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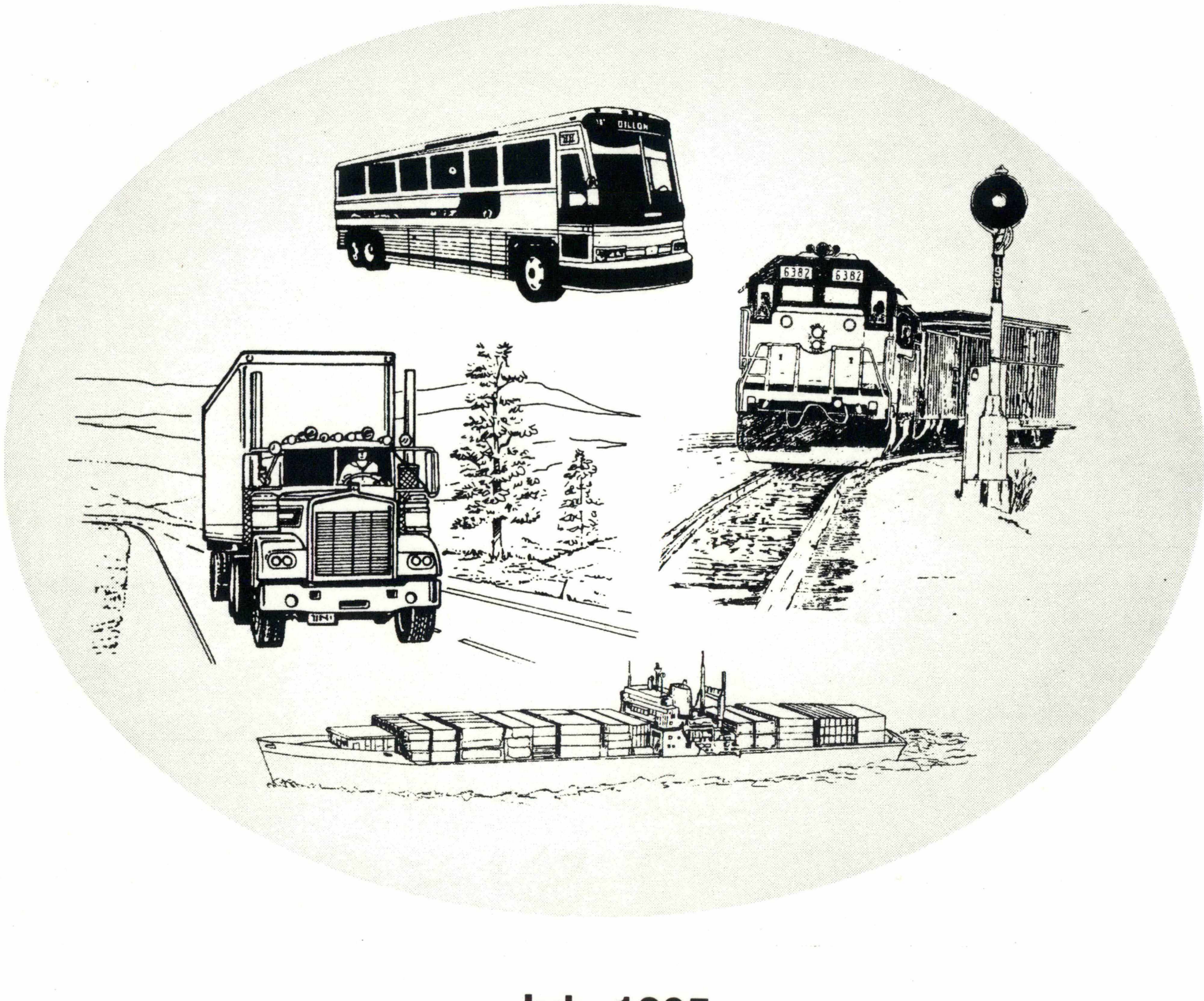
U.S. Department
of Transportation

Report on the Functions of the Interstate Commerce Commission



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EXECUTIVE SUMMARY

Background

This report examines a range of policy issues dealing with the economic regulation of surface transportation service (primarily freight) in the United States.

Freight transportation represents a core element of our National economy. It provides U.S. manufacturers and consumers with access to domestic as well as global markets and has a dramatic impact on economic growth and on our international competitiveness.

The surface freight transportation industry includes many different sectors--trucking, railroads, barges, pipelines, buses, and intermediaries such as freight forwarders and brokers. The structure and performance of each sector have been considered in discussing options for economic regulation.

The industry has changed dramatically in the past several decades. Regulatory policy has both led and responded to these changes. A new regulatory principle, recognizing competition as the best regulator of transportation, has been embodied in bipartisan legislation enacted in each of the past three decades. Federal economic regulation has increasingly been reserved for glaring instances of market failure or as a tool to pursue broader social purposes.

Deregulation has resulted in more efficient operations for carriers and better service at lower rates for shippers. As a result of the Staggers Rail Act of 1980, the railroad industry--which teetered on the brink of financial failure in the late 1970's--has been revitalized and is now a viable competitive sector of the economy. Deregulation of air cargo, trucking and "piggyback" traffic has led to spectacular growth in intermodal traffic.

The trucking industry has also been transformed. Many new firms have entered the industry, and both new and existing carriers have been given greater flexibility to meet customers' needs. Improvements in the reliability of trucking service have enabled manufacturers to enhance productivity by placing greater reliance on just-in-time manufacturing techniques.

The principal rationale for the remaining regulatory structure is to protect competition and the interests of shippers. However, ongoing changes in the nature of the transportation industry clearly indicate that the current level of Federal economic regulation of surface freight transportation burdens the public interest. Further reductions in regulation are needed.

The Process

This report is mandated by the Trucking Industry Regulatory Reform Act of 1994, P.L. 103-311 (TIRRA), which requires that the Interstate Commerce Commission (ICC) and the Department of Transportation (DOT) conduct studies to be used as the basis for considering further policy changes related to the regulation of surface transportation.

Section 210(a)of TIRRA requires ICC to examine its functions and responsibilities and to report within 60 days of enactment recommendations on which of these functions should be continued, modified, or eliminated. The ICC report (completed on October 25, 1994), provides a detailed treatment and analysis of the full panoply of existing functions and responsibilities of the agency. Section 210(b) requires DOT to study the feasibility and efficiency of merging ICC into DOT as an independent agency, combining it with other Federal agencies, retaining ICC in its present form, eliminating the agency and transferring all or some of its functions to DOT or other Federal agencies, and other organizational changes that would be expected to lead to government, transportation, or public interest efficiencies.

The Department has given serious consideration to the recommendations of ICC in assessing the merits of eliminating or restructuring the current functions and responsibilities of ICC. This report reflects a different view from that taken by ICC and generally concludes that government should retain fewer functions.

DOT's approach to conducting this study ensured full participation by all affected parties including carriers, shippers, intermediaries, labor, the insurance industry, and government agencies identified as potential locations for necessary ICC functions. The Department solicited comments from the public on ICC's study and held outreach meetings with all sectors of the industry, as well as government agencies.

DOT also sponsored a conference on the transportation industry of the future. The focus of this conference, which was open to the public, was to discuss the likely evolution of the transportation industry over the next fifteen years (1995-2010) and to identify and evaluate options for regulatory policies that would enable the industry to operate efficiently, as well as provide sufficient protection to the shipping public. A summary of the conference is attached as Appendix 3 to this report.

As a result of the process outlined above, the Department proposed recommendations in the draft report which were circulated for comments throughout the transportation community.

<u>**Comments on the DOT Report**</u>

The following is a characterization of the comments received on DOT's draft recommendations, from shippers, carriers, and others. A more complete summary of the comments filed is attached as Appendix 1. A list of all parties that participated in this process is included as Appendix 2.

Shippers

We received comments from more than a dozen shippers or shipper associations. Generally, they agreed that motor carrier economic regulation should be eliminated. With regard to railroad regulation, shippers generally supported: creation of an independent agency within DOT to inherit retained railroad functions, retention of the current maximum rate regulation scheme for protection of captive shippers, guaranteed general competitive rail access, oversight of car supply, preemption of state regulation of abandonments, continued collection of rail data, and retention of the Carmack cargo liability regime. Grain shippers, in particular, supported retention of the railroad agricultural contract filing requirements.

Railroads

The Association of American Railroads (AAR) recommends: establishing a commerce board within DOT; codifying all existing exemptions; retaining labor protection; retaining Interstate Commerce Act standards for mergers and antitrust immunity; retaining maximum and minimum rate regulation; retaining authority over abandonments, limited to notification and opportunity for parties to purchase lines; retaining Carmack amendment; repealing common carrier obligation; and repealing authority over Amtrak's compensation to freight lines.

On the other hand, the American Short Line Railroad Association (ASLRA) asserts the importance of requiring joint rates and through routes, retaining the common carrier obligation and mandatory interchange, and retaining car supply and car hire regulations.

Amtrak wants to retain dispute resolution authority, particularly for line use compensation issues, between Amtrak and the freight lines, and authority over mergers that takes into consideration the impact on the passenger carrier.

Freight Motor Carriers

The for-hire freight motor carriers generally assert that: antitrust exemptions for pooling, classification, interlining, joint-line rates, and carrier/agency agreements should not only be retained, but codified; jurisdiction over rate reasonableness should be retained; licensing and insurance requirements should apply to all carriers including common, contract and private; the self-insurance option must be continued; and broker licensing should be retained and expanded.

Household goods (HHG) carriers want to maintain antitrust immunity for van line/agent relationships, pooling, collective ratemaking, mileage guides, and tariff filing; Carmack liability with released rates regime; carrier data collection; fitness requirement for HHG authority; owner-operator leasing rules with Federal enforcement; agents for service of process; and consumer protection oversight.

Private carriers oppose being subjected to Federal insurance requirements, believe the self-insurance option must be continued, and oppose expanding the collection of financial data to them, since such information cannot be segregated from that of their parent companies.

Passenger Motor Carriers

Reply comments filed by the American Bus Association, United Bus Owners of America, and others, assert they want to: retain regulation of rates, practices, and adequacy of service; retain a mechanism for dispute resolution among carriers; retain protection of unsubsidized carriers from subsidized carriers; retain authority to approve pooling arrangements; retain collective ratemaking for general increases and changes in tariff structure; and retain Carmack amendment for resolution of cargo claims.

Insurance Companies

While the insurance providers support DOT's recommendation for a reduced cargo liability limit, and also recommend reduced property damage liability limits, they generally believe that government should continue to require regular, periodic financial reporting as a surrogate for safety fitness, and that Federal insurance requirements should not be extended to private carriers.

Ocean Shippers and Carriers

Carriers support continued regulation of the domestic offshore trades, but believe the rates should be set by market conditions, not by government intervention. However, rates should be published in tariffs to avert discrimination.

Shippers views, on the other hand, vary with the Caribbean group indicating that regulation should be ended, but Hawaiian shippers arguing for some continued regulation in markets, such as theirs, with limited competition.

The Federal Maritime Commission (FMC) believes that the major domestic offshore trades tend to be dominated by a few carriers, and, consequently, rate-of-return regulation is a proven means to assure that carriers do not charge excessive rates.

Labor

Motor carrier labor essentially wants to retain regulation, including an independent ICC; oversight of Mexican motor carriers; oversight over motor carrier mergers and acquisitions; financial reporting; truth in billing; motor carrier contract requirements; and antitrust immunity for collective ratemaking, interlining, and joint rates.

Rail labor wants to retain an independent ICC, employee protection, rail merger authority at DOT if ICC is sunsetted, and elimination of rail antitrust exemptions.

DOT Recommendations

We have carefully analyzed the comments filed on our report on the functions of ICC. For the most part, we continue to support the same basic approaches set forth in the draft: eliminating antitrust immunity and remaining motor carrier regulation, while retaining railroad rate regulation for certain shippers. Based upon the comments filed on our draft report, the Department has decided to make some changes to our draft recommendations:

- Continue to permit the option of motor carrier self-insurance, with appropriate qualifications.
- Continue the Carmack liability regime providing that rail carriers, motor carriers and freight forwarders would be liable for full value of the goods lost, damaged, or delayed, except that shippers, carriers, and freight

forwarders may agree on different liability limits in the receipt or bill of lading.
- Clarify that we are retaining railroads' common carrier obligation and mandatory interchange requirements.
- Clarify the car-hire regulations to assure that the negotiated agreement over car hire rates will be completely phased in and maintained indefinitely.

The Department has not revised any of its other recommendations based on comments received on the draft report. The following discussion summarizes DOT's final recommendations and the Administration's implementing legislation, submitted to Congress on April 6, 1995.

Antitrust Immunity

Federal economic regulation of transportation predates the antitrust laws and has its roots in the late nineteenth century, when railroads had a virtual monopoly for most freight. Although the "public utility" model of regulation was subsequently applied to all of the modes subject to ICC's jurisdiction, it is now limited primarily to regulation of "captive" rail traffic.

The trucking, rail freight, household goods, intercity bus, water carrier, and other surface transportation industries still subject to economic regulation by ICC and FMC are competitive either entirely or with respect to most of the markets they serve. Over the past two decades, recognition of the intrinsic competitive nature of these industries has resulted in bipartisan legislative efforts to reduce regulation of surface transportation, including the number of activities that are accorded immunity from the antitrust laws by ICC.

Because of the existence of competition between and within these industries, they bear little resemblance to utilities having local franchise monopolies. Even the freight railroads face vigorous competition, often from other modes, in the majority of the markets they serve. Accordingly, it is appropriate to rely on the antitrust laws rather than unnecessary regulation to police these industries.

There are two categories of arrangements among firms to which the antitrust laws normally apply. The first is the cartel-type arrangement to fix prices or allocate markets, which has no redeeming value. Such activity should never be permitted to occur. The second category includes arrangements that can have beneficial aspects that may enhance competition. The legality of the latter type is evaluated by the Department of Justice under a "Rule of Reason" inquiry that weighs all its relevant effects. If the activity is beneficial, it is not illegal and does not need immunity from the antitrust laws; if it is harmful, the antitrust laws will prohibit it. Accordingly, we recommend eliminating all antitrust immunity for these industries.

Following are some examples of how certain types of transportation activities would be analyzed under the antitrust laws:

- Rate setting. A rate bureau agreement to impose a general rate increase on shippers is a classic horizontal price-fixing arrangement, a "naked restraint" on competition. There is no legitimate reason to continue to permit such per se unlawful collective activity.
- Joint ventures. Joint rate agreements between two or more firms providing similar services in different geographic markets do not generally, if ever, violate the antitrust laws; therefore, antitrust immunity is not needed. As far as household goods van lines and their agents are concerned, as long as there are a sufficient number of firms capable of performing the services in question, joint ventures between the van lines and their agents should not significantly lessen competition and should not violate the antitrust laws. Therefore, their agreements do not need antitrust immunity.
- Other joint operating activity. The "Rule of Reason" standard used by the Department of Justice (DOJ) in analyzing most kinds of joint activity under the antitrust laws is not significantly different from the "public interest" standard used by ICC. For example, ICC may approve pooling arrangements among common carriers only where they are demonstrated to promote better service or efficiencies and will not "unreasonably" or

"unduly" restrain competition. Arrangements that meet this test do not need antitrust immunity.

- Industry guides and standards. Compilations such as mileage guides can provide useful information to both shippers and carriers. On the other hand, collective agreement to adhere to such schedules could have anticompetitive effects. Such arrangements should be subject to the antitrust laws and deemed unlawful if their beneficial effects are outweighed by any anticompetitive effects. Activities that are no more restrictive than necessary to achieve the desired results are unlikely to be challenged by DOJ under the antitrust laws.
- Information gathering and dissemination. Carriers can use common entities to gather and publish information about demand, capacity, and unilaterally established rates without competitors agreeing on specific actions that would violate the antitrust laws.

Railroads

The Staggers Act of 1980 has transformed the railroads from a declining industry poised on the brink of financial ruin to a healthy one that provides excellent service to shippers at rates that are, on average, well below those of 25 years ago. The legislation introduced significant rate deregulation, allowing pricing flexibility where competition is effective to protect shippers from abuse. It also retained significant protections for shippers in situations where competition is either absent or weak.

The critical freedoms of the Staggers Act must be maintained if the rail industry is to remain financially successful. Equally important, the basic shipper protections that were incorporated in 1980 are still needed today to ensure that rates and services for captive traffic are reasonable. However, there are many aspects of the rail regulatory system that can be revised, modified or even eliminated in light of today's and tomorrow's competitive realities.

DOT believes that the following regulatory activities are either outdated or unnecessary to accomplish the Staggers Act's objectives, and should be eliminated:

- Antitrust immunity for industry agreements. The antitrust laws provide sufficient flexibility to ensure smooth and efficient intercarrier operations.
- Rail-shipper contract filing requirements. Rail contracts should be treated in the same manner as contracts in other industries.
- Rate discrimination regulation. These restrictions are a holdover from the era of collective ratemaking, and are no longer necessary in today's competitive market.
- Minimum rates. It is not necessary to limit minimum rail rates because predatory pricing could be addressed through the antitrust laws if it occurs in the future.
- Commodities clause. The prohibition on carriers transporting their own commodities is an impediment to shipper ownership of short line carriers.
- Rail car hire agreements. Oversight of car supply and interchange practices shall be retained, assuring implementation and maintenance of the negotiated agreement deprescribing car hire rates.
- Oversight of rail financial practices such as interlocking directorates, issuance of securities, etc. Regulations covering financial practices of railroads should be the same as those applied to other industries.
- Rate caps on recyclables. It is not equitable to require special treatment for particular classes of shippers.
- Rail merger standards, line sales, transfers, and trackage rights under the Interstate Commerce Act. As with transactions in other U.S. industries, rail consolidations and sales should be reviewed by the Department of Justice, under the standards of the Clayton Act.

The following rail functions would, unless otherwise noted, be retained and transferred to DOT:

- Maximum rate regulation as provided by the Staggers Act.
- Exemption authority, which has been extremely useful for removing rail traffic from regulation.

- Line construction authority for new lines crossing another railroad.
- Competitive access (terminal access and joint switching) provisions for captive shippers.
- Labor protection provisions would be administered by the Department of Labor.
- Line sales to non-carriers (determination of carrier/non-carrier status).
- Reasonable practices in cases where rate regulation is retained.
- Abandonment regulations, feeder-line development program, and financial assistance to facilitate purchases or subsidy agreements for lines proposed for abandonment; agency approval should be replaced by a requirement for adequate notification of all parties.
- Dispute resolution between passenger and freight railroads.
- Rails-to-trails program for abandoned rail lines.
- Preemption of state regulation of rail rates, routes, and services.
- Recordation of liens would be continued, but administered differently.
- Common Carrier Obligation and Mandatory Interchange should be retained.
- Existing precedents established by ICC remain applicable where statutory provisions have not been changed.

Motor Carriers

Trucking. The interstate trucking reforms of 1980 have provided billions of dollars in annual savings and enhanced U.S. competitiveness in world markets. Another significant barrier to further efficiencies in the trucking industry was removed beginning in January 1995, as a result of Public Law 103-305, which generally prohibits the states from imposing economic regulation on all sectors of the trucking industry except household goods carriers.

Most of the remaining trucking regulations administered by ICC are needless and burdensome requirements that have no place in today's competitive, cost-conscious environment. Although TIRRA substantially reduced the requirements for entry into the business of hauling regulated commodities and removed the requirement that motor common carriers file their independently-set rates with ICC, it stopped short of doing away with these requirements altogether.

Our reviews have found no useful function served by the remaining economic regulation of trucking by ICC, and we recommend that it all be <u>eliminated</u>, except for those functions enumerated below. In particular, we recommend an end to all antitrust immunity, all filing of tariffs and rate regulation, all distinctions between common and contract carriers, and control over mergers and transfers.

We recommend that only the following regulations be <u>retained</u>:

- <u>Motor carrier licensing</u>. All interstate private and for-hire carriers would be subject to the same safety requirements, administered by DOT/Federal Highway Administration (FHWA). DOT recommends seeking authority to subject private carriers to existing insurance requirements.
- <u>Mexican carriers</u>. As the North American Free Trade Agreement (NAFTA) is phased in, DOT, in conjunction with the states, would monitor Mexican carriers' safety and insurance compliance, as well as their access to U.S. markets.
- <u>Undercharge resolution</u>. Adjudication of existing undercharge claims under the Negotiated Rates Act of 1993 (NRA) would be continued over a transition period until the issue ceases to exist. We also recommend that NRA be amended to designate claims for undercharging as an "unreasonable practice," as long as any tariff filing is required.
- <u>Household goods, household goods freight forwarders, and transporters of personally-owned automobiles</u>. Authorize the Federal Trade Commission (FTC) to regulate practices of motor carriers just as it does in other industries. FTC would not become involved routinely in individual HHG consumer protection cases, but would be able to monitor the industry and take action as it does in other industries if there should be a pattern of abuses.

- Owner-operator leasing rules. These rules would be maintained by DOT, but there would be no agency involvement in adjudicating individual claims between carriers and owner-operators. There would be general DOT oversight, and owner operators would be given a right of private action to enforce the rules and the opportunity to collect treble damages in case of violations.
- Loss and damage claims. Retain the Carmack amendment, but eliminate ICC dispute settlement functions. Issues would be resolved privately, as with any other contract dispute.

Intercity Buses. Although the charter and tour sector of the bus industry has grown, the financial condition of the regular route carriers is marginal, reflecting intense competition with the airlines, the private automobile, and Amtrak. Continued regulation by either ICC or state regulatory bodies can hurt, but cannot help this industry. We recommend that all ICC economic regulation of the intercity bus industry be eliminated. DOT/FHWA would be responsible for monitoring bus safety and insurance (with state enforcement authority), and the existing procedure for ICC preemption of state bus regulation would be amended to provide outright preemption such as that provided for motor carriers of property by P.L. 103-305. Bus industry practices would also be subject to DOJ antitrust oversight.

Transportation Intermediaries

Freight forwarders and brokers are only two types of a wide panoply of transportation intermediaries, including ocean freight forwarders and nonvessel operating common carriers (NVOCCs). The intermediaries are an important segment of the industry that creates value for both shippers and carriers. The rather minimal regulation of all types of transportation intermediaries should be harmonized. We recommend that all regulation of surface freight forwarders and brokers be eliminated and that they be free of any regulation of their rates, routes, or services. Surface freight forwarders would be subject only to cargo liability rules.

Pipelines

ICC has authority to regulate transportation by pipelines of commodities such as coal and fertilizer. However, there is significant intermodal competition for such traffic and there have been virtually no complaints concerning competitive problems. We recommend that ICC regulation of pipelines be eliminated and any competitive problems be handled under the antitrust laws.

Intermodal Transportation

ICC has the authority to prohibit the acquisition of a water carrier or a motor carrier by a rail carrier. ICC may also prescribe joint rates and through routes on intermodal rail-water movements. The deregulation legislation of 1977-1980 has resulted in an enormous increase in intermodal traffic. However, there are some remaining hindrances that could impede intermodal acquisitions. There is no longer any economic rationale for these restrictions. We recommend elimination of all restrictions against intermodal ownership and removal of Federal jurisdiction over intermodal rates, routes, and practices.

Domestic Water Carriers

The ICC has authority to regulate water carriage both within the contiguous states and between the continental United States and its possessions (the domestic offshore trades). Most of the water traffic within the contiguous states is already exempt from regulation, and competition is sufficient to prevent abuses. We recommend an end to all ICC regulation of such traffic.

Regulatory authority over the domestic offshore trades is already shared between ICC and FMC. When an offshore movement is intermodal and employs a joint through rate, ICC regulation applies, but is minimal. Other types of movements are regulated by FMC. This bifurcation makes no sense. It simply lets the carriers select one of two very different regulatory forums. We recommend eliminating all economic regulation (including tariff filing) by both ICC and FMC in the contiguous states and in the domestic offshore trades. Consequently, the provisions of the Intercoastal Shipping Act, 1933, which authorizes FMC's rate regulation authority, should also be repealed. Any continuing jurisdiction over nontariff-related malpractices in the domestic trades, such as boycotts of shippers by carriers, would be transferred to DOT.

Federal vs. State Interests

Surface transportation in the United States is a National system. The "Commerce Clause" of the Constitution of the United States (Article 1, Section 8, Paragraph 3) grants Congress the power "to regulate commerce with foreign nations and among the several States." This provision allows Congress to regulate a huge volume of trade moved via land, water, and air. The recommendations outlined above would reduce or eliminate Federal oversight by repealing Federal laws that constrict the efficient and competitive operation of the surface freight transportation system. It is also essential to preempt conflicting state laws or procedures that could overturn the benefits of Federal deregulation, as has been done in previous legislation affecting the airline industry in 1978 and the trucking industry in 1994.

Administration of Remaining ICC Functions

TIRRA identified a wide range of organizational choices for relocating ICC functions. These included retaining ICC in its current form, merging ICC into DOT as an independent agency, merging ICC into DOT but not as an independent agency, eliminating ICC and transferring all or some of its functions to DOT or other Federal agencies, and combining ICC with other Federal agencies, e.g., FMC. Each of these alternatives was extensively examined in the Department's study.

Given the dramatic reductions in regulatory authority recommended in this report, it is clear that there is no longer any need to maintain ICC as an independent agency. Furthermore, given that the functions to be retained are quite diverse, e.g., monitoring of Mexican motor carriers, railroad rate oversight, we do not believe that it makes sense to consolidate these functions, either in a separate agency or in a discrete agency within DOT. It makes more sense to house the motor carrier functions in DOT's Office of Motor Carriers and the railroad oversight in a new rail regulatory unit within the organizational structure of DOT, with labor protection at the Department of Labor.

Moreover, there is no need for the railroad regulatory office to remain completely independent. Most of the remnant regulatory functions are similar or analogous to activities currently administered by DOT (or other agencies) without any independent or insulated staff. For those few functions where there is a special need for "insulated" decisionmaking, such as resolution of disputes between passenger and freight railroads, administrative procedures can be readily established.

Careful planning of the transition of functions is important. This includes: examination of staffing requirements, workload, and workflow; space and other physical resources; and processes for performing specific functions within the new organizational framework. It is critical to the transportation industry, shippers, and the economy that transition plans maintain continuity and integrity for any remaining regulatory functions. The Administration proposes that the transition occur during FY 1996.

CROSS CUTTING REGULATION

General Background

Early Federal Regulation

Federal economic regulation of transportation predates the antitrust laws and has its roots in the late nineteenth century, when railroads had a virtual monopoly for most freight. Although the "public utility" model of regulation was subsequently applied to all of the other modes subject to the ICC's jurisdiction, it is now limited primarily to regulation of so-called "captive" rail traffic.

Modern Regulation

At present, comprehensive economic regulation is usually applied only to industries in which the local provider is granted a monopoly, e.g., local utilities, such as electricity and local-loop telephone service. Because of the existence of competition within the surface transportation modes and with other modes, these industries bear little resemblance to utilities having local franchise monopolies. Even the freight railroads face vigorous competition (often from other modes) in the majority of the markets they serve, and only a small percentage of their traffic is currently subject to regulation.

Recent Legislative Reforms

Over the past two decades, recognition of the intrinsicly competitive nature of the surface transportation modes has resulted in bipartisan legislative efforts to reduce regulation of them.

The Motor Carrier Act of 1980 (MCA) further deregulated the trucking industry giving motor carriers greater freedom over entry, rates, routes, and contracts. More recently, TIRRA continued this deregulatory trend by eliminating the requirement that individuallyset rates be filed with ICC.

In addition, Section 601 of Public Law 103-305 preempted the states from imposing economic regulation of most intrastate trucking as of January 1, 1995.

In 1980, the Staggers Rail Act gave rail carriers greater rate and contract flexibility, enabling them to compete more effectively with one another and with carriers of other modes. In addition to enhancing competition, reduced regulation helped revitalize the freight rail industry, which had been experiencing severe financial difficulty prior to the Staggers Act.

In 1982, intercity bus carriers were substantially deregulated, and in 1986 surface freight forwarders were totally deregulated.

The Need for Further Legislative Reform

We believe that it is now time to complete the job of deregulating surface transportation and that it is appropriate to rely on the antitrust laws, rather than burdensome and unnecessary regulation, to police these industries. In recognition of these realities, and also in light of a broad consensus that these industries will remain highly competitive, this report recommends elimination of most of the remaining economic regulation that effects them.

Antitrust Immunity

Even after the legislative reforms of the past 15 years, ICC still has extensive authority to grant immunity from the antitrust laws. With respect to rail activities, it has granted immunity for mergers and consolidations; line transfers, leases, and trackage rights; pooling of equipment or revenues; and certain joint ratemaking activities. For trucking, immunity has been granted for joint-line ratemaking, general rate increases, broad tariff restructuring, and collective commodity classification. The intercity bus industry has received immunity for carriers to pool equipment or revenues, as well as to publish schedules jointly. In addition, immunity is available for the collective setting of general rate increases; however, the bus industry rarely engages in this activity. Household goods carriers have the right to pool traffic and revenues, own their parent van lines, and engage in collective activities such as formulating general rate increases and producing the Mileage Guide, under the umbrella of antitrust immunity.

Background

As Congress has relied on market forces rather than regulation as the organizing principle of our extensive and complex economic system, it has relied on the antitrust laws as the primary means by which to protect our system of free market competition. Those laws protect the vigor of that competition by prohibiting unreasonable restraints of trade, mergers that threaten substantially to reduce competition, and actual or attempted monopolization of trade. The antitrust laws serve as an economic "umpire" on the playing fields on which competition occurs and thereby help ensure that the benefits of competition will be realized by consumers.

The Sherman Act, enacted in 1890, is the primary Federal antitrust law that deals with business conduct. Section 1 of that Act prohibits agreements or arrangements among firms that unreasonably restrain trade. This provision generally applies to two categories of agreements or arrangements. The first type consists of cartel-type arrangements, so-called "naked restraints" on competition with no redeeming virtue. Common examples are agreements among competitors to fix prices, rig bids, or allocate markets among themselves. Because experience with such arrangements has shown them to be universally harmful, they are deemed to be per se unlawful wherever they are found.

The second category of joint activity subject to scrutiny under Section 1 of the Sherman Act includes arrangements that can have beneficial aspects that may enhance or facilitate competition. These can be cooperative arrangements among competitors, such as pooling of equipment by carriers, joint publication of bus schedules, formulation of commodity classifications, or creation of mileage guides. Such arrangements can generate efficiencies for these firms and, hence, may be permitted.

Because these types of arrangements generally have some beneficial features, their competitive impact is determined after an inquiry into their specific effects in the contexts in which they are found under a "Rule of Reason" inquiry that evaluates all their relevant effects. Such arrangements will be found to be unlawful only when the increased efficiency associated with these changes are outweighed by any anticompetitive effects they may have.

Two other important antitrust laws are Section 2 of the Sherman Act, which prohibits actual or attempted monopolization, as well as conspiracies to monopolize any relevant market, and Section 7 of the Clayton Act, which governs mergers, acquisitions, and joint ventures. While market shares are an important part of the analysis, they are only the beginning. These provisions require analysis of the competitive effects of conduct or transactions, respectively. Monopolization is generally held to require two elements: (1) the possession of market power, that is, a market share large enough to permit a single firm to control price or exclude competitors from the market; and (2) the use of unlawful means to achieve or maintain a monopoly. The latter element frequently requires a showing that the alleged monopolist has engaged in some form of predatory or other anticompetitive conduct. Hence, size or market share alone is not unlawful, nor does Section 2 prohibit all instances in which a firm may enjoy monopoly power.

Section 7 of the Clayton Act also requires analysis of a transaction's likely competitive effects in the market in which they are likely to be observed. This analysis takes into account the degree of market concentration of the merging firms and the extent to which concentration would be increased, the competitive conditions likely to exist in the market after the transaction, and the likely ability of the resulting firms to collude or otherwise exercise market power to the detriment of consumers.

The Merger Guidelines used by DOJ expressly recognize that mergers can enhance efficiency. DOJ's analysis thus takes into account any efficiencies that will flow from a merger, and challenges only those transactions where, on balance, the harm to competition outweighs the benefits. Over approximately the past ten years, the Department has opposed only one rail merger in its entirety--the proposed consolidation of the Santa Fe and Southern Pacific Railroads--a transaction that ICC ultimately disapproved. DOJ raised no objection to the two rail mergers most recently approved by ICC, namely, Kansas City Southern's acquisition of Mid-South and the Union Pacific's control of the Chicago & North Western. In addition, DOJ recognizes that joint ventures among competitors can enable firms to share the risk and expense of research and development projects or to engage in activity that neither firm is able to engage in alone and thus may be procompetitive.

Two additional observations about the antitrust laws should be made. First, firms are generally free to raise or lower their own rates unilaterally, even with full knowledge that other firms have acted or may act in similar fashion. Such similar actions where taken unilaterally (so-called "conscious parallelism") are not unlawful, since it requires some sort of agreement to find a violation of Section 1 of the Sherman Act. Likewise, firms other than railroads are generally free to refuse to deal with other firms or to establish the basis upon which they will deal, subject to the condition that such decisions are not part of an attempt to acquire or maintain a monopoly. Mandatory interchange and the common carrier obligation limit the ability of railroads to refuse traffic or establish unreasonable terms.

<u>**Comments on ICC's Study**</u>

Less-than-truckload motor carriers and household goods carriers support retention of antitrust immunity for collective ratemaking and commodity classification. Household goods carriers also believe that retention of antitrust immunity for relationships between van lines and their agents is necessary if the moving industry is to retain its present structure. Truckload motor carriers do not express a need for antitrust immunity, nor do brokers. The intercity bus industry believes it needs immunity for purposes of pooling revenues and equipment. Railroads generally support retention of antitrust immunity, especially for pooling activities (such as equipment pooling). Shipper groups generally support abolition of antitrust immunity.

<u>**Comments on DOT's Report**</u>

Comments generally tracked those submitted in the first round on ICC's report.

<u>**Options**</u>

- Retain the existing situation in which the regulating agency can review and grant antitrust immunity for a variety of practices.
- Eliminate the ability to grant such immunity and subject transportation firms to the normal operation of the antitrust laws, as is the case in virtually every other industry.

Analysis

Application of the Antitrust Laws to Transportation

Among transportation firms, there are many different types of business arrangements ranging from those that substantially restrict competition among firms in a particular market to those that do not restrict competition at all. In general, procompetitive arrangements do not need antitrust immunity, and anticompetitive ones should not receive it. Between these two extremes are other arrangements that may have both procompetitive and anticompetitive effects. While not attempting to predict in advance which, if any, specific arrangements might raise significant antitrust concerns, the following discussion summarizes how some common examples of such arrangements would be analyzed under the antitrust laws.

Rate Setting. One kind of arrangement that unreasonably restricts competition is a motor carrier (including household goods) rate bureau agreement to impose a general rate increase on shippers with respect to movements for which bureau members compete. This is a classic cartel-type horizontal price fixing arrangement that would be per se unlawful but for the ability of ICC to immunize it from the antitrust laws. In light of the competitive nature of these industries, there is no legitimate reason to continue to permit such collective activity.

Congress applied this principle in MCA, which banned collective ratemaking for single-line motor carrier rates. In setting general rate increases collectively, motor carriers may be agreeing only to raise all their tariff or "list prices" from which they offer discounts to shippers, and members of the bureau may be free to take independent action and not increase their own rates. However, such factors do not alter the essentially anticompetitive nature of the collective activity, which denies consumers the benefits of full price competition among the agreeing firms. Discounting from agreed-upon price levels does not save an otherwise anticompetitive agreement from violating the antitrust laws. Likewise, a firm's decision not to charge the collectively established price does not vindicate its participation in a conspiracy, since "naked restraints" of trade can not be justified.

Joint Ventures. An example of an arrangement that would be viewed under the Rule of Reason would be a joint-line agreement between two or more firms providing similar services in different geographic markets. For example, a carrier serving the East can arrange a through rate with a firm serving the West to cover the total price of transportation for a shipment. Because neither firm is competing with respect to the total shipment, their joint-rate agreement does not eliminate or restrict competition between them. Hence, such joint-line rates have long been viewed by DOJ as not creating any antitrust liability for the participating motor or rail carriers. Because such arrangements will not generally (if ever) violate the antitrust laws, antitrust immunity is not necessary in order for the activity to occur. Moreover, the fact that one or the other firm participating in the joint-rate agreement could carry the shipment over the entire route does not alter the fact that such arrangements would be viewed under the Rule of Reason.

Van Line-Agent Relationships. A similar Rule of Reason analysis applies with respect to relations in the household goods moving industry among interstate household goods carriers and their local agents, where one firm is essentially acting as an agent for the other. The firms are generally free to negotiate a division of responsibility and to present a composite rate to the consumer that represents the combined price of their respective services. So long as there are a sufficient number of other firms in the market capable of performing the services in question, joint ventures between the participating household goods carriers should not significantly lessen competition for such services in that market; hence, it should not violate the antitrust laws.

Pooling and Other Forms of Joint Operating Activity. The Rule of Reason would also apply to arrangements, such as a rail car pool, by which firms participate in joint efforts designed to accomplish significant operational or other efficiencies. For example, utilizing a Rule of Reason analysis, DOJ acknowledged in its filings before the Commission that Trailer Train's flatcar pool might well have generated certain efficiencies. DOJ's concern arose primarily from the proposed collective purchasing of flatcars, including cars to be assigned or allocated to specific railroads rather than for general pool use. DOJ recommended approval of a pooling arrangement that achieved possible efficiencies without having unnecessary anticompetitive effects, and ICC approved the arrangement for most of the requested activity.

The standard used by DOJ in analyzing such arrangements under the antitrust laws is not significantly different from the "public interest" standard used by ICC under the Interstate Commerce Act. Under that statute, ICC may approve pooling arrangements among rail or most other common carriers only where: (1) they are demonstrated to promote better service or economy of operation, and (2) "will not unreasonably restrain competition" or (in the case of motor carriers) will not "unduly restrain competition." Thus, under both approaches, the beneficial aspects of Trailer Train's rail car pool were recognized by each agency in its competitive analysis.

Industry Guides and Standards. An example of an arrangement found in the household goods moving industry that would also be analyzed under the Rule of Reason is the Mileage Guide. This compilation provides useful information to carriers and shippers, standardizes the parameters of transactions, and facilitates negotiations and the making of contracts. It is widely used by the motor carrier industry, as well as the household goods moving industry. A Rule of Reason approach to such joint activity would fully take into account all of its effects, and such an arrangement would be deemed unlawful only if its beneficial aspects were outweighed by any anticompetitive effects it might have.

Likewise, industry groups often engage in various forms of self-regulation consistent with antitrust requirements. For example, they often set industrywide standards for product sizes, performance, minimum qualifications for certification, financial responsibility, or other factors that facilitate the interaction of firms. Each of these types of activity can have positive and negative competitive aspects, and antitrust analysis will take these fully into account. So long as such standards are reasonably related to legitimate business objectives sought to be achieved and are no more restrictive than necessary to achieve such results, these activities will generally not run afoul of the antitrust laws. Indeed, DOJ has issued several Business Review Letters indicating it would not challenge such activity. Examples are the Business Review Letter of November 12, 1993, concerning the Household Goods Freight Forwarders Association of America, and Letters of January 28, 1986, and November 23, 1993, concerning the American Society of Travel Agents, Inc.

<u>Information Gathering and Dissemination</u>. Transportation firms can use common entities to gather and disseminate information. For example, such entities may collect information about demand, capacity, existing rate and service levels, and other industry data that will assist participants without violating the antitrust laws. In addition, firms can use such common entities to publish unilaterally established rates and thereby notify their customers of those rates. Such activity occurs quite frequently through industry trade associations or other entities and does not require antitrust immunity. Some of the desired industry data are also collected by the Bureau of the Census.

<u>Procedural Advantages of Removing Antitrust Immunity</u>

Removal of existing antitrust immunity for the surface transportation industry would save substantial time and costs to both the government and private parties by eliminating unnecessary regulatory procedures. In virtually all other areas of our economy, firms are free to engage in such activity without seeking prior approval, subject to the normal operation of the antitrust laws. DOJ only becomes involved in such matters where significant competitive concerns arise.

Moreover, such concerns can be addressed better, as they are in other industries, in the manner normally employed by DOJ using the investigative tools available to them. This work often involves obtaining information on a voluntary, confidential basis from suppliers and customers of the firms under review, who are often reluctant to speak frankly in a public regulatory proceeding if they fear commercial retaliation. Hence, the ability of the agencies to make informal inquiries and, if necessary, conduct formal investigations will not only increase their efficiency, but will also maximize the amount and usefulness of the information that they obtain. In addition, the agencies could tailor their remedies to address only their concerns, without interfering with those aspects of the practice that may not be troublesome, through the use of consent decree or other conditions.

Finally, there is no reason to believe that there will be any significant uncertainty as to antitrust enforcement policies. Firms should be aware of which actions might raise antitrust issues and can seek appropriate guidance, either internally or with outside counsel familiar with such matters. While some shifts in emphasis may occur during different administrations, the fundamental principles outlined above have not changed significantly over time. Rather, they have evolved through the normal process of courts applying established precedent in light of increased understanding of relevant economic principles.

There are several sources of information available to help identify potential problem areas and the likely views of the enforcement agencies. Federal antitrust enforcement officials regularly speak about many aspects of antitrust matters. Such statements are widely reported and are available from the agencies. In addition, each agency has a formal procedure whereby it will provide its views with respect to proposed activity. For example, under DOJ's business review procedure, it issues statements about its enforcement intentions with respect to proposed courses of conduct. Thus, information, predictability, and continuity of decision making are no more a problem here than elsewhere in our jurisprudential system.

DOT Recommendation

DOT recommends that the surface transportation industry be made subject to the antitrust laws applicable to all other industries. Most cooperative activity--even that among competitors--is evaluated under the Rule of Reason. In such an analysis, likely cost-reducing or other procompetitive effects are weighed against any likely anticompetitive harm. Under this approach, practices that could harm consumers, either through collective action or the unilateral exercise of market power, would not be permitted to occur. However, practices that, on balance, did not have such effects would not be prohibited. Moreover, if freed from regulatory oversight, transportation firms would not need to await prior regulatory approval before undertaking beneficial or procompetitive activity. This change would save a significant amount of scarce government resources, as well as time and resources of firms in the industry.

Loss and Damage Claims

Background

The Carmack Amendment to ICA sets out carrier liability rules with respect to loss and damage claims. It preempts state laws and applies to all common carriage by rail, motor carriers, and surface freight forwarders.

The Carmack Amendment provides that a common carrier is liable for loss and damage while the goods are in the possession of the carrier. The carrier is liable for actual loss (provable damages) to the property, limited to the full value of the goods. Carriers are permitted to offer a "released rate," which effectively limits liability to an amount less than the full value of the goods, but only by mutual agreement with the shipper. The 1980 revisions to ICA established somewhat differing liability regimes for motor and rail carriage due to the difference in the nature of carriage. Rail carriers successfully developed negotiated liability limits whereas motor carriers, due both to their large numbers and contentious claims process, have not fully taken this direction.

The claimant may bring action: (1) against the originating carrier at the point of origin of the cargo; (2) against the delivering carrier at the claimant's place of business; or (3) against the carrier alleged to have caused the loss or damage, at the place where the loss or damage occurred. Actions must be brought in Federal or state court against carriers within two years. Although the carrier has the burden of proof to show that it was not at fault, several defenses to liability are available.

Most carriers acquire liability insurance to protect against cargo claims, and most shippers buy cargo insurance. The cost of insurance reflects the risk of loss. Typically, carriers' cost of paying claims is less than 2 percent of total operating revenues.

With respect to loss and damage claims, ICC:

- Requires carriers to file evidence of liability insurance;
- Prescribes procedures for processing claims for loss and damage; and
- Mediates disputes between shippers and carriers regarding loss and damage claims.

<u>ICC Recommendation</u>

ICC concludes that the Carmack Amendment and its implementing regulations provide uniform Federal laws and regulations that efficiently and effectively resolve loss and damage claims. ICC recommends no changes in either the present liability regime or ICC's role in implementing it.

<u>Comments on ICC's Study</u>

All the affected parties fear losing a Federal liability regime and being subjected to the uncertainties of the varying liability laws of the fifty states. In their view, the absence of a Federal liability regime would result in inefficiency, increased litigation, and higher costs of operation. However, aside from agreeing on the need for a Federal liability regime, the affected parties expressed varying views on loss and damage issues.

<u>Carriers</u>. The carriers generally prefer the system of liability as described above. In conversations, motor carriers expressed interest in a stable Federal liability regime with a fixed liability limit--$3 to $5 per pound was suggested as a reasonable range for this limit. Under such a regime shippers would be able to recover provable damages up to the fixed limit on liability. The carriers would also like to continue their ability to negotiate special agreements on liability. They believe that the Carmack Amendment should be expanded to apply to contract carriage, if the distinction between common and contract carriage is otherwise eliminated. The carriers recommend that the ICC continue its dispute settlement functions.

Shippers. Shippers expressed interest in a statutory Federal liability regime with a fixed liability similar to other statutory liability regimes such as that existing in the Carriage of Goods by Sea Act. A liability limit of $5 per pound, with an inflation adjustment linked to the Producer Price Index, appeared to be acceptable to shippers. Shippers also would like to have the flexibility to negotiate special agreements to impose liability in excess of a fixed liability limit, as they now have under the maritime bill of lading and the Warsaw air waybill.

Insurance Companies. Insurers recommend elimination of the distinction between common and contract carriers, thus making all carriers (contract and common carriers) subject to Federal cargo insurance requirements. They recommend that the Carmack Amendment, coupled with the insurance requirements, continue as before in ICC or in another agency.

Comments on DOT's Report

Comments reiterated those made on ICC's report, with additional comment, especially from shippers, to continue Carmack as it is, and not to institute the DOT draft recommendation for a fixed dollar per pound liability limit.

Options

- Retain the Carmack Amendment in its current form, as suggested by ICC;
- Convert the Carmack Amendment into a Federal liability regime with a statutory liability limit;
- Establish a statutory limit with the right of the carrier and the shipper to agree on different limits;
- Eliminate ICC dispute settlement functions;
- Eliminate the distinction between common and contract carriage and bring both under the Federal liability regime; and
- Include transportation intermediaries (forwarders, brokers) under the Federal liability requirements to the extent they act as carriers.

Analysis

The 1975 DOT Cargo Liability Study indicated that the entire cost of compensation for loss, damage, or delay of goods carried by road was only 1.32 percent of operating revenue. Rail carriers' costs of compensation are about the same. Shippers' cost of compensation is also low. The DOT study indicated that it is less than one percent of the value of the goods. Conversations with carriers indicated general concurrence with the results of DOT's 1975 study.

DOT believes that the preferred course is to preserve a Federal liability regime that governs liability for cargo loss and damage. Carriers should continue to be presumed liable, and the defenses to liability should be the same. A Federal liability regime ensures that the parties would not have to deal with differing and possibly inconsistent liability laws of fifty states. Transportation intermediaries should be included under the Federal liability requirements to the extent they act as carriers.

However, there is no need for any ICC (or other Federal agency) role in motor carrier liability issues. The dispute settlement role should be totally eliminated, the resolution of claims left to the parties and their insurance companies, as is done in some other modes of transportation.

DOT Recommendation

Continue the current liability regime retaining Carmack's full value liability, with the right of the carrier and shipper to agree on different limits and eliminate all Federal dispute settlement functions.

Data Collection and Analyses

Background

ICC requires a fair amount of data to be collected, mainly from large rail and motor carriers. These data serve several purposes: first, there are data needed for regulatory actions such as review of carrier rate increases; other data are useful primarily for general oversight and industry planning purposes.

Trucking. Two broad categories of data are currently collected by ICC: (1) financial and operating statistics for Class I and II carriers, with over $1 million in annual operating revenues; and (2) safety, fitness, and insurance coverage information. ICC financial and operating statistics are not often accessed directly by the user community, but generate a large number of derivative reports that are used by industry and government agencies. The quality of carrier financial data is questionable, because ICC has rarely exercised its authority to force responsiveness. Cross checks of the data (internal and external) make them reliable at an aggregate level. No other data source like this one exists.

Major omissions in ICC financial and operating statistics include data on commodity flows, smaller for-hire carriers, private carriers, and carrier costs and pricing. Limited intermodal information is included in the carrier reports, but the reporting quality is questionable. Aggregate private carrier data are sometimes derived by subtracting ICC data (regulated carriers) from other sources of total trucking expenditures. These various types of data are not essential to regulatory functions of the Commission, but are useful for various industry and government analyses.

Safety and fitness information for ICC-certificated motor carriers is obtained from DOT. This information is reliable, but does not cover the entire motor carrier industry. Insurance carriers voluntarily provide information to ICC regarding motor carriers' lapses in insurance coverage. This information is also reliable, but not comprehensive.

Railroad. General financial and operational information is used to monitor the financial health of the rail industry and of individual railroads. More detailed information is required to make jurisdictional threshold determinations in the market dominance phase of rail maximum rate cases, resolve stand-alone cost issues in rail abandonment cases, analyze affected traffic in rail consolidation cases, analyze the costs and revenues attributable to particular traffic groups as pertinent in other types of complaint cases, determine whether individual railroads are revenue adequate, calculate the Rail Cost Adjustment Factor (RCAF), including the productivity adjustment, calculate the Cost Recovery Percentage (CRP), and calculate the ratio for applying the special rate cap for certain recyclable commodities.

ICC currently collects data for Class I rail carriers (those with annual revenues in excess of about $250 million) regarding financial condition, operations (including volumes and costs by cost category), trackage rights, and salaries. Other ICC data include the Waybill Sample and detailed information for individual ex parte proceedings. The cost data is processed through the Uniform Railroad Costing System (URCS). URCS output allows carriers, shippers, governmental agencies, and interested members of the public to estimate the costs of a railroad movement. The Commission also issues four rail-oriented data publications on a regular basis. Major omissions in ICC data include data on smaller carriers and detailed information on contract rates (which are estimated in the Waybill Sample).

Forwarders, Brokers, Pipelines, and Waterborne Traffic. ICC collects very little data concerning forwarders and brokers. All that forwarders are required to file is evidence of cargo insurance; no license is required. It is nearly impossible to identify forwarders who do not comply with this requirement. ICC data for brokers are also minimal. ICC regulates pipeline movements only of commodities other than water, gas, and oil. Consequently, most pipeline traffic does not generate ICC data.

The domestic water carrier industry includes traffic within the contiguous States (inland waterways, intracoastal, Great Lakes, and intercoastal trade) and "domestic offshore" markets (trade between the 48-state mainland and Alaska/Hawaii/U.S. territories). ICC regulation of water carriers is very limited, since most water transportation is exempt from economic regulation. Consequently, relatively little information is collected from water carriers by ICC. However, the Army Corps of Engineers does collect water carrier data.

ICC Recommendation

ICC recommends continuation of data collection for both rail and trucking, but suggests that its publication functions could be terminated.

Comments on ICC's Study

Operating and financial statistics are extremely important to carriers, insurers, financial institutions, and governmental agencies. Commentors believe that data collection should be maintained.

Comments on DOT's report

Comments reiterated those filed on ICC's study.

Analysis

Data currently collected by or under authority of the Commission is used for these purposes: to support the Commission's regulatory activities; to support other necessary public purposes, such as assessing the output and performance of the national transportation system, and to provide general information on the movement of goods and the state of the industry. The data collection requirements have changed over time as ICC's authorities and responsibilities have evolved.

ICC has endeavored to update its data bases and utilize new technologies and new data collection arrangements with industry. However, there appears to be significant potential for rationalizing and streamlining data collection activities in conjunction with the elimination of additional regulatory responsibilities and transfer of remaining activities to DOT. The Department's Bureau of Transportation Statistics (BTS) has the statutory responsibility for implementing long-term data collection programs, issuing guidelines to assure accuracy and reliability, identifying information needs, and other data and statistical assignments.

In the Department's view, BTS should conduct a "zero based" assessment of data needs in the surface freight transportation sector. This assessment would include, among others, consideration of the following factors:

- Identifying data and statistics essential for continuing regulatory responsibilities. This would include, for example, data to support railroad rate regulation, as well as motor carrier safety and insurance requirements.
- Identifying data needed for public purposes. This would presumably include data such as the railroad waybill sample, which is a valuable source of information for public planners, for rail merger cases, for DOT safety programs, and for various industry and shipper purposes.
- Proposing data collection standards, formats and other technical controls, to assure that information meets needs, maintains continuity with existing data bases and, at the same time, can be collected economically and efficiently.
- Exploring various arrangements for collection of data. This might include maintenance of motor carrier insurance data under DOT authority by the insurance industry, a trade association or one or more states (presumably on a self-supporting basis).

Early determination of resource requirements for staffing, data processing, publication, and maintenance would help to make the transition as seamless as possible.

Whichever final needs are identified and wherever the data collection activities reside, decisions would be made promptly on approaches such as joint ventures with trade associations. A number have volunteered in the past to perform data collection activities for a minimal charge. Both the American Trucking Associations, Inc. (ATA) and Transportation Technical Services (TTS) have previously volunteered to perform data management and publication functions for ICC. A precedent already exists; for many years, ATA was a database manager under contract to ICC. Allowing non-government organizations to manage the data programs may be a cost-effective solution, but care would be taken to ensure that the resultant programs are consistent with the scope of post-sunset regulation. Data collection to meet other government needs should be cost justified on its own merits, not simply because "ICC has always collected it."

Even if all ICC data programs were continued, there still would be enormous gaps in freight transportation data. While ICC data programs are useful, they represent only a small part of the overall picture. Along with ICC, other major suppliers of freight data include AAR, FHWA, FRA, and Moody's. BTS anticipates that the 1993 Commodity Flow Survey, conducted by the Census Bureau, will also contribute to the existing body of information.

DOT Recommendation

Undertake a zero-based review of post-sunset data collection needs. Data needed for remaining rail regulation would be collected by, or under contract from DOT. Motor carrier safety and related data will continue to be collected by the Office of Motor Carriers (OMC) or under authority of OMC. For other data that has been collected by ICC, the Department's BTS will take the lead in consulting with public agencies, state and local governments, and affected industries to identify the data needed for transportation planning purposes and for industry use. Cost-effective arrangements for collection and dissemination of that data by private sources such as trade associations, states, Federal agencies, and joint ventures will be recommended. Existing data sources will be used, as far as possible. Quality standards could be identified and arrangements proposed to assure continuity of data bases and a seamless transition.

ICC sunset should be regarded as an opportunity to pare away outdated or redundant data collection, not an opportunity to add paperwork burden to carriers. However, reliable, usable data will become increasingly critical to enacting and implementing good public policy decisions. The conundrum is how to generate the required data in light of reduced regulatory requirements.

RAILROAD REGULATION

Background

ICC administers the economic regulatory regime that Congress has established for the rail carrier industry under ICA and certain other acts. FRA, an agency of DOT, exercises regulatory authority over the safety aspects of rail transportation.

ICC is responsible for deciding rail economic matters such as consolidations, rate reasonableness, operating practices and abandonments. The National Rail Transportation Policy, set forth in ICA, protects shippers and others from the exercise of monopoly power by railroads, and also addresses the need to protect national defense, labor conditions, and community interests that might be adversely affected by the actions of rail carriers.

The rail economic regulatory structure that existed before 1980 developed because railroads, much like public utilities, have certain characteristics of "natural" monopolies: the cost of providing multiple, competitive rail services to each and every shipper is prohibitive. Therefore, many shippers, served by only one railroad when intermodal alternatives were weak or nonexistent, had limited bargaining power in negotiating rates. The regulatory regime that had been established resembled those used for other natural monopolies such as gas, electric and telephone companies. Rail regulation was designed to constrain potential abuses by railroads and to set reasonable rates for shippers. ICC regulated railroad operations such as line construction and abandonment, mergers, conditions of service, and car supply and tariffs. Its objective was to reconcile and balance the conflicting interests of the railroads, shippers, and communities, always with the overarching need for an efficient National rail system.

The emergence of competitive alternatives, chiefly motor carriers, but also pipelines and barges, eroded the monopoly power of the railroads, in part because the other modes operated under significantly less regulation and had considerably more flexibility to tailor rates and services to meet shippers' needs. The railroads, saddled with a rigid regulatory system, were unable to respond effectively or rapidly. By the late 1960's, the Nation was left with a rail industry providing inadequate service at high rates, with a poor safety record and inadequate profit to maintain the system. Only shippers with no alternatives were shipping by rail. In the 1970's, these problems came to a head--a number of eastern and midwestern railroads, representing about one-quarter of the Nation's track miles, were bankrupt.

Faced with this crisis, the Federal government first addressed the rail problems in the northeast, forming Conrail out of the bankrupt railroads, eliminating duplicative lines and investing in the remaining system to develop a property that could be financially viable in the private sector. While this solution ultimately proved to be very successful, it was also extremely costly, particularly at the beginning, when the outcome was still uncertain. Eventually, approximately $7.8 billion was spent buying lines from the bankrupt companies, investing in plant and equipment and other actions necessary to make Conrail self-sustaining. Congress chose not to take the same approach when faced with the bankruptcies in the Midwest. Instead, the lines of the bankrupt carriers were sold to other railroads or allowed to be abandoned.

Congress recognized the critical role that inflexible economic regulation had played in these crises. To prevent complete financial collapse of the industry, it was essential that ICA be revamped to reflect the current competitive markets faced by rail carriers. The Staggers Rail Act, passed in 1980, was the congressional response.

The legislation introduced significant rate deregulation, allowing pricing flexibility where competition is effective to protect shippers from abuse; however, it also retained significant protections for shippers in situations where competition is either absent or weak. Other parts of the Staggers Act show this same balance between railroad flexibility and shipper protection. For example, the approval process for line abandonments was shortened considerably, recognizing the carriers' need to divest assets no longer producing sufficient revenues. However, Congress also ensured that local rail service could be maintained, by mandating that those willing to continue rail operations could acquire an abandoned line at below-market cost.

The most significant reform of the Staggers Act was the recognition of the need for differential pricing in the rail industry. The widespread availability of alternatives for most railroad traffic means that a railroad must set rates to meet its competition. Regulations requiring all shippers to bear a similar proportion of overall rail system costs would soon drive away traffic that has a lower cost alternative (as was the case in the 1960's and 1970's). Captive shippers, those with no alternative but rail, would be left bearing all the costs of rail service--or the carrier would be forced into bankruptcy. Railroads must be allowed to exercise some market power to earn sufficient returns to modernize their infrastructure and to continue to provide rail services, both to captive shippers and to those with alternatives. The ability to practice price discrimination has allowed railroads to improve return on investment by charging relatively higher rates to captive shippers without alternatives while at the same time offering more competitive rates to those shippers with alternatives. This has benefited captive shippers by assuring that non-captive shippers are bearing some of the cost of providing and maintaining the infrastructure. The Staggers Act recognized that railroads could achieve and maintain financial health only by charging shippers different rates depending on the degree of railroad market power.

As a result of the Staggers Act reforms, the health of the industry has improved significantly: for the 12 months ending September 30, 1994, the railroad industry earned an average 8.4 percent return on its net investment base, in contrast to an average ROI of 4.2 percent in 1980. Carriers have invested approximately $190 billion in infrastructure and equipment since 1980, allowing much needed rehabilitation and modernization of the nationwide rail system. The flexibility provided by the Staggers Act has allowed the rail industry to maintain its overall market share of 38 percent of traffic (based on intercity ton-miles) as ton-miles overall have risen, particularly for intermodal traffic. Overall real (inflation-adjusted) freight rates have dropped 1.6 percent annually since 1980; coal rates have declined 1.8 percent per year, grain and chemicals 1.2 percent, and miscellaneous mixed freight (a major component of rail intermodal traffic) 2.2 percent, indicating that a wide cross section of rail shippers have benefited from Staggers Act reforms.

The rail industry is now relatively healthy, and the critical freedoms of the Staggers Act must be maintained if it is to remain financially successful. Moreover, the basic shipper protections that were incorporated in 1980 are still needed to ensure that rates and services for captive traffic are reasonable. However, there are many aspects of the rail regulatory system that can be revised, modified or even eliminated in light of today's, and tomorrow's, competitive realities.

ICC Recommendation

ICC report concludes that continued Federal economic regulatory oversight of rail freight transportation is necessary, and that an independent agency is best suited to conduct these functions. ICC suggests that where rail carriers retain monopoly power over certain sectors of traffic, regulation is necessary to protect "captive" shippers from the abuse of that power. ICC also concludes that continued regulatory oversight "ensures that the interests of privately-owned railroads do not subordinate the public's interest in the same matters." Federal regulation is needed to preempt local or state control of the rail network to ensure "uniformity and cooperation in the use of a rail network comprised of numerous carriers operating across many jurisdictional boundaries."

ICC suggests that the following rail matters no longer require oversight. It recommends repealing:

- special provisions for rail securities;
- rail rate equalization provisions;
- intermodal ownership restrictions;
- antidiscrimination provisions relating to recyclable commodities;
- valuation of rail carriers' property;
- regulation of the discontinuances of local and regional (non-Amtrak) rail passenger services.

"Given the highly adversarial and adjudicatory nature of rail regulatory proceedings," ICC also recommends that any retained rail regulatory functions be housed in an independent regulatory agency. Independence also may be needed to avoid possible conflicts with the executive branch in matters where "the executive branch has a pecuniary interest in the outcome of a proceeding," such as matters involving Amtrak.

__Comments on ICC's Study__

DOT received comments from several groups concerning the rail portions of ICC Report. AAR believes that the ICC report is predicated on the false assumption that railroads still retain widespread market power. Absent market power, ICC fails to make "a persuasive rationale for continued regulation." AAR recommends "that ICC issue exemptions from regulations in every instance except those where railroads have been shown to have--and to have abused--market power." AAR also believes that ICC should continue as an independent agency. Questions concerning ICC's size, structure and location should follow from the analysis of the nature and scope of ICC's substantive functions. AAR makes a number of recommendations for retaining, eliminating, or amending the law relating to specific ICC functions.

The National Industrial Transportation League (NITL) commented that it generally supported ICC report. In particular, NITL agreed that regulation of railroad rates and practices should be retained. NITL urged a more vigorous effort to extend competitive access provisions to increase competition. NITL agrees with ICC that a number of regulatory functions should be curtailed. NITL supports independence for "adjudicatory functions in areas where such independence is critical to the fairness of the decisional process."

The Institute of Scrap Recycling Industries (ISRI) commented that it supports the retention of the statutory maximum rate ceiling on nonferrous recyclables, in contrast to the ICC position that it will institute a rulemaking to consider an exemption from the rate ceiling for recyclables.

The Kyle Railways, an operator of shortline railroads, commented in support of ICC's use of the class exemption for sales of lines to new carriers. However, they believed that ICC should have considered reducing the "long and involved environmental review process that its regulations mandate" for minor abandonments. They also stated that ICC should consider reviewing the "generous labor protective conditions in mergers or trackage rights proceedings" to determine whether another approach, more consistent with "today's marketplace constraints" might be more appropriate. Kyle supports an independent ICC, and believes that shortlines need certain provisions, administered by ICC, to safeguard their interests, for example, the line-crossing, interchange and terminal-access provisions, and the authority to prescribe joint rates.

The United Transportation Union (UTU) expressed disappointment with ICC's report. In general, UTU supports continuation of ICC jurisdiction in areas that protect the public. Specifically, UTU urged retention of ICC oversight or administration of rates on nonferrous recyclables, the commodities clause, railroad securities, valuation, and passenger transportation. UTU supports the continuation of ICC as an independent agency.

The Transportation Trades Department (TTD), AFL-CIO, also supports continuation of ICC in its present form. Additionally, it supports continuation of the rail labor protections administered by ICC. TTD believes that transferring ICC functions to DOT, even under an arrangement similar to the Federal Energy Regulatory Commission (FERC), would be a mistake, due to the quasi-legislative and quasi-judicial role ICC performs. A means of insulating decisions from "disruptive partisan pressures" is needed.

The American Short Line Railroad Association (ASLRA) urges the continuation of some Federal economic regulatory oversight of rail freight transportation and believes an independent agency is best suited to conduct these functions. ASLRA urges retention of ICC to prevent regulation of interstate commerce by the individual states and believes ICC needs to continue to have authority over: mandatory interchange between rail carriers, car service and car hire, switching service, private contracts, rate discrimination, joint rates, reasonable practices, tax discrimination, rail mergers, line sales and labor conditions. However, ICC need no longer, in their view, provide oversight over rail securities, rate equalization, anti-discrimination relating to recyclables, valuation, and control of non-rail carriers.

Comments on DOT's Report

With regard to railroad regulation, shippers generally supported: creation of an independent agency within DOT to inherit retained railroad functions, retention of the current maximum rate regulation scheme for protection of captive shippers, guaranteed rail access; oversight of car supply; preemption of state regulation of abandonments, continued collection of rail data, and retention of the Carmack cargo liability regime. Grain shippers, in particular, supported retention of the railroad agricultural contract filing requirements.

Analysis

ICC believes that because "(t)he rail industry needs consistent application of policies from administration to administration to protect long-term investments and foster long-term stability," there must be an independent regulatory agency like ICC. DOT agrees that limited Federal economic regulatory oversight of freight transportation by rail carriage is necessary to deal with maximum rate and certain passenger transportation matters. However, the regulatory workload could be reduced, both by statutory elimination of requirements that are no longer needed and by more effectively administering those requirements that have a useful purpose.

Repeals or cutbacks in ICC's current regulatory authority should not revive common law or state jurisdiction. Without Federal preemption, rail transactions would be subject to numerous state and local laws. Securing approval for actions would become more, rather than less, burdensome, and transactions that promote efficiency in the rail industry would be jeopardized.

There are four general areas of rail economic regulation that can be regarded as ICC's most significant responsibilities: mergers, maximum rates, passenger issues, and abandonments.

Railroad Mergers and Consolidations

It is the policy of the United States to exercise oversight of mergers in all industries to determine their competitive impact. Railroad mergers are subject to approval in advance by ICC, under a broad set of guidelines that includes an examination of competitive impacts; the effect of the proposed transaction on transportation to the public; the effect of including, or failing to include, other rail carriers in the proposed transaction; the total fixed charges that would result from the transaction; and the interests of the carriers' employees. ICC may design particular conditions to mitigate anticompetitive or other adverse effects of a merger, denying approval unless the conditions are implemented. Depending on the size of the merging parties, railroad merger proceeding can take from just under 12 months to almost 3 years. However, ICC has recently shortened the process to 180 days and is evaluating the Burlington Northern-Santa Fe merger under this expedited schedule. Any interested party may file comments and evidence, and the decision is made based on the public docket. ICC approval confers antitrust immunity as well as immunity from other Federal and state laws that might block the transaction. Labor protection is mandated for employees who are affected adversely because of the transaction.

In contrast, mergers in almost every other U.S. industry are subject to the standards of the Clayton Act, as administered by DOJ and the Federal Trade Commission (FTC). These standards focus solely on a merger's competitive impacts and the efficiencies generated by the consolidation. Like ICC, these can challenge a consolidation that is likely to substantially lessen competition. Typically, DOJ and FTC work with the parties to restructure a problem transaction.

The review process under the Clayton Act is considerably shorter than ICC merger proceedings to date. According to DOJ, even mergers with complicated competitive issues can be resolved in less than 1 year. In part, this is due to the nature of the process. There is no requirement to hold a public proceeding, and DOJ can target its investigation to cover only those shippers affected by the competitive impacts of the merger. Therefore, the review process is not delayed by lengthy procedural or discovery disputes, often initiated by competitors trying to block the consolidation. Where competitive concerns cannot be resolved, DOJ must prove its case in open court. Consent decrees resolving cases are subject to an open "public interest" review.

Although such suits are rare, mergers reviewed under the Clayton Act procedures are not immune from challenge by private antitrust suits seeking treble damages.

Railroads are not fundamentally different from other U.S. industries, particularly other network-type sectors such as telecommunications and pipelines. Although the Clayton Act standards would appear to be more narrow than the wide-ranging approach under ICA, the Commission's merger decisions in the past 15 years have focused primarily on the competitive impact of the mergers on shippers. The Clayton Act provides sufficient protection against anticompetitive impacts of a rail consolidation, and, like ICA, ensures that efficiencies inherent in a merger are given sufficient weight. All industries, including rail, have some distinguishing characteristics. The issue here is whether the rail industry's characteristics are so different from all other industries as to justify special exemptions under the antitrust laws.

DOT Recommendation: The specialized provisions for reviewing and deciding mergers under ICA should be repealed, and rail mergers should be subject to the antitrust laws and reviewed by the Department of Justice. Labor protection requirements can continue to be mandated--see discussion below.

Rate Regulation

ICC, under ICA, has responsibility for assuring that railroad rates and other practices are reasonable. When rail rate regulation was established, railroads had a near monopoly on most intercity freight shipments, other than those that could move by water. "Originally, rail rate regulation was designed to ensure fair, nondiscriminatory pricing for all rail shippers." With the growth of the trucking industry, and other major changes in the economy, railroads' ability to raise rates beyond a "reasonable" level diminished rapidly. Indeed, by the 1970's, the railroads' dire financial condition prompted Congress to begin deregulating the rail industry. The Staggers Rail Act of 1980 recognized this shift in the market and ended ICC regulation except where competition was absent or ineffective. Rates that meet certain conditions (primarily meeting or exceeding a rate-to-variable cost ratio) are now presumed reasonable; even for rates meeting this prima facie test, ICC is required to determine that competition is ineffective before it may prescribe a maximum reasonable rate.

Only about 16 percent of rail traffic, based on revenues, moves under rates subject to ICC review. This is the case for three reasons. First, most traffic does not meet the prima facie rate-to-cost threshold test. Second, the Commission has used its authority under 49 U.S.C. 10505 (described more fully below) to exempt major classes of traffic (including intermodal shipments, boxcar traffic, and most grain products) from all regulation, because there is sufficient competition to ensure reasonable rates. Finally, a significant proportion of rail shipments moves under contracts negotiated between shippers and carriers, and ICC has no authority to review contract rates.

The relatively few maximum rate cases that have come before ICC in recent years suggest that there are few "captive" shippers. However, it is also clear that not all rail markets are competitive. In addition to the roughly 16 percent of traffic cited above, there are shipments now moving under contract that could meet the threshold test if they were to move under tariff rates. Many shippers of coal, grain, and chemicals strongly support continued maximum rate regulation, since they believe they have few economic alternatives to rail transportation. "Consequently there remains a clear need for continued economic regulatory responsibilities to protect shippers from the potential for exercise of monopoly power."

<u>DOT Recommendation</u>: It is essential that the existing statutory protections for captive shippers established by the Staggers Act be maintained. Differential pricing, administered through the market for most shippers, is the most effective way of balancing railroad and shipper needs. For shippers where competition is absent or ineffective, the rate reasonableness procedures provide an effective simulation of a market-based price. However, the Constrained Market Pricing approach to developing the simulation, established administratively, can be refined further and simplified through rulemakings so that smaller shippers and those with fewer financial resources can afford the time and costs of pursuing a maximum rate complaint.

Additionally, captive shippers believe they receive poorer service than their more favorably located competitors; reduced service is often equivalent to increased rates. Retention of regulation of reasonable railroad practices with regard to these shippers is discussed more fully below.

Passenger Transportation

ICC has jurisdiction over passenger rail transportation as well as freight transportation. With the demise of the private rail passenger industry and the formation of Amtrak, most of ICC's activities in this area relate to adjudicating disputes between Amtrak and the freight railroads over whose tracks Amtrak operates (and, conversely, similar disputes in the relatively rare cases where a freight carrier operates over Amtrak's track.) ICC also has jurisdiction over aspects of commuter rail services, including authority to regulate route discontinuances. Additionally, with the growth in commuter rail services, ICC is seeing more cases related to commuter rail access to freight railroad lines.

DOT Recommendation: It is essential that a forum continue to be available to resolve issues between Amtrak and the freight railroads as issues of track access, fees, and other matters continue to arise. Absent such an organization, disputes would be resolved by the courts, a long and expensive process with an uncertain outcome given their lack of rail expertise.

With respect to commuter issues, there is no need to continue Federal oversight of service starts or discontinuances. This oversight was needed when privately-owned railroads provided commuter service, to balance community interests with a carrier's financial needs. Today, commuter service is provided by public agencies, either directly or through contracts with private operators. However, there is still a need for Federal oversight on issues concerning commuter rail access to freight right-of-way, to ensure an appropriate balance between the requirements of interstate commerce and commuter passenger traffic.

Line Abandonments

A railroad may not abandon or discontinue service over a rail line without prior approval from ICC. ICC must balance the railroad's need for adequate revenues with the community's need to preserve necessary service. Lines where there has been no local traffic for at least 2 years may be abandoned automatically, under an exemption established by ICC. ICC also has, as a policy, granted approval for abandonments where the carrier's costs were not covered by revenues generated by the line.

ICC's process provides notice and opportunity for shippers, communities and new operators to develop alternatives to abandonment. Under the Staggers Act, ICC can require a railroad to sell a line proposed for abandonment to another operator at the line's "net liquidation value," even if the railroad has higher offers for the line for nonrail use. This is to assure that, if at all possible, rail service can be maintained. This provision has been extremely successful --according to ICC, 350 small railroads have been formed since 1980 to provide local and regional rail service.

There are a number of ICC programs that relate directly to ICC's authority over abandonments:

Financial Assistance Program. The Staggers Act provides incentives to preserve rail service on lines that would otherwise be abandoned. In order to maintain uninterrupted service, ICC has a program that sets conditions for developing purchase prices or subsidy agreements for such lines. ICC also examines the financial credentials of potential purchasers or subsidizers, to ensure that abandonment applications are not subject to undue procedural delays because of impractical offers.

Rails-to-Trails. This program facilitates voluntary preservation ("railbanking") of rights-of-way that would otherwise be abandoned, by working with carriers, States and local groups to convert otherwise unwanted lines into non-motorized trails.

Feeder Line Development Program. This program allows ICC to require the sale of a rail line whose shippers are not being adequately served. Generally, these cases (which have been rare) seem to occur when a railroad is considering abandoning the line or is otherwise in financial difficulty.

DOT Recommendation: Federal oversight over abandonments should be retained to ensure adequate notification to affected shippers and communities, and to administer programs that promote creation of shortline railroads and railbanking. However, the requirement of agency approval for abandonments would be replaced by a notification requirement sufficient to allow interested parties to make offers of purchase or financial assistance.

Other ICC Functions

ICC has a number of other responsibilities in addition to the four major functions discussed above. Many are critical, in some form, to carry out the Staggers Act's twin goals of allowing competition to function, while protecting shippers where competition is nonexistent or ineffective. Some provisions are anachronisms that have outlived their usefulness. Others, while minor, are very necessary. The following discussion analyzes the most important functions DOT recommends be maintained, either as they currently exist or in modified form, as well as functions that can be eliminated as unnecessary or outmoded.

Exemptions. One of the primary aims of the Staggers Act was to give the rail industry the flexibility to provide services and rates in a competitive market. The exemption provision charges ICC to exempt rail carriers, services, and transactions from regulatory scrutiny where the agency finds that regulation is not necessary to carry out the Rail Transportation Policy, and the transaction or service is of limited scope or shippers do not need protection from the abuse of market power. (ICC may not exempt carriers from intermodal ownership prohibitions, from loss and damage obligations, or from labor protection obligations.) ICC also has the authority to revoke an exemption if it finds it to be necessary.

The exemption provision has proven to be one of the Staggers Act's most significant innovations. Using this broad authority, ICC has exempted significant classes of traffic subject to intense competition--e.g., intermodal shipments, perishables, and a wide range of manufactured items. It has also exempted transactions such as line sales to new carriers, joint relocation projects, voluntary trackage rights agreements and, under certain circumstances, abandonments. The traffic exemptions have allowed railroads to retain or increase market share and meet competition by offering innovative rates and services without regulatory lag. The exemptions of transactions have lifted significant paperwork burdens for actions that were approved routinely, thus cutting administrative costs for the railroads (and ultimately, shippers) and ICC itself.

DOT Recommendation: This authority to lift regulatory requirements without resorting to Congressional action should be retained, and used aggressively by the Department (as AAR suggested in its comments). It has proven to be a particularly useful way to promote competition and eliminate costly regulatory lag and unnecessary paperwork.

Line transfers, leases and trackage rights (49 U.S.C. 11343) and line sales to non-carriers (49 U.S.C. 10901). 49 U.S.C. 11343 covers oversight and approval of "[a]greements between carriers for a transfer of operating authority from one railroad to another or for joint use of facilities--by line sales, leases, or trackage use arrangements--require prior review and approval by ICC under a public use standard. ICC approval automatically confers antitrust immunity from other Federal and state laws that might otherwise be used to block such a transaction."

Section 11343, which applies to transactions between existing carriers, covers consolidations of operations short of the merger of two complete rail systems, for example voluntary trackage rights, sales, and joint facilities operations. Many of the routine actions under this provision have been exempted under 49 U.S.C. 10505, most importantly transfers between carriers that do not create a contiguous rail system. (Transfers that facilitate a contiguous system could, under certain circumstances, approach a merger, which would require considerably more scrutiny.) Approval, whether through the exemption process or through ICC review, preempts otherwise applicable state regulations. Employees affected adversely by these transactions may be entitled to labor protection, overseen by ICC under 49 U.S.C. 11347.

49 U.S.C. 10901 covers line sales to "noncarriers"--that is, new railroads. ICC applies a broad "public convenience and necessity" standard in deciding these matters. There are two major purposes of this provision: (1) to ensure that the public is not harmed by transfers of lines to entities that are not able to provide needed rail service, and (2) to ensure that the buyer is truly a "noncarrier," since labor protection is not mandated for transactions under this

provision, in contrast to those falling under 49 U.S.C. 11343.

Many of the 350 shortline railroads created since 1980 and still operating were formed by sales under Sec. 10901, preserving local service (and over 8,000 local jobs), on lines that would otherwise have been abandoned by Class I carriers. ICC's chief concern has been to ensure that these sales are indeed sales to a new "noncarrier" and not sham transactions designed solely to avoid labor protection. Many transactions under this provision have been exempt from filing requirements, except for advance notification, with the burden on opponents of a transaction to demonstrate why the Commission should investigate the sale in depth.

DOT Recommendation: The issues faced in reviewing transactions under Sections 11343 and 10901 are similar to those involved in reviewing rail mergers and consolidations; therefore, DOT recommends that overall responsibility be transferred to DOJ, for review under the antitrust standards. Labor protection requirements for transactions involving existing carriers should continue. (See discussion below.) However, it is important to continue to distinguish between sales to existing and new railroads in order to stimulate creation of new shortlines and preserve local rail service. Therefore, we recommend that the provisions be revised to preserve authority for DOT to rule on whether the purchaser of a line is an existing carrier or a noncarrier. This responsibility could continue to be exercised under the exemption procedures established by ICC.

Labor protection. ICC is required to impose labor protective conditions on three categories of rail transactions: rail carrier consolidations; lesser forms of inter-carrier consolidations through line transfers, leases, and trackage rights arrangements; and line abandonments. These conditions must provide an arrangement that is at least as protective for employees who are adversely affected by the transaction as the protection historically imposed by ICC and contained in the legislation creating Amtrak. Protection imposed in these transactions is not subject to bargaining under Railway Labor Act procedures, thus eliminating any lag in implementing the transaction.

DOT Recommendation: To preserve smooth and rapid facilitation of mergers, other consolidations, line sales and abandonments, this provision should be retained and administered by the Department of Labor. This would be consistent with the administration of section 13(c) of the Federal Transit Act dealing with mass transit systems.

Reasonable Practices. Under this provision, ICC reviews a railroad's practices with regard to shippers, including such items as storage charges on empty rail cars, use of privately owned cars, and inspections of grain cars. As the ICC states, "The regulation of unreasonable practices is a corollary to the regulation of unreasonable rates."

DOT Recommendation: Authority over practices is appropriate in cases where rate regulation is necessary (e.g., for captive shippers), since a railroad might be able to change its practices in lieu of a rate increase (e.g., raise storage charges on cars). If a railroad does not have market power over the shipper, the carrier's ability to engage in unreasonable practices is limited. Therefore, jurisdiction over reasonable practices should be modified to cover only those circumstances involving captive shippers.

Rail Car Supply and Interchange. ICC has authority over the terms and conditions--including price--under which railroads make their equipment fleet available to shippers and other carriers. Railroads may set these terms and conditions collectively through agreements that receive antitrust immunity; antitrust immunity may also be granted to car pooling agreements. These agreements are designed to ensure that cars can be interchanged freely and efficiently throughout a nationwide rail system.

Regulated or collectively-set rates cannot ensure that the carriers will acquire and maintain sufficient equipment to serve shippers. Recognizing that market-based pricing is the only way that carriers can earn a rate of return that will allow investment to sustain an adequate car fleet, ICC has completely deregulated the setting of prices--per diem, or car hire--for some types of rail equipment, including trailers used in intermodal service; car hire for all other equipment is being deregulated over a 10-year period, based on an agreement negotiated among all classes of railroads and other car owners, and adopted by ICC.

DOT Recommendation: Agreements concerning operating practices and rules do not normally violate the antitrust laws, and removing antitrust immunity should not jeopardize efficient rail car interchange. We recommend that antitrust immunity be repealed and that agreements and practices be reviewed under the antitrust laws. However, regulatory authority over car hire and supply should be retained to assure the negotiated agreement over car hire rates will be completely phased in and maintained indefinitely.

Rail Service orders. ICC issues orders that authorize a rail carrier to use the equipment or lines of another rail carrier that suddenly fails to provide service, e.g. bankruptcy, natural disaster.

DOT Recommendation: This function should be retained to preserve service to shippers in emergencies, should agreements between carriers not be reached in a timely manner.

Competitive access. This authority covers applications to grant one railroad reciprocal switching or terminal access trackage rights over another railroad. It is rarely used although it does provide a mechanism to increase competition in cases where such a remedy is deemed appropriate. Competitive access is another tool for assuring shippers receive adequate service at reasonable rates.

A number of shipper groups expressed the hope that competitive access could be expanded significantly to guarantee each shipper access to at least two railroads. One group asserted that it would gladly trade expanded competitive access for maximum rate regulation.

However, competitive access must be exercised judiciously, since granting a railroad permission to operate over another railroad's line raises issues of proper compensation, and certainly poses the danger of financial harm to the railroad forced to admit a competitor onto its tracks. There are markets that cannot financially sustain more than one railroad, even if there is no other competition from motor or water carriers. If adequate compensation to the owning carrier is not assured, there is a distinct danger that the railroad will not have a return sufficient to maintain its investment in the right-of-way, causing service to shippers to deteriorate, not improve.

DOT Recommendation: Competitive access authority should be retained in its current form. However, it should only be considered as a remedy in captive shipper situations.

Line Construction. ICC approval is required for the construction of new rail lines or line extensions. The original purpose of this provision was to protect railroads from themselves, by assuring that construction projects would not drain the resources of the railroads and reduce their ability to serve existing shippers. Currently, the Commission's review covers all environmental and community impacts of the construction, and approval prevents attempts by competitors to block crossing of their rights-of-way. (According to ICC, most of these cases involve extending a line to offer a shipper, often a utility or a mine, a competitive alternative to the service offered by its existing rail line.) Since ICC approval is a Federal action, these projects must be reviewed under the National Environmental Policy Act, which often means an environmental impact statement must be prepared.

DOT Recommendation: This provision should be retained, in a modified form, to preserve the ability of railroads to construct a new line where it would cross another railroad's line. It is important to ensure that new service cannot be blocked by other carriers seeking to prevent additional competition; however, it is also critical to address issues of compensation associated with construction and operation when it interferes with operations on the crossed line.

Recordation of Liens. A mortgage, lease, equipment trust agreement, or conditional sales agreement relating to a railroad car or locomotive filed with ICC "is notice to, and enforceable against, all persons," and satisfies other Federal or state laws relating to the recordation of documents. Without a centralized nationwide system, financing documents related to rolling stock would have to be recorded in 49 states, Canada, and Mexico, because U.S. equipment moves about so widely. (In some states, recordation would have to be made in every county as well). To maintain the recordation system privately at a national level would require amending the Uniform Commercial Code to preempt state law.

DOT Recommendation: The system, administered at low cost by ICC, is very effective and a valuable service. Requiring recordation of liens at the state (or county) level would be extremely burdensome and costly for an industry that operates nationwide, and might add significantly to the cost of financing rail equipment. Therefore, we recommend the system be maintained, funded entirely by user fees. DOT will study the possibility of contracting out the actual operation of the system to determine if it would produce cost savings.

State Certification. Since the Staggers Act, states may not regulate intrastate railroad rates and rate-related matters except in accordance with the standards and procedures of ICA, and only if ICC certifies that the state's standards and procedures comply with ICA. (States that are not certified may not regulate intrastate rail service in any fashion.) In the 1970's, restrictive state regulations on abandonments and rates contributed significantly to the rail industry's decline. This provision was included in the Staggers Act to ensure that restrictive state regulation does not hinder interstate commerce or interfere with the interstate rail system, or thwart the regulatory reforms of the Act.

DOT Recommendation: Federal and state rail economic regulation must be consistent. However the certification procedures are a cumbersome means of achieving this consistency. Instead, state authority in this area could be preempted by statute, as it has been with motor carrier regulation, under P.L. 103-105.

Rail/Shipper Contracts. The legalization of railroad/shipper contracts, with the exemption provision discussed above, has proven to be among the most important reforms of the Staggers Act. Prior to 1980, railroad contracts were held to be anticompetitive, despite the fact that such agreements were legal for barges and motor carriers. Nevertheless, ICC had long held that rail contracts "tied up" traffic covered by the agreements, preventing other carriers carrying the shipments as long as the contracts were in force.

Since 1980, rail contracts have been widely accepted. Over 15,000 new or extended contracts are filed annually, covering all classes of traffic, with terms ranging from several days to several years. It is clear that they have become a routine way of doing business for both railroads and shippers. However, certain statutory limitations and reporting requirements, imposed when rail contracts were a new concept, have outlived their usefulness.

Specifically, there is still a statutory requirement that railroads file contract summaries that contain nonconfidential data, although ICC granted a partial exemption in 1992 that requires filing only a summary for nongrain contracts. Grain contracts have not been exempted, and the statute requires that the full text be filed. Railroads must have advance approval to commit more than 40 percent of any one car type to contract service. Grain shippers and ports have certain rights to challenge contracts as discriminatory, although ICC indicates that these rights have been very infrequently exercised.

<u>**DOT Recommendation**</u>: Fifteen years of successful experience with rail/shipper contracts appears to have mitigated, if not completely eliminated, much of the apprehension with which these agreements were greeted in 1980. It is time for contracts involving railroads to be treated in the same manner as contracts in any other industry. They should be unregulated, completely confidential, and enforceable in court. Additionally, as with other industries, no shipper should have the ability to challenge another's agreement. Therefore, the filing and specialized antidiscrimination requirements should be repealed. Additionally, the requirement for advance approval for assigning more than 40

percent of any car fleet to contract service should be eliminated.

Rates on Nonferrous Recyclables. Congress has established a number of statutory provisions to encourage industrial use of recyclable materials. In particular, for recyclables other than scrap iron or steel, rates must be maintained at revenue-to-variable cost ratio levels no greater than the average cost ratio that carriers would be required to realize in order to cover total operating expenses plus a reasonable profit.

ICC recommends elimination of discrimination provisions that favor shippers of nonferrous recyclables and suggests considering an exemption from rate ceilings.

DOT Recommendation: Treating recyclable shippers more favorably than other shippers can be justified only on the basis of a public policy to encourage recycling. However, even if such a public policy is warranted, it is not appropriate for the rail industry to be the subsidizer. The need to force railroads and other shippers to cross-subsidize recyclable shipments is questionable. Moreover, intermodal competition will likely assure competitive rates. These provisions should be repealed, and recyclable rates should be set by the market.

Rate Discrimination. A railroad "may not subject a person, place, port, or type of traffic to unreasonable discrimination" (49 U.S.C. 10741(b)). Additionally, this provision deals with concerns about shippers being charged a greater rate for shipments over a portion of a route than the rate for shipment over the entire route ("the long-haul/short-haul provision"). The rate discrimination clause was intended to prevent shippers from being denied "equal" access to the national rail system through disparate pricing. Contracts, joint rates, and rates over different routes are not subject to the provision, and the Commission has exempted all rail rates and charges from the need for approval prior to departing from the long-haul/short-haul provision.

DOT Recommendation: This provision is a holdover from the pre-Staggers Act era when rate equalization was the norm, and carriers practiced collective ratemaking. It is an anachronism that runs contrary to the Staggers Act's emphasis on flexible and competitive ratemaking. It should be repealed.

Commodities Clause. A railroad may not transport in interstate commerce an article or commodity (other than timber and timber products) that is owned by the carrier or manufactured, mined, or produced by the carrier or under its authority unless the commodity is necessary and intended for use in the business of the carrier (e.g., ballast). This provision prevents railroads from competing with shippers whom they serve. While this ban may have had some justification in an era when railroads had significant monopoly power, and owned mines or mineral rights, it seems irrelevant today. To the extent that there is any concern regarding this issue, it is that the commodity clause inhibits the purchase of lines that would otherwise be abandoned by shippers located on those lines.

DOT Recommendation: This provision serves no purpose in today's environment, and should be repealed.

Interlocking Officers and Directors. A person may not serve as a director or officer of more than one rail carrier unless ICC has determined that public or private interests will not be adversely affected. This restriction is intended to prevent one carrier from being operated for the benefit of another resulting in a lessening of competition.

DOT Recommendation: There is no need for the railroad industry to have greater restrictions on officers and directors than other industries. This provision should be repealed.

Railroad Securities. By statute, railroads are required to obtain ICC authorization to issue securities or to assume an obligation or liability with respect to the securities of another. Unlike securities in other industries, ICC's authority protects railroad securities from review and revision by States.

DOT Recommendation: This provision predates the current broader securities laws. There is no reason to continue separate requirements and review procedures for rail securities. The Securities Exchange Commission, states, and other government entities should be able to adequately deal with any issues this provision was designed to address.

Rail Valuation Studies. ICC is charged with valuing all property owned or used by each rail carrier. These determinations of "fair value" were intended to supply the basis for determinations of rate reasonableness. ICC now relies on book value, rather than independent field evaluations, to value property for regulatory purposes.

DOT Recommendation: There is no reason to retain this provision.

Minimum Rates. Rail carriers are prohibited from establishing rates below a "reasonable minimum" to protect railroads from rate wars and "destructive competition." The Commission has held that this minimum is effectively the "out-of-pocket" costs incurred in providing the service.

DOT Recommendation: In today's market, with significant intermodal and intramodal competition, ease of entry for motor and water carriers as well as comparatively easy entry (through purchase of existing lines) for rail, there is no longer a need to protect competitors from each other. This authority should be repealed.

Common Carrier Obligation and Mandatory Interchange. Railroads are required to provide transportation "on reasonable request (49 U.S.C. 11101(a))." This requirement assures the smooth functioning of the National rail network, assuring shippers and other railroads that all railroads will accept and transport cars and commodities that are tendered, if they comply with safety and other established interchange requirements.

DOT Recommendation: The common carrier obligation and mandatory interchange requirements should be retained to assure an effective National rail network.

MOTOR CARRIER REGULATION

Licensing and Insurance

Background

Since the Motor Carrier Act of 1935, for-hire trucking companies transporting regulated commodities in interstate commerce have been required to obtain a license from ICC. Initially, entry was restricted by imposition of the "public convenience and necessity" standard on carriers applying for operating authority.

After nearly half a century of strict regulation, there was a major shift in policy. MCA codified many of the deregulatory reforms undertaken by ICC in the late 1970's. MCA substantially reduced entry restrictions, although it continued to require applicants to show that they were fit, willing, and able and to demonstrate that the proposed service would serve a useful purpose responsive to a public demand or need. TIRRA affirmed congressional intent that entry controls should be limited to safety and insurance requirements (except those seeking household goods authority and passenger operations).

Except for the insurance filing requirements, the standards for obtaining an ICC license are now essentially limited to DOT's determination of safety fitness. Non-ICC-regulated firms are required by regulation to obtain a DOT identification number for safety tracking. Trucking companies wishing to obtain ICC operating authority to operate in interstate commerce are merely required to demonstrate safety fitness (e.g., familiarity with DOT's safety regulations) and to meet minimum insurance coverage standards. Levels of insurance are prescribed by statute. Carriers that do not meet these requirements at the time of application are not permitted to begin operations. After a license has been obtained, a carrier must continue to conform to these requirements or else face suspension or revocation of its license.

ICC and DOT regulations have a common goal: ensuring that for-hire motor carriers meet levels prescribed in the insurance statute and operate in a safe manner. However, there are fundamental differences in the way these goals are pursued and in the populations of carriers that are subject to regulation. For example, only 55,000 for-hire carriers (about 20 percent of all interstate motor carriers) are subject to ICC jurisdiction. This relatively small proportion of the carrier population accounts for nearly 50 percent of all interstate trucking revenues and a higher percentage of revenues for interstate household goods carriers.

The levels of financial responsibility required by ICC and DOT are identical, but enforcement is very different. Passenger carriers using vehicles transporting 16 or more persons are required to have at least $5 million in insurance ($1.5 million for smaller vehicles). For-hire freight haulers must have at least $750,000 in insurance, except for hazardous materials ($1 million or $5 million, depending on the material). However, DOT's insurance requirements for freight (non-hazardous materials) are applied only to vehicles above the 10,000 pounds rating. Private carriers, except for certain private hazardous materials carriers, are exempt from DOT's insurance requirement, as well as from ICC requirements.

ICC Insurance Compliance

ICC has an automated insurance monitoring system, which is updated daily, to monitor insurance compliance of carriers subject to its jurisdiction. ICC receives notification from insurance companies 30 days in advance of the expiration or cancellation of a carrier's insurance. In response, ICC sends a notification letter to the carrier informing it that in order to keep operating it must either renew the existing policy or obtain insurance from another source before the current policy expires. If the carrier does not obtain insurance within 25 days of this notification, the appropriate ICC regional office is notified. A field representative calls or visits the carrier to determine whether it has obtained insurance or if it intends to do so.

At that time, the ICC agent will require a representative from the carrier to sign a consent decree agreeing that the carrier will not operate without insurance. If the carrier attempts to operate or refuses to sign the consent decree, the Commission uses its independent litigating authority to take immediate action to enjoin the carrier from operating. A parallel administrative show cause proceeding is initiated to revoke the carrier's operating authority if the insurance is not retained.

In FY 1994, ICC used its insurance procedures to revoke the operating authority of approximately 6,500 for-hire carriers. Many of these carriers were likely going out of business and no longer required insurance. Revocation of operating authority becomes a formal Federal notice that the carrier cannot operate without the required insurance. If a carrier obtains insurance after its authority has been revoked, it can apply for reinstatement without going through the full application process. In the first 10 months of 1994, 526 carriers successfully applied for reinstatement.

ICC also promotes compliance with DOT safety regulations through the licensing process. The agencies consult with each other to identify interstate carriers (including passenger carriers) and evaluate their safety records. The Secretary of Transportation may also request that ICC institute an appropriate suspension or revocation proceeding due to the unsafe operation of a carrier.

DOT Safety and Insurance Compliance

The scope and approach of DOT's insurance and safety programs are substantially different from those of ICC. DOT's jurisdiction is much broader; safety rules extend to approximately 307,000 carriers, including all motor carriers subject to ICC jurisdiction. DOT's safety requirements apply to all carriers with vehicles having a 10,000-pound gross vehicle weight rating (or below the 10,000-pound weight if transporting placarded hazardous materials) operating in interstate or foreign commerce. ICC regulations apply to interstate for-hire carriers regardless of weight. ICC has jurisdiction over all vehicles of a for-hire interstate passenger carrier; DOT has similar jurisdiction for the insurance requirements, but safety jurisdiction begins for vehicles designed to transport 16 or more passengers, including the driver.

DOT has jurisdiction over qualifications and hours of service for all drivers of commercial vehicles over 10,000 pounds in interstate commerce. DOT also sets standards for testing and licensing of all drivers of commercial motor vehicles (26,000 pounds or more gross vehicle weight rating, 16 or more passengers, and all placarded hazardous materials vehicles), as well as for alcohol/drug testing of these drivers. DOT also has jurisdiction over certain intrastate hazardous material carriers and shippers, as well as cargo tank manufacturers and repairers. The Department is also issuing final regulations that will subject all remaining intrastate hazardous materials carriers to its regulations. The motor carrier safety and registration regulations apply to private and for-hire carriers, and to Mexican and Canadian carriers operating in the United States.

FHWA enforces the safety regulations directly through on-site carrier compliance reviews and cooperatively through a Federal-state partnership for state/local inspections of vehicles and drivers on the road. Information systems collect the inspection data, as well as accident and other carrier data, to identify unsafe carriers. The carrier review process is then used to check safety compliance and insurance coverage. These reviews result in a carrier's safety rating, which reflects compliance with the Federal Motor Carrier Safety Regulations and the Federal Hazardous Materials Regulations. Three ratings are possible: satisfactory, conditional, and unsatisfactory. About 15,000 carrier reviews are conducted each year by Federal and state investigators. The reviews target potentially unsafe motor carriers. In FY 1993, approximately 2,152 carriers received unsatisfactory ratings. For hazardous materials and passenger carriers, an unsatisfactory rating results in an FHWA order to cease hazardous materials or passenger operations within 45 days, unless the rating is improved. FHWA conducts followup reviews during and after this period to verify improvement and ensure compliance with the order.

Followup actions through the local U.S. Attorney's Office are available to help enforce the order.

Civil penalties and "imminent hazard" out-of-service orders (which require a motor carrier to cease all or part of its commercial motor vehicle operations) are used to enforce the safety requirements, including insurance. In FY 1994, FHWA conducted enforcement cases and issued civil fine claim letters to 2,116 carriers for violation of the safety or insurance regulations. The combination of compliance review, enforcement proceeding, rating, and educational materials left with the carrier results in improved safety compliance by more than 68 percent of targeted carriers. If a second review results in continued major noncompliance, a second fine and a "Notice of Investigation" (NOI) is issued. The NOI is the prerequisite to placing out-of-service either the carrier's entire operation or the portion that remains in noncompliance. In FY 1994, FHWA issued 25 out-of-service orders to unsafe or unfit carriers. If such an order is issued to a for-hire interstate carrier, FHWA notifies ICC to initiate a show cause proceeding to revoke the carrier's operating authority. In the past, the carrier has reduced the safety risk and FHWA has rescinded the order well before ICC proceeding is concluded.

Motor carriers subject to DOT regulations are required to file a Motor Carrier Safety form 150. DOT assigns the carrier a DOT identification number, which must be displayed on the vehicle. Presently, carriers are not required to show proof of insurance at the time of application for a DOT number. Identification numbers are used not only to identify the carrier but also to compile a carrier's safety profile (i.e., roadside inspections, reviews, and ratings) through the Motor Carrier Management Information System.

<u>ICC Recommendation</u>

ICC recommends that licensing of all truckers be based solely on compliance with safety and insurance requirements and that all licensing responsibility be consolidated in one agency.

Comments on ICC's Study

ATA supports the continuance of carrier licensing, filing of insurance certificates, and the ability of carriers to self-insure. The Owner Operators Independent Driver Association (OOIDA) also believes carriers should continue to show proof of insurance. The insurance industry (as represented by the American Insurance Association, National Association of Independent Insurers, Inland Marine Underwriters Association, and United States Fidelity and Guaranty Company) believes that DOT should lower the mandatory levels of financial responsibility coverage. However, since the minimum insurance limits are set by Congress, a legislative change would be required.

The states are eager for electronic access to a central database containing carrier insurance information and want the ability to electronically transmit updated information on the status of carriers' insurance policies.

Comments on DOT's Report

Comments reiterated those on ICC's study and, in addition, numerous commentors strongly urged the retention of self-insurance as an option for financial responsibility.

Options

- Expand the regulatory DOT identification number process to a registration program; authorize DOT to establish minimum insurance requirements; seek authority to deny, suspend or revoke registration on safety fitness and/or insurance grounds; and allow states to act on behalf of DOT regarding interstate carriers.
- Retain ICC's licensing and insurance functions but at DOT.
- Retain only ICC's insurance functions at DOT.
- Eliminate ICC's licensing and insurance functions; retain existing DOT responsibility and enforcement methods for these activities.

In addition, one or more of the following changes could also be made:

- Strengthen DOT's carrier registration program and enhance enforcement of the insurance regulations; seek a public/private sponsor for an automated insurance system; retain state access to the insurance database.
- Extend coverage to all commercial for-hire vehicles regardless of weight.

Analysis

TIRRA reflects Congress' intent that a carrier's entry into interstate commerce be based solely on safety and insurance. This legislative mandate is currently being met by two separate and distinct Federal programs. While the programs of these agencies are somewhat different in terms of scope and effect, it does not seem appropriate to continue both. DOT proposes to eliminate ICC's licensing function and replace it with a streamlined registration program. DOT believes registration rules should require safety registration for all carriers prior to operation and specify denial, suspension, and revocation conditions for noncompliance with safety or insurance requirements. In addition, DOT should seek authority to require evidence of insurance prior to registration.

In lieu of the pre-expiration notices to the carriers ICC now makes, non-compliance with registration/licensing requirements, including insurance provisions and access limitations, would be handled similar to FHWA's enforcement of safety regulations; i.e., a carrier would be issued a significant civil penalty and/or an out-of-service order for noncompliance in these events. Registration suspension and/or revocation could also be used to enforce compliance. Congress would have to provide this new authority to DOT/FHWA for these sanctions and penalties. FHWA would initiate these actions after getting information from the insurance database, complaints, or its own investigations. In addition, the information could be made available to the state insurance or enforcement personnel who would conduct roadside inspections and would be connected electronically to the databases of drivers/vehicles that are out of service.

With respect to ICC's insurance monitoring system, DOT supports the need for states, insurers, and DOT to access a central database on carrier insurance. ICC has developed a separate automated system that would allow insurers to update carrier records electronically when insurance policies have lapsed, been modified, or been canceled. ICC has completed this system, expects to have guidelines out by July, and the first filings by August 1995. However, DOT does not support the transfer of this system to DOT for operation by the Federal government. Instead, to administer the database, a public/private partnership, authorized through legislation, with its costs met through a fee structure, would be proposed.

There are several options for improving DOT's insurance monitoring and compliance activities. In lieu of the series of pre-expiration notices to carriers regarding insurance policies, noncompliance should be handled like safety compliance (i.e., a carrier would be issued a significant civil penalty and/or an out-of-service order for lack of insurance or improper insurance levels). A statutory change would be made to allow immediate issuance of an out-of-service order, as well as suspension or revocation of registration. Because Congress has substantially eliminated barriers to entry into for-hire operations, the burdensome show-cause and consent agreement activities of the current program at ICC are no longer appropriate. FHWA can initiate these actions after obtaining information from the information system, through complaints, or from its on-site reviews. In addition, the information would be made available to the state enforcement personnel, who will be connected electronically to the safety and driver/vehicle out-of-service databases in the 200 MCSAP-Site Project mandated by Congress in the 1994 and 1995 DOT Appropriations Act. This remote, objective oversight would remove government from the day-to-day operations of motor carriers and insurance companies, while creating sufficiently high Federal penalties to encourage compliance. (See the attached table for a summary of current and proposed methods of handling carrier insurance).

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) established the Commercial Vehicle Information System (CVIS) to determine the feasibility of linking commercial vehicle registration to safety fitness. Under this system, carrier (freight and passenger, including interstate, intrastate, and Mexican carriers) safety, and financial responsibility would be monitored. Since commercial vehicle registration occurs on an annual basis and is a prerequisite for operation of all commercial vehicles on public highways, it is the logical point for mandatory identification of the carrier responsible for the safety of the vehicle and for a periodic safety fitness and insurance check of all carriers prior to and during the registration cycle. Vehicle registration could be denied, suspended or revoked if a motor carrier is found to be unsafe or uninsured. A five-state pilot test is currently underway with an expected completion July of 1996.

DOT Recommendation

Insurance

A real-time database for motor carrier insurance should be maintained. FHWA and the states would make use of the information to determine noncompliance and target violators. DOT recommends that the system be fully automated (e.g., electronic updates by insurance companies), fully user supported, managed by the private sector (similar to the Commercial Driver License Information System), and subject to DOT regulatory oversight.

Given the expense and expertise required to review carrier applications for self-insurance and continuously monitor their financial performance, FHWA had proposed eliminating self-insurance in the draft DOT report. However, based on the comments received on this proposal, FHWA will retain self-insurance. DOT recommends further, however, that the cost of administering the self-insurance program will be fully supported by those carriers using it.

Licensing

We recommend elimination of the ICC's current licensing functions. DOT's carrier registration program should be strengthened and DOT's enforcement of the insurance regulations should be enhanced, with the following provisions:

- Require all interstate carriers to register;
- Seek authority to subject private carriers to insurance requirements;
- Require insurance at the time of registration;
- Provide per day fines and authority to issue an immediate out-of-service order for non-compliance with safety or insurance requirements;
- Authorize a public/private sponsored automated insurance system;
- Retain state access to the insurance database;
- Authorize DOT to suspend and revoke DOT registration based on safety fitness and insurance; and
- Seek authority to allow states to act on behalf of DOT regarding interstate carriers.

ICC (CURRENT)	DOT (PROPOSED SHORT-TERM)
I. ESTABLISH INSURANCE DATABASE • Insurance Companies Send ICC Policy Notices Hard Copies) • ICC Enters Information on Computer • Illinois ICC Gets Electronic Update of Database • Insurance Companies Remit Fee	I. ESTABLISH INSURANCE DATABASE • Select and Oversee "Private-Sector" Manager of the Insurance Database* • Majority of Notices/Updates Would Be "Electronically" sent By Insurance Companies to Manager • Insurers with Few Filing Could Provide Hard Copies • Manager Would Collect Fee and Be Self Sustaining • Database Available to States, Industry, and FHWA
II. FEDERAL ENFORCEMENT OF INSURANCE • ICC Sends Letter to Carrier 30 Days Before Policy Expires or is Eliminated • Initiates Show Cause By ICC Field Staff • Initiates Phone Contact By Field Attorneys • Tries to Reach "Consent Agreement" • Goes to Court for Injunctive Relief • Operating Authority Revoked	II. FEDERAL ENFORCEMENT OF INSURANCE • FHWA/OMC Gets Notice From Insurance Company When Insurance Lapses • FHWA/OMC Investigates (Not Necessarily Visits) the Carrier and Issues a Civil Forfeiture Penalty** and "Show Cause Order" • On Follow-up, FHWA/OMC Issues Operations Out-of-Service Notice to Carrier for Lack of Insurance** • FHWA/OMC Seeks Injunctive Relief**
III. FEDERAL ENFORCEMENT OF REGISTRATION • ICC requires for-hire carriers to register for operating authority • Carrier demonstrates insurance coverage and safety fitness • ICC issues carrier an ICC number • ICC may revoke carrier's operating authority for an unsatisfactory rating or otherwise unfit operation • Initiates a show-cause proceeding to revoke	III FEDERAL ENFORCEMENT OF REGISTRATION • FHWA/OMC requires carriers to register for safety and certify insurance coverage • FHWA issues U.S. DOT numbers (i.e., proof of registration) • FHWA/OMC monitors safety performance • FHWA/OMC may issue operations out-of-service notice and civil penalty to enforce safety compliance • FHWA/OMC suspends or revokes registration based on unfit safety fitness determination and or insurance

* ICC is currently planning an "electronic" filing method.

** Congressional approval needed for higher fines, out-of-service, suspension, revocation, and direct injunctive relief.

Mexican Motor Carriers

Background

Mexican law reserves use of its Federal roads to Mexican carriers only. Foreign investment in motor carrier companies in Mexico is prohibited. As a result, no U.S. carriers currently operate across the border into Mexico.

Because of Mexican restrictions on foreign motor carriers, the United States has limited Mexican motor carriers' access to the United States to the area immediately across the border, in ICC-defined commercial zones that extend from 25 to 75 miles into the United States. This access to the commercial zones along the southern border of the United States permits the switching operations needed for cross-border shipments in both directions. Mexican motor carriers are not permitted to operate beyond the commercial zones nor are they permitted to make pickups and deliveries in the commercial zones. In addition, no Mexican-owned or -controlled carrier may be established within the United States.

NAFTA created a timetable for the removal of barriers to the provision of transportation services among NAFTA countries for carriage of international cargo and passengers:

- For trucking, the United States and Mexico will allow access to each other's border states for the delivery and backhaul of cargo beginning in December 1995. In 2000, all restrictions on cross-border trucking will be lifted.

- For buses, liberalized cross-border access involves two steps. For charter and tour buses, all cross-border restrictions were lifted in January 1994. In 1997, Mexico and the United States will lift all restrictions on granting authority to carry passengers from one country to another over regular routes in scheduled operations.

- Mexico will gradually lift its investment restrictions for motor carriers established in that country over the next 10 years. The United States will lift all investment restrictions in 1995 for trucking companies transporting international cargoes and in 2001 for bus companies.

ICC is solely responsible for the enforcement of the current restrictions on the operations of Mexican motor carriers in the United States. ICC licenses are specifically designed to prevent Mexican carriers from exceeding the scope of entry currently authorized and form the basis for subsequent enforcement action if a Mexican carrier exceeds the scope of the authorization.

Options

- Transfer all current ICC NAFTA oversight and enforcement to FHWA.

Analysis

DOT recognizes the importance of continuing the current ICC NAFTA licensing and enforcement provisions applicable to Mexican carriers, so it recommends that these functions be transferred to FHWA. The current ICC licensing provisions are essential to achieve the reciprocal treatment of motor carriers envisioned by NAFTA. NAFTA does not authorize Mexican carriers to provide point-to-point domestic service in the United States. This restriction will be difficult to enforce as future entry provisions permit greater access for international traffic and authorize Mexican motor carriers to operate throughout the United States. Ensuring that Mexican carriers do not violate the NAFTA liberalization provisions will present a major enforcement challenge.

Elimination of ICC's licensing function would make enforcement of entry restrictions very difficult and would eliminate revocation as an enforcement tool. ICC has made effective use of the revocation process, and widespread publicity of specific ICC actions has had a substantial deterrent effect. As border enforcement has improved, the ICC license allows Immigration and Customs personnel to turn back Mexican carriers that do not have proper authorization. In addition, the license provides ICC with a vehicle for taking action against carriers that fraudulently claim to be owned by Mexican citizens.

ICC's experience with Mexican motor carrier operations has contributed to effective enforcement strategies vis-a-vis these carriers. Because of a number of problems with Mexican operators--no fixed U.S. presence, unfamiliarity with English, complex company affiliations, frequent name changes, sporadic and unpredictable entries into the U.S.--ICC has used the injunction process effectively. However, criminal violations such as submitting false documents must be referred to the U.S. attorney's office.

Motor coach and freight carriers, Mexican and Canadian alike, are required to register with FHWA and demonstrate financial responsibility. DOT/FHWA would modify its current procedures for registration of carriers to require all carriers (for-hire and private) to be registered by DOT before they operate on a public highway and would modify its numbering system so that Mexican carriers could be readily identified. The carrier would have to be aware of the safety regulations and, if appropriate, insurance requirements and access limitations. FHWA has been working with Mexico and the states, through the Commercial Vehicle Safety Alliance (CVSA), to get Mexican membership in CVSA and adoption of the CVSA roadside inspection procedures and standards. FHWA has translated the inspection materials into Spanish and has trained Mexican inspection trainers. FHWA has also contracted with the International Association of Chiefs of Police (IACP), to monitor the safety and insurance compliance of Mexican carriers now crossing the border. IACP is also working to define what an appropriate inspection program should be, as traffic increases because of NAFTA. Funding has been earmarked for the Motor Carrier Safety Assistance Program for enhanced inspection activities in the border states. FHWA will assess what increases may be needed in staffing and the grant program as the IACP review is completed and as Mexican traffic increases. Due to the current workload and anticipated increases in Mexican traffic, current ICC staff assigned to Mexican operations should be transferred to DOT.

DOT Recommendation

Enforcement mechanisms for NAFTA's access and investment liberalization provisions for Mexican motor carriers operating in the United States must be retained to preserve the integrity of the Agreement. Such enforcement functions will be transferred to FHWA and integrated with FHWA's safety enforcement activities concerning Mexican carriers.

Undercharges

Background

Until the 1994 enactment of TIRRA, common carriers were required to file all their tariffs with the ICC. Since the Motor Carrier Act of 1980, shippers and carriers have negotiated discounts from the tariffs on file with the ICC for specific traffic. In some cases, the carriers (for one reason or another) did not file an amended tariff to reflect the discount agreed upon. By law, however, the discounted rate was not the legal rate unless it was filed with the ICC.

Trustees of some bankrupt carriers, attempting to maximize the assets to be distributed to the stockholders and creditors, compared the freight charges paid with the actual tariffs on file at the ICC on the date of the shipment. If the charge was a discounted rate not on file, the auditor sent a bill to the shipper for the balance due, the "undercharge." If a shipper did not pay, the trustee or auditor took the shipper to court. In some cases the courts asked the ICC for its advice on what was the legal rate.

ICC's policy of reviewing these cases and providing relief to shippers was overturned in 1990 by the Supreme Court's Maislin decision, which held that ICC could not undermine the "filed rate doctrine" by administratively declaring undercharging an "unreasonable practice."

Over the following three years, during which shippers, carriers, and ICC proposed legislation to deal with the problem, bankruptcy trustees identified additional practices under which they asserted that the negotiated rates were invalid, even if they were filed with ICC.

The Negotiated Rates Act of 1993 (NRA) provided a temporary resolution of these issues. Although NRA appears to handle the undercharge problem, there are several severe complications. First, the Act expires in December 1995, and the undercharge problem may endure for a number of years because a portion of the filed rate doctrine that spawned the problem would continue to exist unless all tariff filing is eliminated. In addition, trustees are now arguing in the courts that, since NRA's section 9 provides that the Act is not to be construed as limiting or otherwise affecting the bankruptcy laws or the jurisdiction of the courts, the relief granted to shippers does not apply to claims by bankrupt carriers.

The courts will eventually sort out this latter complication, but unless the tariff filing requirement is abolished completely, the potential for further undercharge challenges will remain.

While TIRRA repealed the tariff filing requirements for most trucking shipments, traffic that moved prior to enactment of this legislation remains subject to the filed rate doctrine. In addition, TIRRA retained the requirement that collectively set rates, as well as rates for household goods, continue to be filed at ICC.

Under NRA, ICC continues to have a significant role in resolving undercharge claims. For example, ICC must make determinations regarding tariff applicability, tariff interpretations, as well as the reasonableness of rates for contested tariffs. Further, ICC administers other undercharge related provisions, including ruling on unreasonable practice defenses and determining whether a particular shipment was done as common or contract carriage. ICC's Office of General Counsel participates in a number of undercharge cases in Federal District Courts and Courts of Appeal. The Supreme Court has decided 4 undercharge cases in the past four years.

ICC Recommendation

ICC recommended that trucking undercharge responsibilities continue to be performed by an independent agency.

Comments on ICC's Study

There was general consensus among carriers, as well as shippers, regarding the need to provide a forum to adjudicate pending undercharge claims and those that may be filed. Shippers point out that one key aspect of eliminating the undercharge problem is the elimination of all tariff filing requirements. However, there would remain a statutory period within which claims could be filed following the revocation of the filed rate doctrine. NRA provides that undercharge claims may be filed within eighteen months of the time of the shipment. In addition, there is a two year grace period under the Bankruptcy Code. Therefore, there appears to be a need to ensure the continuation of a mechanism for handling these claims for a period of three and one-half years following the elimination of <u>all</u> tariff filing.

<u>Comments on DOT's Report</u>

Comments reiterated those on ICC's study.

<u>Options</u>

Options for dealing with the undercharge situation must, of necessity, include near-term as well as long-term remedies. Of immediate concern is the need to address cases pending at ICC and cases that may be referred to ICC by the courts. Therefore, the question of where to locate this function and how to implement an orderly transfer becomes paramount.

For the longer run, approaches must be devised to ensure that this situation does not recur. These approaches concern:

- Tariff filing requirements,
- Unreasonable practice defense, and
- Incorporating by reference additional documents on the bill of lading.

<u>Analysis</u>

While ICC is currently handling only approximately 300 cases, thousands more cases involving hundreds of millions of dollars are in the courts. In addition, new undercharge claims are likely to be filed in response to other trucking company bankruptcies. However, the adjudication of these cases need not be handled by an independent entity such as ICC, since it consists mainly of analytical and ministerial functions that can be handled by DOT.

The undisputed long-term remedy for the undercharge problem is the elimination of the filed rate doctrine for all shipments, including rate bureau rates and rates for household goods shipments. However, as stated above, this does not eliminate the short term need for resolution of undercharge claims now in process or brought for transportation that occurred prior to the elimination of tariffs.

<u>DOT Recommendation</u>

In order to fully address this issue, it is imperative that all tariff filing requirements be eliminated. This is the cornerstone in dealing with this problem. As long as any tariffs are required to be filed, the potential for undercharge claims persists. As a minimum, the legislation should expressly provide that no undercharge claims may be brought for transportation occurring after the date of elimination of tariff filing. We also recommend that undercharge claims be declared an unreasonable practice.

In order to ensure that a mechanism continues to be available to deal with this issue during the transition period, responsibility and staff for this function should be transferred to DOT.

Owner Operator Leasing Rules

Background

Owner-operators are independent businessmen who own and often operate their equipment under lease to regulated trucking firms. While they may obtain their own operating authority, typically they operate by virtue of a contractual arrangement with licensed carriers. They are the small businesses of the trucking industry.

In response to complaints by carriers and lessors, Congress enacted legislation to prohibit "lumping," and ICC adopted rules governing the relationship between owner-operators and carriers that use them. Lumping occurs when a driver is coerced into paying for unnecessary labor to unload his truck. ICC requires that lease agreements specify, among other things, the duration of the lease and the compensation to be paid to the owner-operator. In addition, ICC has, in response to complaints by owner-operators, expanded the basic leasing rules to provide additional information including:

- the identity of the party responsible for items such as fuel, fuel taxes, permits, detention, and licenses.
- specify which party will assume the risks and costs of fines for overweight and oversized trailers.
- the requirement that payments to lessors be made within a specified time period.
- the requirement that documentation be made available to the owner-operator if they are paid on a percentage of revenue basis.
- that escrow funds be governed by specific rules.

These rules were adopted primarily to protect owner-operators from the unscrupulous practices of some carriers. Because of their small size and weak bargaining position, owner-operators sometimes lack the ability to negotiate and the resources to enforce equitable terms of their contractual agreements with carriers.

ICC Recommendation

ICC recommended continuation of owner-operator leasing regulations at the Federal level, either at ICC or at some other agency, provided that the agency had appropriate injunctive and criminal enforcement powers and staff resources.

Comments on ICC's Study

Motor carriers (represented by the American Trucking Associations, the Regular Common Carrier Conference, the Interstate Truckload Carriers Conference, and the American Movers Conference) as well as owner-operators (written statement by OOIDA and discussions with Independent Truck and Drivers Association and Independent Truck Owner-Operator Association) support continuation of the leasing rules at the Federal level.

The essence of the arguments of these parties was the same. That is, the leasing rules provide a sense of order and help to police the contractual relationships between owner-operators and motor carriers. Representatives of the owner-operators maintain that if the rules are not enforced, owner-operators will not be able to survive. They believe that the rules act as a deterrent to inequitable treatment of owner-operators. Further, while direct collections by ICC are relatively small, the owner-operator representatives indicated that the mere existence of the rules helped owner-operators or their representatives collect a multiple of ICC collections.

The owner-operators stated that reliance on the small claims courts as an alternative to government enforcement of leases is not a viable alternative due to the relatively small dollar amounts involved and the fact that owner-operators are highly mobile and cannot always appear in court when a particular case is scheduled to be heard.

OOIDA recommended that the leasing rules be amended to grant affected parties the right to enforce the rules through private legal action. This provision would be particularly important if the government ceased enforcing the rules. Finally, the option of awarding treble damages was suggested in order to provide an incentive for attorneys to pursue claims against carriers.

Comments on DOT's Report

Comments reiterated those on ICC's study.

Options

This issue entails a fundamental policy question: Is there a continuing rationale for providing protection to this sector of the transportation industry, and if so, what kind? The following courses of action are available:

- Continue to provide the full protection and enforcement of the leasing rules in a Federal agency as recommended by ICC. Candidate agencies include the Federal Trade Commission, the Small Business Administration, DOT or a regulatory body like ICC.
- Retain the existing leasing rules as a benchmark for issues that should be addressed in leases. Provide no Federal enforcement of the rules, but convey to owner-operators the right of private action to enforce the rules and treble damages.
- Eliminate both the rules and Federal enforcement.

Analysis

As noted above, leasing rules were adopted and implemented in response to numerous complaints by carriers and owner-operators about abuses and inequitable treatment of owner-operators by some carriers. Owner-operators provide a significant amount of flexible capacity to regulated motor carriers, especially in the household goods sector. They are an integral part of the trucking industry. Although protection of owner-operators is not required by statute (except for the lumping provisions), the continued viability of this sector is essential to the efficient operation of the trucking industry. Leasing rules have contributed to a stable supply of lessors and offer some measure of protection for owner-operators in their dealings with regulated carriers. If oversight in this area were eliminated, it is possible that the incidence of leasing practices disputes might increase, contributing to instability in the industry. Further, there would be no readily available forum for periodic petitions to amend the rules in response to new problem areas. All of these factors argue for continuation of the leasing rules and enforcement by some Federal agency.

Alternatively, there are numerous examples of independent contractors negotiating agreements and providing products and services to a wide range of businesses throughout our economy that do not enjoy the same level of protection afforded owner-operators. Further, remedies exist for owner-operators, other than to enforce the rules. Certainly, owner-operators have the option of refusing to sign leases with carriers that have acted unscrupulously in the past. In addition, the courts are available to pursue complaints against carriers, and one owner-operator association provides a cooperative legal defense fund for pursuing such complaints.

DOT Recommendation

The leasing rules have no doubt provided protection to owner-operators in their dealings with regulated carriers. However, the cost of Federal enforcement of these rules has been significant. For example, ICC spent approximately one million dollars on owner-operator enforcement actions in FY 1994 while collecting less than $100,000 for complainants. There does not appear to be sufficient justification to continue these enforcement expenses.

Given the uneven bargaining power of owner-operators, the small dollar amount of their claims, and the unique nature of their operations, DOT recommends that the lumping provision and the leasing rules be retained in their present form. In lieu of Federal enforcement, owner-operators will be given the right of private action to enforce them, and treble damages would be an award option. Because of the relatively small dollar amount of owner-operator claims and the transient nature of owner-operators, treble damages are necessary in order to act as a deterrent to carriers and an incentive to attorneys to pursue these claims.

Household Goods and Auto Driveaway Carriers

Background

Interstate carriage of household goods (HHG) currently is subject to regulation by the ICC. ICC's jurisdiction also extends to household goods freight forwarders and motor carriers that transport personally owned automobiles (auto driveaway carriers).

In most respects household goods regulation is similar to general motor carrier regulation. Many of the differences that do exist reflect the belief that customers of household goods carriers (especially those individuals whose moves are not arranged by their government or corporate employers) are a proper focus of Federal consumer protection activities. Other differences reflect support for the existing industry structure, in which van lines, their local agents, and the owner-operators that provide the bulk of their transportation interact to produce a nationwide system of transportation.

Prior to the deregulatory reforms of 1980, ICC regulation sometimes prohibited marketplace forces from providing consumer protection benefits. The Household Goods Transportation Act of 1980 (HHGTA) addressed two of these deficiencies by explicitly giving household goods carriers the right to offer price guarantees and to make full value replacement insurance available to customers. These services--which many customers wanted--were forbidden under the Interstate Commerce Act prior to passage of the HHGTA in 1980.

The reforms of MCA of 1980 dealing with entry into the industry and rate regulation apply to household goods carriers. However, freight forwarder deregulation in 1986 did not include household goods forwarders. Similarly, the 1994 motor carrier reforms specifically excluded HHG carriers.

Consequently, interstate carriage of household goods remains subject to fairly extensive economic regulation. HHG carriers must obtain operating authority from ICC and file all of their common carrier rates, which are subject to review by ICC. Antitrust immunity can be conferred on both ratemaking and "pooling" agreements (agreements among carriers to "pool" equipment or shipments in areas where there is a limited amount of traffic, as well as agreements between van lines and their agents to pool equipment). Collective ratemaking plays an important role in the industry's operations.

According to the American Movers Conference, most interstate HHG carriers base their rates on the industry's collectively set tariff, which provides a base (a "list price") from which individually determined discounts are taken. Industry members also engage in other activities under antitrust immunity, such as development of the HGCB Mileage Guide. This publication is widely used for calculating charges for government and commercial traffic, both household goods and general freight.

ICC Recommendation

The ICC's report recommends that existing Federal regulatory oversight of household goods carriers, household goods forwarders, and motor carriers that transport personally owned automobiles should be preserved and strengthened, whether at an independent agency or at an executive agency. The report notes that additional authority is needed to allow regulators to assess civil penalties more effectively against HHG carriers that commit abuses and to give regulators adjudicatory authority over loss and damage claims against HHG carriers. Suggested options include a mandatory dispute settlement program; giving ICC (or its successor) the right to adjudicate small damage claims and ICC authority to sue on behalf of claimants where appropriate.

Comments on ICC's Study

DOT received formal comments regarding ICC's household goods recommendations from the American Movers Conference (filing jointly with the Household Goods Carriers' Bureau Committee). These comments support preservation of existing ICC regulation of the household goods industry. However, the comments also note that if deregulatory change were to occur, total deregulation might be preferred to partial reform. The latter option was perceived as likely to disrupt industry operations without providing any substantial countervailing benefits to consumers.

United Van Lines, Inc., comments that three areas of current ICC regulation of household goods movers are important and should not be eliminated or restructured: pooling, agent-van line relations, and loss and damage claims.

Comments on DOT's Report

Comments reiterated those on ICC's study.

Options

- Do as ICC recommends, by preserving and strengthening Federal regulatory oversight of household goods carriers, household goods freight forwarders, and motor carriers that transport personally-owned automobiles. Under this scenario, household goods regulation would be transferred to an executive agency or independent agency.
- Maintain Federal consumer protection regulation of household goods, but abolish all other Federal economic regulation (including antitrust immunity). The consumer protection function could be housed in an executive agency or independent agency.
- Abolish all existing Federal regulation of household goods and impose a new consumer protection requirement on the industry: mandatory participation in an industrywide dispute resolution program by all interstate household goods carriers, HHG freight forwarders, and transporters of personally owned automobiles.

Analysis

DOT does not share ICC's view that existing household goods regulation should be preserved and strengthened. We believe that the existing regulatory scheme has become excessively burdensome to carriers, without providing commensurate benefits to consumers.

According to ICC testimony before the House Transportation and Infrastructure Committee in March 1995, only about 10-15 percent of all household moves are subject to ICC regulation. The remainder are either within commercial zones and exempt from ICC regulation, or intrastate and subject to state regulation in most states, even after all other state trucking regulation has been preempted.

In order to choose an appropriate strategy for reform, we must first stipulate what problems we are attempting to solve. During the past two decades, major issues debated in congressional hearings on surface transportation regulation have included competitive problems (either intrinsic or caused by government regulation), government paperwork burden on industry, direct costs of government regulation, and consumer protection.

Costs of HHG Regulation

With respect to the household goods industry, the direct cost of Federal regulation appears to be quite modest when weighed against the number of moves made annually by individual consumers. However, the problem of paperwork burden cannot be summarily dismissed.

During the 1981-1985 congressional oversight hearings, representatives of HHG industry argued convincingly that Federal regulation imposes a huge paperwork burden on interstate carriers of household goods. This view has gained broad acceptance, but there is rather less agreement concerning whether the benefits of regulation justify this burden. Since 1980, ICC has sought to reduce the paperwork burden; however, in the context of existing regulation, this task has proved substantially intractable. Reformers may legitimately ask whether further reforms might have to cut the Gordian knot of existing economic regulation in order to achieve meaningful relief from Federal paperwork requirements for the household goods industry.

Economic Regulation of HHG

The household goods industry does not exhibit any of the characteristics of natural monopoly (the original rationale for regulation of transportation industries). Since the 1980 legislative reforms, competition has been vigorous, and carriers do not appear to be earning excess profits.

Economic regulation is not needed to protect consumers from monopoly pricing abuses.

DOT and DOJ also believe that antitrust immunity is not needed for development of the Mileage Guide (or other efficiency enhancing collective activities), and the Department long has been on record as opposing antitrust immunity for motor carrier collective ratemaking. However, HHG carriers have historically expressed strong concern that removal of all antitrust immunity would expose them to treble damage suits, as well as render impossible the current industry agent-van line structure.

Under current law, agents of van lines may also have ICC operating authority of their own. Consequently, an agent and its parent van line may be actual or potential competitors for some traffic. Because of this competitive aspect of the relationship, many HHG carriers fear that collaboration on rates with their parent van line would violate the Sherman Act. As stated in the antitrust immunity section above, the rule of reason approach to agency relationships makes antitrust liability unlikely. Thus, there is no reason to retain antitrust immunity for the industry.

As we recommended in the chapter dealing with antitrust matters, DOT and DOJ believe that all antitrust immunity for motor carriers (including HHG carriers) should be abolished.

<u>Consumer Protection Regulation of HHG</u>

The last remaining issue--consumer protection--is of great importance to our analysis of the household goods industry. There is substantial agreement that individual consumers tend to be less knowledgeable about transportation than corporate shippers, who utilize the services of general freight carriers. Consumer abuses can occur during the moving process, just as they occur in many other types of business transactions. However, it is pertinent to inquire whether individual customers of household goods carriers require greater Federal regulatory protection than individuals purchasing other high priced goods and services, such as automobiles, computers, and boats. The answer to this question will substantially determine which policy options make sense for regulation of the household goods industry.

Analysis of Options

We examine three options: maintain the existing regulatory framework, as ICC recommends, maintain only part of the existing framework, or take a less traditional approach to the issue.

Proponents of the first option argue that existing regulation works well, allowing competition to flourish in the industry while providing meaningful protection against consumer abuses. Those who favor the status quo believe that the modest direct costs of ICC regulation of the household goods industry are a small price to pay for a system that works well.

While various combinations of "middle ground" reforms could be assembled, the two main issues to be dealt with are antitrust immunity and consumer protection. We believe that the most logical middle ground option would be to remove antitrust immunity and all other remaining economic regulation except for consumer protection regulation, which could be transferred to another executive agency or independent agency. The HHG industry is intrinsically competitive, and any truly efficiency-enhancing collective activities would not require antitrust immunity. However, this option would not remove a substantial amount of regulatory burden unless HHG consumer protection regulation were subsequently streamlined.

The third option proceeds from the view that the existing ICC consumer protection regulation of household goods carriers would be abolished, but a new requirement would be imposed on all interstate participants in the industry: mandatory participation in an industrywide dispute resolution program or in some form of binding arbitration. Carriers would certify on their moving contracts that they participate.

A prototype for household goods dispute resolution programs already exists, but carrier participation is voluntary. This requirement could stand alone, or it might be coupled with a requirement that interstate carriers provide binding estimates for all individual consumer moves or a requirement that carriers provide all individual shippers with a standard informational brochure describing pertinent aspects of the moving process.

It is our understanding that there is relatively little precedent for this type of Federally-imposed dispute resolution program in areas other than labor law. DOT does not recommend this option, but we believe the idea may merit further discussion among the parties as a possible vehicle for future reform.

DOT Recommendation

DOT recommends that existing regulation of the industry should be abolished and the Federal Trade Commission be authorized to regulate household goods carriers, just as it regulates other industries. Any HHG consumer protection issues requiring industrywide rulemaking would be treated in the same manner as issues affecting other industries subject to the FTC's jurisdiction.

As a further deregulatory measure, Congress might wish to consider mandating a new dispute resolution mechanism for the industry. The household goods industry's existing voluntary dispute resolution program could be used as a model, or the industry might choose to develop a different program. This option is designed to replace consumer protection regulation with an approach that combines effective relief for consumers with reduced regulatory burden on carriers.

Intercity Bus

Background

The intercity bus industry provides two major types of service: regular route intercity service over specific routes at scheduled intervals; and charter, tour, commuter, and special operations services, such as individually ticketed dedicated service to sports events, race tracks, casinos, and other special events. Many bus carriers also provide package express service in conjunction with their regular route systems. Today, only about 110 of the more than 4,600 interstate intercity passenger carriers provide regular route service. Greyhound Lines, Inc., (GLI) is the only carrier with a national regular route system. Bus operators performing other types of services comprise the overwhelming majority of carriers, and their numbers have been increasing by about 600 carriers annually for the past 5 years.

For decades, regular route bus service has represented a small, declining, and relatively unprofitable share of the intercity passenger market. Today, the intercity passenger market is dominated by the private automobile, which accounted for 81 percent of total intercity passenger miles in 1993. Airlines accounted for about 17 percent, the bus industry only about one percent, and the railroads 0.7 percent. Nevertheless, buses provide an important and valuable service for millions of Americans. Most bus passengers are drawn from lower income groups. The elderly, the young, students, and military personnel are heavy users of this service.

The Bus Regulatory Reform Act of 1982 (BRRA) made entry into the industry easier for regular route and charter carriers, although ICC operating authority is still required. Most importantly, through a Federal preemption procedure, the BRRA gave carriers greater freedom to set fares, enter markets, and discontinue unprofitable service on traffic traveling interstate routes.

ICC Recommendation

- Licensing. Reduce licensing criteria to safety and insurance requirements, eliminating opportunity for competitors to challenge an application for operating authority on the basis that it is not consistent with the public interest.

- Mergers. Eliminate regulation of mergers, leaving them subject to the antitrust laws, the same as any other unregulated industry.

- State Preemption. Extend the outright Federal preemption of intrastate passenger fares and package express rates, enacted in 1994, to include route discontinuances by interstate carriers.

- Intercarrier Dispute Resolution. Continue unchanged the current authority for oversight of intercarrier disputes.

Comments on ICC's Study

Comments were received from the American Bus Association (ABA), jointly with the Independent Bus Companies Creditor Committee (IBCCC) and the Trailways National Bus System (TNBS); they will be referenced as the joint respondents. In addition, the United Bus Owners of America (UBOA) and Greyhound Lines, Inc. (GLI) filed comments. Carolina Trailways and Southeastern Trailways specifically commented on the merits of retaining the regulatory authority contained in 49 U.S.C 11342 (pooling agreements).

Joint Respondents. The joint respondents strongly oppose the recommendation to change current licensing criteria to encompass only safety and insurance requirements. They believe the proposed procedure would violate specific congressional mandates not to issue charter authority to a public entity without first considering the availability of a privately financed carrier. With regard to mergers, state preemption, and intercarrier dispute resolution, joint respondents support ICC recommendations to repeal authority over merger transactions, provided that the States are precluded from asserting authority over the subject; to wholly preempt state control of route discontinuances by interstate carriers; and to continue to oversee intercarrier disputes under the adequacy of intercity bus service provision of 49 U.S.C. 11101(a), which provides that "a motor common carrier shall provide safe and adequate service, equipment, and facilities."

Furthermore, the joint respondents agree with ICC recommendations that Federal monitoring of NAFTA conditions, uniform Federal guidelines for cargo damage claim resolution, and motor carrier financial reporting requirements be continued.

With regard to administration of the remaining ICC functions, joint respondents favor retaining the ICC in its present form. However, if its size and responsibilities were to be reduced, it would favor insulating ICC's most important existing quasi-judicial functions from political influence, by establishing an independent agency within DOT (much like FERC is part of the Department of Energy).

United Bus Owners of America. UBOA urges continued existence of the ICC as an independent agency. Further, UBOA believes that: (1) current charter and tour operations tariff maintenance and oversight should be eliminated; (2) current oversight of those services that require interlining between carriers (joint rate through route operations) or that require sharing of resources between competitors (pooling and terminal access) should be continued; (3) current oversight of consolidation or mergers and route discontinuance should be eliminated; (4) the criteria for granting interstate operation rights should be limited to safety and fitness; and that (5) control over entry and service areas granted to foreign carriers should be continued.

Greyhound. GLI believes that: (1) based on the intense competition encountered by intercity bus lines and their collective small share of the passenger market, carriers should be relieved of the remaining regulatory constraints, as have carriers in other modes; and (2) reform should finish the job of removing state regulation of intrastate bus services performed on interstate routes by eliminating the remaining state regulation of discontinuance of intrastate bus service on interstate routes. GLI, Carolina Trailways, and Southeastern Trailways believe it is important to preserve the regulatory authority to approve pooling arrangements among bus carriers, so long as the arrangements are in the interest of either better service to the public or economy of operation and will not unreasonably restrain competition.

Comments on DOT's Report

Comments reiterated those on ICC's study, with the addition of comments on continuation of the self-insurance option and protection from competition by subsidized carriers.

Options

- Eliminate all economic regulation of the intercity bus industry. Continue insurance and safety criteria for licensing and Federal Transit Administration regulations that preclude publicly subsidized operators from performing charter and tour operations if private operators are willing to perform the service.

- Follow ICC recommendation. Continue insurance and safety criteria for licensing, including the retention of ICA provisions that preclude the grant of authority to a public operator if private operators are willing to perform the service. Retain discretionary authority to investigate anticompetitive and anticonsumer activity.

- Amend the present system to provide for outright preemption of state laws with regard to fares, routes, and services, rather than the current appeals process.

Analysis

The regular route intercity bus industry faces intense competition in the intercity travel market from auto, air and rail transportation. The charter/tour segment of the bus industry is intrinsically competitive. It has been growing, and its customers seem pleased with the variety of options available to them. DOT believes there is no need to maintain any economic regulation of the intercity bus industry.

Some of the carriers desire retention of antitrust immunity for pooling arrangements (i.e., the sharing between two competitors of traffic, revenues, schedules, and equipment). DOT recognizes the benefits of these sorts of pooling arrangements as long as the operation of a pool does not hinder competition and results in enhanced efficiency of the existing carriers' operations. DOT does not believe there is any antitrust problem with end-to-end pooling of equipment in connection with through schedules and joint fares. We do not believe that carriers need continued antitrust immunity for these pooling arrangements, to develop and publish joint fares, schedules, or terms of carriage for interline transportation.

ICC currently has discretionary authority to investigate complaints of anticompetitive and/or anticonsumer activity. However, the antitrust laws can adequately address competitive problems in the industry. For example, DOJ is in the process of investigating GLI terminal access conditions, which suggests that carriers desiring resolution of disputes over practices might get better, faster treatment without ICC (or similar agency). Consumer protection functions could be handled at FTC if it had authority over motor carriers. Therefore, DOT does not believe it is necessary to provide special treatment for the bus industry in areas where it is not provided for other surface modes.

DOT Recommendation

We recommend elimination of all economic regulation of the intercity bus industry, including antitrust immunity, but continue insurance and safety criteria for licensing, as well as existing Federal Transit Administration regulations protecting private motor carriers of passengers from competition by subsidized transit agencies for charter and tour business. Furthermore, we recommend outright preemption of state regulation with regard to fares, routes, and services, like freight motor carriers, rather than the current appeals process.

TRANSPORTATION INTERMEDIARIES

Background

Intermediaries comprise an important segment of the transportation industry, creating value for both shippers and carriers. The freight forwarders and brokers under the jurisdiction of ICC are only two types of a whole panopoly of transportation intermediaries, including ocean and air freight forwarders, transport terminal operators, and nonvessel operating common carriers.

Surface Freight forwarders arrange freight transportation, but do not physically provide the linehaul transportation itself; however, they may provide local pickup and delivery services. They assemble small shipments from numerous shippers, arrange for the linehaul transportation by an ICC-licensed carrier (usually rail or motor), provide distribution of the shipments at the final destination, and assume overall responsibility for the entire movement. Freight forwarders, other than those that handle only household goods shipments, were substantially deregulated in 1986. They must still file evidence of cargo insurance with the Commission, but all other regulation was removed.

Brokers also arrange for transportation on behalf of shippers, but usually handle relatively larger shipments (truckload quantities). They match shippers with carriers and carriers with loads. They were substantially deregulated in 1980 and have become an important element in improving the overall efficiency of motor carrier transportation. Their activities are similar to those of freight forwarders. The main difference is that forwarders "take possession" of the freight, whereas brokers do not. Many brokers also function as freight forwarders. Brokers must obtain a license from ICC and furnish proof of insurance that funds received by the broker from shippers will be paid to the carriers that perform the transportation.

ICC Recommendation

Because it is difficult to enforce the insurance requirement for freight forwarders, without a program to register them, the ICC recommends a registration requirement for them, to be administered along with motor carrier licensing. Since so little capital is required to begin business as a broker, and because the ICC receives numerous complaints from motor carriers about misappropriation of funds by brokers, the Commission recommends continuing to require broker licensing, along with motor carrier licensing.

Comments on ICC's Study

The Transportation Brokers Conference of America (TBCA) recommends, among other things, that: (1) a National Transportation Commission should be established, combining the property transportation functions of the Interstate Commerce Commission, the Federal Maritime Commission, and the Office of the Secretary of the Department of Transportation, to more appropriately reflect the reality of today's transportation service activities; (2) reform and deregulation must be equalized among all third parties, eliminating all regulation but registration and existing financial security requirements of the Interstate Commerce Act; (3) all state regulation of third parties should be preempted, coupled with the provisions that any intrastate registration or financial security requirements be identical to interstate requirements and that evidence of interstate registration and security satisfies any state requirement; (4) except for mergers and consolidations, all antitrust immunity for collective ratemaking or other market decisions should be abolished; (5) further deregulation should be accomplished through the effective use of administrative exemption authority granted to ICC; and, (6) additional motor carrier deregulation should be accomplished by legislative reforms removing artificial distinctions between common and contract carriage, while maintaining the traditional strict liability for service at reasonable and non-discriminatory rates.

Several trucking organizations also commented on the continued need for broker regulation. OOIDA complained about licensed brokers failing to reimburse motor carriers for their services and then relocating in another state under another name. OOIDA wants an investigation into broker practices, an increase of the bonding requirement to $100,000, and a requirement to escrow payments from shippers. The ATA, as well as its Interstate Truckload Carriers Conference (TLCC), seek similar protections, as well as the requirement to continue licensing brokers and establish rules on the filing of claims on the bonds.

Comments on DOT's Report

Comments reiterated those on ICC's study.

Options

- Eliminate all remaining ICC regulation of brokers and freight forwarders.
- Eliminate all remaining ICC regulation, except registration and requirements for surety.
- Eliminate all remaining ICC regulation, but require a disclosure statement concerning insurance on the bill of lading, like the one required for air freight forwarders.
- Eliminate all ICC regulation, but maintain a registry of intermediaries, including brokers, surface and air freight forwarders, and all other third party intermediaries; require a disclosure statement concerning liability limits prominently displayed on the bill of lading.

Analysis

Brokers are very similar not only to surface freight forwarders, but also to air freight forwarders (also called indirect air carriers), which were totally deregulated by the Air Cargo Deregulation Act of 1977. (See the attached table showing the various transportation intermediaries and the extent to which they are regulated.) Air freight forwarders receive freight from shippers, use the services of a scheduled or charter airline for linehaul transportation, and arrange for pickup and delivery, all under a single bill of lading.

Domestic air freight forwarders have only two requirements: they must state on their bill of lading whether they offer cargo insurance, and if so, how much; and they must have a security plan on file with the Federal Aviation Administration to deal with explosives and certain other hazardous materials. International air freight forwarders must also be owned and controlled by U.S. citizens, must register with DOT, and must certify the citizenship of the owning/controlling parties. The direct air carriers with which international air forwarders deal are relied upon to enforce the security requirement. Otherwise, there are no formal regulations for air freight forwarders, including requirements to register. There are an estimated 3,000-5,000 air freight forwarders in existence in the U.S.

Customers of brokers and freight forwarders are relatively sophisticated. Although ICC received 1,139 complaints in 1993 concerning brokers, DOT receives only about 30 complaints per year concerning air freight forwarders. A 1986 survey by a large trucking industry credit bureau found that licensed brokers were responsible for only 4 percent of the cases of unpaid freight bills and unmet obligations; shippers were responsible for 63 percent, and trucking companies and their own broker firms together were responsible for 11 percent. Practices of some brokers may be a problem, but they are clearly not <u>the</u> problem.

<u>DOT Recommendation</u>

We believe that transportation intermediaries should be treated like any other business. Customers should be able to take their complaints to court or the Federal Trade Commission. Intermediaries should be subject to cargo liability rules to the extent they are considered to be carriers. We recommend that all regulation of surface freight forwarders and brokers be eliminated and that they be free of any regulation of their rates, routes, or services. Surface freight forwarders would continue to be subject to the Carmack Amendment cargo liability rules.

COMPARISON OF REGULATORY REGIMES FOR TRANSPORTATION INTERMEDIARIES

ACTIVITIES OR ATTRIBUTES	SURFACE FREIGHT FORWARDER	SHIPPER ASSN	SHIPPER'S AGENT	SURFACE PROPERTY BROKER	AIR FREIGHT FORWARDER	NVOCC	OCEAN FREIGHT FORWARDER
AGENCY WITH REGULATORY AUTHORITY	ICC	ICC	ICC	ICC	DOT	FMC	FMC
ENTRY CONTROL	BOND	NONE	NONE	LICENSE & BOND	REGISTER (FOREIGN ONLY)	BOND	LICENSE & BOND
PRICE/RATE CONTROL	NONE	NONE	NONE	NONE	NONE	LIMITED	LIMITED
TARIFF FILING	NO	NO	NO	NO	INT'L ONLY	YES	NO
CARGO LIABILITY	YES	CONTRACT	NONE	NONE	YES	YES	NONE
UNDERLYING CARRIER RESTRICTIONS	LIMITED	NONE	NONE	NONE	NONE	NONE	NONE
OPERATING RESTRICTIONS	LIMITED	NONE	NONE	NONE	NONE	NONE	NONE

DOMESTIC WATER CARRIERS

Background

Domestic water carriage currently is subject to economic regulation by ICC, as well as by FMC. At times the regulatory authority of these agencies overlaps.

ICC licenses interstate water carriers of passengers and non-bulk freight operating in the contiguous states trades (comprising waterborne transportation between points on the U.S. inland waterways, intracoastal waterways and the Great Lakes), and is charged with ensuring that rates and practices are reasonable and nondiscriminatory. ICC regulatory authority also extends to rates and practices of marine carriers offering joint rate service in combination with rail or motor carriers in the domestic offshore trades (between the 48 mainland states, on the one hand, and points in Alaska, Hawaii, Puerto Rico, and U.S. territories and possessions, on the other). The United States Coast Guard, a DOT administration, regulates the safety of water carriers and publishes and enforces regulations pursuant to which U.S. flag vessels enter and ply the domestic "Jones Act" trades. The "Jones Act" reserves all transportation in the contiguous States trades and domestic offshore trades to U.S. flag vessels.

FMC has statutory jurisdiction over the water portions of certain of these same domestic movements, but only where the transportation does not have an intermodal land carriage component. In such cases the rates not only must be filed with FMC, they also can be subject to FMC investigation and suspension if the carrier's profits exceed a reasonable rate of return.

The major overlap between ICC and FMC authority concerns the domestic offshore trades. Carriers plying those trades currently have two jurisdictional alternatives that may be chosen based largely upon how the given rate is defined by the carrier. By way of example, a true port-to-port rate for offshore transportation must be filed with FMC, and is subject to FMC's public utility rate analysis. However, carriers can avoid FMC's jurisdiction simply by framing the rate as a joint rate with an inland segment which can be quite minimal. For the last 15 years most carriers have readily availed themselves of this intermodal option, and where they have utilized joint intermodal rates in offshore domestic trades, both agencies, as well as reviewing courts, have recognized that the ICC has jurisdiction over the through traffic.

<u>ICC Recommendation</u>

The ICC report recommends the elimination of its economic regulation of contiguous state water carriage, and also recommends that the regulation of all domestic offshore water carriage should be handled by the FMC. To the extent that ICC continues to exist, the Report urges that the ICC should continue to exercise jurisdiction over the inland segment of joint rates applicable to the domestic offshore trades.

<u>Comments on ICC's Study</u>

FMC is concerned about how ICC's recommended transfer of authority over the domestic offshore trades would work, as a practical matter. At base, FMC is concerned that such a transfer could require a return to public utility regulation of the offshore domestic trade. Thus, if FMC were required to apply the rate reasonableness provisions of the Intercoastal Shipping Act, 1933, to the ocean portion of such rates without having jurisdiction over the entire intermodal rate, carriers could easily circumvent an order of FMC. Carriers could simply adjust the inland portion of the rate, which under ICC's proposal would still be subject to ICC jurisdiction and, in practical terms, is already deregulated.

DOT has received specific comments concerning ICC's proposal from a coalition of carriers in the domestic offshore trades as well as comments filed by individual carriers. The comments recognize the potential difficulties involved in transferring existing ICC authority over the water portion of domestic offshore trades to FMC without addressing, at the same time, the fundamentally different regulatory approaches presently taken by the two agencies concerning the regulation of domestic offshore shipping. The coalition did not advocate any particular changes to the current regulatory structure, but two carriers urged that competition and market forces should supplant public utility-type regulation by FMC. DOT has also met with representatives of the U.S. flag fleet, each of which expressed a preference for continued tariff filing requirements, but an elimination of public utility regulation in the domestic offshore trades.

Comments on DOT's Report

Comments reiterated those on ICC's study. However, most shippers and carriers want to retain the current tariff filing requirements.

Options

- Do as ICC suggests, eliminate economic regulation (including tariff filing) for domestic contiguous-states water transportation, and give FMC jurisdiction over domestic offshore water carriage. Under this scenario, FMC would continue to have the power to exert public utility jurisdiction in those trades pursuant to the Intercoastal Shipping Act, 1933. Regulation of all domestic offshore water carriage would reside in FMC regardless of the type of rate involved.

- Eliminate economic regulation (including tariff filing) for domestic contiguous-states water transportation: repeal the public utility provisions of the Intercoastal Shipping Act, 1933: and give FMC or another agency (perhaps DOT) jurisdiction over domestic offshore water-borne transportation. Under this scenario, offshore carriers would file tariffs, would be accountable under the Shipping Act, 1916, for malpractices (such as rebating and discrimination among shippers) but would not be subject to reasonable rate determinations by FMC.

- Totally deregulate shipping in domestic contiguous-states and offshore trades, including tariff filing, but without affecting ship safety regulation or the Jones Act.

Analysis

The analysis that follows relates only to domestic shipping. Changes to the regulation of international shipping are not considered in this report.

DOT shares ICC's view that economic regulation of contiguous-states water carriage should be eliminated in its entirety. This traffic faces intense intramodal and intermodal competition, and there is no longer any public benefit from regulation of this trade.

DOT also believes that legislation concerning ICC regulatory jurisdiction over the offshore trades should also address the fundamental issue of dealing with the type of regulatory control, if any, that is to be exercised over such transportation. By and large the present alternative of public utility regulation at FMC versus simple tariff filing, without rate prescription at ICC, has afforded carriers a choice of regulatory approaches. DOT understands that carriers almost unanimously have embraced the less intrusive ICC regulatory approach by filing through intermodal tariffs with that agency. It would be both costly and ironic if sunset of the ICC and deregulation of other areas had the effect of subjecting all offshore carriers to the more stringent public utility rate of return and anti-rebating regulation by FMC.

As with other ICC functions, DOT has evaluated both sides of the issue of regulation of the domestic offshore trades. Arguments for and against deregulation are described below.

Proponents of maintaining regulation claim that tariff filing assures rate stability, because both carriers and shippers know what rates are actually being charged. Moreover, they argue, FMC has authority to determine whether the filed all-water rates are reasonable, and this assures shippers that they are not being overcharged. This could be especially important in some of the domestic offshore trades because restrictions on which carriers are eligible to carry cargo in these trades means that there are only a few competitors. The fewer the competitors, the less the market itself can discipline cargo rates and keep them low and related to the cost of providing service. For example, twice since 1985, FMC has investigated the reasonableness of a particular carrier's rates between the Pacific Coast and Hawaii and rolled them back, saving shippers an estimated $10 million.

FMC also has authority to penalize carriers that offer rebates or discounts from the filed tariffs. FMC has a very active anti-rebating program in international shipping, but reports that it has never had an illegal rebating case in the domestic offshore trades. However, if FMC had evidence that such a practice was going on, it would investigate and fine any guilty carrier. Proponents of maintaining regulation argue that this assures not only stable rates, but that it also prevents rate discrimination, whereby certain shippers are secretly favored over others that do not get discounts.

Proponents also claim that deregulating the domestic offshore trades would result in rate instability; in other words that shippers would not know what rates are being charged. Shipping rates might be higher; and there could be rate discrimination between shippers, especially favoring large shippers and penalizing small shippers.

On the other hand, critics of the present regulatory scheme counter that, even though FMC has authority to regulate rates, there has been no meaningful rate regulation for many years. Carriers have been able to escape FMC regulation by filing their tariffs instead at the ICC, which has no authority to determine the reasonableness of the rates. Because most carriers do choose to file their tariffs at the ICC, rates in the domestic offshore trades are currently set by competition, albeit competition limited by the Jones Act.

The only rates that are currently filed in domestic offshore trades with the FMC are those of one carrier in the Hawaiian trades. The last time the FMC held a hearing on any of those rates was in 1990. The last time before that was in 1985. In both cases, FMC rolled back the carrier's rates. Given the choice of regulatory venue that was available, if the carrier believed that FMC was holding its rates too low, the carrier could have easily reconfigured them to be intermodal rates, file them with the ICC, and change them at will. Thus, even in the Hawaiian trades there has been little or no real rate regulation in the last 10 years; none in the last five.

As a result, the current state of the domestic offshore trades is one of quasi-deregulation. Domestic offshore carriers are currently setting their rates at whatever level they want, subject only to competitive constraints, and tariff filing appears to accomplish little or nothing.

One reason tariff filing is anachronistic is the case of small shippers. Tariff filing obligations historically exist in order to assure small shippers of being able to obtain the same rates as those offered large shippers. However, given the advent of time/volume rates and door-to-door rates, available as a practical matter only to particular shippers, this assurance is illusory. In fact, small shippers depend on middlemen, such as NVOCCs, to secure competitive rates for their cargo.

What filed tariff rates do to hurt competition is to "signal" the rates charged by one carrier to all of its competitors. Classically, such "signaling" has a tendency to stabilize rates and depress competition. Moreover, FMC stands ready to fine carriers for discounting off the filed tariffs, and this could lead to rates that are "stabilized" at too high a level. Given the fact that tariff filing no longer accomplishes what it was intended to accomplish in earlier times, and given the possible adverse effects of its continuance, proponents believe that tariff filing should be abolished for the same reasons that it has been abolished in domestic air carriage, and most trucking and rail.

Rates generally go down when tariff filing is eliminated, which benefits the shipper. In the case of air cargo deregulation rates went up, because they had been artificially depressed by strict CAB regulation of both entry and rates. However, even with air cargo rate increases, shippers were happier with the improved service and competitive options that came about. A more vibrant, efficient air freight industry has been the result, and there is no clamor for a return to regulation.

<u>Recommendation</u>. After weighing the arguments, DOT recommends deregulation of water carriage in both the contiguous states and the domestic offshore trades, because there is no need for such regulation. Although the Jones Act restricts the level of competition by preventing entry of vessels that are not U.S. owned, flagged, built, and manned from competing, rates are already being set by competition, because reasonable rate regulation is no longer a factor in these trades. Given this, the Department does not believe that tariff filing should be required in this market any more than it is in most other markets. DOT believes that Congress should eliminate economic regulation (including tariff filing) in both the contiguous states, as well as domestic offshore water trades, and repeal the public utility provisions of the Intercoastal Shipping Act, 1933. This recommendation would not affect either safety regulation, international shipping, or the Jones Act.

PIPELINES

Background

ICC has authority to regulate the transportation by pipeline of all commodities other than water, gas, or oil. Economic regulation of oil and gas pipelines is conducted by the Federal Energy Regulatory Commission (FERC), while DOT regulates the safety aspects of these carriers. The ICC's authority does not include regulation of entry, exit, or mergers. However, ICC-regulated pipelines must file their tariffs, and their rates and practices must be "reasonable," in order to protect shippers against possible abuses of monopoly power.

In practice, pipeline cases are very rarely brought before ICC, although there is currently one case involving reasonable access terms for a phosphate slurry (fertilizer) pipeline. ICC would also have jurisdiction over coal slurry pipelines if the construction of such pipelines for interstate transportation ever became feasible. Coal slurry pipelines may be technologically and economically feasible, but there are severe obstacles to their use, including environmental concerns and difficulties experienced in assembling pipeline right of way.

ICC Recommendation

Jurisdiction over ICC-regulated pipelines could be transferred to FERC. However, ICC believes that there is no reason to make such a change. Pipeline regulation should remain at ICC or its successor agency.

Comments on ICC's Study

No comments were received regarding pipeline transportation.

Comments on DOT's Report

No comments were received.

Options

- Transfer all ICC pipeline jurisdiction to FERC.
- Transfer ICC pipeline jurisdiction to DOT, which already has pipeline safety authority.
- Eliminate all ICC pipeline jurisdiction and subject carriers to the antitrust laws.

Analysis

Pipelines carry almost 20 percent of all intercity ton-miles of freight and have certain attributes of natural monopoly (such as high sunk costs and significant economies of scale). However, the vast majority of pipelines are regulated by FERC, not ICC. The few types of pipelines subject to ICC jurisdiction (such as phosphates and coal slurry) tend to face strong intermodal competition from railroads. In addition, the near absence of complaints also suggests that there is no need for special treatment and no public purpose served by retaining Federal regulatory oversight. Competitive problems, if any, could be handled under the antitrust laws.

DOT Recommendation

Eliminate all ICC pipeline jurisdiction and subject carriers to the antitrust laws.

INTERMODAL TRANSPORTATION

Background

ICC has the authority to prohibit the acquisition of a water carrier or a motor carrier by a rail carrier, and may prescribe joint rates and through routes on intermodal rail-water movements. In practice, ICC has aggressively promoted intermodal transportation over the last two decades.

ICC Recommendation

Eliminate all special restrictions against intermodal acquisitions by rail carriers, but retain sufficient regulatory authority over motor and water carrier rates and operations to enable transportation regulation to be effective in an intermodal context.

Comments on ICC's Study

Intermodalism in transportation was highlighted as a key element in shaping the future of the transportation industry in the "Conference on the Transportation Industry of the Future." Participants uniformly expressed the view that deregulation had made one of the two key contributions (the other was double-stack container trains) to the extraordinary growth of intermodal transportation in the 1980's. They also predicted that continued development of intermodal services was the most promising avenue for future rail traffic growth in markets other than the basic bulk commodities. Technological developments and improved intermodal marketing should enable railroads to offer intermodal service to a widening spectrum of markets in the future.

Comments on DOT's Report

No comments were received on DOT's report.

<u>**Options**</u>

- Retain the current restrictions against intermodal consolidations.
- Eliminate restrictions against railroad acquisitions of water or motor carriers, but retain regulatory authority over rates and operations.
- Eliminate all restrictions against intermodal acquisitions and jurisdiction over intermodal rates, routes, and practices.

<u>**Analysis**</u>

Intermodal transportation is often the most efficient--and in many instances, the only possible way--to meet critical transportation needs. Congress has indicated its desire that intermodal approaches be encouraged and facilitated whenever possible. Intermodal transportation had been relatively stagnant for decades until regulatory reform legislation and subsequent administrative reforms enabled it to grow dramatically. Air cargo deregulation in 1977 and motor carrier reforms in 1980 combined to enable a tremendous growth in the air cargo and package express industries, by permitting air cargo carriers to begin operations with efficiently-sized aircraft, and by permitting air carriers to begin trucking operations and trucking companies to begin air cargo operations. Likewise, the rail and trucking reforms of 1980 combined to enable a dramatic increase in intermodal ship/rail and truck/rail traffic, including the new technology double-stack container trains, after ICC exempted certain "piggyback" movements from regulation beginning in 1981. Not only has this taken a great deal of truck traffic off congested highways, reducing wear and tear as well as air pollution, it has also hastened the development of new, more efficient technologies.

Although ICC has permitted intermodal acquisitions whenever possible under the law, there are still some remaining hindrances to prevent them or make them cumbersome and expensive. For example, there is an absolute prohibition against a rail carrier acquiring either a motor carrier (though a few have been permitted by special legislation) or a water carrier that operates through the Panama Canal. Railroads must seek ICC permission to acquire water carriers that do not operate through the Panama Canal. These restrictions no longer make sense. There are no similar restrictions in other parts of the industry, and the industry is very vibrant and competitive. There is no reason to force modes to provide interconnected services through contractual partnerships rather than intermodal ownership.

There is no regulation of either intermodal air/truck or rail/truck rates, and beginning in 1995 there is no regulation of intrastate trucking rates. Moreover, there is no appreciable regulation of either inland barge rates or intermodal water rates on traffic in the domestic offshore trades. Thus, there is no apparent reason why there should be retention of any motor or water carrier rates to "enable transportation regulation to be effective in an intermodal context," as suggested by ICC.

Intermodal operations enhance the efficient movement of freight both domestically and internationally. Technological innovation coupled with diminished regulation have fostered the growth of this segment of the transportation industry. Due to the inherently competitive nature of this traffic, there is no reason to subject intermodal operations to extensive rules and regulations that tend to impede the development of intermodal operations.

DOT Recommendation

DOT recommends the elimination of all statutory restrictions against intermodal ownership and of jurisdiction over intermodal rates, routes, and practices.

ADMINISTRATION OF ICC FUNCTIONS

Organizational Options

TIRRA mandated a reexamination of the roles and responsibilities of ICC. The preceding chapters assess the various functions currently performed by the Commission. This discussion addresses possible organizational structures to carry out only those ICC regulatory functions that continue to serve an essential public need.

There are many possible ways in which the remnant ICC functions might be organized and administered. The four organizational options identified below (and their respective advantages and disadvantages) cover the range of possibilities and are based upon DOT staff reports, agency interviews, and responses to a request for comment from industries with an interest in ICC regulatory functions.

Option 1: Retain ICC in its Present Form

Option 1 would retain ICC in its current form. This option does not preclude eliminating particular functions that no longer serve an essential economic purpose.

Advantages

- The current structure of ICC preserves the perceived independence of decision-making processes. This satisfies an industry concern that decisions affecting the industry and public might otherwise be subject to undesirable political pressure.
- Maintains continuity of existing personnel, expertise, and precedents.
- Avoids transition costs associated with reassignment of ICC functions.
- Best serves industry needs, according to most industry groups.

Disadvantages

- Retains a substantial and costly organizational structure to serve a drastically reduced economic purpose.
- Fails to consolidate similar functions performed by multiple agencies (such as antitrust review conducted by DOJ).
- Fails to respond to broad interest in downsizing and streamlining government activities and eliminating unnecessary entities.
- Retains time-consuming procedures that impose unnecessary costs on both industry and government.

Option 2: Merge ICC into DOT, but Keep It As an Independent Agency

The merger of ICC functions into an independent agency within DOT would aim to maintain the independence of ICC decision-making processes while permitting consolidation of essential regulatory functions within a single Federal department. This option has a precedent in the establishment of the Federal Energy Regulatory Commission (FERC) within the Department of Energy.

Advantages

- Provides for independence of decision-making processes affecting industries currently regulated by ICC.
- Reduces transition costs by using existing staff and procedures for retained ICC functions.
- Enables ICC to take advantage of DOT support functions to achieve some savings.

Disadvantages

- The remaining regulatory functions are very limited and do not require a separate agency, either outside or within DOT.
- The remaining regulatory functions are, for the most part, similar or analogous to functions currently carried out in DOT and other executive agencies and do not require any special independence. Sensitive functions can be handled with administrative procedures that assure objectivity.

- Maintains the overhead costs of Commissioners and their staffs for the remaining functions.
- An insulated, FERC-type entity within DOT would diminish cabinet level authority and accountability for regulatory decisions.

Option 3: Transfer Remaining ICC Functions to DOT and/or other Federal Agencies

Advantages

- Retained functions are insufficient to merit a separate agency.
- Retained functions can be readily accommodated in DOT (motor carriers in FHWA/OMC, rail unit to be established, data in Bureau of Transportation Statistics); antitrust to DOJ; rail labor protection to the Department of Labor (DOL); and household goods and other consumer protection functions handled by FTC as in other industries.
- Offers greatest potential for staff and cost reductions by adding relatively small increments of ICC functions and staff into DOT and other agencies, while eliminating all separate overhead.
- DOT and the other Federal agencies have specific expertise which, in combination with some transferred staff, can accommodate the relevant regulatory functions.

Disadvantages

- Does not preserve the perception of independence that many commentors deem important.
- Potential conflicts of interest in some regulatory actions where executive branch agencies such as DOD and DOE are involved as shippers or DOT is involved as the sole stockholder in Amtrak.

Option 4: Combine ICC with Other Federal Agencies (e.g., the Federal Maritime Commission)

Advantages

- Preserves the independence of ICC regulatory processes.
- Provides for possible administrative savings through consolidation of ICC functions with those of another agency.

Disadvantages

- The regulatory functions of FMC are quite different from those of the ICC, and there would be little opportunity for synergies or economies of scale.
- Contrasting approaches to regulation between ICC and FMC suggest that few benefits would result.
- Misses opportunity to achieve maximum streamlining and assignment of functions to agencies able to carry them out most efficiently and effectively.

Comments on ICC's Study

Rail Industry. The rail industry predominantly supports either retaining ICC in its present form or merging it into DOT as an independent agency. This would preserve the current capability to make decisions in a neutral, non-partisan manner. A slimmed-down ICC, in the industry's view, would be the most cost effective way for Congress to protect consumers and reduce unnecessary Federal expenditures. Additionally, they believe that the ICC has the necessary experience to meet the regulatory objective of preserving fair and reasonable pricing for rail transportation. Some railroads, however, support abolition of the ICC and its regulatory functions.

Bus Industry. The bus industry favors merging ICC into DOT but retaining organizational independence like FERC within DOE. A significant segment of the industry considers the ICC to have a unique role as arbiter of the competitive marketplace and as advocate for transportation users.

Trucking Industry. The trucking industry supports the preservation of ICC functions within an independent agency. Independence from direct executive branch authority is necessary to carry out adjudicatory and policy responsibilities in an environment that is free of real or perceived political pressure. The industry is also skeptical that significant cost savings can be derived from transferring ICC functions piecemeal to the DOT.

Shippers. In the view of shippers and shipper associations, ICC should be retained. Preservation of ICC's independent adjudicatory authority is important for the stability of the relationship between shippers and carriers.

Insurance Industry. The insurance industry recommends retaining the ICC's functions in an independent agency. The industry believes that the current ICC is more likely to serve essential needs of both motor carriers and insurers.

Transportation Intermediaries. This constituency supports the creation of a National Transportation Commission made up of ICC, FMC, and FAA. This super-transportation oversight organization would handle all modes of transportation.

Household Goods Industry. The household goods industry favors retaining CC as a separate agency, but would support a FERC-like agency in DOT.

Labor. Labor organizations would like to preserve ICC and maintain the existing regulatory structure in an independent agency. There are concerns regarding the receptiveness of DOT to labor concerns, in light of past decisions perceived to have been hostile to the interests of labor. The Teamsters believe that certain functions, such as truck licensing and registration, could be transferred to DOT. In their view, ICC should retain the functions of tariff filing, oversight of rate bureau activities, and data collection. Moreover, they question the ability of FERC model to produce substantial savings and to maintain an effective "arms length" arrangement with DOT.

DOT Recommendation

TIRRA identified a wide range of organizational choices for relocating ICC functions. These included retaining ICC in its current form, merging ICC into DOT as an independent agency, merging ICC into DOT but not as an independent agency, eliminating ICC and transferring all or some of its functions to DOT or other Federal agencies, and combining ICC with other Federal agencies (e.g., the Federal Maritime Commission). Each of these alternatives was extensively examined in the Department's study.

Given the dramatic reductions in regulatory authority recommended in this report, it is clear that there is no longer any need to maintain ICC as an independent agency. Furthermore, given that the functions to be retained are quite diverse (e.g., maintaining of motor carrier insurance, railroad rate oversight), we do not believe that it makes sense to consolidate these functions, either in a separate agency or in a single, discrete agency within DOT.

This section summarizes the Department's position regarding administration of ICC functions that would be preserved. DOT recommends option 3, transfer of the remaining critical functions to DOT and other Federal agencies. The relatively few functions that truly require independence can be properly insulated within DOT in the same way that sensitive aviation functions inherited after sunset of the Civil Aeronautics Board are currently performed. All the other ministerial ICC functions that should be maintained can be fit in easily within DOT, DOJ, and elsewhere, with greater budget savings than any other option.

Rail Regulation

The major area of ICC regulation that has wide support within industry and government, and is consistent with the ICC report, is the limited rate regulatory system that is viewed as a vital element of the success of the Staggers Rail Act. In the Department's judgment, certain core railroad regulatory functions must be maintained: preserving competition through review of rail consolidations; oversight of the rail line abandonment process; rate regulation to protect "captive" shippers from unreasonable rates; and adjudication of disputes between publicly supported passenger services and privately-owned railroads.

We would house the rail functions in a new rail regulatory unit within the organizational structure of DOT. However, there is no need for such an office to remain completely independent. Most of the remnant regulatory functions are similar to activities currently administered by DOT (or other agencies) without any independent or insulated staff. For those few functions where there is a special need for "insulated" decision-making (such as resolution of disputes between passenger and freight railroads), appropriate administrative procedures can be readily established.

This new organization would rely significantly on former ICC staff and their expertise to help it develop and modernize rail regulation. We recommend that rail mergers and acquisitions, and other transactions such as line transfers and trackage rights, be reviewed by DOJ and that most of the other retained functions be housed in a new rail regulatory unit within DOT.

<u>Abandonments</u>. The requirement for prior Federal approval of an abandonment should be eliminated, but Federal oversight over abandonments should be retained to ensure adequate advance notification to affected shippers and communities, and to administer the feeder line development, financial assistance, and rails-to-trails programs that promote creation of shortline railroads and railbanking. DOT would actively pursue administrative steps to simplify the application and paperwork burden, particularly for small carriers seeking to abandon service.

<u>Rate Regulation</u>. While recognizing opportunities for improving the regulatory process for railroad rates, DOT also recognizes the continuing need for some limited rate regulation. Because of the expertise, experience, and industry acceptance of the ICC with regard to rate regulation, DOT recognizes the desirability of retaining that capability and would expect to transfer key ICC staff to DOT.

<u>Passenger Transportation</u>. This is an area in which a procedure for "insulated" objective decision-making would be needed, because DOT is a major source of funding for

commuter rail operations and has a substantial interest in Amtrak. There is precedent at DOT for insulated decision-making in hearing cases involving the award of international aviation route authority. Route awards are determined by a senior career official, subject to formal review by senior political officials for consistency with departmental policy.

Labor Protection. To preserve smooth and rapid facilitation of mergers, other consolidations, line sales, and abandonments, this provision should be retained and administered by the Department of Labor. This would be consistent with the administration of section 13(c) provisions dealing with mass transit systems.

Motor Carrier Registration

Insurance and Safety Compliance. We recommend that the safety functions of ICC and DOT be combined and administered by DOT. The insurance function would also be retained and administered by DOT for all for-hire carriers.

Mexican Registration. The motor carrier licensing functions for Mexican carriers should be administered as part of an expanded, comprehensive program within DOT for all motor carriers.

Undercharge Caseload. Because of pending cases, there will be a transitional requirement for addressing undercharge issues. This function should go to DOT.

Guidelines for Transition

Careful planning of the transition of functions is important. This includes examination of staffing requirements, workload and workflow, space and other physical resources, and processes for performing specific functions within the new organizational framework. It is critical to the transportation industry, shippers, and the economy that transition plans maintain continuity and integrity for any remaining regulatory functions. The Administration proposes the transition occur during FY 1996.

APPENDIX 1: SUMMARY OF REPLIES TO DOT'S REPORT ON THE FUNCTIONS OF THE ICC

ADAMS & HOWE, P.C. (in behalf of Richard D. Howe). Maintain owner-operator leasing rules, and enforcement procedures; maintain single state registration program.

AMERICAN BUS ASSOC., TRAILWAYS NATIONAL BUS SYSTEM, INDEPENDENT BUS COMPANIES CREDITORS COMMITTEE. Retain regulation of rates, practices and adequacy of service of regular route carriers; retain protection of unsubsidized carriers from subsidized ones; retain authority to approve pooling arrangements; retain collective ratemaking for general increases, changes in tariff structure; retain Carmack amendment, and regulations providing guidelines for resolution of cargo damage claims.

AMERICAN INSURANCE ASSOCIATION. Current high financial responsibility limits set by the Federal government are counterproductive and should be reduced or eliminated. These insurance requirements do nothing to prevent or mitigate accidents; TIRRA language in section 207 indicates that "safety requirements" are intended to be different from, and in addition to, the current DOT "safety fitness" requirements; government should require regular, periodic financial reporting, including detailed and accurate balance sheets by motor carriers. Therefore, any "zero based" review should not consider whether financial reporting should continue, but how it should be enhanced for the public's benefit; AIA supports continuation of an electronic insurance filing system; however, the system must be voluntary because some smaller insurance writers might be unable to financially absorb the costs of a new electronic system; private carriers should not be added to existing insurance certification programs created to cover for-hire carriers.

AMERICAN MOVERS CONFERENCE. Retain antitrust immunity for van line/agent relationship, pooling, collective ratemaking, mileage guides, etc; retain Carmack, and released rates option; retain data collection; retain fitness requirement for HHG authority; retain owner-operator leasing rules and their enforcement by a Federal agency; retain tariff filing; retain agents for service of process; retain, at DOT, consumer protection oversight.

<u>AMERICAN PUBLIC TRANSIT ASSOC</u>. Exempt state and local commuter rail operators from the Interstate Commerce Act; provide a forum for dispute settlement between the freight railroads and the commuter lines.

<u>AMERICAN SHORT LINE RAILROAD ASSOCIATION</u>. Retain common carrier obligation and the requirement for mandatory interchange; retain provisions requiring joint rates and through routes; retain car supply and car hire obligations; retain common carrier cargo liability rules.

<u>AMERICAN TRUCKING ASSOCIATIONS</u>. Certain antitrust exemptions should be codified: interlining, joint-line rates, carrier-agency agreements; jurisdiction over rate reasonableness should be retained in an insulated agency; licensing requirements should apply to all motor carriers: common, contract, and private; self-insurance standards currently administered by ICC should transfer to an insulated agency within DOT; retain broker licensing and expand the rules to include fiduciary responsibility to the motor carrier, increase the bond to $250,000, and provide that no license be issued to a broker that has been a principal in a brokerage who has forfeited on its performance bond in the last five years; provide for uniform nationwide business practices for motor carriers; retain truth-in-billing provisions.

<u>AMTRAK</u>. Retain dispute authority between Amtrak and freight railroads regarding compensation, service, etc; retain authority over rail mergers, etc., to take into consideration their impact on Amtrak.

<u>ASSOC. OF WASTE HAZARDOUS MATERIALS TRANSPORTERS (ATA)</u>. Some competent authority should determine what is "property" within the meaning of 49 USC 10521 (trash, garbage, and refuse are considered property for purposes of DOT safety regulations, but not for ICC jurisdiction).

<u>ASSOCIATION OF AMERICAN RAILROADS</u>. Establish an independent commerce board within DOT; retain all existing exemptions,

and codify them; retain labor protection; repeal of provisions should not reinstate common law or state jurisdiction; retain existing authority and standards regarding antitrust immunity for mergers, joint use arrangements, etc; retain maximum rate regulation; retain authority over abandonments; retain minimum rate regulation; retain cargo loss and damage rules; repeal the common carrier obligation; and repeal authority over Amtrak compensation to freight lines.

<u>BEST BUY COMPANY, INC., GENERAL FELT INDUSTRIES</u>. Maintain current cargo liability regime.

<u>CARIBBEAN SHIPPERS ASSOC</u>. Supports recommendation that the domestic off-shore trades be deregulated, including elimination of tariffs.

<u>CENTRAL ANALYSIS BUREAU</u>. The annual and quarterly reports of financial and operating statistics filed with the ICC are used by many others in addition to the Commission. An objective review will demonstrate the merit and need for continued financial reporting, DOT's BTS has not required motor carrier reporting in the past and may not fully appreciate its importance. While the report recommends BTS conduct a "zero based" study, this study should be conducted by the Congressional Office of Technology Assessment. Central renews its offer to collect industry data at a minimal charge. Should common and contract carriage be combined into a new for-hire category, the existing cargo insurance requirements should be retained for all for-hire carriers. With regard to intermodal shipments, cases involving the applicability of COGSA to inland portions have used various criteria on whether COGSA or ICA applies. Further guidance is necessary.

<u>CENTRAL TRANSPORT</u>. Opposes the elimination of the current self-insurance program.

<u>CHEMICAL MANUFACTURERS ASSOCIATION</u>. Supports creation of an independent board within DOT to inherit retained functions; the current rail regulatory scheme at ICC lacks provision for an adequate remedy for shippers in the event grant of an exemption does not provide intended benefits--an exemption has never been revoked; supports a competitive access plan which will afford all shippers the benefits of rail vs. rail

competition and will reduce the effects of rail consolidations. Should this happen, railroads should be subject to the same antitrust standards as other industries; authority to regulate rates and prevent rate discrimination must be continued as long as there are captive shippers, which is any shipper served by only one railroad, whether or not other modes are available; oversight of car supply practices should be preserved; any new legislation must encourage greater rail vs. rail competition than currently exists--all shippers must have the right to access two or more railroads; state regulation of rail service should be preempted entirely by Federal law; continue to provide recordation of liens; rail data collection should continue to the extent necessary to provide information to insure fair rates to captive shippers; and cargo liability rules should be continued for non-contract rates.

COMMITTEE AGAINST REVISING STAGGERS. Supports retention of constrained market pricing guidelines as they exist, or as can be further simplified.

CROWLEY AMERICAN TRANSPORT. Supports end of rate of return regulation in the domestic offshore trades; concerned about ending common carrier requirements by eliminating prohibition against rate discrimination and the filing of tariffs; the common carrier system, with true transparent and nondiscriminatory rates, has served this market well.

EC-MAC ASSOCIATION (MOTOR CARRIER BUREAU). Collective ratemaking is vitally important to the continued operations of smaller motor carriers as job producing businesses; through routes and joint through rates will vanish without antitrust immunity.

EDISON ELECTRIC INSTITUTE. Recommends an independent board be set up within DOT to administer transferred ICC functions; retain common carrier obligation and access to rail lines; retain authority over abandonments.

ELWOOD LINE GRAIN & FERTILIZER CO., KEMPTON GRAIN & SUPPLY CORP., RISING FARMERS GRAIN CO., FARMERS COMMODITIES CORP., M & D, INC., GROWERS COOP. Need public disclosure of private shipper contracts and the availability of the same information as currently available under present ICC system.

<u>FEDERAL MARITIME COMMISSION</u>. FMC has long been in favor of ending the jurisdictional bifurcation between FMC and ICC, and subjecting all domestic offshore transportation to a consistent form of regulation in one independent agency. At present, however, there are restraints on the entry of potential competitors in domestic offshore trades. As a result, the major trades tend to be dominated by a few carriers that have the power to establish the level of rates to be charged. In such trades, rate-of-return regulation is a proven means to assure that carriers do not charge excessive rates.

<u>GREAT WEST CASUALTY COMPANY</u>. Continue self-insurance as an option for motor carriers.

<u>HANNA RUBBER COMPANY</u>, <u>PENDLETON WOOLEN MILLS</u>. Preserve current cargo liability rules.

<u>HAWAII, STATE OF</u>. Recommends elimination of split domestic offshore trade regulatory jurisdiction in favor of FMC. Effective regulation by the FMC, by eliminating or reallocating the appropriate functions of the ICC, alone offers the only feasible means of assisting Hawaii in overcoming the impediment of isolation with efficient service at reasonable rates.

<u>HILL'S SUPPLY.</u> Reiterates position of Transportation Claims & Prevention Council.

<u>INLAND MARINE UNDERWRITERS ASSOCIATION</u>. Concurs with DOT's recommendation to convert to a Federal liability regime with a statutory liability of $5 per pound, etc., and eliminate all Federal dispute settlement functions. It is unclear whether an owner-operator who leases service to a motor carrier falls under the public liability and insurance obligations imposed by the motor carrier or is subject separately to liability requirements. Define responsibility of leasee and lessor. DOT should continue to require financial reporting as it currently exists to remedy the "major omissions" in present ICC financial and operating statistics, and to explore partnerships with industry for the collection, compilation, and dissemination of motor carrier data.

INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC. There is no basis for repealing the current rate cap provision on non-ferrous recyclables.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS. Maintain an independent ICC; retain oversight of Mexican carriers; retain oversight of mergers and acquisitions in order to ensure that unsafe operators are unable to avoid detection by merging with other carriers, etc. The newly formed entity should be obligated to stand scrutiny and acquire new operating authority; opposes "zero based" assessment of data needs; retain collection of data; retain rate reasonableness and rate discrimination oversight; retain truth in billing; retain contract requirements.

LANDSTAR. Landstar objects strongly to the proposal to eliminate self-insurance as a means by which interstate motor carriers of property may satisfy their insurance obligation. Self-insurance is different from a high deductible. By obtaining self-insurance, Landstar was able to turn to the excess insurance market, since it did not necessarily need to buy insurance from a company authorized to write first dollar coverage. That opened up an entirely new market to its insurance broker. Landstar could now shop from among any available company qualified to write excess coverage, which includes a vastly greater number of companies, and a vastly more competitive market than those in the first dollar market.

MALLINCKRODT CHEMICAL. Retain the current cargo liability rules; retain option for motor carriers to self-insure.

MATSON NAVIGATION COMPANY (serves Hawaii). Continue limited regulation of the domestic offshore trades: let the rates be set by the market, not by government intervention, but require that such market-based rates be published in a tariff.

MCKEE FOODS. Opposes elimination of self-insurance as an option; opposes collection of financial data from private carriers since such data can not be separated from the parent company.

MINNESOTA TRANSPORT SERVICES ASSOCIATION. Supports continuation of the ICC's motor regulatory activities.

MONTANA FARMERS UNION. Fears that DOT plans to diminish economic protection for rail captive shippers by lessening maximum rate regulation and eliminating rate discrimination; elimination of filing requirements for grain contracts would erode the protections shippers have against predatory contracting practices of the railroads.

MONTANA WHEAT & BARLEY COMMITTEE. Supports strong maximum rail rate regulation, especially for captive Montana shippers served by one railroad.

NATIONAL ASSOC. OF SHIPPERS, CONSIGNEES, AND CONSUMERS (HAWAII). The lack of competition and existence of parallel pricing is all that is required to show that the shipping lines and FMC regulation of the domestic offshore trades is not working. Except for elimination of tariff filing provisions, these trades should be deregulated and rate of return regulation eliminated. But, due to limited competition under the Jones Act and the Shipping Act of 1936, safeguards must be provided to protect shippers.

NATIONAL ASSOC. OF WHEAT GROWERS. Retain an independent agency to oversee rail regulation; retain Staggers Act protections for captive shippers; retain oversight of mergers and consolidations in the future independent agency; retain line abandonment oversight to ensure adequate notification to interested parties.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOC. Retain antitrust immunity for motor freight classification.

NATIONAL PRIVATE TRUCK COUNCIL. Opposes making private carriers subject to Federal insurance requirements; opposes elimination of self-insurance. If DOT adopts a plan to include all private carriers under a Federal insurance scheme, the impact would be far greater. Thousands of private carriers are self-insured under their company structures. It would cost billions to force them to purchase insurance on the open market. Opposes collection of financial data, since financial data for a private truck fleet can not be segregated from that of the parent company. Opposes duplicative Federal and state regulation, including requirements for insurance registration.

<u>NPR, Inc. (Water Carrier to Puerto Rico)</u>. Retain obligations imposed on common carriers to treat shippers in a nondiscriminatory manner, including tariff filing.

<u>PETER PAN BUS LINES</u>. Peter Pan objects to the proposal to eliminate self-insurance as a means by which motor carriers may satisfy their insurance obligation. In addition, the standards which the carrier must meet for self-insurance are uniform, set by ICC or other agency, not by an insurance company.

<u>REGULAR COMMON CARRIER CONFERENCE (ATA)</u>. Retain Carmack until Federal government substitutes a uniform cargo liability scheme, like Canada, for trucking; retain rate and practice adjudication between shippers and truckers; retain antitrust immunity at DOT for interlining, joint line rates, pooling, freight classification, collective activities, and rate research for members; retain HHG regulation unchanged.

<u>UNITED TRANSPORTATION UNION</u>. DOT report changes the emphasis of Section 210 of TIRRA from transfer of ICC functions, to the elimination of statutory provisions which protect rail carrier users and employees. Rate reasonableness regulation has been denied shippers on the basis of a massive decline in rail rates, a hoax, since rail rates have risen an average of 46 percent since 1980. Retain line abandonment regulation; retain provisions prohibiting rail acquisition of water carriers under the Panama Canal Act; retain provisions regarding interlocking directorates.

<u>SKILL TRANSPORTATION CONSULTING</u>. Represents the Kansas Shippers Association (railroad shippers). Members overwhelmingly favor transfer of ICC functions to DOT, rather than DOJ. Now with a handful of Class I carriers, there is need for an independent agency within DOT to take into consideration public, as well as railroad interests.

<u>SOCIETY OF THE PLASTICS INDUSTRY</u>. Endorses simplification and exercise of remaining ICC functions by independent agency or board within DOT and retention of the current cargo liability regime.

<u>TOTEM OCEAN TRAILER EXPRESS</u>. The current regulatory system at the ICC is fundamentally sound, especially tariff filing

serves the interests of shippers and carriers--particularly small shippers--and should be continued.

<u>TRANSPORTATION BROKERS CONFERENCE OF AMERICA</u>. Opposes recommendations by the American Trucking Associations which propose a $250,000 bond requirement and the establishment of fiduciary trust fund mechanisms for receipt and payment of freight charges.

<u>TRANSPORTATION LAWYERS ASSOCIATION</u>. TLA believes rail mergers should be reviewed under ICA standards; takes no position on amending the cargo liability limits; ICC regulations on claim handling and dispute resolution should be kept; any review of data needs should be conducted by the Office of Technology Assessment. The common carrier obligation should be retained, with all its ramifications for cargo liability, collective bargaining, etc. The follow-on agency must be independent and perform all the retained functions because of continuity of staff expertise. This is an opportunity for DOT to put in place a better way of uncovering unsafe motor carrier applicants, by requiring them to write a narrative explanation of their safety plans. Keep all consumer protection programs, the self-insurance option, and authority over bus mergers and disputes among bus carriers. TLA supports total deregulation of domestic contiguous-states water carriers, but not that of domestic offshore carriers.

<u>TRANSPORTATION TRADES DEPARTMENT, AFL-CIO</u>. Maintain independence of ICC; rail employee protection should be transferred to DOL; rail merger authority to DOT; rail antitrust exemptions should be eliminated, permitting private suits in Federal courts with treble damages; provide antitrust exemption only in situations required by public interest; motor carrier consolidation, mergers, and acquisition of control should be reviewed by an independent agency within DOT; Mexican carriers must be subject to strict regulation; data must be continued to be collected to assess and evaluate the consequences of deregulation; motor carrier rates must continue to be reasonable and non-discriminatory. The ICC's future is about the role of government in safeguarding workers and consumers.

<u>TRAVELERS INSURANCE</u>. Retain financial reporting and expand to include to include carriers not now included at ICC;

opposes subjecting private carriers to same insurance requirements as for-hire carriers.

TRI-COUNTY COMMUTER RAIL AUTHORITY (FT. LAUDERDALE, FL) Exempt state and local government commuter rail authorities from the IC Act.

U S West (Communications). Opposes subjecting private carriers to Federal insurance requirements; opposes elimination of self-insurance option.

UNITED BUS OWNERS OF AMERICA. Retain antitrust immunity and competitive dispute resolution in an independent agency, not DOJ; make sure states are subject to fee caps in connection with motor vehicle registration and fuel tax administration.

UNITED PARCEL SERVICE. Make clear that DOT recommendation to eliminate all further economic regulation of motor carriers encompasses the common carrier obligation, rate discrimination, and rate reasonableness provisions; DOT's specific recommendation of a statutory liability limit of $5 per pound would have a significant detrimental impact on UPS small package shippers.

VIRGINIA, COMMONWEALTH OF. Concurs in DOT overall conclusion that there is no need to maintain ICC as an independent agency, and that remaining functions be integrated into existing agencies.

WESTERN COAL TRAFFIC LEAGUE. Retain existing merger standards; opposes moving merger review to DOJ; all remaining functions should reside in an independent agency at DOT, not DOJ or DOL.

WESTERN TRAFFIC CONFERENCE (RETAIL TRAFFIC MANAGERS). Continue motor carrier safety and financial responsibility; continue rail/motor responsibility for cargo loss and damage; maintain Negotiated Rates Act defenses for undercharges.

WISCONSIN, STATE OF. Supports repeal of rail antitrust immunity and merger review by DOJ; retain line abandonment notice for the states; states and governments that acquire abandoned rail lines should always be considered non-carriers for labor protection purposes; retain state motor carrier registration and insurance enforcement: states would not like to be surprised by the loss of these revenues.

<u>WOMEN INVOLVED IN FARM ECONOMICS</u>. Supports independent agency; retention of oversight over abandonments; competitive access in its current form; and grain contract filing.

APPENDIX 2: LIST OF PARTICIPATING PARTIES

DOT DOCKET 49848
(COMMENTS ON BOTH ICC AND DOT REPORTS)

1. ALK Associates, Inc.
2. American Bus Association
3. American Insurance Association
4. American Movers Conference
5. American President Lines, Inc.
6. American Public Transit Association
7. American Short Line Railroad Association
8. American Trucking Associations, Inc.
9. Association of American Railroads
10. BC Transportation, Inc.
11. Best Buy Company, Inc.
12. Caribbean Shippers Association
13. Carolina Trailways, Inc.
14. Central Analysis Bureau
15. Central Transport, Inc.
16. Chemical Manufacturers Association
17. Cleveland, Donald L.
18. Committee Against Revising Staggers
19. Consolidated Railroad Corporation
20. Crowley American Transport, Inc.
21. EC-MAC Motor Carriers Service Association
22. Edison Electric Institute
23. Elwood Line Grain & Fertilizer Co.
24. Farmers Commodities Corp.
25. Federal Maritime Commission
26. Freight Forwarders Council of America
27. General Felt Industries
28. Great West Casualty Company
29. Greyhound Lines, Inc.
30. Growers Coop
31. Hanna Rubber Company
32. Hawaii, State of
33. Health & Personal Care Products Distribution Conference
34. Hill's Supply, Inc.
35. Howe, Richard D.
36. Inland Marine Underwriters Association
37. Institute of Scrap Recycling Industries

38. International Brotherhood of Teamsters
39. Interstate Truckload Carriers Conference
40. Kempton Grain & Supply Corp.
41. Kyle Railway, Inc.
42. Landstar System, Inc.
43. M & D Ag., Inc.
44. Mallinckrodt Chemical, Inc.
45. Matson Navigation Company
46. McKee Foods Corporation
47. Minnesota Transport Services Association
48. Montana Farmers Union
49. Montana Wheat & Barley Committee
50. National Association of Regulatory Utility Commissioners
51. National Association of Shippers, Consignees and Consumers for Maritime Affairs
52. National Association of Wheat Growers
53. National Grain and Feed Association
54. National Industrial Transportation League
55. National Motor Freight Traffic Association
56. National Private Truck Council
57. National Railroad Passenger Corp.
58. National Small Shipments Traffic Conference
59. NPR, Inc.
60. Owner-Operators Independent Drivers Association
61. Pendleton Woolen Mills
62. Peter Pan Bus Lines, Inc.
63. Puerto Rico Maritime Shipping Authority
64. Regular Common Carrier Conference
65. Rising Farmers Grain Company
66. Rocky Mountain Motor Tariff Bureau
67. Rubber Manufacturers Association
68. SeaLand Service, Inc.
69. Simpson Investment Company
70. Skill Transportation Consulting, Inc.
71. Society of the Plastics Industry
72. Southeastern Trailways, Inc.
73. Southern Motor Carriers Rate Conference
74. Totem Ocean Trailer Express
75. Trailways National Bus System
76. Transportation Brokers Conference of America
77. Transportation Claims & Prevention Council
78. Transportation Lawyers Association
79. Transportation Trades Department, AFL-CIO
80. Travelers Insurance
81. Tri-County Commuter Rail Authority

82. U S West
83. United Bus Owners of America
84. United Parcel Service
85. United States Fidelity & Guaranty Company
86. United Transportation Union
87. United Van Lines, Inc.
88. Virginia, Commonwealth of
89. Walden, Gregory S.
90. Waste, Hazardous Materials Transportation Conference
91. Western Coal Traffic League
92. Western Traffic Conference, Inc.
93. Wisconsin Department of Transportation
94. Women Involved In Farm Economics

APPENDIX 3: CONFERENCE ON THE TRANSPORTATION INDUSTRY OF THE FUTURE

Highlights of the Conference

On January 9, 1995, a one-day Conference on The Transportation Industry of The Future was convened at the Department of Transportation, 400 7th Street SW, Washington, DC. The conference highlights were prepared by Apogee Research, Inc., for the Office of the Secretary, U.S. Department of Transportation (DOT).

Conference Background and Highlights

The objective of this conference was to develop information on the future path of the transportation industry and its customers and the proper direction of regulatory policy to meet their needs. The conference was designed to assist DOT in predicting the probable structure and conduct of the transportation industry of the future, seeking to provide a basis for examining current regulatory policies and programs, and for developing broad-based information on the most appropriate Federal role in future economic regulation.

The conference was held in the context of developing the Secretary of Transportation's study regarding the future of ICC, whether any of its current regulatory activities should be preserved, and what agency (or agencies) should exercise that regulatory authority, as required by Section 210(b) of TIRRA.

To initiate the conference dialogue, four papers were commissioned and briefly presented by the authors. These papers described the railroad, trucking, intermodal, and logistics segments of the transportation industry as they are likely to evolve over the next 25 years.

To gather an appropriate group of the Nation's transportation leaders to discuss the transportation industry of the future, letters of invitation were sent to selected individuals based on contractor recommendations, comments to the Docket established by DOT's Federal Register Notice of November 1, 1994 (59 FR 54668), and other suggestions. The public was notified of--and invited to participate in--the conference via DOT's Press Release of December 30, 1994. Approximately 100 individuals participated, including representatives from the railroad, trucking, maritime sectors, private shippers and shipper associations, university researchers, private consultants, regulatory, and Federal government agencies.

The conference discussions consisted of the following: an opening address by Mortimer Downey, Deputy Secretary of Transportation, paper presentations and discussion with authors, general discussions, discussions on trucking, rail, intermodal, and general issues, a plenary session moderated by Frank Kruesi, Assistant Secretary for Transportation Policy, and wrap-up comments by Gail McDonald, Chairman of ICC.

Key Themes of the Papers

A general theme reflected in all the papers was the powerful effect of regulatory reform embodied in the Staggers Rail Act of 1980 and the Motor Carrier Act of 1980. The former substantially reduced regulation of rail carriage and the latter made sweeping reductions in Federal control over interstate motor carriage. The result has been tremendous gains in efficiency in the provision of rail and trucking services and tremendous reductions in logistics costs nationwide. Railroads have achieved substantial cost reductions (reflected in falling rail freight rates), but have not translated these reductions into much market-share expansion over the past decade. Efficiency gains in trucking have taken many forms: one significant development has been the emergence of hyper-efficient truckload (TL) companies, exemplified by Schneider National and J. B. Hunt; also, package carriers have strengthened and are serving more of the small-shipment freight market, exemplified by UPS. Both of these trends are increasing competitive pressure on the traditional less-than-truckload (LTL) carriers.

Technological developments in rail cars combined with ICC's complete deregulation of rail intermodal traffic has led to the rapid growth of truck/rail (and ship/rail/truck) intermodal traffic. Although originally developed to move international containers inland for the steamship lines, the large TL truckers are now aggressively using intermodal transport for long-distance domestic shipments. Third-party marketers, now often called intermodal marketing companies (IMCs), are also in the market arranging and selling intermodal transportation to both large and small shippers. There are a growing number of firms (both truckers and IMCs) whose business is not tied to an individual mode but simply to obtaining and selling whatever form or combination of freight transport best serves their customers.

A signal effect of deregulation, pervasive throughout freight transport markets, is that transportation arrangements are now driven by customers, not by carriers, regulators, or legal proceedings. Competitive pressure on all firms and modes to satisfy customer requirements has led to efficiency gains over recent years and will continue to propel future improvements. The gain to shippers has been enormous, going well beyond better freight rates or transit times. Shippers have realized significant reductions in inventory and associated costs.

Firms are entering these third-party markets in increasing numbers, selling not just transportation but also logistics management. The logistics firm plans inventory levels, distribution, deliveries, warehousing, etc., and the associated transportation, all focused around the requirements of the client manufacturing or merchandising firm. Through the evolution of such specialized services, the original gains from more efficient truck, rail, or intermodal service are compounded and spread more widely.

These efficiency gains in trucking, intermodal services, and logistics are projected to continue into the future. The recent Federal preemption of intrastate trucking regulation, effective January 1, 1995, will give added impetus to that growth. The greatest threat to future efficiency gains would come from reintroduction of economic regulation.

The continued development of intermodal services looks to be the most promising avenue for future rail traffic growth in markets outside the basic bulk commodities (coal, grain, and chemicals). Technological developments and improved retail-level intermodal marketing should enable railroads to offer intermodal service to a widening spectrum of markets in the future. Mergers of carriers within the rail industry could reduce the number of large railroads from seven currently to four or even fewer. Mergers offer the potential for further efficiency gains, but also carry some risk of reduced competition in at least some markets.

Highlights of the Discussions

The conference discussions, both among the whole group and in the break-out sessions, echoed many of the themes from the presented papers, especially the importance of deregulation in driving efficiency gains and allowing customers to influence significantly, and greatly improve, the nature of the product offered by transport providers. Without question, however, rail and maritime regulatory issues, including restraints over rail rates and rail mergers, and what agency of government should have jurisdiction over rail mergers, were dominant themes in the floor discussions.

Concerns expressed about elimination or significant restructuring of ICC regulation included the following:

- Bulk shippers are worried that the Federal government would cease to play any role regarding the "reasonableness" of rail rates. They did not deny the gains associated with deregulation; rather, they worry that railroads have enough market power to charge monopolistic rates in some markets. They indicated they were comfortable with the market-dominance concept as defined in the Staggers Act, but felt a continuing need for some agency where they could lodge a complaint and get a prompt resolution.
- Shippers expressed a parallel concern regarding proposed rail mergers, worrying that railroads might obtain market power sufficient to charge monopolistic rates.
- A number of railroads are also concerned about rail mergers, as are some non-bulk shippers. A major package carrier emphasized its anxiety about the possibility of reduced rail competition.
- Several participants pointed out that end-to-end mergers, if well designed, could leave most shippers that now have access to two rail carriers with continued access to two carriers.

- Generally, those worried about concentration resulting from rail mergers tended to favor review by the Antitrust Division of DOJ, believing that the application of Clayton and Sherman Act standards would bar any truly large mergers.
- Comments were made distinguishing the "network" character of rail services from product manufacturing, expressing concern that DOJ would not be experienced in applying competitive standards to a "network of services" and might not have authority to obtain appropriate "side conditions."
- There was concern that the DOJ process provided less of a forum for opponents and left no clear record of decision upon which to build an appeal.
- A wide spectrum of participants, both shippers and carriers, expressed a preference that whatever body had authority over rail mergers and any residual rail rate regulation should be "independent." Participants acknowledged that independence might be difficult to achieve in practice, but preferred to deal with an entity that was consistent over time in its application of principles and not subject to abrupt changes of direction at each national election.
- There was a wide consensus that Federal preemption of state regulation should be preserved. Bulk shippers shared in this view, provided their concerns about reasonable rates are addressed.
- A number of carriers expressed a desire for Federal standard-setting of a limited nature, such as insurance requirements or mileage guides.
- Several shippers favored extending the deregulatory regime to maritime carriers and all North American territories. In particular, a thorough examination of all FMC regulatory activity was urged.
- A broad spectrum of participants were concerned about the uncertainties attendant on ICC sunset, and urged that minor Federal budgetary savings not be allowed to endanger the efficiency of the existing transportation marketplace.

Summation

The conference participants strongly endorsed the gains from deregulation and the prospect for continued gains as long as the government generally stays out of the market place. They were particularly optimistic about continuing efficiency gains in trucking, intermodal, and logistics services. In the same vein, they seemed desirous that the government also review, and probably withdraw from, its regulation of maritime rates and services. The concerns voiced at the conference focused on the potential effect of rail mergers on rail competition and the shipper of bulk commodities who might face a market-dominant railroad. Subject to these reservations, the conference participants were broadly supportive of the proposition that free markets and competition would serve to guarantee that transport providers could deliver the service-and-price combinations demanded by shippers.