregulating the industry Kahn never promised them a rose garden. Deregulation wasn't supposed to spare the industry the consequences of poor business judgment, any more than regulation itself had been able to protect it from the ruinous excess capacity poor management created twice in less than two decades.

Of course, the merits of airline deregulation haven't been proved by one summer's boom, but the first results were so spectacular that the Administration and Congress promptly began talking about doing the same thing for the rest of the carriers. President Carter hoped airline deregulation would be the precursor of deregulation in other overregulated industries, and deregulator Kahn argued there was even less reason to regulate trucking than airlines.

Maybe so, but success in airline deregulation doesn't guarantee success in the rest of the transportation business. For one thing, real reform is difficult in Washington. Airline deregulation was politically popular. The public loved the

lower fares, and the public votes. However, the general public does not much use trucks and railroads—except indirectly—and therefore, deregulation of these industries does not have the same political constituency.

And politics is only half the difference. By cutting prices, the airlines have induced more people to fly. But truckers and railroads move goods, mostly, not people. Cutting freight rates is not going to expand the size of the market. Cheaper shipping rates are unlikely to cause the appliance industry to produce more refrigerators, say, or the steel mills, more steel. Instead of expanding the market and lowering unit costs in transportation, lower prices are simply going to come out of the hides of the truckers and railroads. The ultimate result could be less competition, not more, as the weaker companies are forced under.

Congress had earlier attempted to deregulate the railroads' ratemaking in the so-called 4R Act of 1976, only to be thwarted by the Interstate Commerce Commission, which interpreted the act's market dominance provisions so narrowly as to leave a good 50% of the industry's traffic still under rigid control. The free market advocates are almost certain to try again, only this time with trucking. Senator Edward Kennedy expects to introduce legislation deregulating trucking later this year, and in November 1978 the ICC's Chairman Daniel O'Neal came up with a group of proposals that would in effect deregulate all but the common carrier truckers, ease entry even there and establish a range within which price changes would not be subject to ICC review.

The other members of the Commission greeted O'Neal's proposals with a notable lack of enthusiasm, but in November, ostensibly in the interest of saving fuel, the ICC took a major step toward deregulation by authorizing private carriers to solicit backhaul traffic from other shippers for the first time. By such means, the ICC could deregulate much of the trucking industry without any need for congressional action, just as the CAB had the airlines, but the American Trucking Association denied that the ICC had the option and took the matter to court.

Cheaper shipping rates are unlikely to cause the appliance industry to produce more refrigerators, or the steel mills, more steel. Instead of expanding the market and lowering costs, lower prices are going to come out of the hides of the truckers and railroads. The result could be less competition, not more.

Trucking will be a tough nut to crack. You would be hard put to find anybody in the regulated surface transport business who thinks that truck deregulation is a good idea—not the railroads certainly, who face the prospect of their unregulated truck competition growing worse; not the common carrier truckers, who long since have found the unregulated truckers the common enemy of all regulated carriers; and not the Teamsters Union, which wants to keep the trucking rates high so as to have a healthy cow to milk.

The airlines basically compete with each other and only to a small degree with buses and Amtrak. But the trucks, barges and railroads compete not only with one another but also with other trucks, rails and barges.

Regulation has kept the trucks and water carriers healthy and prosperous, but it has helped to bankrupt a good portion of the railroad industry—not simply the seven companies absorbed by Conrail, but the Boston & Maine, the Rock Island and the Milwaukee as well—and threatens such once-prosperous carriers as the Illinois Central Gulf and conceivably even the Seabord Coast Line. The 5.3% five-year return on capital the railroads average on the Forbes yardsticks, as against the 13.1% of the motor carriers, understates the disparity. As the ICC calculates it, the railroads last year earned only 1.3% on their net investment, *vs.* 23.8% for the truckers, 21.07% for the water carriers.

That's why Kahn and Kennedy chose the trucks as their next target.

Deregulation is never going to bring any new competitors into the railroad

Transportation—Air:
Yardsticks of Management Performance

	Profitability								Growth			
	Return on Equity				Return on Total Capital				Sales		Earnings Per Share	
company	5-year average	5-year rank	latest 12 months	debt/ equity ratio	latest 12 months	5-year rank	5-year average	net profit margin	5-year average	5-year rank	5-year average	5-year rank
Emery Air Freight	36.9%	1	38.6%	0.0	38.4%	1	36.6%	5.4%	18.8%	2	17.8%	5
Braniff Intl	17.8	2	21.3	1.1	10.5	3	8.9	5.1	14.6	6	23.9	4
Delta Air Lines	17.6	3	20.2	0.2	11.5	2	9.2	6.3	17.3	4	14.0	7
Western Air Lines	16.3	4	32.8	0.5	14.0	4	7.7	5.4	13.6	6	33.7	2
UAL	11.6	5	31.1	0.7	14.2	6	6.0	7.6	11.4	11	50.6	1
Tiger International	10.9	6	16.8	2.0	6.7	9	5.4	6.9	18.9	1	4.1	9
Allegheny Airlines	10.7	7	28.5	1.8	12.6	7	5.9	4.3	16.4	5	D-P	
Northwest Airlines	10.3	8	9.7	0.1	6.8	5	7.0	8.8	14.3	7	11.1	8
Continental Airlines	10.2	9	29.5	1.4	12.5	8	5.8	7.3	12.4	9	26.7	3
American Airlines	7.6	10	15.6	0.5	8.8	10	4.8	4.5	10.5	12	D-P	
National Airlines	7.6	11	8.6	0.2	5.4	12	4.2	2.8	8.8	13	2.5	10
Eastern Air Lines	6.3	12	21.0	1.4	10.3	11	4.5	3.2	11.9	10	D-P	
Trans World Airlines	3.9	13	21.7	1.2	10.0	13	3.6	3.0	17.6	3	16.1	6
Pan Am World Airways	0.8	14	29.2	3.1	10.4	14	2.4	5.3	7.8	14	D-P	
Industry Medians	**10.5**		**21.5**	**0.9**	**10.5**		**5.9**	**5.4**	**14.0**		**17.0**	
All-Industry Medians	**13.9**		**15.4**	**0.4**	**10.5**		**10.2**	**5.0**	**12.9**		**12.6**	

Note: Explanation of Yardstick calculations on page 40. D-P Deficit to profit; not ranked.

busin_ss—it costs too much. Who would invest new capital in an industry where its largest and most successful companies average less than 6% on their capital? But trucking is a different matter. In an industry where a driver can buy a $60,000 rig for maybe $9,000 down and go into business for himself, open entry could conceivably transform the industry. This deregulation will bring a rash of new competition into the trucking business: competitors who will price-cut their way into the market and set off a wave of mergers that will transform trucking into a far more concentrated business than it is now. The short haul and regional truckers may well be squeezed out, and the big national companies—outfits like Yellow Freight, Roadway Express, Consolidated Freightways and McLean Trucking—will come to dominate the industry. And it is likely that the same will happen with the entrenched companies in freight forwarding (Transway International) or contract leasing (Leaseway International).

Deregulating the truckers while leaving the railroads regulated could, in addition to disrupting trucking, come close to being fatal to the railroads, with newly deregulated truckers price-cutting into the railroads' remaining markets.

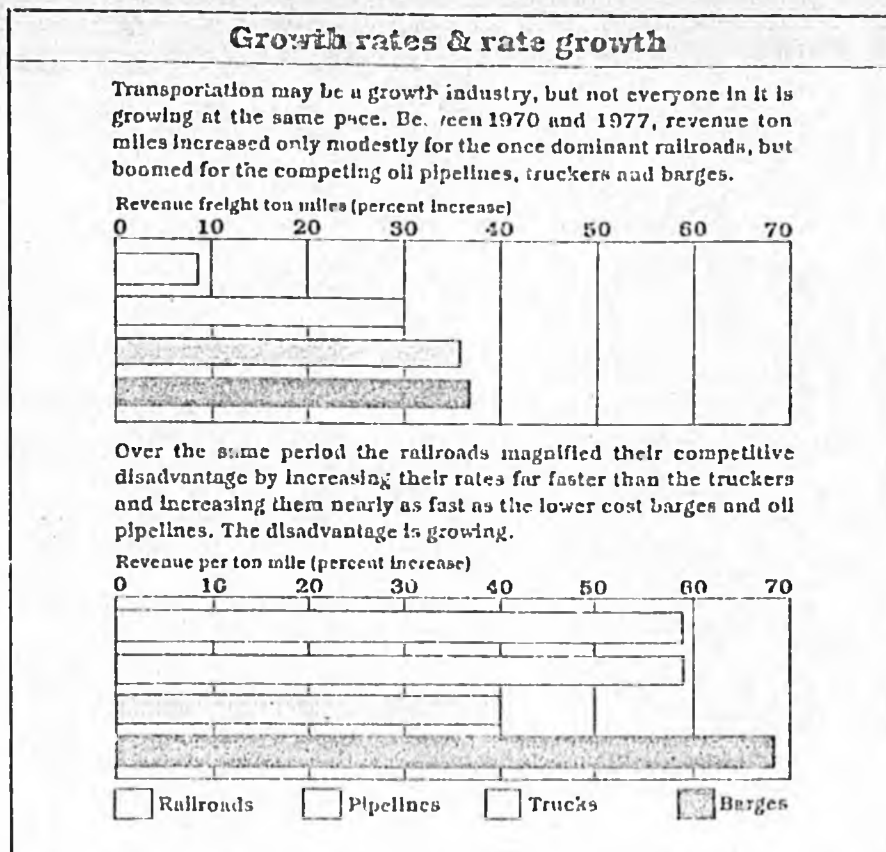
"I think," says ICC Chairman Daniel O'Neal, "the government will have to be concerned about the disruptive effect of changes in the system. Actions we take as far as motor carriers are concerned should be read in conjunction with how they affect the railroads. Some commodities carried by the railroads are vulnerable to motor carrier competition—agricultural commodities, anything that moves in full trucks. There's one reason for regulating the motor carriers: because of their threat to the railroad industry."

Sad to say, O'Neal has a point.

Deregulation isn't likely to produce anything like the boom conditions that airline regulation has. Freight transportation, unlike passenger traffic, is basically price inelastic. The volume of freight traffic is determined by the level of the economy. So what you may do by deregulating ratemaking is to divert traffic from one carrier or mode of transport to another.

All you really may accomplish is to reduce the general rate level of the carriers involved, a reduction that the railroads at least no longer have the financial resources to withstand.

And the truth is that, in terms of their costs, transportation rates are in general probably too low. Veteran rail analyst, Isabel Benham, head of Princeton, Kane Research, calculates that since the end of the 19th century the U.S. government has spent nearly $130 billion developing U.S. highways and waterways, as against $2 billion on railroads, and this indirect subsidy has enabled barges and truckers



to price their services for less than they would have otherwise and to force the railroads, in competing with them, to underprice their services as well. The result has been a progressive dissipation of railroad capital and a corresponding inability to provide the service that in many transportation markets is far more important than costs. "The motor carriers," says ICC Chairman O'Neal, "are doing well because they provide pretty darned good service."

"Actions we take as far as motor carriers are concerned," says ICC Chairman O'Neal, "should be read in conjunction with how they affect railroads. Some railroad commodities are vulnerable to motor carrier competition. There's one reason for regulating motor carriers: because of their threat to the railroad industry."

And they do. So good, in fact, that even with a rate level nearly five times that of the railroads they have easily walked off with the market. Transportation is a volume business, and the volume—the most profitable volume at that—has increasingly gone to the truckers and water carriers, leaving the railroads particularly vulnerable to the cost inflation of the Seventies. Railroad freight traffic has admittedly expanded 8% since 1970, but that compares with a 36% gain for the truckers, 37% for the barges. And the railroads, squeezed for the profits they need to keep going, have responded by increasing their rates far more rapidly than the truckers have—increasing them, over the past eight years, 60% on average, vs. 40% for the truckers—a move that has probably cost them even more of the growth they might otherwise have been entitled to.

What the railroads obviously need is still higher rates—to restore their basic earning power—and greater flexibility in adjusting them up or down to suit the competitive environment. But ratemaking freedom is probably no longer enough. What the railroads need even more is the imposition of user charges on their competitors to even out the inequities created by government subsidized highways and waterways, and this would almost certainly mean that the rate level in both railroads and trucking would rise.

But even without user charges, Morgan Stanley's transportation expert Andras Peterey argues, long-term deregulation of trucks and rails is unlikely to produce the lower prices across the board the politicians dream about. It would only lessen competition in trucking, encourage prices to rise and could further weaken the railroad industry. "The curious effect," he says, "would probably mean many increases rather than decreases in freight rates. Once the weaker firms are squeezed out, prices will go up again." Deregulation in the air cargo in-

dustry may have got the air cargo business booming at last, but the result so far has been higher, not lower, fares. Kahn explains the anomaly by suggesting that fares were probably too low—just as they probably are throughout the surface transportation industry. So in the end deregulation may prove to be not the deflationary device some of its proponents suggest but an inflationary one—or if not that, one which encourages transportation to reflect its true costs for the first time in generations.

Deregulation is popular in Washington these days and *that* is good news for those who believe in free enterprise. But Congress would be wise to go slow on deregulating trucks and railroads because lower prices are not what the railroads need to survive. As things now stand, because freight rates may already be too low, the taxpayer subsidizes trucks and barges, and railroad stockholders and bondholders subsidize most railroads. If the aim of deregulation is to bring freight rates down, the result may be to increase the need for subsidies and to reduce rather than enhance competition. That's a sad thing to say but probably true.

If the politicians and bureaucrats still dream of the benefits of trucking deregulation, hardly anyone seriously suggests that this offers any solution for ocean shipping. Companies like Alexander & Baldwin (Matson Lines), Transway (Waterman Steamships), Seatrain Lines or Moore-McCormack have suffered too long at the hands of cut-rate foreign, and largely Russian, competition. What these carriers want is regulation in order to stay alive: rigid rate regulation in exchange for a secured market position. "You can't have a staunch allegiance to antitrust," says Transway's vice president-law, Lawrence Berman, "when the rules of the game are not controlled by the U.S. So pooling arrangements are the name of the game."

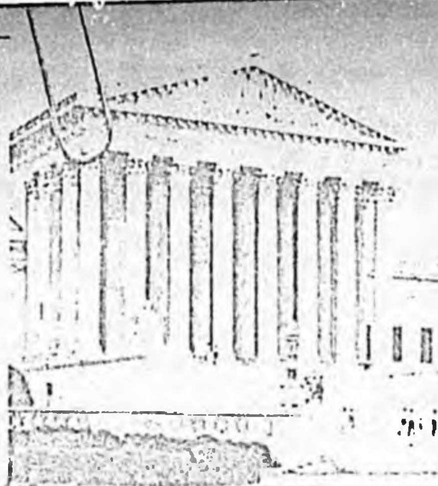
In short, there is no easy answer to the question of deregulation. Can one opt for inconsistency? Favor deregulation for the railroads, favor only restricted deregulation for the truckers? One probably can. What transportation needs is pragmatic, not ideological, solutions. The basic problem, of course, is how do you unscramble eggs. And the answer is, of course, you can't do it. All you can hope to do is stir them around so they don't get too lumpy. ■

Transportation—Surface:
Yardsticks of Management Performance

	Profitability								Growth			
	Return on Equity				Return on Total Capital				Sales		Earnings Per Share	
company	5-year average	5-year rank	latest 12 months	debt/ equity ratio	latest 12 months	5-year rank	5-year average	net profit margin	5-year average	5-year rank	5-year average	5-year rank
RAILROADS												
Missouri Pacific Corp	29.3%	1	25.2%	1.4	11.1%	1	9.5%	7.7%	13.5%‡‡	3	21.8%‡‡	3
Chic & North Western	21.2	2	21.5	1.4	5.7	8	5.2	1.9	7.9‡‡	8	13.6‡‡	7
Southern Railway	11.2	3	12.0	0.6	6.9	3	6.4	9.6	9.2	7	13.1	8
Norfolk & Western Ry	10.4	4	8.4	0.4	5.1	5	5.8	9.0	3.0	13	20.5	4
Union Pacific	9.9	5	11.7	0.3	7.8	2	7.1	6.8	17.0	1	16.5	5
Santa Fe Industries	8.4	6	8.7	0.4	6.1	4	6.0	7.6	11.8	5	14.7	6
IC Industries	8.0	7	8.8	0.6	5.8	6	5.4	3.7	14.6	2	8.7	9
Chessie System	7.7	8	4.6	0.7	3.5	9	5.0	3.6	6.6	11	22.7	2
Seaboard Coast Line	7.3	9	5.7	0.9	4.5	7	5.3	3.8	13.3	4	6.3	11
St Louis-San Fran Ry	6.0	10	[illegible]	0.8	4.9	11	4.0	5.0	7.9	9	6.5	10
Southern Pacific	5.6	11	4.8	0.4	3.6	10	4.0	4.1	7.3	10	1.4	12
Burlington Northern	4.8	12	6.8	0.5	4.7	12	3.8	4.8	11.3	6	34.2	1
Chicago Rock Island	def	13	def	0.9	def	13	def	def	3.7	12	D-D	13
Medians	**8.0**		**8.4**	**0.6**	**6.1**		**5.3**	**4.8**	**9.2**		**13.6**	
TRUCKERS												
Yellow Freight System	26.1%	1	22.0%	0.2	16.4%	2	17.4%	5.2%	19.0%	2	20.6%	1
Roadway Express	24.5	2	21.6	0.0	20.5	1	23.1	5.7	16.4	4	20.0	2
Leaseway Transportn	24.0	3	24.3	[illegible]	10.6	5	9.7	4.7	13.1	5	18.4	4
Consol Freightways	21.6	4	23.6	0.2	19.1	3	16.2	4.5	12.3	6	19.1	3
McLean Trucking	19.2	5	14.2	0.5	10.7	4	13.1	2.8	17.6	3	14.1	5
Ryder System	12.9	6	25.1	1.6	9.8	7	6.6	4.9	20.1	1	6.9	6
Allied Van Lines	9.9	7	7.1	3.7	4.6	6	7.5	0.3	9.9	7	3.1	7
Medians	**21.6**		**22.0**	**0.5**	**10.7**		**13.1**	**4.7**	**16.4**		**18.4**	
OTHER TRANS												
Moore McCormack Res	20.2%	1	12.3%	0.8	7.4%	3	11.7%	7.9%	28.8%	2	221.5%	1
Transway Intl	19.1	2	20.0	0.3	15.8	1	15.6	3.6	8.9	6	13.4	4
Gelco	18.9	3	25.1	4.4	6.4	5	5.9	5.8	62.9	1	32.5	2
Alexander & Baldwin	16.7	4	9.2	0.4	6.9	2	13.6	5.9	11.3	4	28.0	3
Greyhound	11.2	5	8.6	0.5	7.0	4	8.3	1.4	8.9	5	0.7	5
Seatrain Lines	7.5	6	21.[illegible]	8.4	4.3	6	2.5	1.6	19.4	3	D-P	
Medians	**17.8**		**16.2**	**0.7**	**7.0**		**10.0**	**4.7**	**15.4**		**28.0**	
Industry Medians	**11.2**		**11.0**	**0.6**	**6.7**		**6.5**	**4.8**	**12.1**		**14.7**	
All-Industry Medians	**13.9**		**15.4**	**0.4**	**10.5**		**10.2**	**5.0**	**12.9**		**12.0**	

Note: Explanation of Yardstick calculations on page 40. ‡‡Three-year growth. D-D Deficit to deficit. D-P Deficit to profit; not ranked. def Deficit.

Supreme Court Report



by Rowland L. Young

ON JULY 6, a divided Court announced what appears to be a substantial limitation on the doctrine of *Parker* v. *Brown*, a 1943 decision holding that the Sherman Act does not apply to restraints on trade imposed by state law. The new decision seems to have narrowed *Parker* to a holding that only state officials, acting under state legislation, are exempt. The decision leaves the law in doubt, because only three justices joined in Justice Stevens's plurality opinion, with Chief Justice Burger and Justice Blackmun concurring only in the result. Justice Stewart's strong dissent, in which Justices Powell and Rehnquist join, points out that the new decision is not entirely consistent with some of the language in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

This month's report covers two other antitrust law cases, one holding that an allegation of a conspiracy to prevent the expansion of a proprietary hospital was closely enough connected with interstat commerce to raise a Sherman Act que tion, and the other dealing with the app' cation of the Robinson-Patman Act drugs sold to nonprofit hospitals at lower prices than to retail druggists.

On M y 24, the Court refused to find an "act of state" in the refusal of Cuban authorities to return money mistakenly paid to confiscated Cuban businesses instead of to the former owners. The case is curious, both because of the complex factual situation and because only three justices (Chief Justice Burger, Justices Powell and Rehnquist) join in the major premise of Justice White's opinion for the Court—namely, that the act of state doctrine does not apply to commercial obligations of governments.

On June 21, the Court upheld a city ordinance that required voter approval of any changes in zoning restrictions. It also upheld a local school board's right to fire teachers who struck in defiance of state law. Other cases include one involving the constitutionality of a referendum on a zoning change and another on the validity of presidentially imposed licenses for the importation of crude oil.

State Sanction No Excuse for Sherman Act Violation

The first antitrust case was *Cantor* v. *Detroit Edison Company*, ___ U.S. ___, 49 L.Ed. 2d 1141, 96 S.Ct. 3110, 44 U.S.L.W. 5357, decided July 6. The decision held that action by a regulated public utility was not immune from Sherman Act liability even though the action in question was required by a state regulatory board.

Detroit Edison supplies the electricity for southeastern Michigan. It also furnishes about half of the light bulbs used in that area. Customers are billed for their electricity and are entitled to light bulbs at no additional charge. The bulb exchange program is included in the co pany's tariff and could not be changed without the approval of the Michigan Public Service Commission.

Cantor, a druggist who also sells light bulbs, brought this Sherman Act suit against Detroit Edison, alleging that Edison's providing light bulbs was an unreasonable restraint of trade in violation of the Sherman Act. Both the district court and the Sixth Circuit held that the practice was exempt from federal antitrust laws under *Parker* v. *Brown*, 317 U.S. 341 (1943), a case that held that action by state officials under state legislation did not violate the Sherman Act. See 513 F. 2d 630 (1975).

In the new case, the Court reversed and remanded on the ground that the exemption created in *Parker* is limited to official action taken by state officials, and that here the only defendant was a private utility. The opinion of the Court was written by Justice Stevens. The Court reasoned that, while Detroit Edison could not maintain its lamp exchange program without the approval of the state commission and could not abandon it without permission, the option of having such a program was primarily the company's. "There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law," the Court said.

The Court also rejected the argument that federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies: ". . . [M]erely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards," the Court declared, "second, even assuming inconsistency, we would not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs." Enforcement of the Sherman Act here would not interfere with Michigan's regulation of its electric utilities, the Court added.

The Court added that *Eastern Railway Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961), was not applicable. That case held that lobbying by railroads against legislation favorable to motor carriers was not a violation of the Sherman Act. *Noerr*, said the Court, "did not involve any question of either liability or exemption for private action taken in compliance with state law."

To grant an exemption here, the Court contended, would "give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest."

The chief justice concurred in the judgment and in Parts I and III of Justice Stevens's opinion. He disagreed, however, with the plurality's assertion that the *Parker* exemption is limited to suits against state officials.

Justice Blackmun concurred in the judgment in an opinion that took the position that the Sherman Act generally supersedes inconsistent state laws and

that "at least for now" a "rule of reason" should be applied that "state-sanctioned anti-competitive activity must fall like any other if its potential harms outweigh its benefits."

Justice Stewart, joined by Justices Powell and Rehnquist, dissented, arguing that the Court was "trivializing" *Parker* to the point of overruling that decision. The dissent took the position that *Parker* had held that the Sherman Act did not undertake to prohibit restraints of trade imposed by a state and that the Court's distinction between "the exemptive force of mandatory state rules adopted at the behest of private parties and those adopted pursuant to the State's unilateral decision is flatly inconsistent with the rationale of *Noerr*." "Today's holding will not only penalize the right to petition but may very well strike a crippling blow at state utility regulation," the dissent asserted.

Conspiracy against Hospital Covered by Sherman Act

In another antitrust case, *Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738, 48 L.Ed. 2d 338, 96 S.Ct. 1848, 44 U.S.L.W. 4683, decided May 24, a unanimous Court held that a complaint of a conspiracy to prevent the expansion and relocation of a propriety hospital was a complaint upon which relief could be granted under the Sherman Act. Both the district court and the Fourth Circuit dismissed on the ground that the complaint did not adequately allege a "substantial effect" on interstate commerce. See 511 F. 2d 678 (1975).

The complaint was filed by a proprietary hospital in Raleigh, North Carolina, alleging that the trustees and officers of a private, tax-exempt hospital, along with the executive secretary of the local agency responsible for making recommendations on the need for additional hospital facilities, had acted together to block a planned relocation and expansion of the proprietary hospital. The petitioner's complaint alleged that it purchased 80 per cent of its medicines and supplies from out-of-state sellers, spending $112,000 in this manner in 1972. It also stated that a substantial number of its patients come from out of state and that a large proportion of its revenue comes from out-of-state insurance companies or from the federal government.

The Supreme Court reversed and remanded in an opinion by Justice Marshall. The Court cited prior cases holding that "[W]holly local business restraints can produce the effects condemned by the Sherman Act," that, as long as the restraint in question "substantially and adversely affects interstate commerce," the nexus required for Sherman Act coverage is established. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze," the Court declared.

The Court said that, "The complaint, fairly read, alleges that if respondents and their coconspirators were to succeed in blocking petitioner's planned expansion, petitioner's purchases of out-of-State medicines and supplies as well as its revenues from out-of-State insurance companies would be thousands and perhaps hundreds of thousands of dollars less than they would otherwise be."

Robinson-Patman Covers Drugs Purchased by Hospitals

Abbott Laboratories v. Portland Retail Druggist Association, 425 U.S. 1, 47 L.Ed. 2d 537, 96 S.Ct. 1305, 44 U.S.L.W. 4394, decided March 24, was a third antitrust case. The decision dealt with the construction of the phrase "purchases of their supplies for their own use" in the Nonprofit Institutions Act, which exempts purchases by hospitals and other charitable institutions from the Robinson-Patman Act.

The Robinson-Patman Act makes it unlawful to discriminate in price between different purchasers of like commodities when "the effect of such discrimination may be substantially to lessen competition." The Nonprofit Institutions Act exempts from Robinson-Patman some purchases made by hospitals and other charitable institutions. The issue before the Court was the meaning of "purchases of their supplies for their own use" in the case of medicines purchased by hospitals.

The suit was brought by an Oregon nonprofit corporation against twelve manufacturers of pharmaceutical products, alleging, among other counts not before the Court, that they had discriminated between nonprofit hospitals and retail druggists. The pharmaceutical manufacturers pleaded the exemption granted by the Nonprofit Institutions Act as an affirmative defense. The district court ruled that the medicines in question were purchases by nonprofit hospitals "for their own use," which were covered by the exemption. On an interlocutory appeal the Ninth Circuit vacated and remanded. 510 F. 2d 486 (1974).

The Supreme Court vacated and remanded in an opinion by Justice Blackmun. The Court found ten categories of dispensation of drugs by hospitals, three of which it said were clearly for the hospital's "own use" and therefore within the exemption: drugs for inpatient use, for emergency room use, and for outpatients for use on hospital premises. The Court decided that drugs for inpatients' personal use upon release and for outpatients' personal use away from the hospital premises also fell within the exemption, but not refills of such prescriptions. Drugs for the personal use of hospital employees and students and for physicians were held to be within the exemption so long as they were for the personal use of the employee, student, or physician, or their dependents, but not when they were to be used by anyone else. The Court said that drugs sold to the so-called "walk-in" buyer at the hospital pharmacy were not within the exemption.

Justice Marshall wrote a concurring opinion to emphasize his view that he did not read the Court's opinion "as foreclosing hospitals—or other exempted institutions—from expanding their charitable activities in highly untraditional ways and still qualifying for the exemption."

Justice Stewart, joined by Justice Brennan, dissented, arguing that the decision of the Ninth Circuit was correct.

No "Act of State" in Repudiation of Debts

On May 24, the Court held that there was no "act of state" in the failure of Cuban authorities to return to an American-based firm funds mistakenly paid for cigars sold to it by Cuban firms whose businesses were appropriated by the Cuban government. The case was *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 48 L.Ed. 2d 301, 96 S.Ct. 1854, 44 U.S.L.W. 4665.

In 1960, the Communist Cuban government seized five Cuban cigar manufacturing firms whose owners fled to the United States. The Cuban government appointed "interventors" to run the businesses, and the interventors continued to ship cigars to foreign purchasers. At the time of intervention, three firms owed some $477,600 for cigars shipped before the intervention.

The suit began when both the former owners of the seized businesses and the interventors asserted the right to some $700,000 due from the importers for shipments made after the intervention. The district court held that the act of state doctrine required it to give full effect to the 1960 confiscation and that the interventors were entitled to the postintervention sales proceeds. It held, however, that the situs of the preintervention sale proceeds was the United States and that the 1960 seizures did not reach those accounts, even though they had been mistakenly paid to the interventors. The district court held that the importers were entitled to set off the amounts they had mistakenly paid against the amounts due for their postintervention purchases. Two of the importers owed more than the interventors were obligated to them, and so they were satisfied, but Dunhill was

from—

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

No. 35
March 15, 1978

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ALASKA TRUCKING
ASSOCIATION, INC.

MOTOR CARRIERS, RATE BUREAU MANAGERS DEFEND COLLECTIVE RATE MAKING BEFORE SENATE SUBCOMMITTEE

Eliminating the trucking industry's antitrust immunity for collective rate making would force freight transportation costs up for hundreds of towns and destroy the coordinated shipping network the nation enjoys, witnesses told the Senate Judiciary Subcommittee on Antitrust earlier this week.

TWO DAYS OF HEARINGS

Testifying before the subcommittee on March 10 and 13 were panels of motor carrier executives and rate bureau managers as well as representatives of other trucking organizations and the Teamsters Union.

KENNEDY QUESTIONS RATE MAKING

Since last fall the subcommittee, chaired by U.S. Sen. Ted Kennedy, D-Mass., has been conducting an inquiry into the trucking industry's collective rate making practices.

RATES SET IN "CLOSED MEETINGS"

"We know that most trucking companies charge the same rates for their services," Kennedy said at the opening of Friday's hearing. "We know that these rates are set in closed meetings by the carriers themselves. And we know that the Interstate Commerce Commission can give only minimal scrutiny to the thousands of rates filed with it every day."

COMPETITION AN ISSUE

According to Kennedy, concentration in the trucking industry is accelerating, and it's not clear that ICC regulation has had a marked effect in stemming this concentration in a "naturally competitive industry.

"By allowing carriers to set rates collectively and by authority, the ICC may well have made matters worse," Kennedy suggested.

(over)

RATE MAKING NEEDED FOR "EQUAL TREATMENT"

However, Gene T. West of Consolidated Freightways Corp., Menlo Park, Cal., disputed Kennedy's allegation and said that without collective rate making "there could be no such thing as a fair, nondiscriminatory, nonpreferential rate structure under which shippers could receive equal treatment in the transportation of their supplies, materials, goods and products" regardless of location.

TRANSPORT SYSTEM WOULD FALL APART

Noting that fully one-third of Consolidated Freightways' shipments involve joint-line service with over 1,200 connecting carriers, West said the "voluntary, integrated system of transportation which exists today" would fall apart without collective rate making.

Shippers would have to work out arrangements with all the separate carriers that move their freight, West said.

SHEER LOGISTICS DEMAND RATE MAKING

"Sheer logistics," said James T. Hite, III, of Interstate Motor Freight System, Grand Rapids, Mich., is another reason why collective rate making can't be eliminated without altering many other facets of the society and the economy.

BILLIONS OF INDIVIDUAL RATES

He said the collective rate making process "maintains and organizes in a structured manner rate information that is a multiple of thousands of carriers, tens of thousands of geographical points, and literally billions of individual rates."

It would be logistically impossible, he continued, for the ICC or some federal agency to approve literally billions of prices or rates on an individual basis every time one was changed for whatever the reason.

SMALL FIRMS HELPED

Danville, N. Y., motor carrier Timothy L. Shay of Shay's Service Inc., also told the subcommittee that rate making on a collective basis makes it possible for smaller trucking firms to compete.

LACK EXPERTISE TO FIGURE RATES

Small firms simply don't have the time, the financial resources and the expertise to cost out all of their own rates, and as a result they rely on rate bureaus, he explained.

NOT A ONE-WAY STREET

Collective rate making is not a one-way street oriented for motor carriers, Gerald Cole of Coles Express said. Cole, whose company operates out of Bangor, Me., said: "All shippers or receivers, or for that matter, any interested parties, are afforded adequate opportunity to participate in the rate making process."

Another panelist, William J. Jones of Wilson Trucking Co. in Fisherville, Va., charged that small carriers would suffer most from the loss of collective rate making. "Large carriers don't dominate rate bureaus, as the experience of my company shows," he said.

PROTECTS SMALL SHIPPERS TOO

Shay added that rate bureaus help small trucking firms price their services yet "we have no problem setting an independent rate." He also said his participation in a rate bureau helps protect small shippers who aren't sophisticated enough to know if rates are fair.

TOWNS RECEIVE SERVICE

Answering a question from Sen. Kennedy about a 1975 DOT study that shows fifty percent of small towns are not served by carriers who have authority, Hite explained that just because every carrier with authority to serve a town doesn't provide that service still doesn't mean the town isn't served by regulated carriers through interlining or other arrangements.

EXEMPT TRANSPORTATION DEBATED

West also refuted an allegation about the stability of exempt transportation by pointing out that the U.S. Department of Agriculture is considering some form of regulation to save small companies hauling agricultural commodities.

TEAMSTERS SUPPORT

Testifying for the Teamsters Union was Lucien Boutin of Boston, Mass., who said that eliminating collective ratemaking would seriously affect the union's wage base because it is the only protection they appear to have.

RATE BUREAUS PARTICIPATE

In addition to James Harkins, who testified on behalf of the National Classification Board, four rate bureau executives appeared to testify on how rate bureaus operate. They were Vernon Farriba, Southern Motor Carriers Rate Conference; John Womack, Central and Southern Motor Freight Tariff Association; James T. Henry, Eastern Central Motor Carriers Association; and Samuel Herold, Middle Atlantic Conference.

(over)

IMMUNITY IS NOT TO FIX PRICES

They explained that "the immunity granted to carriers by the commission is not an immunity to fix transportation rates and prices. It is strictly limited to an immunity from the antitrust laws to permit carriers to initiate, discuss and agree upon proposals which will be submitted to the commission for its regulatory review."

Additional hearings are planned by the subcommittee March 23 in Chicago and March 24 in Denver, ,and April 4 and 18 in Washington, D. C.

Yet to be heard from in the hearings are shipper groups, several of which are scheduled to testify April 18.

# # # # # # # #

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January 27, 1978

P. W. Benediktsson
3915 Lacarno Drive
Anchorage, AK 99504

Re: Anit-trust legal developments

Dear Ben:

I was unable to find in the printed law reports, the Court of Appeals case which I mentioned to you, but I think that I did find two others that I think are very significant. One is Mount Hood Stages v. Greyhound which deals with the implied anti-trust exemption for regulatory activities and Kurek v. Pleasure Driveway and Park District of Peoria which again limits the imply exemption under the state anti-trust laws. Both of these cases I think should be kept by you and illustrate the importance of further clarifying the exemption that I believe the Alaska Carriers presently have a third case is Motor Carriers Traffic Assn. v. United States which decides the appropriateness of Ex Parte 297. Undoubtedly, Wayne has this although I am sending him a copy of this letter for his information. I think it is apparent that there is going to continue to be a concentrated effort to reduce the anti-trust immunity extended to various motor carrier rate bureaus. It behooves us to get a clear statement, if possible, by the Alaska Legislature or by the Transportation Commission of the status of these agreements.

Very truly yours,

Andrew E. Hoge

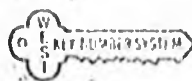
AEH/pfm
Enclosures
cc: Wayne Lucore

that the pilferage was from penalize stealage from an interstate movement or interstate storage, but the *presumption* would not apply to any taking save one from a pipeline system.

The 1966 amendments, as discussed by the majority, sharply make the differentiation. They did not even purport to enlarge the presumption; they simply expanded the types of container embraced in the enactments. In this addition Congress was careful to enumerate each of them separately, manifesting that the legislators were preserving their several identities. With these identifications in mind, "pipeline system" was included for the first time and the presumption was confined to a pipeline system. Obviously, it was not intended to apply elsewhere.

The reason for this inclusion is obvious: a pipeline system runs for thousands of miles and Congress needed to cover every foot of it. It wished protect transportation by pipeline, a somewhat recent utility. Interestingly, the presumption provision was written by the Department of Justice and engrossed ipsissimis verbis within the law.

The Federal Government has no reason for being here.



MOTOR CARRIERS TRAFFIC ASSOCIATION, INC., Petitioner,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents,

and

Drug & Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, National Industrial Traffic League, Intervening Respondents.

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., Petitioners,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents,

and

Drug & Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, National Industrial Traffic League, Intervening Respondents,

and

Bulk Carrier Conference, Inc., Intervening Respondent.

ALL ISLAND DELIVERY SERVICE, INC., Feuer Transportation, Inc., John A. Jungerman Son, Inc., Pinter Bros., Inc., Troiano Express Co., Inc., Petitioners,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents,

and

Drug & Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, National Industrial Traffic League, Intervening Respondents.

Nos. 75-1329, 76-1425 and 76-1426.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 7, 1976.

Decided July 21, 1977.

Proceedings were instituted to review Interstate Commerce Commission's approval of agreements establishing transportation industry rate bureaus. The Commission entered order directing that rate bureau agreements would not be accorded antitrust immunity under certain specified conditions, and various motor carrier rate bureaus and carrier members of rate bureaus appealed. The Court of Appeals, Mr. Justice Clark, sitting by designation, held that: (1) motor carrier rate bureaus did not have constitutional right to file protests

with respect to independent action proposals of any of their member carriers, and Commission was authorized to reverse itself and prohibit rate bureaus from making such protests as a precondition to granting bureaus immunity from antitrust laws; (2) Commission had authority to enter order prohibiting carriers that were in any way affiliated with a shipper from serving on rate bureau's board of directors, general rate committee or any other committee having an effect, either direct or indirect, upon rate-making function of bureau, without specific prior Commission approval, and (3) Commission had authority to prohibit motor carrier rate bureaus from operating as profit-making entities.

Affirmed.

Widener, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Commerce ⇐85.33

Motor carrier rate bureaus did not have constitutional right to file protests with respect to independent action proposals of any of their member carriers, and Interstate Commerce Commission was authorized to reverse itself and prohibit rate bureaus from making such protests as a precondition to granting bureaus immunity from antitrust laws. Interstate Commerce Act, §§ 5a(2, 7), 216, 216(e), 49 U.S.C.A. §§ 5b(2, 7), 316, 316(e); U.S.C.A.Const. Amend. 1.

2. Commerce ⇐85.33

Interstate Commerce Commission had authority to enter order prohibiting motor carriers that were in any way affiliated with a shipper from serving on a rate bureau's board of directors, general rate committee or any other committee having an effect, either direct or indirect, upon rate-making function of the bureau, without specific prior Commission approval; such order had rational basis, and was valid. Interstate Commerce Act, §§ 5a, 5a(7), 49 U.S.C.A. §§ 5b, 5b(7).

3. Commerce ⇐85.33

Action of Interstate Commerce Commission in proceeding to review its prior approval of agreements establishing transportation industry rate bureaus constituted rule making. 5 U.S.C.A. § 551(4); Interstate Commerce Act, §§ 5a, 5a(7), 49 U.S.C.A. §§ 5b, 5b(7).

4. Commerce ⇐85.33

Interstate Commerce Commission had authority to prohibit motor carrier rate bureaus from operating as profit-making entities. Interstate Commerce Act, §§ 5a, 5a(7), 49 U.S.C.A. §§ 5b, 5b(7).

J. Raymond Clark, Washington, D. C. and A. W. Flynn, Jr., York, Boyd & Flynn, Greensboro, N. C., for petitioner in No. 76-1329.

Bryce Rea, Jr., Washington, D. C., Counsel for petitioners in No. 76-1426.

Donald I. Baker, Asst. Atty. Gen., Lloyd John Osborn, Dept. of Justice, Washington, D. C., for the United States of America, respondent.

Robert S. Burk, Acting Gen. Counsel, and Hanford O'Hara, Associate Gen. Counsel, Interstate Commerce Commission, Washington, D. C., for the Interstate Commerce Commission, respondents in Nos. 76-1329, 76-1425 and 76-1426.

John F. Donelan, John M. Cleary and Frederic L. Wood, Washington, D. C., for the National Industrial Traffic League, intervening respondent in Nos. 76-1329, 76-1425 and 76-1426.

Daniel J. Sweeney, Belnap, McCarthy, Spencer, Sweeney & Harkaway, Washington, D. C., for intervenor, Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League and National Small Shipments Traffic Conference, in Nos. 76-1329, 76-1425 and 76-1426.

William E. Kenworthy, Denver, Colo., and Bryce Rea, Jr., Washington, D. C., for petitioner Rocky Mountain Motor Tariff Bureau, Inc. in No. 76-1425.

Leonard A. Jaskiewicz and Edward J. Kiley, Washington, D. C., for intervenor Bulk Carrier Conference, Inc. in No. 76-1425.

Before CLARK, Associate Justice *, BUTZNER and WIDENER, Circuit Judges.

* Tom C. Clark, Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

Mr. Justice CLARK:

These three consolidated ap[...] the Interstate Commerce Com[...] to set aside, in part, Orders th[...] tered by the Commission in E[...] 297, *Rate Bureau Investigation*, a broad scale study of the regu[...] portation industry's various coll[...] making organizations, known a[...] reaus".

The history of collective rate[...] forts by surface transportation[...] the United States is both long[...] versial. See: *United States v. [...]souri Freight Assn.*, 166 U.S. 2[...] 540, 41 L.Ed. 1007 (1897); *Unit[...] Joint Traffic Association*, 171 U[...] S.Ct. 25, 43 L.Ed. 259 (1898); [...] *Pennsylvania R. Co.*, 323 U.S. [...] 716, 89 L.Ed. 1051 (1945); *West[...] Assn.—Agreement*, 276 I.C.C. [...] The Congressional action took [...] the Reed-Bulwinkle Act of 194[...] 472, Section 5a of the Interstate [...] Act (49 U.S.C. § 5b). Congress [...] the problem was one of reconcil[...] mands of the Nation's transpo[...] tem with the policies of the ant[...] This Act left "the antitrust la[...] with full force and effect to car[...] except as to such joint agreem[...] rangements between them as[...] been submitted to the Interstate [...] Commission and approved by[...] upon a finding that, by reason[...] ance of the national transportati[...] declared in the Interstate Com[...] relief from the antitrust laws [...] granted." H.R.Rep.No.1100, 80[...] Sess., at 5, U.S.Code Cong.Ser[...] 1844, 1848. Surface carriers th[...] ties to agreements concerning[...] related matters can submit s[...] ments to the Commission for ap[...] if approved, the parties to the[...] are relieved from the operation [...]

1. 49 U.S.C. §§ 5b(4), (5), and (6) [...] proval of agreements which:

(1) are among carriers of diffe[...] classes and are not limited to ma[...] to transportation under joint ra[...] through routes;

Mr. Justice CLARK:

These three consolidated appeals from the Interstate Commerce Commission seek to set aside, in part, Orders that were entered by the Commission in Ex Parte No. 297, *Rate Bureau Investigation,* which was a broad scale study of the regulated transportation industry's various collective ratemaking organizations, known as "rate bureaus".

The history of collective rate-making efforts by surface transportation carriers in the United States is both long and controversial. See: *United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897); *United States v. Joint Traffic Association,* 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898); *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); *Western Traffic Assn.—Agreement,* 276 I.C.C. 183 (1949). The Congressional action took the form of the Reed-Bulwinkle Act of 1948, 62 Stat. 472, Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b). Congress decided that the problem was one of reconciling the demands of the Nation's transportation system with the policies of the antitrust laws. This Act left "the antitrust laws to apply with full force and effect to carriers . . . except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted." H.R.Rep.No.1100, 80th Cong., 1st Sess., at 5, U.S.Code Cong.Serv.1948, pp. 1844, 1848. Surface carriers that are parties to agreements concerning rates and related matters can submit such agreements to the Commission for approval and, if approved, the parties to the agreements are relieved from the operation of the antitrust laws with regard to the same. 49 U.S.C. § 5b(2). The Act mandates the Commission to approve the agreement only if it finds that the agreement is in furtherance of the national transportation policy and is not prohibited by 49 U.S.C. §§ 5b(4), (5), and (6).[1] The Commission, in carrying out this directive of Congress is the creator of the rate bureau since without immunity from the antitrust laws, it cannot operate. Indeed, the Act requires that rate bureaus operating under approved agreements must maintain and keep open for inspection accounts and records and to file such reports as the Commission requires. 49 U.S.C. § 5b(3). The Commission is also given authority to investigate and determine whether any previously approved agreement, or any terms or conditions upon which the approval was granted, are in conformity with the standards of 49 U.S.C. § 5b(2), and further, the Commission is given the power to terminate or modify its prior approval in order to insure compliance with the standards of the Act. 49 U.S.C. § 5b(7).

Pursuant to 49 U.S.C. § 5b, the Commission has from time to time approved rate bureau agreements. See, e.g., *Western Traffic Assn.—Agreement, supra; Rocky Mountain Carriers—Agreement,* 302 I.C.C. 569 (1958); *Motor Carriers Traffic Assn., Inc.—Agreement,* 301 I.C.C. 781 (1957); *Eastern Tank Carriers—Agreement,* 301 I.C.C. 359 (1957); *Middle Atlantic Conference—Agreement,* 283 I.C.C. 683 (1951).

It was to review its approval of such prior Agreements that Ex Parte No. 297 was instituted in 1973, posing twenty-eight areas of inquiry, as specifically authorized by 49 U.S.C. § 5b(7). Numerous parties indicated an intention to participate in the proceedings; consequently, by Order dated November 15, 1973, the Commission directed the Bureau of Enforcement "to file and

1. 49 U.S.C. §§ 5b(4), (5), and (6) prohibit approval of agreements which:

(1) are among carriers of different specified classes and are not limited to matters relating to transportation under joint rates or over through routes;

(2) which involve "pooling" under § 5(1) of the Act (49 U.S.C. § 5(1)); or

(3) which do not accord to each party the "free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."

serve a statement of verified facts and of argument setting forth the matters developed in the field investigations, as well as from other sources, regarding the conduct of the carrier rate bureau as a catalyst for the subsequent submission of initial statements of facts, arguments and opinion by the respondents and other interested parties." *First Report*, 349 I.C.C. at 816. Several hundred initial and reply statements were filed in response. The Orders of the Commission arising out of this survey directed that the agreements of rate bureaus would not thereafter be accorded antitrust immunity under 49 U.S.C. § 5b; (1) if such bureaus protest the independent action proposals of any of their member carriers; (2) if such carrier members are affiliated with shippers, unless the agreements of the bureau prohibit such carriers from serving on the bureau's Board of Directors, general rate committees or any other committees which have an effect directly or indirectly upon the rate-making function of the bureau, without prior Commission approval; and, finally, (3) if the bureaus involved are operating as profit-making entities.

The petitioners include Motor Carrier Traffic Association, Inc. (MCTA), a motor carrier rate bureau operating for profit, which challenges the withdrawal of antitrust immunity from bureaus which operate for profit; Rocky Mountain Motor Traffic Bureau, Inc. (Rocky Mount), a motor carrier rate bureau challenging the restrictions on carrier members of bureaus affiliated with shippers; and All Island Delivery Service, Inc., Pinter Bros., Inc., Troiano Express Co., Inc., Feuer Transportation, Inc., and John A. Jungerman Son, Inc., individual carrier members of the Middle Atlantic Conference, a rate bureau, challenging the provisions of Ex Parte 297 which withdraw antitrust immunity from rate bureaus protesting independent action proposals of member carriers before the Commission. Additionally, several organizations interested in the outcome have intervened. Respondents are the Interstate Commerce Commission and the United States (statutory respondent under 28 U.S.C. § 2344). This court's jurisdiction to review lies under 28 U.S.C. §§ 2321 and 2341 *et seq.*

The questions raised by the petitioners range from First Amendment rights to a charge of "arbitrary and capricious conduct" on the part of the Commission. None of the claims are meritorious, as we will briefly show below. In so finding, we uphold the Orders of the Commission.

[1] 1. At the outset we note that Section 5a(2) of the Act (49 U.S.C. § 5b(2)) authorizes the Commission to approve an agreement made under the provisions of the Section "if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) . . . should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied." The Commission followed this procedure and, in approving the applications, provided that they were subject to "such [general] terms and conditions as the Commission may prescribe". In addition we note that Section 5a(7) of the Act (49 U.S.C. § 5b(7)) specifically authorizes the Commission "to investigate and determine whether any agreement previously approved by it under this section . . . is not or are not in conformity with the standards set forth in paragraph [5a(2), 49 U.S.C. § 5b(2)]"—in "furtherance of the national transportation policy." In addition, Section 5a(7) provides:

> . . . after such investigation, the Commission shall by order terminate or modify its approval of such an agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard . . . .

Despite these clear and unequivocal words, petitioners say that under the First Amendment and Section 216 of the Act, 49 U.S.C. § 316, the rate bureaus have a constitutional right to file such protests. Section 216(e) of the Act, 49 U.S.C. § 316(e), does provide that "Any person, State board, organization, or body politic may make com-

plaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this Section or of Section 217 (49 U.S.C. § 317). . . ." It may be that under Section 216 or 217 individual protests may be filed but, strangely enough, only Section 5a deals with "agreements concerning rates and related matters", and it requires prior approval of the Commission in order for the parties to the agreements to escape the penalties of the antitrust laws. To permit a rate bureau to protest the proposals of a member individually so chills the individual proposal that it stands little chance of adoption, while providing the opportunity for misuse of the bureaus as policing agencies against individual action. We agree with the Commission that "it is necessary to limit the bureaus' right to protest in order to foster independent action. The right of independent action is paramount to maintaining the integrity of the grant of antitrust immunity." The interpretation pressed by the petitioners would operate to repeal Section 5a, the very heart of the Act, leaving the bureaus without statutory authorization as well as antitrust immunity.

Petitioners urge that the Commission cannot reverse itself and now impose restrictions on the bureaus and that such action is arbitrary and capricious. The short answer is, of course, that reversal of views is no anomaly in democratic societies. In fact, it is the principal tool by which improvement is effected. The Supreme Court itself not only engages in the practice but has approved of its use by the Commission. See: *American Trucking Assns., Inc. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967). Further, there is nothing irrational about the new rule that the Commission intends to put into effect. In fact, the new rule is in the true tradition of our free enterprise system which has been the keystone of our economic accomplishment for nearly a century. The Commission, in so acting, exercises its legislative function, and, as the Fifth Circuit has said: "may look beyond [the record] and draw upon its own expertise and experience." *General Telephone Co. v. United States*, 449 F.2d 846, 862 (1971). Based upon its experience, the Commission found that, as usual, more goes on than meets the eye. The paucity of formal bureau protests does not adequately reflect the number of threatened protests, nor has the mere existence of the right to protest had a significant anti-competitive impact, both Commission findings. Certainly the purpose of the Commission was to stimulate competition by removing the inhibitions against the filing of independent actions, a move not only in the spirit of Section 5a of the Act but in furtherance of the national transportation policy which is the essence of this case.

[2] 2. We now reach the challenge to the order prohibiting carriers that are in any way affiliated with a shipper from serving on a bureau's board of directors, general rate committee or any other committee which has an effect, either directly or indirectly, upon the rate-making function of the bureau, without specific prior Commission approval. It is said that this requirement is beyond the Commission's statutory authority and is also arbitrary and capricious. As we have already indicated, Section 5a(7) of the Act, 49 U.S.C. § 5b(7), grants the Commission full and complete authority to act as it did, and we shall not discuss the point further. See: *United States v. Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 96 S.Ct. 2318, 49 L.Ed.2d 14 (decided June 17, 1976); *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742, 755, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972). Nor does the Commission's Order violate a legislative policy favoring rate bureau organizations. The Order does not destroy the basic purpose of the bureaus, contrary to the bureaus' claim, as the restrictions are not absolute—the Order itself permits exceptions. Moreover, we note that the Congress directed that the Commission should weigh the conflicting demands of the antitrust laws and the surface transportation system, resolving the same by the application of a standard involving the National Transpor-

tation Policy. H.R.Rep.No.1100, 80th Cong. 1st Sess. at 5, U.S.Code Cong.Serv.1948, p. 1844. Such a resolution requires consideration, not only of efficiency but of competitive impact. See: *McLean Trucking Co. v. United States*, 321 U.S. 67, 87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

Nor do we believe that the action of the Commission in this regard lacked a rational basis. Our study of the problem shows that the possibility of a conflict of interest is self-evident, although none was actually shown. In such a state of the record, it appears rational for the Commission to prohibit shipper-affiliated carrier participation in those activities where the possibility of a conflict of interest is high, but to permit exemptions through Commission approval of bureau applications. The Commission adopted a stance which in effect, is a case by case disposition, rather than a general rule. We find that this procedure overcomes the petitioners' objection.

The remaining contentions regarding this rule are frivolous and require no discussion.

[3] 3. The final issue presented is the question of rate bureau profit-making activities. It is contended that prohibiting profit-making is beyond the power of the Commission and that the action involved here should be classified as adjudication, rather than rule-making. As we have indicated, *supra*, we consider the action of the Commission in Ex Parte 297 to constitute rule making—and, we add, all of the petitioners, save one, agree. Under the Administrative Procedure Act "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). Petitioner points to no applicable provision of law which requires a full-dress hearing here, nor have we found any.

[4] The petitioner finally claims that the Commission has no power to prohibit profit-making and to do so is an unconstitutional deprivation of property, but does not support this view with authority. In fact, to the contrary, the Commission found the rate bureaus to be service organizations "financed by fee assessments of the members, and not entrepreneurial. As such, the element of profit has been attacked as not compatible with the strict service function of organizations operating with antitrust immunity." *First Report*, 349 I.C.C. at 826. The bureaus act as agents for the carriers and would be in violation of the antitrust laws without the immunity bath furnished by the Commission. All of the expenses of the bureaus are passed on to the shippers and ultimately to the public. If there are services to the public, reimbursement should be on a compensatory basis. The cost of the bureaus as profit-making organizations chargeable to the shipper and the public is inconsistent with the public interest. If this drives the bureaus out of business, so be it. The public will not be saddled with their profits and at the same time afford them antitrust immunity. The orders of the Commission are

Affirmed.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in the opinion of the court in Nos. 76-1329 and 76-1425. But, in No. 76-1426, I respectfully dissent.

In deciding to prohibit rate bureaus from protesting independent action proposals of member carriers, the Interstate Commerce Commission quotes language from *Arbet Truck Lines, Inc. v. Central States Motor Freight*, 321 I.C.C. 460, 471, stating that "[i]t is necessary to harmonize Section 5a [49 U.S.C. § 5b] and Sections 216(e) and (g) [49 U.S.C. §§ 316(e) and (g)] of the Act."

49 U.S.C. § 5b relieves parties to an approved agreement (rate bureaus) from the operation of the antitrust laws. 49 U.S.C. § 316(e) provides in pertinent part:

"Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title."

For a number of years the ICC has given effect to both parts of the statute as enacted by Congress. *Central States Motor Common Carriers—Agreement*, 299 I.C.C. 773 (1957); *Southern Motor Carriers—Agreement*, 297 I.C.C. 603 (1956); *Middle Atlantic Conference—Agreement*, 283 I.C.C. 683, 689 (1951).

In *Southern Motor Carriers*, the ICC harmonized the two sections in the following way:

> "The right to take independent action by conference members is distinguished from, and does not conflict with, the equally established right of the conference, or any other person or body politic to protest or complain of any such action. After a carrier takes independent action, the action taken stands upon exactly the same footing with respect to the conference, in its efforts to foster a sound and stable rate structure in the interest of its members as a whole, as any such action taken by a carrier not a conference member. To interpret section 5a otherwise would not only contravene the provisions of section 216, paragraphs (e) and (g), as stated, and of the national transportation policy, but would jeopardize the full and free hearing so necessary and essential to the development of complete records in proceedings before the Commission. For the foregoing reasons, we are not in accord with the protestants in their request that the agreement be modified to prohibit the conference from petitioning for the suspension of member-carrier rates or participating in complaint proceedings before the Commission." 297 I.C.C. at 616.

But now, in spite of its findings that "the practice of rate bureaus in protesting rates has been conducted in a manner that is generally fair and devoid of base motives," and in spite of its statement that "[w]e have not found evidence of any flagrant abuse by rate bureaus in the exercise of the right to protest," the ICC declares that the rate bureaus' right to protest must be "subordinated" to the right of independent action.

The statistical background, however, which in this case must speak with more authority than mere feelings, does not show a threat to independent action; indeed I submit the contrary is shown. Of the 7,468 independent actions in 1973, the seven bureaus protested 199, only 2.66 percent. Middle Atlantic, for example, protested 46 of 1,064 independent actions in its tariffs in the twelve months ending May 31, 1973. Thirty-four of the 46 protested tariffs were rejected, suspended, or withdrawn. In 1973, Rocky Mountain Tariff Bureau protested 6 of 320 independent actions in its tariffs. Four of the six protested tariffs were suspended or withdrawn. Southern Motor Carriers Rate Conference protested 26 of the 2,914 independent actions in its tariffs. Thirteen of the 26 protested tariffs were suspended. The low percentage of bureau protests and the high percentage of their success indicate to me that the system is working as Congress intended, that is, as an "advantage and aid to the Commission in the administration of the act and the prevention of destructive rate cutting" in a situation where "[i]t is manifestly impossible, as a practical matter, for the Commission to scrutinize each and all of the multiplicity of tariffs and rate changes that are constantly being filed." *Middle Atlantic Conference*, 283 I.C.C. at 689.

For these reasons, I would preserve the rate bureaus' right to protest as Congress established it in code §§ 316(e) and (g).

Because I rely on the statutory provisions, I find no need to discuss, and express no opinion on, the first amendment issues raised in this appeal and somewhat persuasively presented under the *Noerr-Pennington* doctrine. *Ashwander v. T.V.A.*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1935) (Brandeis, J., concurring). See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1971).

By! Milton Freedman

lowing deductions for income tax, is a step in the direction of creating a true divorce between ownership and control and of undermining the basic nature and character of our society. It is a step away from an individualistic society and toward the corporate state.

Chapter IX

Occupational Licensure

THE OVERTHROW OF the medieval guild system was an indispensable early step in the rise of freedom in the Western world. It was a sign of the triumph of liberal ideas, and widely recognized as such, that by the mid-nineteenth century, in Britain, the United States, and to a lesser extent on the continent of Europe, men could pursue whatever trade or occupation they wished without the by-your-leave of any governmental or quasi-governmental authority. In more recent decades, there has been a retrogression, an increasing tendency for particular occupations to be restricted to individuals licensed to practice them by the state.

These restrictions on the freedom of individuals to use their

resources as they wish are important in their own right. In addition, they provide still a different class of problems to which we can apply the principles developed in the first two chapters.

I shall discuss first the general problem and then a particular example, restrictions on the practice of medicine. The reason for choosing medicine is that it seems desirable to discuss the restrictions for which the strongest case can be made—there is not much to be learned by knocking down straw men. I suspect that most people, possibly even most liberals, believe that it is desirable to restrict the practice of medicine to people who are licensed by the state. I agree that the case for licensure is stronger for medicine than for most other fields. Yet the conclusions I shall reach are that liberal principles do not justify licensure even in medicine and that in practice the results of state licensure in medicine have been undesirable.

UBIQUITY OF GOVERNMENTAL RESTRICTIONS ON ECONOMIC ACTIVITIES MEN MAY ENGAGE IN

Licensure is a special case of a much more general and exceedingly widespread phenomenon, namely, edicts that individuals may not engage in particular economic activities except under conditions laid down by a constituted authority of the state. Medieval guilds were a particular example of an explicit system for specifying which individuals should be permitted to follow particular pursuits. The Indian caste system is another example. To a considerable extent in the caste system, to a lesser extent in the guilds, the restrictions were enforced by general social customs rather than explicitly by government.

A widespread notion about the caste system is that every person's occupation is completely determined by the caste into which he is born. It is obvious to an economist that this is an impossible system, since it prescribes a rigid distribution of persons among occupations determined entirely by birthrates and not at all by conditions of demand. Of course, this is not the way the system worked. What was true, and to some measure still is, was that a limited number of occupations were reserved to members of certain castes, but not every member of those

castes followed those occupations. There were some general occupations, such as general agricultural work, which members of various castes might engage in. These permitted an adjustment of the supply of people in different occupations to the demand for their services.

Currently, tariffs, fair-trade laws, import quotas, production quotas, trade union restrictions on employment and so on are examples of similar phenomena. In all these cases, governmental authority determines the conditions under which particular individuals can engage in particular activities, which is to say, the terms on which some individuals are permitted to make arrangements with others. The common feature of these examples, as well as of licensure, is that the legislation is enacted on behalf of a producer group. For licensure, the producer group is generally a craft. For the other examples, it may be a group producing a particular product which wants a tariff, a group of small retailers who would like to be protected from competition by the "chiseling" chain stores, or a group of oil producers, of farmers, or of steel workers.

Occupational licensure is by now very widespread. According to Walter Gellhorn, who has written the best brief survey I know, "By 1952 more than 80 separate occupations exclusive of 'owner-businesses,' like restaurants and taxicab companies, had been licensed by state law; and in addition to the state laws there are municipal ordinances in abundance, not to mention the federal statutes that require the licensing of such diverse occupations as radio operators and stockyard commission agents. As long ago as 1938 a single state, North Carolina, had extended its law to 60 occupations. One may not be surprised to learn that pharmacists, accountants, and dentists have been reached by state law as have sanitarians and psychologists, assayers and architects, veterinarians and librarians. But with what joy of discovery does one learn about the licensing of threshing machine operators and dealers in scrap tobacco? What of egg graders and guide dog trainers, pest controllers and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers? And what of the hypertrichologists who are licensed in Connecticut, where they remove excessive and

unsightly hair with the solemnity appropriate to their high sounding title?"[1] In the arguments that seek to persuade legislatures to enact such licensure provisions, the justification is always said to be the necessity of protecting the public interest. However, the pressure on the legislature to license an occupation rarely comes from the members of the public who have been mulcted or in other ways abused by members of the occupation. On the contrary, the pressure invariably comes from members of the occupation itself. Of course, they are more aware than others of how much they exploit the customer and so perhaps they can lay claim to expert knowledge.

Similarly, the arrangements made for licensure almost invariably involve control by members of the occupation which is to be licensed. Again, this is in some ways quite natural. If the occupation of plumbing is to be restricted to those who have the requisite capacity and skills to provide good service for their customers, clearly only plumbers are capable of judging who should be licensed. Consequently, the board or other body that grants licenses is almost invariably made up largely of plumbers or pharmacists or physicians or whatever may be the particular occupation licensed.

Gellhorn points out that "Seventy-five per cent of the occupational licensing boards at work in this country today are composed exclusively of licensed practitioners in the respective occupations. These men and women, most of whom are only part-time officials, may have a direct economic interest in many of the decisions they make concerning admission requirements and the definition of standards to be observed by licensees. More importantly, they are as a rule directly representative of organized groups within the occupations. Ordinarily they are nominated by these groups as a step toward a gubernatorial or other appointment that is frequently a mere formality. Often the formality is dispensed with entirely, appointment being made directly by the occupational association—as happens, for example, with the embalmers in North Carolina, the den-

[1] Walter Gellhorn, *Individual Freedom and Governmental Restraints* (Baton Rouge: Louisiana State University Press, 1956). Chapter entitled "The Right to Make a Living," p. 106.

tists in Alabama, the psychologists in Virginia, the physicians in Maryland, and the attorneys in Washington."[2]

Licensure therefore frequently establishes essentially the medieval guild kind of regulation in which the state assigns power to the members of the profession. In practice, the considerations taken into account in determining who shall get a license often involve matters that, so far as a layman can see, have no relation whatsoever to professional competence. This is not surprising. If a few individuals are going to decide whether other individuals may pursue an occupation, all sorts of irrelevant considerations are likely to enter. Just what the irrelevant considerations will be, will depend on the personalities of the members of the licensing board and the mood of the time. Gellhorn notes the extent to which a loyalty oath was required of various occupations when the fear of communist subversion was sweeping the country. He writes, "A Texas statute of 1952 requires each applicant for a pharmacist's license to swear that 'he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is neither a member of nor supports any group or organization that believes in, furthers or teaches the overthrow of the United States Government by force or any illegal or unconstitutional methods.' The relationship between this oath on the one hand and, on the other, the public health which is the interest purportedly protected by the licensing of pharmacists, is somewhat obscure. No more apparent is the justification for requiring professional boxers and wrestlers in Indiana to swear that they are not subversive . . . A junior high school teacher of music, having been forced to resign after being identified as a Communist, had difficulty becoming a piano tuner in the District of Columbia because, forsooth, he was 'under Communist discipline.' Veterinarians in the state of Washington may not minister to an ailing cow or cat unless they have first signed a non-Communist oath."[3]

Whatever one's attitude towards communism, any relationship between the requirements imposed and the qualities

[2] Ibid. pp. 140–41.
[3] *Ibid.*, pp. 129–30.

which the licensure is intended to assure is rather far-fetched. The extent to which such requirements go is sometimes little short of ludicrous. A few more quotations from Gellhorn may provide a touch of comic relief.[4]

One of the most amusing sets of regulations is that laid down for barbers, a trade that is licensed in many places. Here is an example from a law which was declared invalid by Maryland courts, though similar language can be found in statutes of other states which were declared legal. "The court was depressed rather than impressed by a legislative command that neophyte barbers must receive formal instruction in the 'scientific fundamentals for barbering, hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerves, structure of the head, face and neck, elementary chemistry relating to sterilization and antiseptics, disease of the skin, hair, glands and nails, haircutting, shaving and arranging, dressing, coloring, bleaching, and tinting of the hair'."[5] One more quotation on the barbers: "Of eighteen representative states included in a study of barbering regulations in 1929, not one then commanded an aspirant to be a graduate of a 'barber college,' though apprenticeship was necessary in all. Today, the states typically insist upon graduation from a barbering school that provides not less (and often much more) than one thousand hours of instruction in 'theoretical subjects' such as sterilization of instruments, and this must still be followed by apprenticeship."[6] I trust these quotations make it clear that the problem of licensing of occupations is something more than a trivial illustration of the problem of state intervention, that it is already in this country a serious infringement on the freedom of individuals to pursue activities of their own choice, and that it threatens to become a much more serious one with the continual pressure upon legislatures to extend it.

Before discussing the advantages and disadvantages of licens-

[4] In fairness to Walter Gellhorn, I should note that he does not share my view that the correct solution to these problems is to abandon licensing. On the contrary, he thinks that while licensing has gone much too far it has some real functions to perform. He suggests procedural reforms and changes that in his view would limit the abuse of licensure arrangements.

[5] *Ibid.*, pp. 121–22.

[6] *Ibid.*, p. 146.

ing, it is worth noting why we have it and what general political problem is revealed by the tendency for such special legislation to be enacted. The declaration by a large number of different state legislatures that barbers must be approved by a committee of other barbers is hardly persuasive evidence that there is in fact a public interest in having such legislation. Surely the explanation is different; it is that a producer group tends to be more concentrated politically than a consumer group. This is an obvious point often made and yet one whose importance cannot be overstressed.[7] Each of us is a producer and also a consumer. However, we are much more specialized and devote a much larger fraction of our attention to our activity as a producer than as a consumer. We consume literally thousands if not millions of items. The result is that people in the same trade, like barbers or physicians, all have an intense interest in the specific problems of this trade and are willing to devote considerable energy to doing something about them. On the other hand, those of us who use barbers at all, get barbered infrequently and spend only a minor fraction of our income in barber shops. Our interest is casual. Hardly any of us are willing to devote much time going to the legislature in order to testify against the iniquity of restricting the practice of barbering. The same point holds for tariffs. The groups that think they have a special interest in particular tariffs are concentrated groups to whom the issue makes a great deal of difference. The public interest is widely dispersed. In consequence, in the absence of any general arrangements to offset the pressure of special interests, producer groups will invariably have a much stronger influence on legislative action and the powers that be than will the diverse, widely spread consumer interest. Indeed from this point of view, the puzzle is not why we have so many silly licensure laws, but why we don't have far more. The puzzle is how we ever succeeded in getting the relative freedom from government controls over the productive activities of individuals that we have had and still have in this country, and that other countries have had as well.

[7] See, for example, Wesley Mitchell's famous article on the "Backward Art of Spending Money," reprinted in his book of essays carrying that title (New York: McGraw-Hill, 1937), pp. 3–19.

The only way that I can see to offset special producer groups is to establish a general presumption against the state undertaking certain kinds of activities. Only if there is a general recognition that governmental activities should be severely limited with respect to a class of cases, can the burden of proof be put strongly enough on those who would depart from this general presumption to give a reasonable hope of limiting the spread of special measures to further special interests. This point is one we have adverted to time and again. It is of a piece with the argument for the Bill of Rights and for a rule to govern monetary policy and fiscal policy.

POLICY ISSUES RAISED BY LICENSURE

It is important to distinguish three different levels of control: first, registration; second, certification; third, licensing.

By registration, I mean an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities. There is no provision for denying the right to engage in the activity to anyone who is willing to list his name. He may be charged a fee, either as a registration fee or as a scheme of taxation.

The second level is certification. The governmental agency may certify that an individual has certain skills but may not prevent, in any way, the practice of any occupation using these skills by people who do not have such a certificate. One example is accountancy. In most states, anybody can be an accountant, whether he is a certified public accountant or not, but only those people who have passed a particular test can put the title CPA after their names or can put a sign in their offices saying they are certified public accountants. Certification is frequently only an intermediate stage. In many states, there has been a tendency to restrict an increasing range of activities to certified public accountants. With respect to such activities there is licensure, not certification. In some states, "architect" is a title which can be used only by those who have passed a specified examination. This is certification. It does not prevent anyone else from going into the business of advising people for a fee how to build houses.

The third stage is licensing proper. This is an arrangement under which one must obtain a license from a recognized authority in order to engage in the occupation. The license is more than a formality. It requires some demonstration of competence or the meeting of some tests ostensibly designed to insure competence, and anyone who does not have a license is not authorized to practice and is subject to a fine or a jail sentence if he does engage in practice.

The question I want to consider is this: under what circumstances, if any, can we justify the one or the other of these steps? There are three different grounds on which it seems to me registration can be justified consistently with liberal principles.

First, it may assist in the pursuit of other aims. Let me illustrate. The police are often concerned with acts of violence. After the event, it is desirable to find out who had access to firearms. Before the event, it is desirable to prevent firearms from getting into the hands of people who are likely to use them for criminal purposes. It may assist in the pursuit of this aim to register stores selling firearms. Of course, if I may revert to a point made several times in earlier chapters, it is never enough to say that there *might* be a justification along these lines, in order to conclude that there *is* justification. It is necessary to set up a balance sheet of the advantages and disadvantages in the light of liberal principles. All I am now saying is that this consideration might in some cases justify overriding the general presumption against requiring the registration of people.

Second, registration is sometimes a device to facilitate taxation and nothing more. The questions at issue then become whether the particular tax is an appropriate method to raise revenue for financing government services regarded as necessary, and whether registration facilitates the collection of taxes. It may do so either because a tax is imposed on the person who registers, or because the person who registers is used as a tax collector. For example, in collecting a sales tax imposed on various items of consumption, it is necessary to have a register or list of all the places selling goods subject to the tax.

Third, and this is the one possible justification for registration which is close to our main interest, registration may be a means to protect consumers against fraud. In general, liberal principles

assign to the state the power to enforce contracts, and fraud involves the violation of a contract. It is, of course, dubious that one should go very far to protect in advance against fraud because of the interference with voluntary contracts involved in doing so. But I do not think that one can rule out on grounds of principle the possibility that there may be certain activities that are so likely to give rise to fraud as to render it desirable to have in advance a list of people known to be pursuing this activity. Perhaps one example along these lines is the registration of taxicab drivers. A taxicab driver picking up a person at night may be in a particularly good position to steal from him. To inhibit such practices, it may be desirable to have a list of names of people who are engaged in the taxicab business, to give each a number, and to require that this number be put in the cab so that anyone molested need only remember the number of the cab. This involves simply the use of the police power to protect individuals against violence on the part of other individuals and may be the most convenient method of doing so.

Certification is much more difficult to justify. The reason is that this is something the private market generally can do for itself. This problem is the same for products as for people's services. There are private certification agencies in many areas that certify the competence of a person or the quality of a particular product. The *Good Housekeeping* seal is a private certification arrangement. For industrial products there are private testing laboratories that will certify to the quality of a particular product. For consumer products, there are consumer testing agencies of which Consumer's Union and Consumer's Research are the best known in the United States. Better Business Bureaus are voluntary organizations that certify the quality of particular dealers. Technical schools, colleges, and universities certify the quality of their graduates. One function of retailers and department stores is to certify the quality of the many items they sell. The consumer develops confidence in the store, and the store in turn has an incentive to earn this confidence by investigating the quality of the items it sells.

One can however argue that in some cases, or perhaps even in many, voluntary certification will not be carried as far as individuals would be willing to pay for carrying it because of the

difficulty of keeping the certification confidential. The issue is essentially the one involved in patents and copyrights, namely, whether individuals are in a position to capture the value of the services that they render to others. If I go into the business of certifying people, there may be no efficient way in which I can require you to pay for my certification. If I sell my certification information to one person, how can I keep him from passing it on to others? Consequently, it may not be possible to get effective voluntary exchange with respect to certification, even though this is a service that people would be willing to pay for if they had to. One way to get around this problem, as we get around other kinds of neighborhood effects, is to have governmental certification.

Another possible justification for certification is on monopoly grounds. There are some technical monopoly aspects to certification, since the cost of making a certification is largely independent of the number of people to whom the information is transmitted. However, it is by no means clear that monopoly is inevitable.

Licensure seems to me still more difficult to justify. It goes still farther in the direction of trenching upon the rights of individuals to enter into voluntary contracts. Nonetheless, there are some justifications given for licensure that the liberal will have to recognize as within his own conception of appropriate government action, though, as always, the advantages have to be weighed against the disadvantages. The main argument that is relevant to a liberal is the existence of neighborhood effects. The simplest and most obvious example is the "incompetent" physician who produces an epidemic. Insofar as he harms only his patient, that is simply a question of voluntary contract and exchange between the patient and his physician. On this score, there is no ground for intervention. However, it can be argued that if the physician treats his patient badly, he may unleash an epidemic that will cause harm to third parties who are not involved in the immediate transaction. In such a case, it is conceivable that everybody, including even the potential patient and physician, would be willing to submit to the restriction of the practice of medicine to "competent" people in order to prevent such epidemics from occurring.

In practice, the major argument given for licensure by its proponents is not this one, which has some appeal to a liberal, but rather a strictly paternalistic argument that has little or no appeal. Individuals, it is said, are incapable of choosing their own servants adequately, their own physician or plumber or barber. In order for a man to choose a physician intelligently, he would have to be a physician himself. Most of us, it is said, are therefore incompetent and we must be protected against our own ignorance. This amounts to saying that we in our capacity as voters must protect ourselves in our capacity as consumers against our own ignorance, by seeing to it that people are not served by incompetent physicians or plumbers or barbers.

So far, I have been listing the arguments for registration, certification, and licensing. In all three cases, it is clear that there are also strong social costs to be set against any of these advantages. Some of these social costs have already been suggested and I shall illustrate them in more detail for medicine, but it may be worth recording them here in general form.

The most obvious social cost is that any one of these measures, whether it be registration, certification, or licensure, almost inevitably becomes a tool in the hands of a special producer group to obtain a monopoly position at the expense of the rest of the public. There is no way to avoid this result. One can devise one or another set of procedural controls designed to avert this outcome, but none is likely to overcome the problem that arises out of the greater concentration of producer than of consumer interest. The people who are most concerned with any such arrangement, who will press most for its enforcement and be most concerned with its administration, will be the people in the particular occupation or trade involved. They will inevitably press for the extension of registration to certification and of certification to licensure. Once licensure is attained, the people who might develop an interest in undermining the regulations are kept from exerting their influence. They don't get a license, must therefore go into other occupations, and will lose interest. The result is invariably control over entry by members of the occupation itself and hence the establishment of a monopoly position.

Certification is much less harmful in this respect. If the certified "abuse" their special certificates; if, in certifying newcomers, members of the trade impose unnecessarily stringent requirements and reduce the number of practitioners too much, the price differential between certified and non-certified will become sufficiently large to induce the public to use non-certified practitioners. In technical terms, the elasticity of demand for the services of certified practitioners will be fairly large, and the limits within which they can exploit the rest of the public by taking advantage of their special position will be rather narrow.

In consequence, certification without licensure is a half-way house that maintains a good deal of protection against monopolization. It also has its disadvantages, but it is worth noting that the usual arguments for licensure, and in particular the paternalistic arguments, are satisfied almost entirely by certification alone. If the argument is that we are too ignorant to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business; we cannot complain that we did not have the information. Since arguments for licensure made by people who are not members of the occupation can be satisfied so fully by certification, I personally find it difficult to see any case for which licensure rather than certification can be justified.

Even registration has significant social costs. It is an important first step in the direction of a system in which every individual has to carry an identity card, every individual has to inform authorities what he plans to do before he does it. Moreover, as already noted, registration tends to be the first step toward certification and licensure.

MEDICAL LICENSURE

The medical profession is one in which practice of the profession has for a long time been restricted to people with licenses. Offhand, the question, "Ought we to let incompetent physicians practice?" seems to admit of only a negative answer. But I want to urge that second thought may give pause.

In the first place, licensure is the key to the control that the medical profession can exercise over the number of physicians. To understand why this is so requires some discussion of the structure of the medical profession. The American Medical Association is perhaps the strongest trade union in the United States. The essence of the power of a trade union is its power to restrict the number who may engage in a particular occupation. This restriction may be exercised indirectly by being able to enforce a wage rate higher than would otherwise prevail. If such a wage rate can be enforced, it will reduce the number of people who can get jobs and thus indirectly the number of people pursuing the occupation. This technique of restriction has disadvantages. There is always a dissatisfied fringe of people who are trying to get into the occupation. A trade union is much better off if it can limit directly the number of people who enter the occupation — who ever try to get jobs in it. The disgruntled and dissatisfied are excluded at the outset, and the union does not have to worry about them.

The American Medical Association is in this position. It is a trade union that can limit the number of people who can enter. How can it do this? The essential control is at the stage of admission to medical school. The Council on Medical Education and Hospitals of the American Medical Association approves medical schools. In order for a medical school to get and stay on its list of approved schools it has to meet the standards of the Council. The power of the Council has been demonstrated at various times when there has been pressure to reduce numbers. For example, in the 1930's during the depression, the Council on Medical Education and Hospitals wrote a letter to the various medical schools saying the medical schools were admitting more students than could be given the proper kind of training. In the next year or two, every school reduced the number it was admitting, giving very strong presumptive evidence that the recommendation had some effect.

Why does the Council's approval matter so much? If it abuses its power, why don't unapproved medical schools arise? The answer is that in almost every state in the United States, a person must be licensed to practice medicine, and to get the license, he must be a graduate of an approved school. In almost every

state, the list of approved schools is identical with the list of schools approved by the Council on Medical Education and Hospitals of the American Medical Association. That is why the licensure provision is the key to the effective control of admission. It has a dual effect. On the one hand, the members of the licensure commission are always physicians and hence have some control at the step at which men apply for a license. This control is more limited in effectiveness than control at the medical school level. In almost all professions requiring licensure, people may try to get admitted more than once. If a person tries long enough and in enough jurisdictions he is likely to get through sooner or later. Since he has already spent the money and time to get his training, he has a strong incentive to keep trying. Licensure provisions that come into operation only after a man is trained therefore affect entry largely by raising the costs of getting into the occupation, since it may take a longer time to get in and since there is always some uncertainty whether he will succeed. But this rise in cost is nothing like so effective in limiting entry as is preventing a man from getting started on his career. If he is eliminated at the stage of entering medical school, he never comes up as a candidate for examination; he can never be troublesome at that stage. The efficient way to get control over the number in a profession is therefore to get control of entry into professional schools.

Control over admission to medical school and later licensure enables the profession to limit entry in two ways. The obvious one is simply by turning down many applicants. The less obvious, but probably far more important one, is by establishing standards for admission and licensure that make entry so difficult as to discourage young people from ever trying to get admission. Though most state laws require only two years of college prior to medical school, nearly 100 per cent of the entrants have had four years of college. Similarly, medical training proper has been lengthened, particularly through more stringent internship arrangements.

As an aside, the lawyers have never been as successful as the physicians in getting control at the point of admission to professional school, though they are moving in that direction. The reason is amusing. Almost every school on the American Bar

Association's list of approved schools is a full time day school; almost no night schools are approved. Many state legislators, on the other hand, are graduates of night law schools. If they voted to restrict admission to the profession to graduates of approved schools, in effect they would be voting that they themselves were not qualified. Their reluctance to condemn their own competence has been the main factor that has tended to limit the extent to which law has been able to succeed in imitating medicine. I have not myself done any extensive work on requirements for admission to law for many years but I understand that this limitation is breaking down. The greater affluence of students means that a much larger fraction are going to full time law schools and this is changing the composition of the legislatures.

To return to medicine, it is the provision about graduation from approved schools that is the most important source of professional control over entry. The profession has used this control to limit numbers. To avoid misunderstanding let me emphasize that I am not saying that individual members of the medical profession, the leaders of the medical profession, or the people who are in charge of the Council on Medical Education and Hospitals deliberately go out of their way to limit entry in order to raise their own incomes. That is not the way it works. Even when such people explicitly comment on the desirability of limiting numbers to raise incomes they will always justify the policy on the grounds that if "too" many people are let in, this will lower their incomes so that they will be driven to resort to unethical practices in order to earn a "proper" income. The only way, they argue, in which ethical practices can be maintained is by keeping people at a standard of income which is adequate to the merits and needs of the medical profession. I must confess that this has always seemed to me objectionable on both ethical and factual grounds. It is extraordinary that leaders of medicine should proclaim publicly that they and their colleagues must be paid to be ethical. And if it were so, I doubt that the price would have any limit. There seems little correlation between poverty and honesty. One would rather expect the opposite; dishonesty may not always pay but surely it sometimes does.

Control of entry is explicitly rationalized along these lines only at times like the Great Depression when there is much unemployment and relatively low incomes. In ordinary times, the rationalization for restriction is different. It is that the members of the medical profession want to raise what they regard as the standards of "quality" of the profession. The defect in this rationalization is a common one, and one that is destructive of a proper understanding of the operation of an economic system, namely, the failure to distinguish between technical efficiency and economic efficiency.

A story about lawyers will perhaps illustrate the point. At a meeting of lawyers at which problems of admission were being discussed, a colleague of mine, arguing against restrictive admission standards, used an analogy from the automobile industry. Would it not, he said, be absurd if the automobile industry were to argue that no one should drive a low quality car and therefore that no automobile manufacturer should be permitted to produce a car that did not come up to the Cadillac standard. One member of the audience rose and approved the analogy, saying that, of course, the country cannot afford anything but Cadillac lawyers! This tends to be the professional attitude. The members look solely at technical standards of performance, and argue in effect that we must have only first-rate physicians even if this means that some people get no medical service—though of course they never put it that way. Nonetheless, the view that people should get only the "optimum" medical service always lead to a restrictive policy, a policy that keeps down the number of physicians. I would not, of course, want to argue that this is the only force at work, but only that this kind of consideration leads many well-meaning physicians to go along with policies that they would reject out-of-hand if they did not have this kind of comforting rationalization.

It is easy to demonstrate that quality is only a rationalization and not the underlying reason for restriction. The power of the Council on Medical Education and Hospitals of the American Medical Association has been used to limit numbers in ways that cannot possibly have any connection whatsoever with quality. The simplest example is their recommendation to various

states that citizenship be made a requirement for the practice of medicine. I find it inconceivable to see how this is relevant to medical performance. A similar requirement that they have tried to impose on occasion is that examination for licensure must be taken in English. A dramatic piece of evidence on the power and potency of the Association as well as on the lack of relation to quality is proved by one figure that I have always found striking. After 1933, when Hitler came to power in Germany, there was a tremendous outflow of professional people from Germany, Austria and so on, including of course, physicians who wanted to practice in the United States. The number of physicians trained abroad who were admitted to practice in the United States in the five years after 1933 was the same as in the five years before. This was clearly not the result of the natural course of events. The threat of these additional physicians led to a stringent tightening of requirements for foreign physicians that imposed extreme costs upon them.

It is clear that licensure is the key to the medical profession's ability to restrict the number of physicians who practice medicine. It is also the key to its ability to restrict technological and organizational changes in the way medicine is conducted. The American Medical Association has been consistently against the practice of group medicine, and against prepaid medical plans. These methods of practice may have good features and bad features, but they are technological innovations that people ought to be free to try out if they wish. There is no basis for saying conclusively that the optimum technical method of organizing medical practice is practice by an independent physician. Maybe it is group practice, maybe it is by corporations. One ought to have a system under which all varieties can be tried.

The American Medical Association has resisted such attempts and has been able effectively to inhibit them. It has been able to do so because licensure has indirectly given it control of admission to practice in hospitals. The Council on Medical Education and Hospitals approves hospitals as well as medical schools. In order for a physician to get admission to practice in an "approved" hospital, he must generally be approved by his county medical association or by the hospital board. Why

can't unapproved hospitals be set up? Because under present economic conditions, in order for a hospital to operate it must have a supply of interns. Under most state licensure laws, candidates must have some internship experience to be admitted to practice, and internship must be in an "approved" hospital. The list of "approved" hospitals is generally identical with that of the Council on Medical Education and Hospitals. Consequently, the licensure law gives the profession control over hospitals as well as over schools. This is the key to the AMA's largely successful opposition to various types of group practice. In a few cases, the groups have been able to survive. In the District of Columbia, they succeeded because they were able to bring suit against the American Medical Association under the federal Sherman antitrust laws, and won the suit. In a few other cases, they have succeeded for special reasons. There is, however, no doubt that the tendency toward group practice has been greatly retarded by the AMA's opposition.

It is interesting, and this is an aside, that the medical association is against only one type of group practice, namely, prepaid group practice. The economic reason seems to be that this eliminates the possibility of engaging in discriminatory pricing.[8]

It is clear that licensure has been at [illegible] of the restriction of entry and that this involves a heavy [illegible] cost, both to the individuals who want to practice medicine but are prevented from doing so and to the public deprived of the medical care it wants to buy and is prevented from buying. Let me now ask the question: Does licensure have the good effects that it is said to have?

In the first place, does it really raise standards of competence? It is by no means clear that it does raise the standards of competence in the actual practice of the profession for several reasons. In the first place, whenever you establish a block to entry into any field, you establish an incentive to find ways of getting around it, and of course medicine is no exception. The rise of the professions of osteopathy and of chiropractic is not unrelated to the restriction of entry into medicine. On the contrary, each of these represented, to some extent, an attempt to find a

[8] See Reuben Kessel, "Price Discrimination in Medicine," *The Journal of Law and Economics*, Vol. I (October, 1958), 20–53.

way around restriction of entry. Each of these, in turn, is proceeding to get itself licensed, and to impose restrictions. The effect is to create different levels and kinds of practice, to distinguish between what is called medical practice and substitutes such as osteopathy, chiropractic, faith healing and so on. These alternatives may well be of lower quality than medical practice would have been without the restrictions on entry into medicine.

More generally, if the number of physicians is less than it otherwise would be, and if they are all fully occupied, as they generally are, this means that there is a smaller total of medical practice by trained physicians—fewer medical man-hours of practice, as it were. The alternative is untrained practice by somebody; it may and in part must be by people who have no professional qualifications at all. Moreover, the situation is much more extreme. If "medical practice" is to be limited to licensed practitioners, it is necessary to define what medical practice is, and featherbedding is not something that is restricted to the railroads. Under the interpretation of the statutes forbidding unauthorized practice of medicine, many things are restricted to licensed physicians that could perfectly well be done by technicians, and other skilled people who do not have a Cadillac medical training. I am not enough of a technician to list the examples at all fully. I only know that those who have looked into the question say that the tendency is to include in "medical practice" a wider and wider range of activities that could perfectly well be performed by technicians. Trained physicians devote a considerable part of their time to things that might well be done by others. The result is to reduce drastically the amount of medical care. The relevant average quality of medical care, if one can at all conceive of the concept, cannot be obtained by simply averaging the quality of care that is given; that would be like judging the effectiveness of a medical treatment by considering only the survivors; one must also allow for the fact that the restrictions reduce the amount of care. The result may well be that the average level of competence in a meaningful sense has been reduced by the restrictions.

Even these comments do not go far enough, because they consider the situation at a point in time and do not allow for

changes over time. Advances in any science or field often result from the work of one out of a large number of crackpots and quacks and people who have no standing in the profession. In the medical profession, under present circumstances, it is very difficult to engage in research or experimentation unless you are a member of the profession. If you are a member of the profession and want to stay in good standing in the profession, you are seriously limited in the kind of experimentation you can do. A "faith healer" may be just a quack who is imposing himself on credulous patients, but maybe one in a thousand or in many thousands will produce an important improvement in medicine. There are many different routes to knowledge and learning and the effect of restricting the practice of what is called medicine and defining it as we tend to do to a particular group, who in the main have to conform to the prevailing orthodoxy, is certain to reduce the amount of experimentation that goes on and hence to reduce the rate of growth of knowledge in the area. What is true for the content of medicine is true also for its organization, as has already been suggested. I shall expand further on this point below.

There is still another way in which licensure, and the associated monopoly in the practice of medicine, tend to render standards of practice low. I have already suggested that it renders the average quality of practice low by reducing the number of physicians, by reducing the aggregate number of hours available from trained physicians for more rather than less important tasks, and by reducing the incentive for research and development. It renders it low also by making it much more difficult for private individuals to collect from physicians for malpractice. One of the protections of the individual citizen against incompetence is protection against fraud and the ability to bring suit in the court against malpractice. Some suits are brought, and physicians complain a great deal about how much they have to pay for malpractice insurance. Yet suits for malpractice are fewer and less successful than they would be were it not for the watchful eye of the medical associations. It is not easy to get a physician to testify against a fellow physician when he faces the sanction of being denied the right to practice in an

"approved" hospital. The testimony generally has to come from members of panels set up by medical associations themselves, always, of course, in the alleged interest of the patients.

When these effects are taken into account, I am myself persuaded that licensure has reduced both the quantity and quality of medical practice; that it has reduced the opportunities available to people who would like to be physicians, forcing them to pursue occupations they regard as less attractive; that it has forced the public to pay more for less satisfactory medical service, and that it has retarded technological development both in medicine itself and in the organization of medical practice. I conclude that licensure should be eliminated as a requirement for the practice of medicine.

When all this is said, many a reader, I suspect, like many a person with whom I have discussed these issues, will say, "But still, how else would I get any evidence on the quality of a physician. Granted all that you say about costs, is not licensure the only way of providing the public with some assurance of at least minimum quality?" The answer is partly that people do not now choose physicians by picking names at random from a list of licensed physicians; partly, that a man's ability to pass an examination twenty or thirty years earlier is hardly assurance of quality now; hence, licensure is not now the main or even a major source of assurance of at least minimum quality. But the major answer is very different. It is that the question itself reveals the tyranny of the status quo and the poverty of our imagination in fields in which we are laymen, and even in those in which we have some competence, by comparison with the fertility of the market. Let me illustrate by speculating on how medicine might have developed and what assurances of quality would have emerged, if the profession had not exerted monopoly power.

Suppose that anyone had been free to practice medicine without restriction except for legal and financial responsibility for any harm done to others through fraud and negligence. I conjecture that the whole development of medicine would have been different. The present market for medical care, hampered as it has been, gives some hints of what the difference would have been. Group practice in conjunction with hospitals would

have grown enormously. Instead of individual practice plus large institutional hospitals conducted by governments or eleemosynary institutions, there might have developed medical partnerships or corporations—medical teams. These would have provided central diagnostic and treatment facilities, including hospital facilities. Some presumably would have been prepaid, combining in one package present hospital insurance, health insurance, and group medical practice. Others would have charged separate fees for separate services. And of course, most might have used both methods of payment.

These medical teams—department stores of medicine, if you will—would be intermediaries between the patients and the physician. Being long-lived and immobile, they would have a great interest in establishing a reputation for reliability and quality. For the same reason, consumers would get to know their reputation. They would have the specialized skill to judge the quality of physicians; indeed, they would be the agent of the consumer in doing so, as the department store is now for many a product. In addition, they could organize medical care efficiently, combining medical men of different degrees of skill and training, using technicians with limited training for tasks for which they were suited, and reserving highly skilled and competent specialists for the tasks they alone could perform. The reader can add further flourishes for himself, drawing in part, as I have done, on what now goes on at the leading medical clinics.

Of course, not all medical practice would be done through such teams. Individual private practice would continue, just as the small store with a limited clientele exists alongside the department store, the individual lawyer alongside the great many-partnered firm. Men would establish individual reputations and some patients would prefer the privacy and intimacy of the individual practitioner. Some areas would be too small to be served by medical teams. And so on.

I would not even want to maintain that the medical teams would dominate the field. My aim is only to show by example that there are many alternatives to the present organization of practice. The impossibility of any individual or small group conceiving of all the possibilities, let alone evaluating their merits,

is the great argument against central governmental planning and against arrangements such as professional monopolies that limit the possibilities of experimentation. On the other side, the great argument for the market is its tolerance of diversity; its ability to utilize a wide range of special knowledge and capacity. It renders special groups impotent to prevent experimentation and permits the customers and not the producers to decide what will serve the customers best.

Chapter X

The Distribution of Income

A CENTRAL ELEMENT IN the development of a collectivist sentiment in this century, at least in Western countries, has been a belief in equality of income as a social goal and a willingness to use the arm of the state to promote it. Two very different questions must be asked in evaluating this egalitarian sentiment and the egalitarian measures it has produced. The first is normative and ethical: what is the justification for state intervention to promote equality? The second is positive and scientific: what has been the effect of the measures actually taken?

THE ETHICS OF DISTRIBUTION

The ethical principle that would directly justify the distribution of income in a free market society is, "To each according to

INDEPENDENT VIEW

Carl Smiley

Deregulation: Safety's Role

The objectives of government planners in different agencies are often so varied that a single policy can't meet the goals of all concerned. A prime example is the call for deregulation of the trucking industry by some members of the Council of Economic Advisors and officials of some past administrations. While these people have been mainly concerned with operation of the free enterprise system and the lowest possible consumer prices, other branches of government have been spending a lot of time—and truck buyers' dollars—trying to make highways safer.

A recent study by Dr. D. Daryl Wyckoff of the Harvard Graduate School of Business indicates that these two philosophies are not compatible in actual practice. Dr. Wyckoff distributed an extensive four-page questionnaire to drivers last December, and about 10,500 were filled out and returned. About half the responses were made by company drivers for private and common carriers and the balance were from independent contractors and exempt independents.

□ □ □

For those familiar with the trucking industry, the answers contain few surprises. They only support the contention that truckers with the least assurance of an adequate income drive faster and have more accidents and moving violations. In all three of those categories, company or independent carriers of exempt commodities vied for the doubtful distinction of ranking first. Here are some results of the survey:

Type of Operation	Cruising Speed mph	Moving Violations 100,000 mi. per yr.	Reportable Accidents 100,000 mi. per yr.
exempt, company	63.00	1.32	0.24
exempt, contractor	62.55	1.33	0.70
private	61.72	0.87	0.24
contract, contractor	60.95	0.74	0.33
common, contractor	60.26	0.77	0.31
contract, company	59.39	0.76	0.26
common, company	58.85	0.41	0.19

The number of moving violations almost perfectly parallels the average speed of various types of drivers. The number of reportable accidents is not necessarily an indication that drivers for private carriers and exempt haulers have fewer accidents. The Bureau of Motor Carrier Safety has repeatedly charged that those truckers do not report accidents unless they are major crashes.

The data in this survey supports that charge; exempt contractors admitted to having a greater number of reportable accidents than any of the regulated carrier drivers, whether on payroll or under lease. BMCS statistics, based on voluntary reports of accidents where damage exceeds $200, indicate that regulated carriers have a much higher number of accidents in relation to miles driven.

Cheating on hours of service also follows a common pattern in the survey. Here are survey results in that category:

Type of Operation	% Using Multiple Logs	% Falsifying Logs	% Driving Over 10 hrs.
exempt, company	32.74	39.28	45.98
exempt, contractor	27.37	44.94	43.87
private	9.56	29.36	25.06
contract, contractor	10.22	33.56	27.23
common, contractor	11.89	33.91	11.30
contract, company	1.87	29.26	13.05
common, company	4.90	4.27	2.48

It seems clear from the results of this survey that many exempt carriers pay little or no attention to safety regulations. Whether this is a matter of economics or simply a "Go-to-hell" attitude isn't clear. But exempt carriers as a group tend to resist rate regulation.

"Picky, picky, picky . . ."

Interestingly enough, some major rule changes have been made or are pending that coincide closely with the results of the survey. One is the new detention rule. A few days ago a common carrier executive told me: "I can't argue with the intent of the rule. But it simply doesn't take reality into account. We have a long, profitable run to our eastern terminus but only one authority on the return trip. Contractors loved it because it paid well both ways. But they often have to lay over 12 to 24 hours to get loaded out. None ever minded because the haul was profitable even considering the lost time.

"Now comes the new detention rule," he said, "and we charge the customer $18 per hour detention. He calls us and says that while he likes our service two local carriers will drop him trailers at no cost. Our contractors are perfectly willing to go on as they have. After all, they're making money on the round trip. But we can't afford to lose a certificate by waiving detention.

"We have two choices: drop the account and deadhead our contractors back, or set up a trailer pool so we can drop trailers. Problem is about 60% of our contractors own their own trailers so they aren't happy about that either."

This is one of those instances where a well-intentioned rule can hurt more than it helps. The carrier is urged by contractors to forget detention—just get them the loads. But he points out that becoming the first case in court under the new rule is hardly one of his goals.

The pending changes in the hours of service regulation are another example of the same type of situation. The survey of Dr. Wyckoff indicates that only common carrier company drivers pay any attention to hours of service as regulations are now written. Most flagrant violators are those hauling exempt commodities. If nearly half the latter can't live with present hours of service, why are they not protesting the still more stringent hours of service regulations sought by the Teamsters?

□ □ □

In a sense of the word this thumbing the nose at regulations has contributed to the chaos of the trucking industry. If a shipper doesn't like rates or delivery schedules of legitimate carriers, he only has to contact a hot freight artist who will take it across the country non-stop at half the cost. But the same people who accept those types of loads are the ones who cry loudest about the restrictions of regulation and the difficulties of surviving in the business.

The carrier who called me probably reflects a widespread opinion among legitimate carriers when he said, "All these new regulations are placing a burden of enforcement on the carrier. I for one am not going to tolerate falsified logs because BMCS will think of auditing regulated carriers first. It's about time contractors and independents either fight rule changes that take money out of their pockets or learn to live with them. I think we may be headed toward an enforcement situation that gives them no other choice."

The record of compliance with safety regulations has such a direct bearing on the amount of economic regulation that truckers live with that I begin to suspect there are two worlds in trucking: those who largely obey the law and are reasonably well rewarded for their efforts, and those who have trouble surviving even though they break every safety regulation on the books.

That fact alone is mute testimony that independents and contractors need to make their opinions heard. The attitude that BMCS safety regulations were only written to be broken is bringing on an enforcement attitude that could spell disaster for many in trucking.

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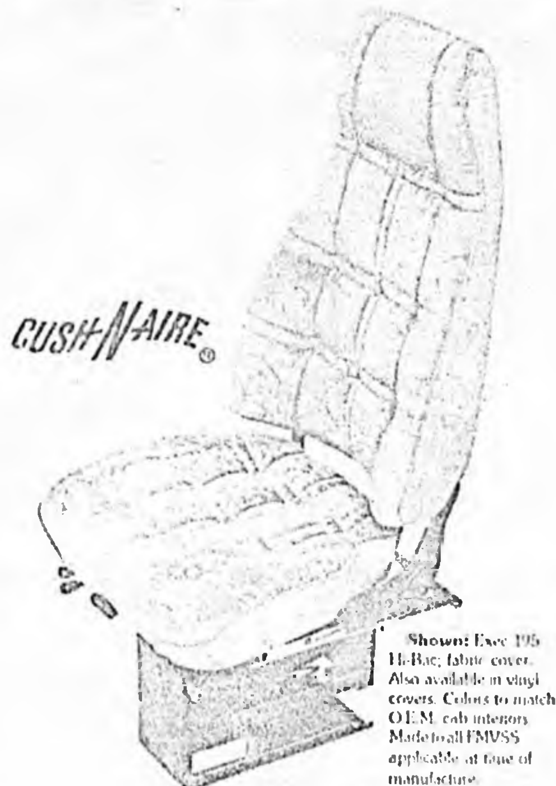

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JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

POUCH Z
JUNEAU, ALASKA 99811
(TELEX 45-328)

RE: Senate Bill 60,
Relating to Enforcement Authority

Honorable Brad Bradley
Chairman, Senate Commerce Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Bradley:

The Department of Transportation and Public Facilities offers the following comments on Senate Bill 60.

The amendments proposed by this bill are in consonance with actions by National and other States' regulatory authorities for surface and air carriers, to reduce safety violations and other infractions of carrier regulations.

The debate on carrier deregulation, especially for the trucking industry, is intense at the National and State levels. Attached for your information are reports on the subject. Please note the report by the American Trucking Association, Inc., "Against Deregulation".

As discussed with the Alaska Transportation Commission, the amendments will provide the legal authority needed for enforcement of the ATC's regulations.

Sincerely,

Richard A. Holden
Deputy Commissioner

Attachment

cc: Robert W. Ward
Keith Specking

25A-11LH

Attachment

AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS

THOMAS D. MORELAND, President
Commissioner and State Highway Engineer
Georgia Department of Transportation

HENRIK E. STAFSETH, Executive Director
444 N. Capitol Street, N.W., Suite 225
Washington, D. C. 20001
Telephone: (202) 624-5800

January 8, 1979

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STATE OF ALASKA
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To Members of the Policy Committee
of the American Association of State
Highway and Transportation Officials

Dear Members:

Enclosed are three reports done by the Task Force on Trucking Deregulation under the Highway Subcommittee on Highway Transport. These are being supplied for your review prior to the Policy Committee meeting in Forth Worth, Texas on January 23rd.

Sincerely,

H. J. Rhodes
Deputy Director

HJR:dk

Enclosure

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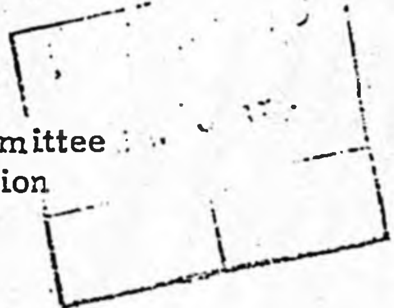
Mississippi
State Highway Department
Jackson

John R. Tabb
Director

P.O. Box 1850
Zip Code 39205

January 5, 1979



Mr. Bill Bulley, Secretary
Chairman, Highway Transport Subcommittee
Washington Department of Transportation
Transportation Building
Olympia, Washington 98504

Dear Mr. Bulley:

The Task Force on Trucking Deregulation met on December 28, 1978, at which time we reviewed and discussed the material we had been able to accumulate at that time.

Enclosed are three reports which we feel give accurate views on the pros, cons and middle ground to this issue. Although we do not feel we will have a draft position paper prior to the Policy Committee meeting in Fort Worth on January 23, we do feel it would be most helpful if the enclosed material were reviewed by the Policy Committee prior to our meeting.

One important matter we believe must be addressed by the Policy Committee prior to our position on this issue is Section III of the AASHTO National Transportation Policy as adopted by the Policy Committee, November 16, 1975, St. Louis, Missouri. It appears that a position toward deregulation would be in conflict with the present policy.

Sincerely,

John R. Tabb

John R. Tabb, Chairman
Task Force on Trucking Deregulation

JRT:lb
Enclosures
CC: Mr. H. J. Rhodes, AASHTO
Mr. Verdi Adams, Louisiana
Mr. Marcus Yancey, Texas
Mr. Billy Cooper, Arkansas

FOR DEREGULATION

Regulation of Entry and Pricing in Truck Transportation

Edited by Paul W. MacAvoy and John W. Snow

Ford Administration Papers on Regulatory Reform

American Enterprise Institute for Public Policy Research
Washington, D.C.

As Analyzed and Edited
By
Task Force Committee on Trucking Deregulation

INTRODUCTION

- Motor Carrier Industry - large, complex.

- Exact number of intercity trucking firms is unknown.

    - Best total estimate in excess of 100,000 individual firms.
    - 15,000 motor carriers are regulated by ICC.

- Trucking Industry hauls literally thousands of commodities to tens of thousands of U. S. communities.

- Total expenditures of industry in 1974 - $48.8 Billion.

- Accounts for 23% of all intercity freight transport measured in ton-miles or 64% measured in terms of transportation expenditures.

- Industry employs approximately 1.2 million people.

- Labor force heavily organized - principally by Teamsters Union.

- Despite large number of carriers, individual shipper of regulated commodities has limited choice available to him.

- No ICC-regulated carrier authorized to carry freight to any place in the U.S.

- Shipments between large cities - perhaps dozen or more carriers available.

- For smaller cities - particularly in growth areas since regulation of motor carriers began - perhaps one or two.

- In most instances - no carrier has authority to serve both the shipping and receiving points.

- Thus, two or more carriers must combine efforts to provide service required.

- Regulated carrier profits comparable with the rest of the U. S. economy.

- No information on exempt carriers - apparently good since that portion of industry continues to attract new capital. Operate good equipment - provide reliable service.

- Corporate turnover rate comparable to similar industries.

- All sectors of industry - regulated and unregulated - are affected by the regulatory system.

    - Common carriers must provide service to anyone, but cannot enter into contracts with their customers and are limited to certain commodity hauling and places served.

- Contract carriers - service by contract only and to a limited number of customers.

- Private carrier may haul goods for own company, but not for any other company - including its own corporate affiliates and subsidiaries.

- Agricultural carriers exempt from federal regulations, but are limited to unprocessed agricultural products - wheat, cabbage, corn, livestock, etc.

REGULATED CARRIERS

- Common and Contract Carriers.

  - Account for about 40% of total intercity truck freight in ton-miles.

  - ICC regulates rates of common carriers - commodities carried and routes of operation.

- Entry by new firms - limited.

- Most ICC operating authorities referred to as "grandfather rights" - in existence before 1935 Act.

- New entry granted, generally, only when ICC determines existing carriers not adequate to serve demands for truck transport.

- Expansion of existing carriers into new routes generally requires purchase of another carrier's operating authority.

- Firms regulated in one of two ways -

  - As to commodities carried, but latitude as to routes - "Specialized Commodity Carriers."

  - As to where they may operate, but latitude as to commodities carried - "General Freight Carriers."

- Specialized Commodity Carriers - generally smaller firms - specialize in truckload shipments, but do not require use of terminals.

- General Freight Carriers - 2/3 of total revenue of ICC - regulated industry.

- Truckload shipment carriers compete with railroads.

- Rates apply to both truckload (TL) and less than truckload (LTL), but affects general freight most.

- Rates determined by rate bureaus sanctioned by ICC.

- Result - LTL shippers have only one rate available - no competition.
- Private carriers and railroads provide competition for truckload rates. In fact, most TL rates are negotiated individually between shipper and carrier.

UNREGULATED CARRIERS

- Nonregulated sector of trucking industry accounts for 60% of all traffic.
- Consists for most part of exempt and private carriers.
- Unregulated carriers must not carry regulated commodities on a for-hire basis.
- Though not directly subject to economic regulation, they are severely restricted by it.
  - Example: A carrier hauling wheat to a flour mill cannot haul processed flour back to wheat growing area.
  - Example: A private trucking company may not haul goods on a for-hire basis for another company, even though it is entirely owned by the other company.
  - Example: Private carriers may not lease their trucks and drivers to regulated carriers for periods of less than thirty days. Thus, they cannot lease their trucks on a back-haul basis. Result - unnecessary empty truck mileage - higher costs to consumers.

PASSENGER CARRIERS

- Intercity Bus Industry subject to economic regulation like trucking industry.
- 1067 regulated intercity bus firms in 1973 with $884 Million in revenue.
- Bus industry dominated by two firms w[illegible] account for 70% of total revenue.
- Most routes dominated by one carrier.
- Most heavily traveled routes have two to no more than three carriers at best.
- Entry tightly restricted and rates tightly regulated.

MOTOR CARRIER RATES - Description of Present System

- Rate regulation particularly affects LTL general freight traffic.
- LTL rates initiated by associations of carriers called Rate Bureaus and are granted antitrust immunity by ICC.
- Almost all LTL shipments move under these rates.
- Individual carriers permitted to file independent rates - but the important rates are almost always set by rate bureaus. If an important rate is set by independent rate filing, the ICC routinely suspends the rate pending a hearing on ultimate lawfulness of the rate.
- ICC has broad powers to supervise rates through authority to find a rate unlawful. But instead, its powers usually exercised in enforcing the price-fixing of rate bureaus - rather than promoting price competition in rate making.
- Most LTL traffic moves under Categorical Class Rates. Commodities grouped into broad classes and rates are average rates based on average costs which are published for each class.
- Placement of a commodity in a class can substantially affect the shipping rate. Not unusual for several commodities with same transportation characteristics to move under different rates because of artificial grouping into different classes.
- Classification of Commodity based on characteristics of transportation and value of the commodity.
  - Example: A product may be placed in different classes based on the method of production.
- Class rates loosely related to industry-wide or system-wide average costs.
- No allowance made for the quality of the service provided under a rate.
- Rates not affected by balance of traffic or seasonal factors.
- Fronthaul and backhaul rates; peak and off-peak rates are same. Result - little inducement to utilize space on backhaul or to ship in off-peak time.
- TL (truckload) shipments frequently move under contract based on rates reflecting actual costs of required movements.

ECONOMIC EFFECTS OF RATE MAKING

- Rates are:
  - Too high.
  - Too inflexible.

- Irrational.
- Discriminatory.

Rates too High

- Unnecessary regulatory restrictions cause less efficient operation than when based on competition.

- Regulation causes carriers to use circuitous routes and empty backhauls.

- Costs are inflated by regulation, thus rates must be higher than otherwise to compensate for such costs.

- Since LTL rates are collectively set by rate bureaus, there is no incentive for competition.

- Firms will use power to set rates to their own advantage and therefore, price-fixing is illegal in almost all other industries.

- Nothing unique about the physical or economic attributes of trucking industry to justify anti-competitive practices such as collective pricing.

- In mid-1950's fresh and frozen poultry and frozen fruits and vegetables were changed from regulated to exempt commodities. Result - "before" and "after" studies by U. S. Dept. of Agriculture showed rates dropped by 33% on poultry and 19% on fruits and vegetables. Service improved dramatically as well.

- The same study found private carriage dropped significantly after commodities were exempted.

- The ATA (American Trucking Association) states that operating rights have great value and that value increases with time. The ATA statement to the ICC indicated that recent acquisitions in the motor carrier industry indicate that amounts paid for operating authorities amount to 15% to 20% of the annual revenues produced by those authorities. This is strong evidence that the present regulatory system works to the disadvantage of the consumers.

- Operating rights would only ha e value if carriers were able to earn higher than competitive returns on motor carrier service.

- Studies on why firms turn from common to private carriers show they do so because they (private carriers) can provide the same service at lower cost. This can be true only if common carriers were inflated or otherwise distorted, since private carrier costs are essentially the same as common carrier costs for the same operation - and private carriers are not allowed to solicit traffic for backhauls.

- Because regulated carrier rates are too high, shippers' distribution costs are too high. Result - consumers pay more for goods than they should.

- In certain markets, carriers with stifled price competition engage in wasteful service competition. Since they are unable to compete for traffic by lowe ing

rates, they compete by adding more frequent service than they otherwise would. This results in increased truck costs because the trucks run less fully loaded than they otherwise would. This fuels higher rates, because rates are based on average costs.

RATES AND SERVICE INFLEXIBLE

- Since rates are not allowed to vary, service quality is constrained. Carriers are prevented from charging premium rates to offset costs of superior service.

- Considerable evidence that users of motor carrier services want a diversity of price and service-quality alternatives, but they are prevented from it by the rate regulation system.

- A DOT survey showed that about 50% of industrial shippers used private carriers.

- Reasons given by 70% of those shippers cited dissatisfaction with common carrier service.

- There are numerous examples of shippers who are willing to pay premium prices for superior service, but unable to obtain such service from common carriers.

Rates are Irrational

- No rational relation between rates charged and service rendered.

- Rates for groups of towns further from a point of origin may be charged less than those nearer. (Example: Dallas & Houston to Colorado towns).

- Rates may be different even if traveling the same route. (Rocky Mountain Study - Nine States).

Rates are Discriminatory

- ICC requires all carrier rates be reasonable and not unjustly discriminatory. ICC has decided this means the same rates apply to all shippers moving similar traffic between specific points. When costs differ, the concept of equal is actual discrimination. Some shippers are charged more than the cost of their traffic and some charged less. Result - inequitable discrimination which breeds economic inefficiencies.

- Where traffic is greater in one direction than in the other, rates should be higher on the prime haul and lower on the backhaul. This is true simply because of lower costs associated with availability of excess capacity. ICC and the industry have resisted application of lower backhaul rates because such action inevitably leads to opening most of U. S. shipping to competitive pricing.

- A serious consequence is that shippers' long-run locational decisions are distorted. Were rates related to costs, manufacturers would have economic incentives to locate in the direction of the prevailing backhaul.

Rate Structure too Complex

- Endless artificial distinctions are strictly a product of regulatory systems.
- Given a choice, customers would not tolerate present system.
- Industry claims complexity results from needs to develop rates for so many different commodities traveling to so many destinations. But many other industries, unregulated, offer product lines to millions of customers. They do so without creating demand for specialized services such as rate audit firms to "ensure that customers receive the correct price", etc.

Restrictions on Entry

- Must have a certificate from ICC.
- Obtained in one of two ways:
  - Grandfather clause of 1935 Act - 18,000 plus firms in existence at time of passage of the Act.
  - Statutory test of "Public convenience and necessity."
- PC&N tough to meet since ICC has decided statute means new carriers should not be certified as long as existing carriers have "potential" to provide adequate service for traffic under consideration. (The inequity of denying individuals the opportunity to engage in the business of their choice in order to protect the interests of existing carriers is not considered at all.)
- In recent years approximately 80% of all applications have been granted, but few of the certificates were for new carriers, and of this small number very few were for authority broader than one commodity or one place.

Economic Effects

- Market Concentration and Monopoly Power.
  - One result of severe limits on new entry is to convert a naturally competitive industry into one in which there are numerous instances of monopoly (or oligopoly) power.
  - Best evidence is market value of operating rights.
  - In 1972 the top four of the top eight firms' shares of total operating income were 17% and 23% respectively. This is low compared to most manufacturing industries, but it must be viewed in the view of individual routes. Since even the largest firms have limited authority and are unable to serve the entire market, concentration on individual routes is much higher.

- Operating Inefficiencies

  - Certificate restrictions not only limit competition, they cause regulated carriers to operate less efficiently than they could if they were free to manage their own internal operations.

  - About 30% of all commodity-restricted authorities provide only one-way authority. Result - wasted resources.

  - Route-restricted authorities specify the route carriers must travel. Result - unnecessary mileage - wasted resources.

  - No single carrier able to carry a shipment its entire journey.

- Inequities

  - Grandfathered firms were awarded, free of charge, valuable property rights. ATA estimated that by 1970 about $300 Million in operating rights had been transacted. This represents a small fraction of total because only those authorities that have actually been sold are in the figure.

  - Other individuals have been prevented from engaging in the business of their choice.

  - Others, wanted to enter or to expand, have been forced to pay huge sums to those who already possessed operating rights.

Service to Rural Communities

- Supporters of present regulatory system contend that unless competition is restricted, motor carrier service to small rural communities will deteriorate. Without the "obligation" to serve, it is contended that small rural towns would not receive service because there would be no incentive to serve them.

- A U. S. DOT study concludes that the current regulatory policies actually impair rural motor carrier service. Rural towns would be better served by a regulatory program which placed greater reliance on competitive market forces and which eliminated unnecessary and wasteful operating restrictions - lower costs result in lower rates for service.

Myths Used to Oppose Motor Carrier Regulatory Reform

- Market Chaos

  - It is argued that any reduction in regulation will result in chaotic motor carrier service. Carriers, it is said, will rush around without direction, entering and leaving markets, or concentrating on large, high-density markets. Most markets are unregulated and these markets function in a generally efficient way. Firms make long-range commitments and customers are able to secure services. It is the supplier's interest to give orderly and dependable service

While it is true that a product needs transportation, transportation without products to transport would be useless - the supplier has a deep interest in planning.

- Regulatory Reform will Lead to Monopoly.

  - For industry concentration to lead to monopoly abuses, surviving firms would have to bar new entrants. Other than by regulatory barriers, there are no effective ways to bar entry in open competition. No unusual management skills are required. Trucks and drivers are available. Capital needs are modest compared to manufacturing industries. Currently, the exempt sector of the industry has thousands of carriers with no evidence of dominance by a few large carriers.

- Predatory Practices.

  - Some opponents to regulatory reform contend it will lead to predatory price cutting as firms try to drive their competitors out of the market. Predatory competition, at best, is a short-term risk. A rational firm would engage in such a practice only where there was a likely prospect of obtaining monopoly profits by reduction of the number of competitors or by disciplining the market. The predator firm would need superior resources and real staying power. There would need to be strict barriers to entry to enable the predator firm to recoup its loss. Where entry or reentry can occur relatively easily whenever prices return to levels at or above cost, the incentive in such behavior is eliminated. Experience in the exempt sector confirms the absence of predatory behavior in an unregulated environment. Besides, other laws that operate in other industries are available to protect against predatory behavior.

- Motor Carriers are Like Public Utilities.

  - The traditional argument for public utility regulation is the industry is a natural monopoly. This argument requires there be long-run economies of scale in the industry. If this is true, the industry will inevitably become concentrated in one or a few large firms unless there are legal constraints against that. Increasing returns to scale will give larger firms a competitive advantage over others in the industry. Unit costs will be lower so that they can underprice smaller firms, thus driving those out of the market. This argument is not applicable as justification for regulation of the motor carrier industry because motor carriers are not subject to increasing returns to scale. Large firms have no competitive advantage simply from being large. There is no tendancy toward natural monopoly. A related argument is regulation is justified for the industry because, like a public utility, the industry has an obligation to provide service. To balance the burdens of this obligation, it is argued the industry should be sheltered from competition by restricting entry. This argument is based on the "cart before the horse" theory. Public utilities are regulated because they <u>are</u> natural monopolies. Because of this monopoly they are required to provide service to all customers and prices are regulated. Saying it another way, utilities are not regulated because they are required to serve; they are regulated <u>and</u> required to serve because they are monopolies.

- Price Discrimination.

  - Without safeguards under the existing system, it is argued that carriers would practice price discrimination against shippers. Under the system all shippers are charged the same rate for the same movement.

    Only a monopoly is equipped to practice price discrimination. The current system causes price discrimination against shippers because rates are not based on the specific costs of service.

- How Can Rates Drop if Costs Do Not Drop?

  - Rates will decrease with regulatory reform, not because the costs of inputs will go down, but because resources will be used more efficiently. Costs will increase if inflation continues, but not inconsistent with the rest of the economy.

- Liberalized Entry Will Lead to Increased Truck Traffic on the Highways.

  - It is argued that regulation holds down the number of trucks on the highways. This argument confuses an increase in the number of firms with increased numbers of trucks on the highways. The latter is determined by the amount of cargo to be shipped. Regulatory reform should increase efficiency in the use of resources. Result - slower increase in total number of trucks necessary to provide service - thus, less truck traffic increase on highways.

- Impact on Railroads.

  - Regulatory system applies to LTL carriers - railroads do not compete in this field.

- Recreate the Conditions of the 1930's.

  - The 1930's was a period of severe depression and not a representative period in American life. The principal proponents of motor carrier regulation in the 1930's were the railroads who wanted to impose restrictions on a growing competitor. The "chaos" of the 30's were small truckers in a severe depression seeking to stay employed.

Paul W. MacAvoy is professor of economics at Yale University and an adjunct scholar at the American Enterprise Institute.

John W. Snow is a visiting fellow at the American Enterprise Institute.

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BACKGROUND
A Series of White Papers on Vital Transportation Issues

AMERICAN TRUCKING ASSOCIATIONS, INC., 1616 P Street, N.W., Washington, DC 20036

AGAINST DEREGULATION

Motor Carrier Regulation — The Issue in Perspective

To: Newspaper and Magazine Editors
Radio and Television News Directors and Assignment Editors
Columnists
Commentators
News Analysts
Reporters

Since 1935, the interstate motor carrier freight system in the United States has been subject to economic regulation under the jurisdiction of the Interstate Commerce Commission.

Basically, this regulation has set controls over entry into the field and has established supervision over the rates charged.

When the regulation first went into effect, there were those who said it would never work. It has, but still over the years there have been voices raised against it — few in number and representing for the most part the isolated, detached views of economists, academic theorists and Justice Department attorneys, plus a few of the largest shippers in the country.

Lately, however, what began as a few whispers now has become a more persistent campaign, though one still supported in the main by a handful of theoreticians, whether they be in government, a university or an editorial office.

For our part, we have always believed — and still want to believe — that the vast majority of those working in the news media take their responsibilities to the public seriously and want, always, to be on the side of truth, fairness and justice.

We also believe that it is virtually impossible to know the truth about this complicated subject without first acquiring some basic knowledge and understanding about the forces that brought about this regulation in the first place and knowledge and understanding about the forces at work that make this regulation just as necessary and valid today.

In the interest of fairness, objectivity and truth, we ask you to take a few minutes to read this Background material, prepared especially for you who work in the news media. You are free, of course, to use all or any part of it, if you desire, but our purpose is to give you background.

If you have any questions concerning this report, the regulatory issue or any other matters relating to the trucking industry, we at American Trucking Associations will be pleased to assist you.

Bennett C. Whitlock Jr.

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President

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On August 9, 1935, President Franklin D. Roosevelt signed into law the Motor Carrier Act, a landmark in transportation legislation which placed the interstate motor carrier freight business under economic regulation by the Interstate Commerce Commission.

Today, despite more than forty years of phenomenal growth and progress by what is universally hailed as the finest transportation network in history, this legislation is under attack by a small but influential assortment of critics.

Certain Senators and Congressmen, a few economists, a handful of government figures, some segments of the news media and a few big shippers have been assailing the regulatory system with a barrage that is virtually all heat and no light.

"We need more competition in trucking," they say.

"Regulation is costing American taxpayers billions of dollars a year," they say.

"Trucks are forced to run around empty because of regulation," they say.

"Trucking is a closed industry that won't allow in new blood," they say.

That is what they say — but the facts show otherwise.

Generally, three basic premises underlie the deregulation rhetoric:

(1) There is a terrible mess in truck transportation that needs correcting.

(2) The solution is simple.

(3) The trucking industry is no different than manufacturing or any other industry and should be subject to the same economic ground rules.

The first premise — that there is a terrible mess in our motor carrier system — is an essential tenet for all who favor deregulation. One could not possibly cry out for "meaningful motor carrier reform," unless one actually believed that such reform was necessary; ergo, things must be in a pretty sad state of affairs.

But are they?

When is the last time you were personally inconvenienced by a breakdown in the surface freight transportation system? If you are a member of the news media, you may give the subject of freight transportation some thought on occasion in the context of a news issue — you may comment on it, you may criticize it, you may report on it. But off the job you probably don't give it a moment's consideration. You just go through your daily routine, buying what you want to buy when you want to buy it, taking for granted it will be there, and thus in your personal life giving the lie to the charge that there is a "mess" that needs correction.

In making your purchases do you ever concern yourself with the cost of transportation that is built into the retail price? Most likely you do not. The general public does not. In fact, the average consumer in the United States takes freight transportation for granted. That is the highest tribute that can be paid to the regulatory system. But if there were a mess, as the critics contend, nobody would be taking the system for granted, and truck transportation would be the butt of the same kind of jokes comedians tell about the mail service.

The second premise — that the solution is simple — points up the lack of understanding of the freight transportation system and regulation. Every critic of the regulatory transportation system has oversimplified the matter.

And finally, the oversimplification always takes the form of comparing the trucking industry with other industries, with the clear implication that there is something unethical or un-American about any industry that can avoid what is referred to as "the competition of the market place."

The plain fact is the trucking industry is *not* the auto industry; the trucking industry is *not* the steel industry; the trucking industry is *not* the chemical industry. Transportation is *not* manufacturing and is not subject to the same economic laws as manufacturing.

Transportation is as special as telephone or electric power service and cannot be left completely to "the competition of the market place," without jeopardizing the public right to such service at an equitable rate. This is not to say there is not competition in trucking. In fact competition within the regulated trucking industry is intense. But admittedly, it is competition within the limits of a federally supervised structure. But it works and it works well.

Why Regulation?

The establishment of economic regulation of surface freight transportation was no accident. Nor was it something introduced in a hasty or cavalier fashion. Economic regulation of America's surface freight system was established by an Act of Congress only after a lengthy and deliberate investigation brought on by a torrent of complaints from the shipping public.

(It is significant that such complaints are not being heard today. General R. Rosen brought out this point in the August, 1977, issue of Dun's Review. "... there is no grassroots pressure for it," Rosen wrote referring to trucking deregulation. "... freight rates do not interest the average voter.")

Back in 1885, following complaints about inadequate or discriminatory freight service, a Senate Committee, the Cullom Committee, conducted hearings in various parts of the country, taking more than 2,000 pages of testimony. This Committee, whose members all would have been labeled "economic conservatives," finally reported:

"It is the deliberate judgment of the Committee that upon no public question are the people so nearly unanimous as upon the proposition that Congress should undertake in some way the regulation of interstate commerce."

The Committee Report zeroed in on the need for regulation, a necessity that still is valid today and will be valid so long as there is a general public need for freight transportation service:

"The paramount evil chargeable against the operation of the transportation system of the United States, as now conducted, is unjust discrimination between persons, places, commodities and particular descriptions of traffic."

Thus, the seller of transportation service had it within his power to favor this shipper to the detriment of that shipper, to serve this locality and ignore that locality, to carry this freight and refuse that freight.

"... it was a common observation," the Cullom Report said, "even among those who might hope for special favors, that a system of rates, open to all and fair as between localities, would be far preferable to a system of special contracts in which so large a personal element entered or was commonly supposed to enter. Permanence of rates was also seen to be of very high importance to every man engaging in business enterprises, since without it business contracts were lottery ventures."

The report said that not only were manufacturers ruined by transportation discrimination, but even whole towns disappeared because of it.

And thus the Interstate Commerce Commission was established, not to protect the railroads, but to protect the shipper and to assure the small community of equitable service. The Interstate Commerce Act was the public's response to the retort, "The public be damned." Anyone wishing to understand the complexities of transportation regulation must first of all understand that this federal control was born of consumerism, not special interest lobbying.

Those favoring the elimination of these controls contend that times have changed, that the railroads had a monopoly on transportation in the 1880's and that there is no longer any need for regulation.

A half a century after the railroads were brought under the ICC, the Congress found it necessary to bring in the burgeoning motor carrier industry also. The Supreme Court referred to the pre-regulation era of the trucking industry while rendering a decision on leasing regulations in 1953 in this manner:

"Then (prior to 1935) the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility."

Moreover, the great competitive spirit seen rising between railroads and trucks in a deregulated system is more myth than reality. Such competition is limited to begin with. Under a non-regulated system, rails could charge whatever they'd like for hauling trainloads of coal from the mine to the generating plant hundreds of miles distant. No trucking company could handle that job at *any* rate. On the other hand, rails are not suitable for hauling the less-than-carload freight, the smaller shipments they long ago abandoned to the motor carriers.

Truck-rail competition has other natural limits, including the limited number of localities served by rails. According to the Rand McNally Commercial Atlas and Marketing Guide, of the 61,000 communities in the United States, 64 percent or virtually two out of three have no rail service whatsoever. Even those which do have rail service are dependent on trucks for most of the goods imported and for door-to-door transportation on those commodities brought in by rails.