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COMPETITION OR CONTROL III: MOTOR CARRIERS *

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INTRODUCTION

The initial study in this series surveyed broadly the field of public utilities with the objective of determining in what degree regulated industries must comply with the antitrust laws. Amazingly divergent decisions were discovered. The second study dealt with a specific industry which is subject to only slight interventionist controls: broadcasting. The conclusion was reached that the antitrust laws do and should apply to that trade.

We turn now to an industry somewhat more comprehensively controlled and in which prices are subject to administrative determination. Truckers are regulated by both federal and state governments. By the 1935 amendments to the Interstate Commerce Act, the Interstate Commerce Commission was vested with authority over motor

* Prior installments in this series appeared in 106 U. PA. L. REV. 641 (1958) (public utilities), and in 107 U. PA. L. REV. 585 (1959) (radio and television broadcasting).

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carriers.¹ Comparable tribunals at the state level exercise roughly co-ordinate powers over intrastate transportation.² The regulatory legislation is designed both to enhance public safety and to promote the "economic" welfare of the carriers, shippers and the public. At the federal level it was enacted to prevent "ruinous" or "destructive" competition. Its sponsors believed that competition had got out of hand and that without regulation existing practices would seriously weaken the industry.³

Regulation, then, was prescribed in some degree as an alternative to competition. Competition, however, was not wholly to be eliminated. Congress neither made the antitrust laws wholly inapplicable to the transportation industry nor authorized the ICC to ignore their policy.⁴

¹ Interstate Commerce Act, 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1958) [hereinafter cited by act section number only]. It is worth noting that a violation of the statute is made criminal in character by § 222(a). A history of the motor transport industry containing information concerning the number of truckers, the tonnages hauled and the like will be found in NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 400-12 (1942). In this study we have considered solely the regulation of motor carriers of property and have not investigated the regulation of carriers of passengers and their baggage. For purposes of this study, a page by page examination was made of volumes 292 through 304 of the I.C.C. reports and volumes 73 through 79 of the M.C.C. series. In addition, all earlier cases cited in the secondary literature were examined. All reports available in the Chicago area from the states of Illinois, Massachusetts, Mississippi, Washington, and Wisconsin were also examined except that the Wisconsin decisions were examined only back to 1951.

² See *Stephenson v. Binford*, 287 U.S. 251 (1932). *E.g.*, ILL. ANN. STAT. ch. 95½, §§ 282.1-30 (Smith-Hurd 1958). Note also the heavy registration fees imposed upon truckers. In Illinois, for example, the fee now may run as high as \$1,139.00 per year. ILL. ANN. STAT. ch. 95½, § 3-801(d) (Smith-Hurd Supp. 1960). Regulation in Illinois at an earlier stage is described in Lilienthal & Rosenbaum, *Motor Carrier Regulation in Illinois*, 22 ILL. L. REV. 47, 52-55 (1927). Wisconsin legislation is codified in WIS. STAT. ANN. § 194.18 (1957). As to the effectiveness of state regulation consult WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 571-77 (1955); FAIR & WILLIAMS, *ECONOMICS OF TRANSPORTATION* 526-29 (1950). By far the most exhaustive examination of state regulation is found in HARPER, *ECONOMIC REGULATION OF THE MOTOR TRUCKING INDUSTRIES BY THE STATES* (Illinois Studies in the Social Sciences vol. 43, 1959) [hereinafter cited as HARPER]. Harper's survey indicates that by 1943 only two states did not regulate common carriers and only one more did not regulate contract carriers. Even private carriers are regulated in some states. *Id.* at 31-32, 42-43.

³ *McLean Trucking Co. v. United States*, 321 U.S. 67, 83 (1944). It is commonly pointed out that trucking, unlike other industries which have fallen under public utility regulation, presented little of the aspects of monopoly. Gray, *The Passing of the Public Utility Concept* in READINGS IN THE SOCIAL CONTROL OF INDUSTRY 280, 287 (1942); Pegrum, *The Economic Basis of Public Policy for Motor Transport*, 28 LAND ECON. 244, 246 (1952). It is often suggested that regulation of motor transport was undertaken for the benefit of the railroads. *E.g.*, Stein, *Federal Regulation of Water Carriers*, 16 J. LAND & P.U. ECON. 478 (1940). However that may be, it is apparent that at least some of the truckers are also anxious that regulation be maintained. *Hearings on S. Res. 50 Before the Subcommittee on Domestic Land and Water Transport of the Senate Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 853, 892 (1950).

⁴ *McLean Trucking Co. v. United States*, *supra* note 3 at 86. The Court said that the history of the development of the national transportation policies suggested that the policies of the antitrust laws determine the public interest only in a qualified way; that the premises of motor carrier regulation posit some curtailment of free

On the other hand, the ICC has no power to enforce the Sherman Act as such. It cannot decide whether a contemplated transaction constitutes a restraint of trade or an attempt to monopolize.⁵ The precise adjustments which it must make will vary from instance to instance, depending on the extent to which Congress has indicated a desire to have various policies implemented in the enforcement of the specific provisions of the legislation.⁶

As in the case of broadcasting, we proceed to an examination of the direct controls exercised over motor carrier operators. The purpose, as before, is to determine whether the intervention is so pervasive as to render antitrust enforcement against the truckers undesirable.

ENTRY

Antitrust Standards

A first axiom of antitrust policy is that entry into competition must be free and unhampered. That principle applies under both "hard" and "soft" doctrines.⁷ It could be applied to motor carriers because the financial and technological requirements for entry make it relatively easy for new firms to come into the industry.⁸

Under both state and federal systems of trucking regulation, however, entry is not free; it can be accomplished lawfully only after the issuance of an administrative license.⁹ Furthermore, many commis-

and unrestrained competition. *Id.* at 83. The congressional committee which reported favorably on the legislation which is commonly known as the Reed-Bulwinkle Act made the following statement: "It is plain that in the field of transportation both policies [regulation and antitrust] cannot be applied in full measure. . . . It will not be overlooked that in the field of transportation important objectives of the antitrust laws are achieved by means of Government regulation. For example, the antitrust laws are designed to protect the public from unreasonable or excessive prices But . . . in the case of common carriers . . . the objective of reasonable prices is achieved by other means" *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess., ser. 14, pt. 2-A, at 734 (1949). Compare the concept expressed in *Elgin Storage & Transfer Co. v. Perrine*, 2 Ill. 2d 28, 34, 116 N.E.2d 868, 871 (1953): "It is thus seen that the basic scheme of the legislature is the granting of limited monopoly privileges to motor carriers of property for hire (by certificates, permits and registrations) with the concurrent imposition of regulation of service and rates."

⁵ *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944).

⁶ *Id.* at 80.

⁷ ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 326 (1955). If entry is restricted and sellers are few, each seller is aware that any action he may take may induce a comparable reaction upon the part of his rivals. This situation has often been characterized as noncompetitive. HALE & HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* § 3.10 (1958).

⁸ *Coordination of Motor Transp.*, 182 I.C.C. 263 (1932).

⁹ *Interstate Commerce Act*, §§ 207, 209(b). A common carrier certificate is to issue if the ICC finds that the proposed service is required by the present or future public convenience and necessity. A contract carrier permit is to issue if the applicant is fit and if the proposed operation is consistent with the public interest and the

sions deny such licenses if service rendered by existing carriers is deemed adequate.¹⁰ To the extent the ICC or a state tribunal denies the grant of a certificate and thus blocks entry into the industry, it is negating the impact of the antitrust laws.

Entry Against Established Rail Carrier

In the federal system (and in most states) the mere existence of rail service is not usually deemed a ground for denial of an application for motor carrier authority. Justification for permitting the entry of new trucking is usually achieved by a finding that rail service is inadequate—for example, that it does not serve consignees located off rail routes.¹¹

national transportation policy. Some years ago applications were being received by the ICC at the rate of 275 per month. 65 ICC ANN. REP. 139 (1952). State legislation is usually comparable to the federal. See, e.g., ILL. ANN. STAT. ch. 95½, §§ 282.1, .5, .6 (Smith-Hurd 1958); WIS. STAT. ANN. § 194.20 (Supp. 1959), § 194.34 (1957). Most federal and state commissions obviously exercise considerable discretion in applying the legislative standards. See *Gateway City Transfer Co. v. Public Serv. Comm'n*, 253 Wis. 397, 34 N.W.2d 238 (1948). A leading student of state regulation writes: "The chief method used by the states in preventing the demoralizing effects of excessive competition has been the requirement that motor carrier operators obtain authority from the regulatory agency, either in the form of a certificate of public convenience and necessity or a permit, before operations can be begun." HARPER 29. The pattern of regulation varies somewhat from state to state and the license which the trucker must obtain carries several different labels. HARPER 82, 88, 99-102. Note also that author's analysis: "Control over entry into the motor trucking business is designed to prevent or reduce the unsatisfactory conditions . . . which may result in unlimited competition, such as destructive competition among motor carriers and between motor carriers and railroads, inadequate rates, high turnover of operators, and poor standards of service. Where the objective of regulation is to guard against the consequences of cutthroat competition, as it has been in most states, the supply of transportation must be controlled to put such a policy into effect." *Id.* at 80-81. See also TAFF, *COMMERCIAL MOTOR TRANSPORTATION* 469-71 (1955).

¹⁰ E.g., *ICC v. Parker*, 326 U.S. 60, 69 (1945); *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215 (E.D. Pa.), *aff'd per curiam*, 317 U.S. 587 (1942); *Coastal Motor Lines*, 77 M.C.C. 510, 513 (1958). Compare *Fred Lindeman*, 29 M.C.C. 183, 184 (1941). In *Kansas City So. Transp. Co.*, 28 M.C.C. 5, 15-16 (1941), the Commission said: "Manifestly unnecessary and wasteful duplications of service should be avoided in the public interest . . ." See KOONTZ & GABLE, *PUBLIC CONTROL OF ECONOMIC ENTERPRISE* 129 (1956); WILCOX, *op. cit. supra* note 2, at 633-34. The experience of the state commissions is summarized in HARPER 99, 105-09, 179-80. Harper describes the practice of the state commissions in the following language: "Two policies have been followed by the states in dealing with the question of how much competition to permit among motor carriers. Under the 'regulated monopoly' or 'limited monopoly' theory, the state attempts to limit as much as possible the number of motor truckers serving a particular route or territory. Through such a policy, operating authority becomes substantially a monopoly right. The second policy, that of 'regulated competition,' recognizes that competition among truckers must be restricted but also that operating authority does not give to the holder any monopoly rights and new competition will be allowed to the extent that the interests of the public require." *Id.* at 103-04.

¹¹ *Dallas & Mavis Forwarding Co.*, 76 M.C.C. 245, 247 (1958); *Diamond Transp. Sys., Inc.*, 76 M.C.C. 363, 367 (1958); *Brady Transfer & Storage Co.*, 23 M.C.C. 767, 778 (1940); *Brookes-Gillespie Motors, Inc.*, 10 M.C.C. 151, 154 (1936); *Jason W. House*, 1 M.C.C. 725, 736 (1937). See NATIONAL RESOURCES PLANNING BOARD, *TRANSPORTATION AND NATIONAL POLICY* 413 (1942); OPPENHEIM, *THE NATIONAL TRANSPORTATION POLICY AND INTER-CARRIER COMPETITIVE RATES* 51 (1945); TAFF, *op. cit. supra* note 9, at 502. Experience under state regulation has been mixed. In some instances, state commissions have taken the position that rail carriers are not entitled to protection against motor carrier competition. HARPER 157; Hall, *Certifi-*

Under the National Transportation Policy,¹² the Supreme Court recently admonished the ICC not to deny certificates to motor carrier applicants merely because rail service existed; the Commission was told that it must consider the inherent advantages of the motor carrier operation, including (where applicable) its lower costs.¹³ Both before and after this judicial mandate the ICC appears to have been reasonably ready to find that rail service was inadequate (or that motor carrier service had inherent advantages)¹⁴ and hence to grant authority to motor carriers, although in a substantial number of cases presenting the issue applications have been denied.¹⁵

cates of Convenience and Necessity, 28 MICH. L. REV. 107, 276, 282 (1929). But see *Stephenson v. Binford*, 287 U.S. 251, 271 (1932); *Texas & New Orleans R.R. v. North-Side Belt Ry.*, 276 U.S. 475, 479 (1928); *Kelly v. Finney*, 207 Ind. 557, 194 N.E. 157 (1935). Some observers take the position that motor carriers have only taken short haul and less than carload freight from the rails and hence that the licensing of the truckers has had little effect on railroad traffic. Spurr, *The Case for the Common Carrier in Trucking*, 24 LAND ECON. 253, 257 (1948). On the other hand, a railroad is a prime example of indivisibility in which excess capacity is almost always to be found. TROXEL, *ECONOMICS OF TRANSPORT* 399 (1955). In any event, the railroads appear to oppose free licensing of motor carrier operators. S. Doc. No. 78, 79th Cong., 1st Sess. (1945).

¹² 54 Stat. 899 (1940), 49 U.S.C. preceding § 1 (1958).

¹³ *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 89 (1957). Subsequent proceedings are reported in A. W. Schaffer, 77 M.C.C. 5, 10 (1958). Compare *Rice Truck Lines*, 76 M.C.C. 62 (1958). See Nutting & Kuhn, *Motor Carrier Regulation—The Third Phase*, 10 U. PITT. L. REV. 477, 479 (1949).

¹⁴ Among the reasons given for inadequacy of rail service are that the commodities involved require more expensive hauling in local cartage and that some consignees are off sidings and hence require trans-shipment; that rail service does not furnish sufficiently rapid transportation; that rail service does not provide protection against freezing; that rail service does not move the commodity in bulk; that the hours of rail service are inconvenient. *Emery Transp. Co.*, 78 M.C.C. 483, 486 (1958); *Carl Subler Trucking, Inc.*, 77 M.C.C. 633, 639 (1958), *rev'd on new facts*, 79 M.C.C. 457 (1959); *Capital Transp. Co.*, 77 M.C.C. 69, 73 (1958); *Chemical Tank Lines, Inc.*, 77 M.C.C. 39, 42 (1958); *Commercial Carrier Corp.*, 77 M.C.C. 463, 467 (1958); *International Transp., Inc.*, 77 M.C.C. 329, 334 (1958); *Liquid Transp. Corp.*, 77 M.C.C. 529, 532 (1958); *Oriole Terminal & Transp. Co.*, 77 M.C.C. 481, 485 (1958); *Marine Motor Transp., Inc.*, 76 M.C.C. 308, 310 (1958); *Southwest Bulk Handlers, Inc.*, 76 M.C.C. 49, 51 (1958); *Moffatt Trucking, Ltd.*, 73 M.C.C. 327, 329 (1957); *Wilber Lowdermilk*, 73 M.C.C. 413, 414 (1957); *Edgar A. Gill*, 26 M.C.C. 593, 595 (1940); *Barton-Robison Convoy Co.*, 19 M.C.C. 629, 636 (1939); *Brooks-Gillespie Motors, Inc.*, 10 M.C.C. 151, 154 (1938); *Edwin A. Bowles*, 1 M.C.C. 589, 591 (1937); cf. *Lewiston Transfer & Storage Co.*, 8 Wash. Dep't Pub. Works 155, 156 (1927); *C. F. Dappman*, 8 Wash. Dep't Pub. Works 136 (1927); *Roy L. Parks*, 7 Wash. Dep't Pub. Works 132 (1926); *Michela Coal & Dock Co.*, 41 Wis. Pub. Serv. Comm'n 557 (1956).

¹⁵ *Boyd E. Richner, Inc.*, 77 M.C.C. 766, 769 (1958); *California Express, Inc.*, 77 M.C.C. 118, 119 (1958); *Carl Subler Trucking, Inc.*, 77 M.C.C. 707, 713 (1958); *Carl Subler Trucking, Inc.*, 77 M.C.C. 395, 397 (1958); *Bluff City Transfer & Storage Co.*, 76 M.C.C. 199, 208 (1958); *Commercial Carriers, Inc.*, 76 M.C.C. 449, 454 (1958); *Dallas & Mavis Forwarding Co.*, 76 M.C.C. 528, 532 (1958); *Gray-Bell Truck Line, Inc.*, 76 M.C.C. 302 (1958); *Kenosha Auto Transp. Corp.*, 52 M.C.C. 123, 126 (1950); *Case Driveaway, Inc.*, 51 M.C.C. 659, 663 (1950); *Forrest Worm*, 32 M.C.C. 641 (1942); cf. *Davis & Banker, Inc.*, 8 Wash. Dep't Pub. Works 157 (1927); *Emmett S. Graham*, 3 Wash. Dep't Pub. Works 170 (1922); *Johnson Cartage Co.*, 42 Wis. Pub. Serv. Comm'n 379, 382 (1957). As to water transportation compare application of *C. C. Davis*, 2 Wash. Dep't Pub. Works 370 (1922).

Entry Against Established Motor Carrier

By the clear weight of authority, licenses are denied to applicants seeking to enter the trucking field when service rendered by existing motor carriers is deemed adequate: the applicant must show a public "need" for his service.¹⁶ This involves, conversely, the requirement that he must demonstrate the inadequacy of the existing service. In case after case both federal and state commissions have found existing service adequate and denied applications on that ground.¹⁷

¹⁶ *Dealers Transit, Inc.*, 79 M.C.C. 580, 584 (1959); *Lee E. Champ*, 79 M.C.C. 311, 316 (1959); *Eldon Miller, Inc.*, 79 M.C.C. 77, 80 (1959); *Watkins Motor Lines, Inc.*, 78 M.C.C. 563, 565 (1958); *Dean S. Axtell*, 76 M.C.C. 115, 122 (1958); *Ernest Braun*, 76 M.C.C. 124, 126 (1958). Among the state decisions see *Motor Transp. Co. v. Public Serv. Comm'n*, 263 Wis. 31, 38, 56 N.W.2d 548, 551 (1953); *United Truck Lines, Inc.*, 19 Wash. Dep't Pub. Serv. 58 (1942); *C. A. Heisserman*, 18 Wash. Dep't Pub. Serv. 59, 60 (1940); *Ralph Wrezic*, 42 Wis. Pub. Serv. Comm'n, 468, 469 (1957). See *HARPER* 88. Compare *Earl A. Sweet*, 19 Wash. Dep't Pub. Serv. 69 (1942) (*Coca Cola* a commodity essential to the war effort and hence its carriage a public "need").

At times the applicant for a certificate may face a chicken-or-egg problem of proof. For example, applications have been denied because the testimony of supporting shippers with respect to the need for the service is too vague, indefinite and conjectural. See *Watkins Motor Lines, Inc.*, *supra* at 566; *Orieo Terminal & Transp. Co.*, 77 M.C.C. 481, 485 (1958). The inference seems to be that testimony of actual shipments must be adduced before a public "need" can be found, yet the actual shipments cannot move unless the authority has been granted. In several cases the ICC appears to have met that problem by letting the applicant develop traffic as a carrier in some other capacity. *E.g.*, *Freight Transit Co.*, 78 M.C.C. 427, 432 (1958); *Stanley W. Belnap*, 78 M.C.C. 287, 291 (1958), *reversing* 73 M.C.C. 93 (1957). In other instances, the ICC has relaxed its standards of proof and granted certificates on the mere hope that the shipper might develop additional traffic if the application were granted. *Langer Transp. Corp.*, 78 M.C.C. 621, 624 (1958).

¹⁷ See *Consolidated Freight Ways, Inc.*, 79 M.C.C. 17, 25 (1959); *Morgan Drive-Away, Inc.*, 78 M.C.C. 698, 700 (1959); *W. J. Digby, Inc.*, 78 M.C.C. 681, 684 (1959); *Interstate Dress Carriers, Inc.*, 77 M.C.C. 787, 790 (1958); *Bert Hodges*, 77 M.C.C. 495 (1958), *reversing* 74 M.C.C. 746 (1958); *Commercial Oil Transp.*, 77 M.C.C. 81, 85 (1958); *Grayrod Trucking Co.*, 77 M.C.C. 66, 68 (1958); *C. & D. Transp. Co.*, 76 M.C.C. 265, 268, *rev'd on new facts*, 77 M.C.C. 293 (1958); *Carolina Haulers, Inc.*, 76 M.C.C. 254, 256 (1958); *Carl Metheny*, 76 M.C.C. 21, 24 (1958); *Transport Serv. Co.*, 73 M.C.C. 591 (1957); *C. & D. Oil Co.*, 1 M.C.C. 329, 332 (1936); *Zephia Odell Clark*, 1 M.C.C. 445, 448 (1937). In *Harold D. Wagner*, 77 M.C.C. 777, 781 (1958), it was said "We have held repeatedly that the existing motor carriers are entitled to all authorized traffic that they can handle economically and efficiently before a new competing service may be authorized therefor, unless it can be shown that such existing carriers are unwilling or unable to meet the public's reasonable transportation needs within their authorized territories." See *C. E. Hall & Sons Inc. v. United States*, 88 F. Supp. 596, 601 (D. Mass. 1950). The rule as to passenger service is stated in *Clarke v. United States*, 101 F. Supp. 587, 590 (D.D.C. 1951). A commission is apt to take a more rigorous stand against entry if the applicant proposes merely contract carrier service. This position finds some support in the federal statute. Section 207(a) of the Interstate Commerce Act provides that a common carrier certificate is to issue if required by the public convenience and necessity. Under § 209(b) a contract carrier permit may be granted on a finding that its issuance is consistent with the public interest and the national transportation policy (a requirement which, however, has come to be read as presenting a standard not appreciably lower than that for common carriage, see Note, 107 U. PA. L. REV. 1150, 1152 n.18 (1959)), but as to contract carriers the ICC is expressly required to give consideration to the effect of granting the permit upon the services of the protesting carrier. See *HARPER* 112, 114; S. Doc. No. 78, 79th Cong., 1st Sess. 15, 166 (1945); *George & Boldt, Certification of Motor Common Carriers*, 17 J. LAND & P.U. ECON. 82, 206

It is true, of course, that in some instances existing service has been found to be inadequate for various reasons:¹⁸ the existing carriers, for example, may maintain terminals too far distant from shippers' plants,¹⁹ or their equipment may not be suitable for the commodities involved.²⁰

(1941). Adverse comment on the policies of the Commission will be found in Pegrum, *Public Policy in Motor Transport*, in *BUSINESS ORGANIZATION AND PUBLIC POLICY* 456, 458 (Levin ed. 1958); the protectionisms of the Commissions are supported in Spurr, *supra* note 11.

Among the state decisions denying applications on the ground that existing service is adequate are: *Campbell Sixty-Six Express, Inc. v. Delta Motor Lines, Inc.*, 218 Miss. 198, 67 So. 2d 252 (1953); *Gateway City Transfer Co. v. Public Serv. Comm'n*, 253 Wis. 397, 34 N.W.2d 238 (1948); *George A. Wichohn*, 19 Wash. Dep't Pub. Serv. 61 (1942); *Mountain Rd. Freight Co.*, 8 Wash. Dep't Pub. Works 177 (1927); *E. L. Middaugh*, 3 Wash. Dep't Pub. Works 14 (1922); *Beaver Distrib. Co.*, 38 Wis. Pub. Serv. Comm'n 42 (1953). Statutes sometimes specifically direct commissions to take into account the protection of existing carriers. *E.g.*, Wis. STAT. ANN. § 194.23 (1957). A similar rule was applied with respect to passenger traffic in *North Coast Transp. Co. v. Department of Pub. Works*, 157 Wash. 79, 288 Pac. 245 (1930). The earlier history of regulation in Illinois is set forth in Lilienthal & Rosenbaum, *supra* note 2, at 59, 64, wherein the authors conclude that Illinois then relied on regulated monopoly rather than competition in transportation. The Wisconsin experience is set forth in careful detail in Auerbach, *The Regulation of Motor Carriers in Wisconsin* (pts. 1-2), 1951 Wis. L. REV. 5, 229 [hereinafter cited as *Auerbach*]. Auerbach found that without exception the Wisconsin commission had authorized only one carrier to perform the service required for the public convenience and necessity; that the Wisconsin commission believed in protecting the existing motor carrier from competition because it was in the public interest to avoid unnecessary duplication of services; and that as a result of the commission's policy the common carrier trucking business in the state had been concentrated in the hands of a few large companies. A survey of the experience in other states will be found in HARPER 82-124.

It is common practice for the commissions to place the burden of proof with respect to the inadequacy of existing service on the applicant for the new license. *E.g.*, *Carl Metheny*, 76 M.C.C. 21, 25 (1958); *McCoy Truck Lines, Inc.*, 26 M.C.C. 585, 589 (1940); *Kitsap Auto Freight, Inc.*, 6 Wash. Dep't Pub. Works 225 (1925); *Lawrence Severson*, 41 Wis. Pub. Serv. Comm'n 272 (1956). Exception, however, is often made in cases where it appears that the existing motor carriers will not be injured by the issuance of the new license. *Refiners Transp. & Terminal Corp.*, 77 M.C.C. 745 (1958); *Goodman Motor Transp. Co.*, 77 M.C.C. 11, 14 (1958); *Consolidated Motor Lines, Inc.*, 18 M.C.C. 35 (1939); *Ray Powell*, 19 Wash. Dep't Pub. Serv. 65 (1942); *Vincent J. Flanagan*, 19 Wash. Dep't Pub. Serv. 63 (1942).

¹⁸ *E.g.*, *Lee E. Champ*, 79 M.C.C. 311, 316 (1959); *Avery J. Burns*, 77 M.C.C. 721, 724 (1958); *Chemical Tank Lines, Inc.*, 76 M.C.C. 597, 601 (1958).

¹⁹ See *William Perkins*, 77 M.C.C. 795, 798 (1958); *Northern Tank Lines*, 77 M.C.C. 35, 37 (1958).

²⁰ See *Langer Transp. Corp.*, 78 M.C.C. 621, 624 (1958); *Ryder Tank Line, Inc.*, 78 M.C.C. 533, 539 (1958); *Coastal Tank Lines, Inc.*, 78 M.C.C. 218, 220 (1958); *Dan's Motor Lines, Inc.*, 77 M.C.C. 457, 459 (1958); *Eldon Miller, Inc.*, 77 M.C.C. 23, 26 (1958); *Goodman Motor Transp. Co.*, 77 M.C.C. 11, 13-14 (1958); *Hayes Freight Lines, Inc.*, 77 M.C.C. 233, 238 (1958); *Refiners Transp. & Terminal Corp.*, 77 M.C.C. 745, 747 (1958); *Tex-O-Kan Transp. Co.*, 77 M.C.C. 715, 719 (1958); *Tractor Transp., Inc.*, 77 M.C.C. 359, 362 (1958); *William O. Mattox*, 77 M.C.C. 165, 168 (1958); *EE-Jay Motor Transp., Inc.*, 76 M.C.C. 97, 99-100 (1958); *Associated Transp., Inc.*, 54 M.C.C. 528 (1952); HARPER 113, 123-24.

An application may be granted to serve a destination to which traffic has not previously moved. *Doral Pallesen*, 76 M.C.C. 421, 428 (1958). *Accord*, *Dallas & Mavis Forwarding Co.*, 77 M.C.C. 31, 34 (1958); *Indianhead Truck Line, Inc.*, 76 M.C.C. 357 (1958); *John W. Carlson*, 7 Wash. Dep't Pub. Works 160 (1926). Also, applicants have sometimes been successful when they offered extra services tailored to shippers' needs. *E.g.*, *Fox-Smythe Transp. Co.*, 79 M.C.C. 279, 283 (1959); *Luper Transp. Co.*, 78 M.C.C. 591, 595-96 (1958); *Thomas G. Burkholder*, 77 M.C.C. 93, 95

Both courts and commissions insist that the already licensed carriers enjoy no right to protection against competition,²¹ but some of the state commissions always grant the existing carrier an opportunity to

(1958); Herbert B. Fuller, 77 M.C.C. 223, 226 (1958); William Grimm, 77 M.C.C. 43, 49 (1958); Diamond Transp. Sys., Inc., 76 M.C.C. 397, 400 (1958); R.N.G. Commercial Auto Renters, Inc., 73 M.C.C. 665, 671 (1957); cf. L. P. Wilber, 19 Wash. Dep't Pub. Serv. 66 (1942). Such Commission action was approved in *Inland Motor Freight v. United States*, 36 F. Supp. 885, 888-89 (N.D. Idaho 1941). As to existing steamship service, compare Adolph Johnson, 3 Wash. Dep't Pub. Works 97 (1922). The fact that the existing carrier may be affiliated with a rival shipper has been the subject of conflicting decisions. Compare *Robideau's Express, Inc.*, 73 M.C.C. 503, 508 (1957), with *F. J. Boutell Driveway Co.*, 79 M.C.C. 318, 320 (1959), reversing 76 M.C.C. 795 (1958).

²¹ In *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 91 (1957), the Court expressly said that no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need; nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers. In *Hudson Transit Lines, Inc. v. United States*, 82 F. Supp. 153 (S.D.N.Y. 1948), *aff'd per curiam*, 338 U.S. 802 (1949), the existing carrier was held entitled to protection against the issuance of a certificate to a rival in the absence of a positive showing of public need for the service or of the inadequacy of the existing service. The court, however, said: "This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. . . . The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service." *Id.* at 157. And in *Lang Transp. Corp. v. United States*, 75 F. Supp. 915 (S.D. Cal. 1948), where a certificate had been granted to a new rival carrier, the court affirmed, saying: "It is clear that under Federal law the carriers first in the field within a particular area do not enjoy legal protection against competition subsequently arising. The Interstate Commerce Commission has power to authorize any number of different carriers to operate within the same territory. The rule applicable in federal courts, applying the statutory standards established by Congress . . . affords less protection to existing carriers . . . than is the case under state law in some jurisdictions." *Id.* at 930. Accord, *Beard-Laney, Inc. v. United States*, 83 F. Supp. 27, 32 (E.D.S.C.), *aff'd per curiam*, 338 U.S. 803 (1949); *A.B. & C. Motor Transp. Co. v. United States*, 69 F. Supp. 166, 169 (D. Mass. 1946); *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215 (E.D. Pa.), *aff'd per curiam*, 317 U.S. 587 (1942); *Inland Motor Freight v. United States*, 36 F. Supp. 885, 889 (N.D. Idaho 1941). Compare *Burks Motor Freight Line, Inc.*, 77 M.C.C. 303, 307 (1958).

State controls have been administered in like vein. Take, for example, ILL. ANN. STAT. ch. 95½, § 282.5 (Smith-Hurd 1958). In the granting of a common carrier certificate, the commission is directed to give consideration, among other factors, to the public interest and the like. Then the statute pursues: "provided however, that the mere existence of a competing transportation service in the area sought to be served shall not in and of itself be proof sufficient to support a denial of the existence of the present or future public necessity and convenience." Similar language with respect to contract carriers appears in § 282.6(a). The Wisconsin court stresses the discretion of the commission in this matter. *Motor Transp. Co. v. Public Serv. Comm'n*, 263 Wis. 31, 56 N.W.2d 548 (1953); *Farmers Co-op. Equity Union Shipping Ass'n v. Public Serv. Comm'n*, 245 Wis. 143, 13 N.W.2d 507 (1944); *United Parcel Serv. v. Public Serv. Comm'n*, 240 Wis. 603, 4 N.W.2d 138 (1942). Compare *Ryder Tank Line, Inc.*, 78 M.C.C. 409, 420 (1958); *Associated Transp., Inc.*, 54 M.C.C. 528, 529 (1952); *Burlington Transp. Co.*, 33 M.C.C. 759, 766-67 (1942); *United Parcel Serv.*, 12 P.U.R.3d 22, 27 (Wash. 1955). See HARPER 109-19, 209. The so-called Weeks Committee recommended more competition among different types of carriers. *Hearings on the Report of the Presidential Advisory Committee on Transport Policy and Organization Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 3, 7, 8 (1955). Note, however, that the present policy of the ICC and the state tribunals is limited by the commodity and geographic limitations of the licensed carriers. Refusal to license would-be entrants into the field does not mean that one motor carrier will eventually transport all the commodities shipped in the United States.

improve its service prior to the issuance of a certificate to the would-be entrant.²² Significantly, in determining the adequacy of existing service the ICC refuses to consider rates. The fact, therefore, that an applicant promises to perform similar services at lower rates will not induce the issuance of a certificate.²³ Again, the ICC has repeatedly held that it will not authorize new operations merely to afford shippers a through service when existing interline service is available—i.e., a joint movement of traffic is usually deemed adequate service.²⁴

²² HARPER 108-09, 117-19. Granting the existing carrier an opportunity to improve its service prior to the issuance of a certificate to an applicant may be viewed as an extension of the standard practice of denying applications when existing service is deemed adequate. See *Highway Transp., Inc.*, 77 M.C.C. 209 (1958): "We have consistently held that existing carriers should be afforded an opportunity to transport all of the traffic which they can handle adequately, economically, and efficiently in the territory they serve before a new carrier is permitted to enter the field. The burden is upon applicant to show that existing carriers cannot or will not satisfactorily perform the considered service. . . ." *Id.* at 213. *Accord*, *Frank Cosgrove Transp. Co.*, 78 M.C.C. 690, 692 (1959); *Arco Auto Carriers, Inc.*, 49 M.C.C. 731, 771 (1949); *Lon D. Fisher*, 30 M.C.C. 217, 222 (1941), *rev'd on new facts*, 42 M.C.C. 695 (1943); *cf.* *Hogland Transfer Co.*, 18 Wash. Dep't Pub. Serv. 61 (1940); *Service Auto Freight Co.*, 6 Wash. Dep't Pub. Works 226, 227 (1926). Compare *Bulk Motor Transp., Inc.*, 79 M.C.C. 321, 325 (1959); *Carl Subler Trucking, Inc.*, 79 M.C.C. 365, 367 (1959), *reversing* 77 M.C.C. 145 (1958); *Direct Transp. Co.*, 79 M.C.C. 327, 329 (1959), *reversing* 71 M.C.C. 808 (1957); *Transport, Inc.*, 76 M.C.C. 560, 564 (1958); *Curtis E. Earhart*, 3 Wash. Dep't Pub. Works 63, 64 (1922). A wholly different approach was taken in *Tex-O-Kan Transp. Co.*, 77 M.C.C. 715, 719 (1958).

²³ *Interstate Dress Carriers, Inc.*, 77 M.C.C. 787, 791 (1958); *Ringle Truck Lines, Inc.*, 77 M.C.C. 448, 452 (1958); *Seago, Inc.*, 77 M.C.C. 587, 591 (1958); *C. & D. Transp. Co.*, 76 M.C.C. 265, 269, *rev'd on new facts*, 77 M.C.C. 293 (1958); *Victor Reindahl*, 39 Wis. Pub. Serv. Comm'n 76, 78 (1954); NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 414 (1942). The ICC is apt to say that if lower rates are desired shippers should seek relief under other provisions of the Interstate Commerce Act rather than promote the application of a new carrier. See, e.g., *Superior Trucking Co.*, 77 M.C.C. 51, 58 (1958). The Commission has, however, suggested that it might consider rates in a licensing proceeding if the rates of the existing carriers have constituted an "embargo" on the movement of the product in question. *Schirmer Transp. Co.*, 77 M.C.C. 240, 242 (1958).

As noted in text, the ICC in determining whether to admit new applicants into competition with existing carriers will take account of improvements in service offered by the applicants. It is difficult to reconcile that position with the denial of applications grounded on the claim that applicants may offer lower rates. In both cases shippers will presumably enjoy lower costs of transport. There is also a question as to whether the ICC's denial of applications made on the grounds that shippers desire lower rates is consistent with the pronouncements in *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957), where a Commission order denying an application for motor carrier service on the ground that rail service was adequate was before the Court. The Court wrote: "The Commission's second basic conclusion from the record was that the main purpose of the witnesses in supporting the application was the prospect of obtaining lower rates. For this reason the Commission discounted the testimony of these witnesses, apparently without even evaluating the claimed advantages of the proposed service other than reduced rates. We think this approach runs counter to the National Transportation Policy. The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize." *Id.* at 91. A different policy has been followed in Ohio. See HARPER 100.

²⁴ In *Consolidated Freightways, Inc.*, 79 M.C.C. 17 (1959), the ICC wrote: "It is well established that shippers are not entitled to single-line service from and to

Entry Against Existing Contract Carrier

Commissions are less eager to protect the already licensed contract carrier. In some instances applications for new common carrier authority will be denied because the existing service rendered by contract carriers is deemed adequate.²⁵ Perhaps more frequently, particularly in the state commissions,²⁶ the effect of a new license upon contract carriers is deemed immaterial.²⁷

every possible point of origin and destination. In the absence of a more positive showing that joint-line service will not meet their reasonable transportation needs, existing carriers should be accorded the right to transport all traffic which they can handle efficiently and economically in the territory served by them before additional competitive services are permitted to enter the field." *Id.* at 25. *Accord*, Harry A. Kemp, 77 M.C.C. 749, 752-53 (1958); Ringle Truck Lines Inc., *supra* note 23, at 452; Oklahoma-Louisiana Motor Freight Co., 77 M.C.C. 77, 79 (1958); Beaufort Transfer Co., 76 M.C.C. 326, 328 (1958); Carl Subler Trucking, Inc., 76 M.C.C. 257, 259 (1958); Pittsburgh & New England Trucking Co., 76 M.C.C. 609, 613-14 (1958); Arco Auto Carriers, Inc., 49 M.C.C. 731, 769 (1949). The Wisconsin experience is set forth in *Auerbach* 67-79. Single line service has been authorized in instances where joint line service was found inadequate by reason of inability of the carrier to make drop-offs for the shipper, slowness of service and the like. *E.g.*, Carl Subler Trucking Co., 79 M.C.C. 365, 367-68 (1959), *reversing* 77 M.C.C. 145 (1958); Zero Refrigerated Lines, 78 M.C.C. 671, 675 (1959); Dundee Truck Line, Inc., 77 M.C.C. 399, 402 (1958); Sooner Freight Lines, 77 M.C.C. 311, 315 (1958); William Grimm, 77 M.C.C. 43, 49 (1958); Juliano Bros., 48 M.C.C. 747 (1948); *cf.* Melvin Arthur Albright, 40 Wis. Pub. Serv. Comm'n 444, 445 (1955). See *Auerbach* 278.

Obviously, motor carriage is much more efficient when the trucks move pay loads in both directions. This "backhaul" problem is encountered in several situations. In the first place, an application for a license may be denied on the grounds that the existing carriers would lose their backhauls if the certificate or permit were to issue. See, *e.g.*, Blue Ridge Transfer Co., 76 M.C.C. 570, 572 (1958); Clay Hyder Trucking Lines, Inc., 73 M.C.C. 481, 485 (1957); *cf.* E. H. Barker, 19 Wash. Dep't Pub. Serv. 71 (1942); Charles A. Lasater, 19 Wash. Dep't Pub. Serv. 59 (1942). An existing carrier may apply for new authority to enable it to backhaul along its outgoing routes. Here again the ICC is anxious to preserve the *status quo* and protect the carriers now hauling such goods. See, *e.g.*, William Perkins, 77 M.C.C. 795, 798 (1958); Carl Subler Trucking, Inc., 77 M.C.C. 707, 714 (1958); Reed Lines, Inc., 77 M.C.C. 155, 157-58 (1958); William C. Woodard, 76 M.C.C. 375, 377 (1958); *cf.* Walter Brincken, 2 Wash. Dep't Pub. Works 487 (1922). Compare Hayes Freight Lines, Inc., 77 M.C.C. 233, 235 (1958); Allied Van Lines, Inc., 46 M.C.C. 159, 200 (1946). In a few instances, however, the ICC has given favorable consideration to applications partially on the ground that a backhaul would be provided. *Aero Mayflower Transit Co. v. United States*, 95 F. Supp. 258, 262 (D. Neb. 1951); *International Transp., Inc.*, 77 M.C.C. 329, 333 (1958); *Chemical Tank Lines, Inc.*, 77 M.C.C. 39, 42 (1958).

²⁵ Bernard Klein, 76 M.C.C. 196 (1958); P. B. Mutrie Motor Transp., Inc., 76 M.C.C. 171, 173, 174 (1958); Craig Trucking, Inc., 46 M.C.C. 333, 340 (1946); Truck Transp., Inc., 44 M.C.C. 268 (1944); HARPER 113-14.

²⁶ *United Parcel Serv. v. Public Serv. Comm'n*, 240 Wis. 603, 4 N.W.2d 138, 142-43 (1942); Donald J. Wilinski, 41 Wis. Pub. Serv. Comm'n 274, 275 (1956); Fred Gurtner, Jr., 38 Wis. Pub. Serv. Comm'n 204, 205 (1953); *Motor Truck Transfer, Inc.*, 38 Wis. Pub. Serv. Comm'n 33, 34 (1953).

²⁷ In *United States v. N. E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 54-55 (1942), the Court said: "The Act [Interstate Commerce Act] clearly contemplates that contract and common carriers will offer competing types of service . . ." See HARPER 110-16, 126, 133. HUDSON & CONSTANTIN, *MOTOR TRANSPORTATION PRINCIPLES AND PRACTICES* 504 (1958) [hereinafter cited as HUDSON & CONSTANTIN]; Poe, *Regulation of Highway Carriers in California*, 30 So. CAL. L. REV. 131, 134 (1957).

Other Criteria

In some instances the ICC has adopted a "follow the traffic" theory whereby a carrier is granted a new route so that he may continue to serve a shipper who moves to a new location.²⁸ To the extent that such action by the ICC tends to "tie" the shipper to the carrier, it would appear to be contrary to antitrust principles. On the other hand, it can be argued that the ICC is opening the door to additional competition at the point to which the shipper has moved.

When there is more than one applicant for a given route, the ICC sometimes prefers the one with the best facilities or the most experience²⁹ and occasionally grants the certificate largely on the grounds of priority of application.³⁰ The ICC also uses its power to deny entry to police the industry. Thus, if the applicant has previously been violating the Interstate Commerce Act, his application for a certificate or permit may well be refused.³¹ When the ICC so acts it is in effect subordinating enforcement of the principles of the antitrust laws to a policy of punishment for violation of another statute.

"Grandfather" Clauses

Under both state and federal legislation those who were engaged in the business of trucking prior to the enactment of the regulatory

²⁸ Kendrick Cartage Co., 78 M.C.C. 311, 313 (1958); C. & R. Trucking Co., 77 M.C.C. 385, 387 (1958); H. H. Follmer Contract Hauling, Inc., 76 M.C.C. 565, 567 (1958). See 71 ICC ANN. REP. 44 (1957). In other instances, applications to "follow the traffic" have been denied. Kirby & Kirby, Inc., 78 M.C.C. 81, 83 (1958); John R. Callahan, 77 M.C.C. 317, 320 (1958); Smith & Solomon Trucking Co., 61 M.C.C. 748, 752 (1953), *complaints dismissed*, 120 F. Supp. 277 (1954); Clark Transp. Co., 53 M.C.C. 237, 244 (1951).

²⁹ Ryder Tank Line, Inc., 78 M.C.C. 409, 420 (1958); Indiana R.R., 21 M.C.C. 73 (1939); HUDSON & CONSTANTIN 503. See HARPER 93, 97-103. Some state commissions place considerable stress upon financial responsibility of the applicant. KOONTZ & GABLE, *op. cit. supra* note 10, at 129. But see Poe, *supra* note 27, at 134. Commission solicitude for licensee's solvency is discussed in text accompanying notes 151-55 *infra*.

³⁰ Ryder Tank Line, Inc., *supra* note 29, at 420. See also C. G. Deppman, 8 Wash. Dep't Pub. Works 136, 140 (1927); Spokane Northwest Auto Freight Co., 7 Wash. Dep't Pub. Works 166, 168 (1927); Curtis E. Earhart, 3 Wash. Dep't Pub. Works 63 (1922); William A. Wright, 2 Wash. Dep't Pub. Works 463 (1922); Auerbach 57. From time to time some emphasis is placed on congestion of the highways as a negative factor in the granting of licenses. HARPER 94. Logically, of course, highway congestion is caused by the number of trucks and not by the number of truckers.

³¹ Johnson & Son, Inc., 79 M.C.C. 362 (1959); Lee E. Champ, 79 M.C.C. 311, 316 (1959); Floyd & Beasley Transfer Co., 79 M.C.C. 269, 274 (1959); J. C. Poole, Jr., 78 M.C.C. 685, 688 (1959); William P. Hoyt, 78 M.C.C. 437, 440 (1958); E. L. Powell and Sons Trucking Co., 77 M.C.C. 501, 508 (1958); Howard H. Krapf, 76 M.C.C. 103, 105 (1958). See J. J. & Cora Gueguen, 5 Wash. Dep't Pub. Works 254 (1925); HARPER 97-98. Sometimes the violations have been excused and licenses issued. Dean S. Axtell, 76 M.C.C. 115, 121 (1958); Earl W. Slagle, 2 M.C.C. 127, 140-41 (1937); cf. R. E. Powell, 19 Wash. Dep't Pub. Serv. 61 (1942).

measures are automatically entitled to licenses thereunder.³² The ICC at times has seemed generous,³³ and at other times restrictive,³⁴ in its interpretation of the grandfather clauses in the federal enactment. These clauses do assure a degree of entry, but insofar as they tend to freeze the *status quo*, they fly in the face of the Sherman Act.

Revocation of Licenses

In the federal system, at least, certificates and permits continue in effect until revoked by formal proceedings.³⁵ Mere nonuser will not of itself work a revocation.³⁶ Thus the ICC, in removing a carrier from the competition, affords him an opportunity to defend and justify his continued access to the field.³⁷

SCOPE OF AUTHORITY GRANTED TO CARRIERS

Antitrust Standards

In the unregulated sector of the economy an enterprise, once launched, is free to expand as it may desire, subject, of course, to the monopoly controls of the antitrust legislation itself. It may diversify its activities into new products or the rendering of new services; it may extend its sphere of action into new territories and it may reach back to produce for itself supplies formerly purchased from others. No such freedom is accorded a licensed motor carrier. His "rights" are narrowly circumscribed and may be employed only within the prescribed limits.³⁸

³² Interstate Commerce Act §§ 206(a)(1), 209 (applies to both common and contract carriers); ILL. ANN. STAT. ch. 95½, § 282.9 (Smith-Hurd 1958); Floyd M. Simpson, 8 Wash. Dep't Pub. Works 173 (1928); HARPER 84. No grandfather clause appears in the Texas legislation. Matson, *Contract Motor Carrier Regulation by the Interstate Commerce Commission*, 11 GEO. WASH. L. REV. 79, 81-82 (1942). It has been pointed out that the grandfather rule contains a presumption of efficient resource allocation in motor transport. It assumes that the existing operational distribution was efficient. TROXEL, *op. cit. supra* note 11, at 407.

³³ Alton R.R. v. United States, 315 U.S. 15, 20 (1942); A.B. & C. Motor Transp. Co. v. United States, 69 F. Supp. 166 (D. Mass. 1946); Brady Transfer & Storage Co., 23 M.C.C. 767 (1940); E. M. Holmes, 8 M.C.C. 391 (1938).

³⁴ United States v. N. E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 54 (1942); Inland Motor Freight v. United States, 60 F. Supp. 520, 526 (E.D. Wash. 1945); Watson Bros. Transp. Co. v. United States, 59 F. Supp. 762, 768-69 (D. Neb. 1945); Allied Van Lines, Inc., 46 M.C.C. 159, 192 (1946).

³⁵ Interstate Commerce Act § 212(2); see HARPER 179-80; Auerbach 109.

³⁶ General Transp. Co. v. United States, 65 F. Supp. 981, 985 (D. Mass.), *aff'd per curiam*, 329 U.S. 668 (1946). See also J. Norman Marshall, 36 M.C.C. 33, 36 (1940).

³⁷ Typical of state proceedings are Harold Stayton, 42 Wis. Pub. Serv. Comm'n 254, 255 (1957) (proposed suspension or revocation of license); John R. Long, 41 Wis. Pub. Serv. Comm'n 11 (1956) (revocation of contract carrier license).

³⁸ 49 C.F.R. § 165.2 (1949); HUDSON & CONSTANTIN 177.

Commodities

Each certificate and each permit issued by the ICC recites the commodities which the carrier is authorized to haul.³⁹ It has been said that haulers licensed to carry general commodities are usually larger firms than those carrying special commodities,⁴⁰ and contract carriers, particularly, are usually restricted to the hauling of three or fewer commodities. In many instances the commodities are given a class description, and the tendency of the Commission has been to interpret such descriptions narrowly. For example, when one motor carrier with authority to transport "building materials" hauled steel and wire forms used to reenforce concrete which was employed in the construction of a bridge rather than a building, the Commission ordered the carrier to stop accepting shipments of such steel unless it ascertained that the material was to be used in some kind of a building, not a road or bridge.⁴¹ In other instances the commodities are defined by the type of equipment used to haul them⁴² or by specifically naming the individual items which may be carried; in one case the ICC granted a certificate which permitted only the carriage of homing pigeons, and even then only within a narrowly defined area.⁴³ Finally, the named commodities

³⁹ Ace Lines, Inc., 78 M.C.C. 523, 527 (1958); J. F. Andrews, 77 M.C.C. 703, 705 (1958). See also *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942); *R. & R. Cartage Corp.*, 41 Wis. Pub. Serv. Comm'n 176, 177 (1956). In some instances licenses have been restricted to the exact types of commodities then being manufactured by supporting shippers. In other instances allowance has been made for the changing character of the shippers' output. Compare *Central Dispatch, Inc.*, 79 M.C.C. 97, 98 (1959), and *Eldon Miller, Inc.*, 78 M.C.C. 113, 115 (1958), with *Dealers Transit, Inc.*, 79 M.C.C. 26, 29 (1959), and *Everts' Commercial Transp., Inc.*, 78 M.C.C. 717, 762 (1959), modifying, 72 M.C.C. 599 (1957). See generally HUDSON & CONSTANTIN 182, 570-71; S. Doc. No. 78, 79th Cong., 1st Sess. 20 (1945).

⁴⁰ *Id.* at 37, 43, 128, 130.

⁴¹ Ace Lines, Inc., 78 M.C.C. 523, 527 (1958). *Accord*, *Interstate Dress Carriers, Inc.*, 78 M.C.C. 609, 612 (1958); *Reliable Transp. Co.*, 78 M.C.C. 530, 532 (1958); J. F. Andrews, 77 M.C.C. 703, 705 (1958); *Coldway Food Express, Inc.*, 77 M.C.C. 210, 211 (1958); *American Transfer & Storage Co.*, 77 M.C.C. 169, 171 (1958); *Sims Motor Transp. Lines, Inc.*, 76 M.C.C. 467, 472 (1958); *McGaughey Bros.*, 76 M.C.C. 229, 233 (1958). See also *North Am. Van Lines, Inc. v. United States*, 243 F.2d 693 (6th Cir. 1957); *Black v. ICC*, 167 F.2d 825, 827 (5th Cir.), *cert. denied*, 335 U.S. 818 (1948); *Scott Truck Line, Inc. v. United States*, 163 F. Supp. 118 (D. Colo. 1958); *Casket Mfg. Ass'n of America*, 39 Wis. Pub. Serv. Comm'n 121, 126 (1954). A recent case of interest is *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554 (1958). Under a contract carrier permit allowing the hauling of "stock in trade of drugstores" the carrier asserted a right to carry products which were sometimes sold in drugstores. The ICC's decision that it could only carry goods which were actually destined for drugstores, not merely goods of the type which a drugstore might sell, was affirmed by the Court.

⁴² *Houff Transfer, Inc.*, 78 M.C.C. 145, 147 (1958); *Telischak Trucking, Inc.*, 77 M.C.C. 672, 674 (1958).

⁴³ *Cirilo Fletcher*, 79 M.C.C. 164, 167 (1959). See also *Dealers Transit, Inc.*, 79 M.C.C. 85, 87 (1959); *C. & H. Transp. Co.*, 78 M.C.C. 441, 445-48 (1958); *Tex-O-Kan Transp. Co.*, 77 M.C.C. 715, 719 (1958); *Wade E. Davis*, 77 M.C.C. 183, 185 (1958); *Schwerman Trucking Co.*, 76 M.C.C. 92 (1958); *Max Snowwhite*, 18 M.C.C. 591 (1939). Compare *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215, 217 (E.D. Pa.), *aff'd per curiam*, 317 U.S. 587 (1942).

may be restricted further by limitation to their "primary movement" as opposed to their "secondary movement" (after processing and the like).⁴⁴

The Commission is called upon to interpret its own licenses in numerous proceedings and will even render declaratory judgments as to their scope.⁴⁵ It should be noted that the system of narrow licensing and strict construction which it has adopted has varying consequences in varying contexts. When the Commission is faced with an application for a license from a would-be entrant into the trucking industry, it surveys the scope of the certificates and permits previously issued to other carriers. Insofar as it then interprets those licenses in a narrow fashion so as to find the existing service inadequate by reason of the inability of the established haulers to participate in that particular traffic, it in effect opens the door to the entry of a new, though noncompetitive, carrier.⁴⁶

Routes

Certificates and permits prescribe the points of origin and destination (frequently narrowly defined)⁴⁷ which the trucker may serve, and

⁴⁴ McCormick Dray Line, Inc., 78 M.C.C. 551, 555 (1958); Kenosha Auto Transp. Corp., 76 M.C.C. 37, 48 (1958).

⁴⁵ Houston & No. Tex. Motor Freight Lines, Inc., 78 M.C.C. 269 (1958); 71 ICC ANN. REP. 43 (1957). See also text accompanying notes 165-69 *infra*. The policy of writing narrow commodity restrictions into certificates and permits has frequently been the subject of adverse comment. *E.g.*, WILCOX, *op. cit. supra* note 2, at 643; Roberts, *Some Aspects of Motor Carrier Costs*, 32 LAND ECON. 228, 236 (1956); S. Doc. No. 78, 79th Cong., 1st Sess. 26, 27, 70, 145 (1945). See also Poe, *supra* note 27, at 132.

⁴⁶ J. F. Andrews, 77 M.C.C. 703, 705 (1958). See C. E. Hall & Sons, Inc. v. United States, 88 F. Supp. 596, 601 (D. Mass. 1950). Note the interesting dissent in Everts' Commercial Transp., Inc., 78 M.C.C. 717, 770 (1959).

⁴⁷ See Dealers Transit, Inc., 79 M.C.C. 26, 29 (1959); Lawrence O. Cousino, 78 M.C.C. 797, 800 (1959), *modifying* 76 M.C.C. 337 (1958); Germann Bros. Motor Transp., Inc., 78 M.C.C. 791, 796 (1959); Miller Petroleum Transps., Ltd., 78 M.C.C. 631, 635 (1958); Coastal Tank Lines, Inc., 78 M.C.C. 218, 221 (1958); Liquid Transp. Corp., 77 M.C.C. 529, 532 (1958); Tractor Transp., Inc., 77 M.C.C. 359, 362 (1958); Southwest Bulk Handlers, Inc., 76 M.C.C. 49, 51 (1958). Compare United Truck Lines, Inc., 76 M.C.C. 279, 288-89 (1958); St. John's Motor Express Co., 19 Wash. Dep't Pub. Serv. 67 (1942). In Arnold Ligon, 79 M.C.C. 31, 36 (1959), the motor carrier certificate was restricted against interchange with traffic from specified places; the service to be rendered at Nashville, for example, was not to include the handling of traffic from other specified cities. See S. Doc. No. 78, 79th Cong., 1st Sess. 5, 82 (1945).

Occasionally, certificates are issued with broader geographical scope. *E.g.*, Everts' Commercial Transp., Inc., *supra* note 46, granted a certificate which was not restricted to point to point carriage but permitted haulage within a territory defined as eleven western states. The ICC has defined the commercial zones of many cities named as points of origin or destination in certificates. From time to time by order it will change the definition of such a zone, usually in the direction of enlarging it, and thus in effect permitting the carrier to serve more shippers. See, *e.g.*, Kansas City, Mo.—Kansas City, Kan., 79 M.C.C. 513, 521 (1959); Commercial Zones & Terminal Areas, Ariz., 78 M.C.C. 422, 425 (1958); St. Louis, Mo.—East St. Louis,

also restrict him to specified routes.⁴⁸ Standing regulations of the ICC permit deviations for detours and the like, but even such necessary departures are severely restricted. A detour, for example, may not be used for more than thirty days if the distance along it is less than ninety per cent of that of the service route.⁴⁹ The Commission receives many applications for alternate routes and will not approve them unless it is shown that the applicant has already developed a substantial business between the points to be served.⁵⁰ It must also find that the competitive situation will not be changed by the enlargement of the carrier's authority,⁵¹ and by regulation it is established that the latter

Ill., 76 M.C.C. 418 (1958). Compare Pickup & Delivery Limits at Los Angeles, Cal., 299 I.C.C. 347, 352-53 (1956). Particular restrictions laid upon the routes to be traversed by motor carrier subsidiaries of railroads are discussed at text accompanying notes 131-34 *infra*. See, e.g., ICC v. Parker, 326 U.S. 60 (1945).

⁴⁸ Interstate Commerce Act § 208(a). Compare Interstate Commerce Act § 1(20); ILL. ANN. STAT. ch. 95½, § 212.5(d) (Smith-Hurd 1958). With respect to backhauls see note 24 *supra*. See also S. Doc. No. 78, 79th Cong., 1st Sess. 121, 126, 132 (1945).

The truckers are not permitted to serve points off their routes. E.g., Reliance Trucking Co., 79 M.C.C. 134, 136 (1959); Turner's Express, Inc., 76 M.C.C. 175, 177 (1958); TAFF, *op. cit. supra* note 9, at 509; S. Doc. No. 78, 79th Cong., 1st Sess. 6, 75, 77, 78, 80, 81, 96, 118 (1945); *cf.* Motor Transp. Co. v. Public Serv. Comm'n 253 Wis. 497, 34 N.W.2d 787, 789 (1948); Ferguson Freight Lines, Inc., 62 M.C.C. 261, 265 (1953). An exception should be noted in favor of irregular route carriers discussed at text accompanying notes 70-72 *infra*. See Brady Transfer & Storage Co., 51 M.C.C. 770, 773 (1950); 49 C.F.R. § 165a.1(b) (Supp. 1959). As to through routes see notes 120-22, 143, 144, 208 *infra* and accompanying text. Compare United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946); United Truck Lines, Inc., 78 M.C.C. 777, 783 (1959); HARPER 152.

⁴⁹ 49 C.F.R. § 211.1(c) (7) (Supp. 1959).

⁵⁰ A leading case is Interstate Common Carrier Council v. United States, 84 F. Supp. 414, 417, 420 (D. Md.), *aff'd per curiam*, 338 U.S. 843 (1949). The court said that the ICC had full authority to grant an alternate route upon a showing merely of economies in operation without the necessity of independent affirmative proof as to public convenience and necessity, but only so long as the alternate route is an alternate and not a new service. *Accord*, Harold Goltzman, 79 M.C.C. 227, 229 (1959); Courier Express, Inc., 62 M.C.C. 751, 753 (1954). Compare Campbell Sixty-Six Express, Inc., 77 M.C.C. 741, 744 (1958); West Bros., Inc., 77 M.C.C. 699, 702 (1958); Consolidated Freightways, Inc., 77 M.C.C. 293, 299 (1958); Cooper's Express, Inc., 51 M.C.C. 411, 414 (1950).

⁵¹ See Pacific Intermountain Express Co., 79 M.C.C. 431, 435-36 (1959); Consolidated Freightways, Inc., 79 M.C.C. 17 (1959); United Truck Lines, Inc., 78 M.C.C. 128, 131-32 (1958), *rev'd on new facts*, 79 M.C.C. 457 (1959); Campbell Sixty-Six Express, Inc., *supra* note 50; Consolidated Freightways, Inc., *supra* note 50, at 300-01; United Truck Lines, Inc., 76 M.C.C. 279, 288 (1958); Earl F. Schultz, 34 M.C.C. 629, 638 (1942); K.F.L., Inc., 26 M.C.C. 83, 92 (1940). See Grays Harbor Motor Freight, Inc., 18 Wash. Dep't Pub. Serv. 58 (1940); Gross Common Carrier, 42 Wis. Pub. Serv. Comm'n 555, 559 (1957); Foreway Express, Inc., 41 Wis. Pub. Serv. Comm'n 96, 98 (1956). As to passenger service, consult Clarke v. United States, 101 F. Supp. 587, 591, 593 (D.D.C. 1951). See HARPER 96; WILCOX, *op. cit. supra* note 2, at 633; S. Doc. No. 78, 79th Cong., 1st Sess. 101, 118 (1945). On occasion the ICC finds that other motor carriers will not be injured by the grant of an alternative route. Red Ball Motor Freight, Inc. v. Herrin Transp. Co., 98 F. Supp. 248, 251 (N.D. Tex. 1950), *aff'd per curiam*, 341 U.S. 938 (1951); Dance Freight Lines, Inc., 77 M.C.C. 487, 490 (1958). See Grays Harbor Motor Freight, Inc., *supra*; Consolidated Freightways, Inc., 18 Wash. Dep't Pub. Serv. 61 (1940). Compare Garrett v. Delta Motor Lines, Inc., 224 Miss. 559, 81 So. 2d 245 (1955). And occasionally the competitive effects of granting an alternate route have been disregarded.

requirement will not be met if the alternate route is less than ninety per cent of the distance of the service route.⁵² In all, considerable litigation is carried on with respect to alternate routes. The various restrictions are, of course, necessary to the general regulatory scheme under which entry into the industry is closely circumscribed.

As a result of these standards, formal approval of the ICC has been held necessary to provide motor carrier service to a single store-keeper receiving one truckload of farm implements per month along a designated highway.⁵³ Note again, however, that the narrow scope of the certificates with respect to routes tends to make entry easier when new applications are considered.⁵⁴ Thus the net effect of the restrictions is to increase the number of truckers without, however, necessarily making the industry more competitive since the careful segregation of routes provides geographic separation among the licensees.⁵⁵

Tacking

As a general rule a motor carrier may "tack" its authority under one license to its authority under another so as to provide service over the combined routes through the point of intersection.⁵⁶ In a good many instances, however, the ICC has protected competing truckers by imposing restrictions against such tacking.⁵⁷ If tacking be considered a form of vertical integration and if, under doctrines of "soft" competition,

East Tex. Motor Freight Lines v. United States, 96 F. Supp. 424, 428 (N.D. Tex. 1951); Hayes Freight Lines, Inc., 54 M.C.C. 643, 650 (1952); Red Ball Transfer Co., 52 M.C.C. 75, 78 (1950), *aff'd on rehearing*, 303 I.C.C. 421 (1958); Dixie Ohio Express Co., 30 M.C.C. 291, 296 (1941); *cf.* Rasco C. Seamahorn, 3 Wash. Dep't Pub. Works 50 (1922); Lewis O. Jacobs, 42 Wis. Pub. Serv. Comm'n 334 (1957).

⁵² 49 C.F.R. § 211.1(c)(8)(ii) (Supp. 1959). See West Bros., Inc., 77 M.C.C. 699, 702 (1958); Curtis Keal Transp. Co., 76 M.C.C. 1, 4 (1958). WILLIAMS, THE REGULATION OF RAIL-MOTOR RATE COMPETITION 106 (1958). In at least one instance, however, the ICC appears to have disregarded its ten per cent rule. T.I.M.E., Inc., 77 M.C.C. 413, 415 (1958) (finding of no substantial adverse effect upon rival carriers). Considerations of safety were given effect in Watson Bros. Transp. Co., 53 M.C.C. 1 (1951).

⁵³ Archer & Archer, Inc., 77 M.C.C. 782, 784 (1958).

⁵⁴ See Neuman Transit Co., 79 M.C.C. 544, 546 (1959); Speedway Transps., Inc., 76 M.C.C. 275, 277 (1958). Compare Everts' Commercial Transp., Inc., 78 M.C.C. 717, 770 (1959), *modifying* 72 M.C.C. 599 (1957); Zero Refrigerated Lines, 78 M.C.C. 671 (1959).

⁵⁵ Adams, *The Role of Competition in Regulated Industries*, 48 PROCEEDINGS AM. ECON. ASS'N 527, 529 (1958); S. Doc. No. 78, 79th Cong., 1st Sess. 75, 94, 97 (1945).

⁵⁶ Eldon Miller, Inc., 78 M.C.C. 113, 115-16 (1958); Daniel Clapps, 77 M.C.C. 683, 687 (1958), *aff'd on rehearing*, 79 M.C.C. 370 (1959); Ecoff Trucking, Inc., 77 M.C.C. 759, 762 (1958); Monson Dray Line, Inc., 77 M.C.C. 727, 736 (1958); Creston Transfer Co., 73 M.C.C. 645, 648 (1957). Compare Malone Freight Lines, Inc. v. United States, 107 F. Supp. 946, 950 (N.D. Ala. 1952), *aff'd per curiam*, 344 U.S. 925 (1953). See HUDSON & CONSTANTIN 575.

⁵⁷ Daily Motor Express, Inc., 78 M.C.C. 234, 237 (1958); Daniel Hamm Drayage Co., 78 M.C.C. 603, 607 (1958); George C. Rawlings, 78 M.C.C. 636, 637-38 (1959); Convoy Co., 77 M.C.C. 159, 164 (1958); Eldon Miller, Inc., 76 M.C.C. 643, 645-46 (1958); Indianhead Truck Line, Inc., 76 M.C.C. 357, 361 (1958); Commercial Oil Transp., 73 M.C.C. 281, 284 (1957). Compare Marcell's Motor Express, Inc., 78

vertical integration is to be limited so as to shelter rival firms from the full force of competition, tacking bans may be regarded as having the effect of enforcing antitrust policy in this area. Under other assumptions, of course, contrary analyses would obtain.

Leasing

Both federal and state agencies have attempted to curb the practice of "trip leasing," by which one motor carrier leases its tractors or trailers to another merely for the duration of a trip. According to the ICC the practice led to many "evils," such as operation by one carrier in another's territory under only an oral lease, overcrowding of the industry, shifting of control and, above all, "fluid" rates.⁵⁸ Accordingly, the Commission promulgated stringent rules limiting the leasing of equipment by motor carriers.⁵⁹ One prominent feature of those rules is the requirement that the lease run for a minimum term of thirty days. Such regulation, of course, constitutes a restraint upon alienation which is at odds with the policy of the antitrust laws. On the other hand, to the extent that it protects licensed truckers against more vigorous competition, it also can be said to constitute enforcement of a policy of "soft" competition.⁶⁰

Other Restrictions

Commissions have been authorized⁶¹ to impose other restrictions upon the operation of carriers and they have done so. Typical are limita-

M.C.C. 668 (1959); Harry J. Scari, 76 M.C.C. 355 (1958); Brady Transfer & Storage Co., 51 M.C.C. 770, 771, 773 (1950); Arthur J. Kohl, 50 M.C.C. 389, 394 (1948); Emery Transp. Co., 49 M.C.C. 176 (1949); Consolidated Freight Lines, 15 Wash. Dep't Pub. Works 170 (1935). See HUDSON & CONSTANTIN 575.

⁵⁸ American Trucking Ass'n v. United States, 344 U.S. 298 (1953); 67 ICC ANN. REP. 56 (1953). See Investigation of Interchange & Leasing, 39 Wis. Pub. Serv. Comm'n 542 (1954); HUDSON & CONSTANTIN 548, 556; *Hearings on S. Res. 50 Before the Subcommittee on Domestic Land and Water Transport of the Senate Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 121 (1950); S. REP. No. 1039, 82d Cong., 1st Sess. 21 (1951); Note, 39 Ky. L.J. 338, 339 (1951). Others have found leasing to be beneficial. HARPER 225; *Hearings, supra* at 859; S. Doc. No. 78, 79th Cong., 1st Sess. 138 (1945).

⁵⁹ American Trucking Ass'n v. United States, *supra* note 58, at 308; Coldway Food Express, Inc., 79 M.C.C. 171, 174 (1959); Lease & Interchange of Vehicles by Motor Carriers, 79 M.C.C. 251, 253 (1959); Interstate Commerce Act § 204(e); 49 C.F.R. §§ 207.4(a), .6 (Supp. 1959); HARPER 227-30. Experience with state controls has been mixed. See ILL. ANN. STAT. ch. 95½, § 282.8 (Smith-Hurd 1958); Investigation of Interchange & Leasing of Motor Vehicles, *supra* note 58. Compare Greyvan Storage, Inc. v. Department of Pub. Util., 332 Mass. 712, 127 N.E.2d 579 (1955); Illinois Cent. R.R., 19 Ill. Commerce Comm'n 99 (1939). The practice of leasing may have collateral effects. See Lemmon Transp. Co., 54 M.C.C. 635, 639 (1952); Lester W. Steenbock, 33 M.C.C. 346 (1942). Compare Consolidated Freightways, Inc., 38 M.C.C. 577, 593 (1942). See Nutting & Kuhn, *supra* note 13, at 490; Note, 39 Ky. L.J. 338, 340, 342 (1951).

⁶⁰ Compare HALE & HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT § 2.15 (1958).

⁶¹ E.g., ILL. ANN. STAT. ch. 95½, § 282.5 (Smith-Hurd 1958).

tions as to the type of equipment which the trucker may utilize,⁶² the weight or bulk of shipments which he may haul,⁶³ the classes of shippers whom he may serve⁶⁴ and even the times when he may render service.⁶⁵ The implications of such restraints are generally the same as those which restrict the commodities which may be hauled by licensed carriers.⁶⁶

STATUS OF CARRIERS

Types of Licenses

In the regulation of truckers, statutes commonly provide for their classification into several categories of which the most frequently encountered are common, contract and private. Under state legislation numerous other categories may be recognized. Each type of carrier is subject to limitations upon its activity which constitute an additional set of restrictions upon the service it may render—another kind of restriction unknown in the unregulated sector of the economy.

Common Carriers

The concept of the common carrier has antecedents deep in the law.⁶⁷ The touchstone to its categorization still lies in the ancient concept of "holding out."⁶⁸ The common carrier is one who advertises

⁶² *W. J. Dillner Transfer Co.*, 79 M.C.C. 335, 347 (1959); *Houston & No. Tex. Motor Freight Lines, Inc.*, 78 M.C.C. 269, 273 (1958); *Dallas & Mavis Forwarding Co.*, 77 M.C.C. 31, 34 (1958). Note, however, that the ICC may not limit the amount of authorized equipment which any licensed carrier may employ. Interstate Commerce Act § 208(a) provides: "no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." To the same effect is ILL. ANN. STAT. ch. 95½, § 282.5(d) (Smith-Hurd 1958). With respect to contract carriers see § 282.6(a). See generally HARPER 223-24; S. Doc. No. 78, 79th Cong., 1st Sess. 146 (1945).

⁶³ *Penn-Van Express, Inc.*, 78 M.C.C. 649, 653 (1958); *Campbell Sixty-Six Express, Inc.*, 73 M.C.C. 387, 388 (1957). Compare *Beatty Motor Express, Inc.*, 79 M.C.C. 1, 2-3 (1959); *Darwin Clark*, 78 M.C.C. 121, 125 (1958); *Diamond Transp. Sys., Inc.*, 76 M.C.C. 619, 620 (1958); *Auerbach* 111.

⁶⁴ *Fine & Jackson Trucking Corp.*, 48 M.C.C. 11 (1948); *McKeown Transp. Co.*, 38 Wis. Pub. Serv. Comm'n 284, 285 (1953); S. Doc. No. 78, 79th Cong., 1st Sess. 5, 151, 161 (1945).

⁶⁵ *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133 (1958); *Harry W. Shaw*, 19 Wash. Dep't Pub. Serv. 60 (1942). Compare Interstate Commerce Act § 208(a), with Wis. STAT. ANN., § 194.36(2) (1957). See *Investigation of Interchange & Leasing of Motor Vehicles*, 39 Wis. Pub. Serv. Comm'n 542, 544-45 (1954); HUDSON & CONSTANTIN 577.

⁶⁶ S. Doc. No. 78, 79th Cong., 1st Sess. 6 (1945). Note, however, that commissions usually are not authorized to limit the amount of equipment which an authorized trucker may use over his designated routes. See note 62 *supra*.

⁶⁷ See *Greyvan Storage Inc. v. Department of Pub. Util.*, 332 Mass. 712, 127 N.E.2d 579 (1955); *Davis v. MacKay*, 128 Wash. 333, 222 Pac. 491 (1924); *David Wood*, 62 P.U.R. (n.s.) 361, 364 (Wash. Dep't Transp. 1945); *Dependable Delivery & Storage Co.*, 28 P.U.R. (n.s.) 303 (Wash. Dep't Transp. 1939); 2 BLACKSTONE, COMMENTARIES *451; *Nutting & Kuhn, Motor Carrier Regulation—The Third Phase*, 10 U. PITT. L. REV. 477, 481 (1949).

⁶⁸ *N. S. Craig*, 31 M.C.C. 705 (1941); *Brady Transfer & Storage Co.*, 23 M.C.C. 767, 771 (1940); *Bartels v. Hessler Bros.*, 1 Ill. Commerce Comm'n 263, 267 (1922);

himself as available to render service for the public generally and who does not confine himself to the carriage of goods of any particular shipper.⁶⁹

Irregular Route Carriers

Within the broad category of common carriers the federal legislation contemplates considerable subclassification. There are, for example, regular-route scheduled service carriers, regular-route nonscheduled service carriers, irregular-route radial service carriers, irregular-route nonradial service carriers and local cartage carriers.⁷⁰ The distinctions between the several subclassifications, and particularly between regular and irregular-route carriers, are not, it must be confessed, crystal clear.⁷¹ In any event the purpose of the restriction is plain: to protect other carriers against the competition which would result unless restraints were imposed.⁷²

Contract Carriers

Somewhere between the fully regulated territory of the genuine public utility and the unrestrained liberty of the unregulated sector of the economy lies the fascinating domain of the contract carrier. His duties, rights and privileges partake in part of both ends of the regulatory spectrum.⁷³ Under recent amendments to the federal legislation the two most significant aspects of the status of a contract carrier are the

Miles v. Enumclaw Co-op. Creamery Corp., 12 Wash. 2d 377, 121 P.2d 945 (1942); ILL. ANN. STAT. ch. 95½, § 282.2(9) (Smith-Hurd 1958); 28 MISS. CODE ANN. § 7634(e) (1956); WASH. REV. CODE, § 81.80.010 (1952); WIS. STAT. ANN. § 194.01(5) (1957).

⁶⁹ Driver Serv., Inc., 77 M.C.C. 243, 254 (1958); Allen Juzeler, 19 Wash. Dep't Pub. Serv. 72 (1942). Compare Earl A. Sweet, 19 Wash. Dep't Pub. Serv. 69 (1942). See 67 ICC ANN. REP. 116 (1954); *Hearings, supra* note 58, at 854; George & Boldt, *Certification of Motor Common Carriers*, 17 J. LAND & P.U. ECON. 196 (1941); Note, 39 Ky. L.J. 338 (1951).

⁷⁰ 49 C.F.R. §§ 165.1, .2 (1949); S. Doc. No. 78, 79th Cong., 1st Sess. 10, 84, 156-57 (1945). Compare MISS. CODE ANN. § 7637(b) (1956); HARPER 131, 136.

⁷¹ See *Shein v. United States*, 102 F. Supp. 320, 324, 326 (D.N.J. 1951), *aff'd per curiam*, 343 U.S. 944 (1952); *Brady Transfer & Storage Co. v. United States*, 80 F. Supp. 110, 114, 116-18 (S.D. Iowa), *aff'd per curiam*, 335 U.S. 875 (1948); *Falwell v. United States*, 69 F. Supp. 71, 77 (W.D. Va. 1946), *aff'd per curiam*, 330 U.S. 807 (1947); *Stanley W. Belnap*, 78 M.C.C. 287, 291 (1958), *reversing* 73 M.C.C. 93 (1957). Compare *Dalrymple Motor Freight & Express Lines*, 9 Ill. Commerce Comm'n 810 (1930); *Georgetown Transp. Co.*, 9 Ill. Commerce Comm'n 278, 279 (1928); *Hessler Bros.*, 1 Ill. Commerce Comm'n 263 (1922); *West Bros. Inc. v. H & L Delivery Serv., Inc.*, 220 Miss. 323, 70 So. 2d 870 (1954); *L. Romano*, 55 P.U.R. (n.s.) 118 (Wash. Dep't Transp. 1944); *Portland-Seattle Auto Freight, Inc.*, 36 P.U.R. (n.s.) 127 (Wash. Dep't Transp. 1940). S. Doc. No. 78, 79th Cong., 1st Sess. 75, 81, 126, 156-57 (1945); *Hearings, supra* note 58, at 1197.

⁷² *Brady Transfer & Storage Co.*, 47 M.C.C. 23 (1947), *aff'd*, 80 F. Supp. 110 (S.D. Iowa), *aff'd per curiam*, 335 U.S. 875 (1948); *HUDSON & CONSTANTIN* 574-75; S. Doc. No. 78, 79th Cong., 1st Sess. 158, 163 (1945). Compare *Freight Transit Co.*, 78 M.C.C. 427, 432 (1958).

⁷³ See *Interstate Commerce Act* §§ 203, 209(b); *N. S. Craig*, 31 M.C.C. 705, 706-07 (1941); *Kenneth L. Nace*, 19 Wash. Dep't Pub. Serv. 71 (1942); HARPER

devotion of his services for considerable periods of time to the needs of a limited number of individual shippers⁷⁴ and the furnishing of exclusive or specialized transportation.⁷⁵ It follows that the contract carrier cannot "hold himself out" as available to the public generally,⁷⁶ although he may aggressively seek traffic within the limits of his permit.⁷⁷ Roughly comparable restraints are laid upon contract carriers by state legislation,⁷⁸ which occasionally has created subdivisions of the category.⁷⁹

111; TROXEL, *ECONOMICS OF TRANSPORT* 410 (1955); NATIONAL RESOURCES PLANNING BOARD, *TRANSPORTATION AND NATIONAL POLICY* 421 (1942); S. REP. NO. 1039, 82d Cong., 1st Sess. 17 (1951); *Hearings, supra* note 58; Matson, *Contract Motor Carrier Regulation by the Interstate Commerce Commission*, 11 GEO. WASH. L. REV. 79, 80 (1942); Note, 39 KY. L.J. 338 (1951). Regulation which prevents a trucker from occupying the status of a contract carrier when he is already a common carrier and vice versa is discussed at notes 225-33 *infra* and accompanying text. *E.g.*, United Parcel Serv., 12 P.U.R.3d 22 (Wash. Dep't Transp. 1955).

⁷⁴ Interstate Commerce Act §§ 203(a)(15), 212. The amendments embody concepts developed by the ICC under earlier legislation. See Sophia Lane, 78 M.C.C. 547, 549 (1958); Armored Motor Serv. Co., 77 M.C.C. 433, 438 (1958); Midwest Transfer Co., 49 M.C.C. 383 (1949); Earl W. Slagle, 2 M.C.C. 127, 134 (1937); S. Doc. No. 78, 79th Cong., 1st Sess. 163 (1945).

⁷⁵ See Schenley Distillers Corp. v. United States, 326 U.S. 432, 436-37 (1946); N. S. Craig, 31 M.C.C. 705, 709-12 (1941); Contracts of Contract Carriers, 1 M.C.C. 628, 630 (1937); HUDSON & CONSTANTIN 528; George, *Supreme Court Views Federal Authorization and Merging of Motor Carriers*, 26 LAND ECON. 274, 276 (1950); Note, 39 KY. L.J. 338, 340-41 (1951).

⁷⁶ Midwest Transfer Co., 49 M.C.C. 383, 390 (1949); Pacific Motor Trucking Co., 34 M.C.C. 249, 253 (1942); N. S. Craig, *supra* note 75, at 708-12; *Hearings, supra* note 58, at 905; Matson, *supra* note 73, at 84.

⁷⁷ Interstate Commerce Act § 204(a)(2); Tractor Transp., Inc., 77 M.C.C. 359, 363 (1958). The effect of the 1957 amendments upon the rule of United States v. Contract Steel Carriers, Inc., 350 U.S. 409 (1956), has yet to be definitively established. See Note, 107 U. PA. L. REV. 1150 (1959). See also *Hearings, supra* note 58, at 907. It is said that contract carriers represented 16% of the total number of regulated carriers in 1955 and accounted for 7% of the ton-miles and 6% of the revenue. HUDSON & CONSTANTIN 528. Another authority indicates that contract carriers haul more tonnage than common carriers and describes various advantages that derive from the coexistence of the two categories, such as the ability of the common carrier to concentrate on uniform profitable truckload traffic. Spurr, *The Case for the Common Carrier in Trucking*, 24 LAND ECON. 253, 258 (1948). Compare WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 629 (1955).

⁷⁸ See ILL. ANN. STAT. ch. 95½, § 282.2(10) (Smith-Hurd Supp. 1959), §§ 282.4(2), .15(d) (Smith-Hurd 1958); MASS. ANN. LAWS ch. 159B, § 4 (1959); MISS. CODE ANN. § 7634(g) (1956); WIS. STAT. ANN. § 194.01 (1957). Miles v. Enumclaw Co-op. Creamery, 12 Wash. 2d 377, 381, 121 P.2d 945, 947 (1942); Davis v. MacKay, 128 Wash. 333, 222 Pac. 491 (1924); United Parcel Serv. v. Public Serv. Comm'n, 240 Wis. 603, 609-12, 4 N.W.2d 138, 142 (1942); Dependable Delivery & Storage Co., 28 P.U.R. (n.s.) 303, 305 (Wash. Dep't Pub. Serv. 1939); Centennial Flowering Mills Co., 28 P.U.R. (n.s.) 48, 51 (Wash. Dep't Pub. Serv. 1939); Earl L. Sweet, 19 Wash. Dep't Pub. Serv. 69 (1942); Dump Truck Serv. Ass'n, 40 Wis. Pub. Serv. Comm'n 574 (1955); HARPER 54; Bailey, *Motor Truck Certificates and Permits in Texas*, 20 TEXAS L. REV. 165, 170 (1941); Poe, *Regulation of Highway Carriers in California*, 30 So. CAL. L. REV. 131, 136 (1957). See also Trudeau v. Pacific States Box & Basket Co., 20 Wash. 2d 561, 571-76, 148 P.2d 453, 459-60 (1944); Independent Truck Co. v. Wright, 151 Wash. 372, 275 Pac. 726 (1929); Frank Ryder, 78 P.U.R. (n.s.) 429 (Wash. Dep't Transp. 1949).

⁷⁹ Curry Bros., 40 Wis. Pub. Serv. Comm'n 174, 177 (1955); Fred Gurtner, 38 Wis. Pub. Serv. Comm'n 204, 205 (1953); ILL. ANN. STAT. ch. 95½, §§ 282.4(4), .9 (Smith-Hurd 1958); MISS. CODE ANN. § 7634(f) (1955); HARPER 136; Auerbach 82-89; Bailey, *supra* note 78, at 173; Poe, *supra* note 78, at 133-36, 142.

Private Carriers

In the trucking industry the private carrier stands as the representative of the unregulated sector of the economy. So far as the federal government is concerned he is subject only to safety regulation.⁸⁰ There is, of course, always a problem of definition. The ICC has looked to the operator's "primary business" as a test to determine whether he is a "legitimate" private carrier or an unauthorized common or contract carrier.⁸¹ Many states treat private carriers in the same manner as the federal agency, but others impose various, more stringent kinds of controls.⁸²

Private carriage constitutes an important factor in the industry because shippers may turn to it whenever the rates or services of contract or common carriers appear unsatisfactory.⁸³ At the present time private carriers are hauling a large proportion of the freight moving on the highways and their share is increasing.⁸⁴ The very possibility of private carriage therefore exerts competitive pressure upon the licensed haulers,⁸⁵ and to the extent that the regulatory commissions permit the existence of private carriers, they allow some part of the forces of competition to function.

⁸⁰ See text accompanying notes 140-43 *infra*. HUDSON & CONSTANTIN 529.

⁸¹ Many truckers engage in so-called "buy and sell" operations and the commission has had frequent opportunity to pass upon the status of asserted private carriers. *Brooks Transp. Co. v. United States*, 93 F. Supp. 517, 522 (E.D. Va. 1950), *aff'd per curiam*, 340 U.S. 925 (1951); *Oklahoma Furniture Mfg. Co.*, 79 M.C.C. 403, 410-15 (1959); *Carleton Houston*, 76 M.C.C. 671, 673 (1958); *Earnest Braun*, 76 M.C.C. 124, 125 (1958); *Lenoir Chair Co.*, 51 M.C.C. 65, 73 (1949); *L. A. Woitishek*, 42 M.C.C. 193, 201-06 (1943); *Ralph Niggle*, 3 M.C.C. 472, 473 (1937). *Cf. Spokane Milk Producers Union*, 18 Wash. Dep't Pub. Serv. 64 (1940); *J. J. & Cora Gueguen*, 5 Wash. Dep't Pub. Works 254 (1925). See also HUDSON & CONSTANTIN 533; *Nutting & Kuhn*, *supra* note 67, at 487-91; *Porter, Federal Regulation of Private Carriers*, 64 HARV. L. REV. 896 (1951); S. Doc. No. 78, 79th Cong., 1st Sess. 164 (1945).

⁸² MISS. CODE ANN. § 7635(k) (Supp. 1958); WASH. REV. CODE §§ 81.80.010, .80.030, .80.060, .80.160 (1952). *Taylor-Edwards Warehouse & Transfer Co. v. Department of Pub. Serv.*, 22 Wash. 2d 565, 157 P.2d 309 (1945); *Elkins v. Shaaf*, 189 Wash. 42, 63 P.2d 421 (1936); *J. Orin Williams*, 79 P.U.R. (n.s.) 31 (Mass. Dep't Pub. Util. 1949); *A. M. Gage*, 62 P.U.R. (n.s.) 319 (Wash. Dep't Transp. 1946); *Younglove Grocery Co.*, 40 P.U.R. (n.s.) 359 (Wash. Dep't Pub. Serv. 1941); *Truman Houser*, 19 Wash. Dep't Pub. Serv. 73, 74 (1942). See HARPER 239; TAFF, *COMMERCIAL MOTOR TRANSPORTATION* 472 (1955).

⁸³ See HARPER 77; HUDSON & CONSTANTIN 529, 534; S. REP. NO. 1039, 82d Cong., 1st Sess. 19 (1951); *Hearings*, *supra* note 58, at 919; 66 ICC ANN. REP. 3 (1952); Taff, *The Competition of Long-Distance Motor Trucking*, 46 PROCEEDINGS AM. ECON. ASS'N 508, 515, 517 (1956); Note, 39 KY. L.J. 338, 339 (1951).

⁸⁴ HUDSON & CONSTANTIN 533; *Hearings on Mergers and Possible Growth of Concentration in the Trucking Industry Before the Senate Select Committee on Small Business*, 85th Cong., 1st Sess. 33 (1957); 72 ICC ANN. REP. 2-3 (1958); 70 ICC ANN. REP. 8 (1956); 67 ICC ANN. REP. 55 (1953); 66 ICC ANN. REP. 304 (1952); Taff, *supra* note 83, at 514-15, 518.

⁸⁵ HUDSON & CONSTANTIN 534; Nelson, *Revision of National Transport Regulatory Policy*, in BUSINESS ORGANIZATION AND PUBLIC POLICY 477 (Levin ed. 1958); Williams, *The ICC and the Regulation of Inter-carrier Competition*, 63 HARV. L. REV. 1349, 1368 (1950); *cf.* 71 ICC ANN. REP. 28-29, 137 (1957); 67 ICC ANN. REP. 17 (1953).

Exempt Carriers

Under both federal and state systems of regulation, carriers of certain specified products are wholly exempt from economic regulation. A substantial fraction of all highway traffic moves under one or more such exemptions,⁸⁶ which are bitterly resisted by the licensed carriers.⁸⁷ The principal exempt commodity under the federal scheme consists of agricultural products which have not been processed.⁸⁸ The exemption has, of course, led to much litigation as to exactly what constitutes an unprocessed agricultural product.⁸⁹ Farm produce is also frequently exempt under state legislation where exemptions are also found in favor of purely local trucking operations regardless of the commodity hauled.⁹⁰ So far as antitrust enforcement is concerned, the considerations applicable to private carriers are equally applicable to exempt carriers.

Unauthorized Carriers

Undoubtedly a considerable portion of the movement of freight along the nation's highways is carried by unauthorized truckers. According to an estimate of the Teamsters Union, sixty per cent of the traffic is unauthorized,⁹¹ a figure which is not so surprising when one remembers that licensed carriers may readily (and even unknowingly) exceed one of the many limitations of their certificates.⁹² Although the ICC proceeds against the so-called "gypsies" when violations become

⁸⁶ Burck, *The Great U.S. Freight Cartel*, Fortune, Jan. 1957, pp. 102, 192; Grubbes, *Inequalities in, and Inadequacies of, Existing Regulatory Laws*, in ASS'N OF AM. R.R., STATEMENTS ON TRANSPORTATION CONDITIONS AND NATIONAL TRANSPORTATION POLICY 6-7 (1950).

⁸⁷ HARPER 77; *Hearings*, *supra* note 58, at 753, 762, 764, 791; Arpaia, *What Price Regulation?*, 22 ICC PRAC. J. 659 (1955).

⁸⁸ Interstate Commerce Act § 203(b).

⁸⁹ *E.g.*, East Tex. Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49, 51, 53 (1956); HUDSON & CONSTANTIN 539. Other exemptions are reflected in Theodore Edward Graff, 48 M.C.C. 310, 315-16 (1948); Bernard F. Rauch, 44 M.C.C. 83, 88 (1944); Rock Port, Langdon & N. Ry., 33 M.C.C. 315, 317 (1942). See TAFF, *op. cit. supra* note 82, at 609; Wilcox, *op. cit. supra* note 77, at 632; Jelsma, *Motor Carriers and Legislative Problems*, 18 ICC PRAC. J. 487, 488-89 (1951).

⁹⁰ ILL. ANN. STAT. ch. 95½, §§ 282.3(c), (d), (e), (g) (Smith-Hurd Supp. 1959); MASS. ANN. LAWS ch. 159B, §§ 2, 13, 15A (1959); MISS. CODE ANN. § 7635a-d, f-j (Supp. 1958); WASH. REV. CODE § 81.80.040 (1951). See Elgin Storage & Transfer Co. v. Perrine, 2 Ill. 2d 28, 116 N.E.2d 868 (1953); State v. Diamond Tank Transp., Inc., 2 Wash. 2d 13, 97 P.2d 145 (1939); Davis v. MacKay, 128 Wash. 333, 222 Pac. 491 (1924); HARPER 70-77, 190-91. See also *Hearings*, *supra* note 58, at 867.

⁹¹ *Hearings*, *supra* note 58, at 1218. The existence of unauthorized operations is attested to in many Commission reports. *E.g.*, Grain & Grain Prods. Within the Western District & For Export, 298 I.C.C. 261 (1956); Johnson & Son, Inc., 79 M.C.C. 362 (1959); Seago, Inc., 77 M.C.C. 587, 591 (1958); Delphis Desroches, 77 M.C.C. 545, 547 (1958); Nelson Transp. Co., 77 M.C.C. 149, 151 (1958); *cf.* C. J. Orphan, 4 Wash. Dep't Pub. Works 58 (1923); 69 ICC ANN. REP. 7 (1955).

⁹² *E.g.*, Black Ball Freight Serv., 76 M.C.C. 5, 11 (1958).

known,⁹³ the Teamsters claim that the Commission has been relatively ineffective.⁹⁴ To the extent of its unsuccess, a measure of competition continues to operate in the motor carrier field.

TRANSFERS

Antitrust Principles

The relationship between the common-law rule against restraints upon alienation and the antitrust laws has not been thoroughly explored. Nevertheless it is safe to state that in the unregulated sector of the economy we assume a freedom to dispose of property and we condemn restrictions thereon.⁹⁵ Under the Interstate Commerce Act⁹⁶ and under most state statutes⁹⁷ motor carriers may only dispose of their licenses with administrative permission. The question arises as to whether the commissions are permitting licenses readily to be transferred or whether they are placing obstacles in the path of such transactions.

Alienability in Action

The Interstate Commerce Commission stands ready to approve transfers of licenses⁹⁸ subject to a number of conditions. In the first place, it examines into the fitness of the transferee much as it does in the case of an original licensee.⁹⁹ In the second place, it will ordinarily

⁹³ *E.g.*, Julia L. Hagan, 78 M.C.C. 332 (1958). *Cf.* Springfield-Beardstown Transp. Co., 3 Ill. Commerce Comm'n 121 (1923); Hessler Bros., 1 Ill. Commerce Comm'n 263, 268 (1922). Compare Consolidated Freightways, Inc. v. United Truck Lines, Inc., 330 P.2d 522 (Ore. 1958), *cert. denied*, 359 U.S. 1001 (1959); Carlsen v. Cooney, 123 Wash. 441, 212 Pac. 575 (1923); Georgetown Transp. Co., 9 Ill. Commerce Comm'n 278, 279 (1928); Younglove Grocery Co., 40 P.U.R. (n.s.) 359, 362 (Wash. Dep't Pub. Serv. 1941). See *Hearings*, *supra* note 58, at 911.

⁹⁴ See *id.* at 1225, 1235; HARPER 242.

⁹⁵ United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944). Compare Natural Prods. Co. v. Dolese & Shepard Co., 309 Ill. 230, 140 N.E. 840 (1923).

⁹⁶ United States v. Resler, 313 U.S. 57 (1941). Interstate Commerce Act § 212(b).

⁹⁷ ILL. ANN. STAT. ch. 95½, § 282.13 (Smith-Hurd Supp. 1959); MISS. CODE ANN. § 7652 (1956); WIS. STAT. ANN. § 194.25 (1957). Transfers to purchasers already in the motor carrier business are considered at notes 108-25 *infra* and accompanying text.

⁹⁸ United States v. Resler, 313 U.S. 57, 60-61 (1941). See 49 C.F.R. § 179.2 (c)(1) (Supp. 1959); HUDSON & CONSTANTIN 561; TAFF, *op. cit. supra* note 82, at 528, 541. Transfer was permitted in, *e.g.*, John P. Fleming, 35 M.C.C. 607, 612 (1940); Merchant's Dispatch, Inc., 25 M.C.C. 407, 409 (1939); McGehee v. Wolchan-sky, 217 Miss. 88, 63 So. 2d 549 (1953); Rock Island Motor Transit Co., 9 Ill. Commerce Comm'n 569, 570 (1930). See HARPER 173; Burstein, *Motor Carrier Acquisitions, Mergers and Consolidations*, 24 ICC PRAC. J. 375 (1957).

⁹⁹ See United States v. Resler, *supra* note 98; G. B. Powell, 57 M.C.C. 597 (1951); Leonard Tornett, 40 M.C.C. 339 (1945). Compare ABCO Moving & Storage Co., 52 M.C.C. 131 (1950); N. S. Taarud, 52 P.U.R. (n.s.) 513 (Wash. Dep't Pub. Serv. 1944); HARPER 174.

refuse to approve the transfer of dormant "rights."¹⁰⁰ The Commission appears anxious to reduce the outstanding number of licenses and hence it may also disapprove transfers whereby two or more carriers would replace a single licensee.¹⁰¹ There seems to be some tendency for regulators to hesitate in granting approval when the transfer promises stiffer competition for motor carriers already in the field; if, for example, the transferee is a larger and more aggressive corporation than the transferor, approval may sometimes be withheld for protectionist reasons.¹⁰²

¹⁰⁰ See Schribner Birlenbach, 50 M.C.C. 749 (1948), *aff'd*, 56 M.C.C. 521 (1950); David H. Ratner, 50 M.C.C. 43, 50 (1947); Silver Ball Transp., Inc., 49 M.C.C. 249, 257-58 (1949); 49 C.F.R. § 179.2(c)(2) (Supp. 1959). *Cf.* A.B. & C. Motor Transp. Co. v. Department of Pub. Util., 327 Mass. 550, 100 N.E.2d 560 (1951); Humphries Transp., Inc., 19 P.U.R.3d 40 (Wash. Pub. Serv. Comm'n 1957); John B. Weythman, 55 P.U.R. (n.s.) 521 (Wash. Dep't Pub. Serv. 1944); B. R. Pace, 19 Wash. Dep't Pub. Serv. 69 (1942); Verne O. Baldock, 40 Wis. Pub. Serv. Comm'n 192, 195 (1955); Estate of John H. Bradley, 39 Wis. Pub. Serv. Comm'n 208, 210 (1954). Compare Roy Barsh, 75 M.C.C. 267, 272-73 (1958); Youngstown Cartage Co., 75 M.C.C. 205, 211 (1958); Merchant's Dispatch, Inc., 25 M.C.C. 407, 409 (1939). Transfer may be approved if the rights are found not actually dormant or if there is no harm to competition. General Transp. Co. v. United States, 65 F. Supp. 981, 985 (D. Mass.), *aff'd per curiam*, 329 U.S. 668 (1946); David Jones, 50 M.C.C. 601, 606 (1948); David H. Ratner, *supra*; Carolina Freight Carriers Corp., 37 M.C.C. 791, 795 (1941); Yellow Truck Lines, Inc., 35 M.C.C. 773 (1940); McGehee v. Wolchansky, 217 Miss. 88, 63 So. 2d 549 (1953); Lee & Eastes, Inc. v. Public Serv. Comm'n, 52 Wash. 2d 701, 328 P.2d 700 (1958); West Shore Express, Inc., 39 Wis. Pub. Serv. Comm'n 85 (1954); Howard W. Pollei, 37 Wis. Pub. Serv. Comm'n 153, 155 (1952). See HARPER 176; Auerbach 238; Burstein, *supra* note 98, at 386-87; Fulda, *Antitrust Considerations in Motor Carrier Mergers*, 56 MICH. L. REV. 1237, 1280-81 (1958); Weinstein, *Sales and Transfer of "Dormant" Carrier Certificates of Public Convenience and Necessity*, 38 MASS. L.Q. 73, 74 (1953).

¹⁰¹ The commissions appear to be afraid that "splitting" of the "rights" will lead to additional competition in the field. Division of rights was not allowed in, *e.g.*, John V. O'Connor, 55 M.C.C. 145, 154-55 (1948); John S. Lennerton, 27 P.U.R. (n.s.) 119 (Mass. Dep't Pub. Util. 1939). See Auerbach 236. In other cases division of rights has been permitted. Arthur J. Kohl, 50 M.C.C. 389, 393-94 (1948); Consolidated Freightways, Inc., 38 M.C.C. 577, 586-87 (1942); *cf.* Verne O. Baldock, *supra* note 100, at 194; Albrent Freight & Storage Corp., 39 Wis. Pub. Serv. Comm'n 367 (1954). Note the rebuke to the ICC in *Stearn v. United States*, 87 F. Supp. 596 (W.D. Va. 1949), where the court called unreasonable the Commission's regulations with respect to transfers and refused to give them effect.

¹⁰² *Cf.* Humphries Transp., Inc., 19 P.U.R.3d 40, 45-47 (Wash. Pub. Serv. Comm'n 1957); George Kress, 64 P.U.R. (n.s.) 126, 128 (Wash. Dep't Transp. 1946); B. R. Pace, 19 Wash. Dep't Pub. Serv. 69, 70 (1942). Compare Charles L. Atwater, 45 M.C.C. 51 (1946); Yellow Truck Lines, Inc., 35 M.C.C. 773, 776-77 (1940); *cf.* W. A. Slater, 77 P.U.R. (n.s.) 223 (Wash. Dep't Transp. 1948). Approval of transfers was recorded in the following cases despite the possibility of more active competition: Dennis Trucking Co., 75 M.C.C. 171, 173-74 (1958); Horlacher Delivery Serv., Inc., 35 M.C.C. 149, 153 (1940); McGehee v. Wolchansky, 217 Miss. 88, 63 So. 2d 549 (1953). The practice of leasing "rights" has also been frowned upon by commissions. E. S. Wheaton, 58 M.C.C. 703, 714 (1952); Northern Transp. Co., 56 M.C.C. 259, 263-64 (1949); Wess Clark, 56 M.C.C. 20, 22 (1949); Thomas M. Jenkins, 57 M.C.C. 249, 252 (1950) (dissent). On the other hand, a common carrier certificate may be pledged and the lien thereof foreclosed, the rule requiring ICC approval constituting no bar to the validity of the lien. *In re Rainbo Express, Inc.*, 179 F.2d 1 (7th Cir.), *cert. denied*, 339 U.S. 981 (1950). Compare Hancock Transp. Corp., 49 M.C.C. 433, 438 (1949); 49 C.F.R. § 179.2(d)(1) (Supp. 1959); HUDSON & CONSTANTIN 562.

Value of "Rights"

For obvious political reasons the ICC is reluctant to admit that the licenses it has granted have a cash value,¹⁰³ although it will act to protect that value against competitive encroachment.¹⁰⁴ As a result, it may disapprove transfers on the theory that the parties are motivated by speculative purposes¹⁰⁵ or it may impose limitations upon the value to be assigned the "rights" in connection with a conveyance of a motor carrier's business.¹⁰⁶ It may require, too, that the acquiring carrier amortize the value of the licenses purchased.¹⁰⁷

MERGERS

Section 7 of the Clayton Act

Under specific provisions of the federal antitrust laws, mergers, as distinct from mere transfers to one who is not engaged in business, are now strictly controlled.¹⁰⁸ Under the applicable regulatory legislation motor carriers may only merge or consolidate with ICC approval.¹⁰⁹

¹⁰³ See cases cited note 105 *infra*. Compare *Auerbach* 234.

¹⁰⁴ *Burks Motor Freight Line, Inc.*, 77 M.C.C. 303, 307 (1958); *John B. O'Connor*, 55 M.C.C. 145 (1948) (dictum); *Yellow Truck Lines, Inc.*, 35 M.C.C. 773, 776-77 (1940) (dictum); *HARPER* 176. Some indication of the value of such "rights" appears in *Burks Motor Freight Line, Inc.*, *supra* at 305, where a certificate was leased to an applicant for \$100 per month for a term of ten years.

¹⁰⁵ *Cf. Bernice Buettner*, 49 M.C.C. 797 (1949); *G. S. Fraps, Jr.*, 38 M.C.C. 703, 706-07 (1942); *John Snyder*, 19 Wash. Dep't Pub. Serv. 70 (1942); *Nelson Transp. Co.*, 77 M.C.C. 149, 153 (1958) (dictum). Compare *John Hrniciar, Jr.*, 78 M.C.C. 467, 469 (1958); *P. B. Mutri Motor Transp., Inc.*, 76 M.C.C. 171, 174 (1958). In order to disguise the fact that the "rights" have economic value, some states insist that they be transferred only in connection with a conveyance of tangible personal property. *E.g.*, *Mass. ANN. LAWS* ch. 159B, § 11 (1959), *P. DiNapoli Co. v. Department of Pub. Util.*, 329 Mass. 772, 110 N.E.2d 379 (1953); *A.B. & C. Motor Transp. Co. v. Department of Pub. Util.*, 329 Mass. 719, 110 N.E.2d 377 (1953); *WASH. REV. CODE* § 81.80.270 (1951), *Humphries Transp., Inc.*, 19 P.U.R.3d 40, 44-45 (Wash. Pub. Serv. Comm'n 1957). See *HARPER* 175; *Weinstein*, *supra* note 100.

¹⁰⁶ *William H. Graves*, 59 M.C.C. 370, 374-75 (1953); *Public Serv. Interstate Transp. Co.*, 5 M.C.C. 735 (1938); 49 C.F.R. § 179.2(d)(3) (Supp. 1959). Compare *Silver Ball Transp. Inc.*, 49 M.C.C. 249 (1949). See *HARPER* 175; *HUDSON & CONSTANTIN* 563; *Meck & Bogue*, *Federal Regulation of Motor Carrier Unification*, 50 *YALE L.J.* 1376, 1398-1400 (1941). In some instances, the value to be assigned to the "rights" has not been controlled. See *Wells Fargo Armored Serv. Corp.*, 75 M.C.C. 285, 291 (1958); *Burstein*, *supra* note 98, at 387-88.

¹⁰⁷ *Wells Fargo Armored Serv. Corp.*, *supra* note 106, at 293-95; *Takin Bros. Freight Line, Inc.*, 75 M.C.C. 236, 243 (1958); *Youngstown Cartage Co.*, 75 M.C.C. 205, 212 (1958); *C. & H. Transp. Co.*, 75 M.C.C. 166, 170 (1958); *Standard Freight Lines, Inc.*, 75 M.C.C. 15, 21 (1957); *Interstate Commerce Act* § 216(h); *cf. ILL. ANN. STAT.* ch. 95½, § 282.14(h) (Smith-Hurd 1958). Despite the fact that the ICC insists that purchased "rights" be written off the rate base, it does not use a rate base method of fixing carriers' charges. See text accompanying notes 170-209 *infra*.

¹⁰⁸ *Clayton Act* § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

¹⁰⁹ *Interstate Commerce Act* § 5(2); 50 ICC ANN. REP. 79-80 (1936). *Cf. Minneapolis & St. L. Ry. v. United States*, 165 F. Supp. 893, 898-99 (D. Minn. 1958), *aff'd*, 361 U.S. 173 (1959); *ILL. ANN. STAT.* ch. 95½, §§ 282.12(c), (d) (Smith-Hurd 1958). Railroad acquisitions of trucks are discussed in text accompanying notes 126-34 *infra*.

Competitive Mergers

The Supreme Court has advised the ICC that it is not to measure proposals for motor carrier consolidations by the standards of the antitrust laws.¹¹⁰ Preservation of competition is to be given some consideration, but other factors must also guide the Commission.¹¹¹ Occasionally, such other factors lead the ICC to disapprove mergers.¹¹² So far as competition itself goes, while it can be said that from time to time mergers are disapproved in order to promote trade rivalry,¹¹³ the frequency of this practice is not so great as to give rise to any serious complaint that the Commission is taking over the enforcement of the antitrust laws.¹¹⁴ Indeed, there is a good deal of complaint from political

¹¹⁰ *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

¹¹¹ "[T]he Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by 'encouraging the organization of stronger units' in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility . . . it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against this background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy." *Id.* at 85-86. See *Chesapeake & Ohio Ry. v. United States*, 283 U.S. 35, 42 (1931) (railroad extension); *Interstate Commerce Act* §§ 5(1), (2)(a), (2)(c), (4), (10), (11); *ILL. ANN. STAT.* ch. 95½, § 282.13 (Smith-Hurd Supp. 1959); 71 *ICC ANN. REP.* 144 (1957); Meck & Bogue, *supra* note 106, at 1381-90.

¹¹² *Shein v. United States*, 102 F. Supp. 320, 324-26 (D.N.J. 1951), *aff'd per curiam*, 343 U.S. 944 (1952); *James F. Black*, 75 M.C.C. 275, 282 (1958); *Schein's Express*, 59 M.C.C. 534, 549 (1953); *J. W. Bringsby*, 58 M.C.C. 739 (1952); *Bernice Buettner*, 49 M.C.C. 797, 800 (1949); *Leonard Tornetta*, 40 M.C.C. 339 (1945); *United States Freight Co.*, 39 M.C.C. 623 (1944); *Transport Co.*, 36 M.C.C. 61, 86 (1940). Compare *Takin Bros. Freight Line, Inc.*, 75 M.C.C. 236, 242 (1958); *Youngstown Cartage Co.*, 75 M.C.C. 205, 212 (1958); *Allied Van Lines, Inc.*, 40 M.C.C. 557, 568 (1946); *J. Norman Marshall*, 36 M.C.C. 33, 37 (1940).

¹¹³ *J. W. Bringsby*, *supra* note 112, at 746; *William W. Brown*, 39 M.C.C. 373, 377 (1943). See *Allied Van Lines, Inc.*, 46 M.C.C. 159 (1946); *Detroit & Can. Tunnel Corp.*, 5 M.C.C. 592 (1938); *Northland-Greyhound Lines, Inc.*, 5 M.C.C. 215, 217 (1937). See 49 C.F.R. § 179.2(d)(4) (Supp. 1959).

¹¹⁴ See *McLean Trucking Co. v. United States*, 321 U.S. 67, 71-72, 88-89 (1944); *Burlington Truck Lines, Inc.*, 75 M.C.C. 322, 325 (1958); *Pic-Walsh Freight Co.*, 75 M.C.C. 297, 303 (1958); *Takin Bros. Freight Line, Inc.*, 75 M.C.C. 236, 242-43 (1958); *Commercial Carriers, Inc.*, 75 M.C.C. 215, 222, 234 (1958); *Youngstown Cartage Co.*, 75 M.C.C. 205 (1958); *ABCO Moving & Storage Co.*, 52 M.C.C. 131, 139-40 (1950); *David Jones*, 50 M.C.C. 601, 606-07 (1948); *W. R. Schaefer*, 50 M.C.C. 433 (1948); *David H. Ratner*, 50 M.C.C. 43, 51 (1947); *Charles L. Atwater*, 45 M.C.C. 51, 54-58 (1946); *Allied Van Lines, Inc.*, 40 M.C.C. 557, 588-89, 592 (1946); *Consolidated Freight Ways, Inc.*, 38 M.C.C. 577, 589 (1942); *Carolina Freight Carriers Corp.*, 37 M.C.C. 791, 794 (1941); *Transport Co.*, 36 M.C.C. 61, 80-86 (1940); *J. Norman Marshall*, 36 M.C.C. 33 (1940); *Dalby Motor Freight Lines, Inc.*, 35 M.C.C. 619 (1940); *Norwalk Truck Line Co.*, 35 M.C.C. 459 (1940); *Public Serv. Interstate Transp. Co.*, 5 M.C.C. 735, 738-39 (1938); *Eastern Mich. Motorbuses*, 5 M.C.C. 120 (1937); *Consolidated Motor Lines, Inc.*, 5 M.C.C. 109, 113 (1937); *HARPER* 178; 71 *ICC ANN. REP.* 53-54 (1957); *S. REP. No. 1441*, 85th Cong., 2d Sess. 3-4 (1958).

and other sources to the effect that the Commission has been too free in permitting mergers¹¹⁵ and that the result has been a trend toward "concentration" in the trucking industry.¹¹⁶

Parallel Routes

Different considerations affect the merger of motor carriers operating side by side but not over the same routes. By definition they are not competitive and hence would be free to consolidate if they were in the unregulated sector of the economy (apart from various doctrines of "soft" competition which might be urged to limit total size of the corporate structure).¹¹⁷ The ICC, while disapproving some such acquisitions for reasons not connected with competition,¹¹⁸ seems generally disposed to approve applications of this character.¹¹⁹

¹¹⁵ See NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 414 (1942); *Hearings, supra* note 84, at 8, 1041; Adams, *The Role of Competition in the Regulated Industries*, 48 PROCEEDINGS AM. ECON. ASS'N 527, 531-32 (1958); *Burstein, supra* note 98, at 388; Fulda, *supra* note 100, at 1286, 1289-90 (1958). Some comment, on the other hand, has been favorable. *Hearings, supra* note 84, at 42, 43, 89; Nelson, *Economics of Large Scale Operation in the Trucking Industry*, 17 J. LAND & P.U. ECON. 112, 114 (1941).

¹¹⁶ See BIGHAM & ROBERTS, TRANSPORTATION PRINCIPLES AND PROBLEMS 271 (1952); BROEHL, TRUCKS, TROUBLE AND TRIUMPH (1954); HUDSON & CONSTANTIN 152; NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 410 (1942); TAFF, *op. cit. supra* note 82, at 195, 199; 72 ICC ANN. REP. 42, 54-55 (1958); 70 ICC ANN. REP. 75-76 (1957); 62 ICC ANN. REP. 60 (1948); 60 ICC ANN. REP. 93 (1946); 59 ICC ANN. REP. 90 (1945); 56 ICC ANN. REP. 32 (1942); 51 ICC ANN. REP. 77 (1937); *Hearings, supra* note 84, at 5-6; Adams, *The Regulatory Commissions and Small Business*, 24 LAW & CONTEMP. PROB. 147, 156 (1959); *Burstein, supra* note 98, at 378; Pegrum, *The Economic Basis of Public Policy for Motor Transport*, 28 LAND ECON. 244 (1952). A decline in absolute numbers, however, is not necessarily indicative of reduction in competition since motor carriers are separated as to routes, commodities and the like. Data indicating a trend away from concentration will be found in TAFF, *op. cit. supra* note 82, at 195, 608-09; WILCOX, *op. cit. supra* note 77, at 629; Poe, *supra* note 78, at 132; Taff, *supra* note 83, at 509; *Hearings, supra* note 84, at 45, 53. It should be borne in mind that elements of indivisibility may be involved in the trucking industry. Accordingly, merger may be a means of reducing the cost of carriage. See generally McLean Trucking Co. v. United States, 321 U.S. 67, 72 (1944); BIGHAM & ROBERTS, *op. cit. supra* at 185; FAIR & WILLIAMS, ECONOMICS OF TRANSPORTATION 655 (1950); S. REP. NO. 1441, 85th Cong., 2d Sess. 7 (1958); S. Doc. No. 78, 79th Cong., 1st Sess. 39 (1945); Poe, *supra* note 78, at 132; Roberts, *Some Aspects of Motor Carrier Costs*, 32 LAND ECON. 228, 230-31, 233 (1956). Compare FAIR & WILLIAMS, *op. cit. supra* at 643; Stigler, *The Economics of Scale*, 1 J. LAW & ECON. 54, 56-58, 61-62, 66, 69-71 (1958).

¹¹⁷ United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

¹¹⁸ Robert G. Hayes, 59 M.C.C. 389 (1953); C. A. Conklin Truck Line, Inc., 37 M.C.C. 467, 468-69, 471 (1941); H. M. Florman, 35 M.C.C. 521 (1940). See also Martin M. Derr, 25 M.C.C. 729 (1939).

¹¹⁹ See Maislin Bros. Transp., Ltd., 75 M.C.C. 329, 337 (1958); Wells Fargo Armored Serv. Corp., 75 M.C.C. 285, 290 (1958); Southern Pac. Co., 70 M.C.C. 5, 14-15 (1956); David H. Ratner, 57 M.C.C. 312, 316 (1951); John B. O'Connor, 55 M.C.C. 145 (1948); David H. Ratner, 50 M.C.C. 43, 51 (1947); Harry F. Chaddick, 40 M.C.C. 41 (1945); Consolidated Freight Ways, Inc., 38 M.C.C. 577, 590-92 (1942); Best Motor Lines, 38 M.C.C. 199, 207-09 (1942); Associated Transp., Inc., 38 M.C.C. 137, 148 (1942); T. A. Minardi, 15 M.C.C. 412 (1938). See also A. B. Crichton, Sr., 57 M.C.C. 715 (1951); Arthur J. Kohl, 50 M.C.C. 389 (1948); Charles L.

End-to-End Mergers

Another situation involves the acquisition by one motor carrier of another with a connecting route. Under the antitrust laws such mergers may take on the character of vertical integration¹²⁰ and have been increasingly attacked on the theory that nonparties to the consolidation might find themselves "foreclosed" from the traffic handled by the originating carrier. While the ICC has approved a great many end-to-end mergers by motor carriers,¹²¹ it has at the same time prevented numerous others on the express grounds that rival carriers, rail or motor, might be adversely affected by the proposed acquisition.¹²² In some measure, therefore, the Commission may be said to be enforcing in this area the doctrines of "soft" competition recently developed under the antitrust laws.

Atwater, 45 M.C.C. 51, 54 (1946); H. & K. Motor Transp., Inc., 37 M.C.C. 621, 622-23 (1941); McCarthy Freight Sys., Inc., 5 M.C.C. 684 (1938). Some such mergers have, however, been disapproved: William W. Brown, 39 M.C.C. 373, 376 (1943); John Colletti, 38 M.C.C. 95 (1942). Mergers have been disapproved also because the result would unduly increase competition for third parties. E. W. A. Peake, 59 M.C.C. 165, 184 (1953). Compare John S. Lennerton, 27 P.U.R. (n.s.) 119, 123 (Mass. Dep't Pub. Util. 1939).

¹²⁰ Cf. *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

¹²¹ *McLean Trucking Co. v. United States*, 321 U.S. 67, 71 (1944); *Baltimore Transfer Co. v. ICC*, 114 F. Supp. 558, 561, 563-66 (D. Md.), *aff'd per curiam*, 346 U.S. 890 (1953); *Ryder Sys., Inc.*, 70 M.C.C. 265 (1956); *Southern Pac. Co.*, 70 M.C.C. 5 (1956); *Pacific Intermountain Express Co.*, 60 M.C.C. 301, 318-19 (1954); *J. L. Keeshin*, 59 M.C.C. 763, 776 (1954); *Harry D. Zabarsky*, 59 M.C.C. 747, 758 (1954); *John Bisgrove*, 59 M.C.C. 447, 450 (1953); *J. W. Ringsby*, 58 M.C.C. 594, 598 (1952); *Foy P. Watson*, 57 M.C.C. 661, 671 (1951); *Allied Van Lines, Inc.*, 40 M.C.C. 557, 585-89, 593, 601-02 (1946); *Claude A. Jessup*, 39 M.C.C. 233, 241 (1943); *Consolidated Freight Ways, Inc.*, 38 M.C.C. 577, 589 (1942); *Best Motor Lines*, 38 M.C.C. 199, 205, 208 (1942); *Associated Transp., Inc.*, 38 M.C.C. 137 (1942); cf. *West Shore Express, Inc. v. Public Serv. Comm'n*, 264 Wis. 65, 58 N.W.2d 407 (1953); *West Shore Express, Inc.*, 39 Wis. Pub. Serv. Comm'n 85, 88-89 (1954). See 72 ICC ANN. REP. 55 (1958); 70 ICC ANN. REP. 77 (1957). See also *HUDSON & CONSTANTIN* 574; *Auerbach* 80, 243; *Meck & Bogue*, *supra* note 106, at 1393. Compare *Navajo Freight Lines, Inc.*, 75 M.C.C. 391, 396 (1958); *Delta Motor Line, Inc.*, 75 M.C.C. 245, 252-53, 255 (1958); *Ryder Sys., Inc.*, 70 M.C.C. 329 (1956); *Glendenning Motor Ways, Inc.*, 75 M.C.C. 191, 201 (1958); *A. B. Crichton*, 57 M.C.C. 715, 726-27 (1951); *W. E. Stewart*, 55 M.C.C. 683, 694 (1949); *Major A. Riddle*, 55 M.C.C. 115, 121 (1948); *Adams & Hendry*, *Trucking Mergers: A Study Prepared for Senate Select Committee on Small Business*, 85th Cong., 1st Sess. 220-21 (1957). Note that in approving end-to-end mergers commissions frequently note that the effect thereof may be to increase competitive pressures upon third party motor carriers.

¹²² *Schein's Express*, 59 M.C.C. 534, 548 (1953); *Robert T. Herrin*, 58 M.C.C. 59-61 (1951); *Pacific Intermountain Express Co.*, 57 M.C.C. 341, 362, 378, 380 (1950); *Wilfred M. Auclair*, 57 M.C.C. 262, 265 (1950); *J. F. La Mere*, 55 M.C.C. 501, 514 (1949); cf. *Albrent Freight & Storage Co. v. Public Serv. Comm'n*, 263 Wis. 119, 56 N.W.2d 846, 851 (1953). Compare *Baltimore Transfer Co. v. ICC*, *supra* note 121, at 563. In some instances, mergers have been disapproved for reasons not bearing on the protection of existing motor carriers. See, e.g., *Schein's Express*, *supra*. Compare *Minneapolis & St. L. Ry. v. United States*, 165 F. Supp. 893, 900 (D. Minn. 1958), *aff'd*, 361 U.S. 173 (1959); *Monson & Dray Line, Inc.*, 77 M.C.C. 727, 736 (1958).

Unrelated Routes

As yet the antitrust laws have had little application to the consolidation of wholly unrelated business enterprises. It has, however, been suggested that such acquisitions should be disapproved under section 7 of the Clayton Act because the larger resulting entity would be wealthier and hence able to give more vigorous competition to other firms in its several fields of operation.¹²³ In the motor field the ICC has often approved mergers of carriers whose routes were separated by distance,¹²⁴ yet it has occasionally been moved by those fears of vigorous competition which would lead some observers to apply the antitrust laws against diversification of business enterprise in general.¹²⁵

COMBINING MODES OF CARRIAGE

In the motor carrier area the active diversification issue has been the extent to which the railroads should be permitted to operate motor transport. The question arises in connection with two kinds of transactions: attempted railroad acquisition of currently extant motor carrier operations,¹²⁶ or railroad application for a certificate to initiate new motor service.¹²⁷ Whether railway entry into the trucking field would restrain or increase competition remains a basic unresolved question. Apparently many truckers do fear that competition would be increased, at least in the short run.

¹²³ Bicks, *Mergers and Acquisitions*, 11 A.B.A. ANTITRUST SECTION REP. 20, 24 (1957). Compare S. Doc. No. 78, 79th Cong., 1st Sess. 69 (1945); *Hearings, supra* note 84, at 8. Roberts, *Some Aspects of Motor Carrier Costs*, 32 LAND ECON. 228, 234 (1956).

¹²⁴ See Dennis Trucking Co., 75 M.C.C. 171, 174 (1958); Standard Freight Lines, Inc., 75 M.C.C. 15, 21 (1957); Ryder Sys., Inc., 70 M.C.C. 329, 340-41 (1956); Ryder Sys., Inc., 70 M.C.C. 265, 271 (1956); E. W. A. Peake, 65 M.C.C. 577, 587 (1955); R. N. B. Converse, 40 M.C.C. 452, 455 (1956); Horlander Delivery Serv., Inc., 35 M.C.C. 149 (1940); cf. Merchants Cartage Co., 17 Ill. Commerce Comm'n 566 (1937). Compare C. & H. Transp. Co., 75 M.C.C. 166, 170 (1958); H. C. Griffin, 59 M.C.C. 155 (1953).

¹²⁵ R. J. Hurst, 56 M.C.C. 739, 753 (1950), *rev'd on new facts*, 58 M.C.C. 465 (1952); John F. La Mere, 55 M.C.C. 501, 514 (1949); William W. Paterson, Jr., 55 M.C.C. 390, 395 (1948). Occasionally unrelated mergers are disapproved for reasons not bearing upon competition. See, e.g., John H. Welch, 56 M.C.C. 505, 515 (1950); Transport Co., 36 M.C.C. 61 (1940).

¹²⁶ Section 5(2) (b) of the Interstate Commerce Act provides in part that the Commission shall not approve the acquisition of a motor carrier by a railroad "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier [railroad] to use service by motor vehicle to public advantage in its operation and will not unduly restrain competition."

¹²⁷ Section 207(a) of the Interstate Commerce Act provides that "a certificate shall be issued to any qualified applicant . . . if it is found that the applicant is fit, willing, and able properly to perform the service proposed . . . and that the proposed service . . . is or will be required by the present or future public convenience and necessity. . . ."

However that may be, in the case of rail acquisition of outstanding motor carrier authority, express statutory provision directs the ICC not to approve unless it finds that such action is consistent with the public interest and that it will not unduly restrain competition.¹²⁸ The advantage of improved rail traffic must be weighed against the possible or potential injury to existing motor carriers.¹²⁹ As for new entry into trucking, on its face the Interstate Commerce Act appears to leave the ICC wide discretion.¹³⁰ It has exercised that discretion for the most part in accord with the same protectionist attitude which underlies the legislative directive regarding acquisitions. On the whole the Commission has narrowly restricted the scope of railroad operation of motor vehicles to the sphere "auxiliary" or "supplemental" to rail service. Usually, for example, a railroad has not been licensed to serve any point not a station on its own lines,¹³¹ and until recently shipments were limited to those which the carrier received from or delivered to its rail facilities under a through bill of lading at rail rates.¹³² Those rules

¹²⁸ Interstate Commerce Act § 5(2)(b). See *American Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133 (1958); 60 ICC ANN. REP. 43 (1946).

¹²⁹ Cf. *ICC v. Parker*, 326 U.S. 60, 68 (1945); 60 ICC ANN. REP. 43 (1946).

¹³⁰ Compare notes 126, 127 *supra*. In 1938 an amendment was proposed in an attempt to incorporate the standards governing acquisition into the provisions of § 207(a). Commissioner Eastman stated in hearings before a Senate subcommittee that the amendment was probably unnecessary because "in administering the provisions of section 207, it would be the duty of the Commission to read the act as a whole and to apply the same policy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of [section 5 (2) (b)]" (*Hearings on S. 3606 Before the Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 23-29 (1938)); and the amendment was subsequently withdrawn on the ground, *inter alia*, of Commissioner Eastman's personal views. See Fulda, *Rail-Motor Competition: Motor-Carrier Operations by Railroads*, 54 NW. U.L. REV. 156, 161 (1959): "Under these circumstances there is no basis for the inference that section 207 (a) was intended to be construed without regard to the limited anti-integration policy expressed in [§ 5 (2) (b)]." Judicial interpretation of § 207(a) has seen that section as requiring the Commission to preserve the inherent advantages of motor carriage in keeping with the National Transportation Policy, which requirement would prohibit the issuance of a certificate for service which was "directly competitive or unduly prejudicial to the already certificated motor carriers." *American Trucking Ass'n v. United States*, 326 U.S. 77 (1945); *ICC v. Parker*, *supra* note 129, at 69-70. The result has been parallel treatment of the acquisition and certificate cases. Fulda, *supra* at 183. *But see* *American Trucking Ass'n v. United States*, 355 U.S. 141, 149-50 (1957): "In interpreting § 207, the Commission has accepted the policy of § 5(2)(b) as a guiding light, not as a rigid limitation. . . . Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207."

¹³¹ *Pacific Motor Trucking Co.*, 77 M.C.C. 605, 622 (1958); *Bangor & Arrostook R.R.*, 73 M.C.C. 699, 703 (1957); *Frisco Transp. Co.*, 47 M.C.C. 63 (1947); *Rock Island Motor Transit Co.*, 40 M.C.C. 457, 465 (1946); *Kansas City So. Transp. Co.*, 28 M.C.C. 5 (1941); *Pennsylvania Truck Lines, Inc.*, 1 M.C.C. 101 (1936). See HARPER 163, 166; TAFF, *op. cit. supra* note 82, at 520; S. Doc. No. 78, 79th Cong., 1st Sess. 13 (1945); Meck & Bogue, *supra* note 106, at 1412.

¹³² See *ICC v. Parker*, 326 U.S. 60, 70-73 (1945); *Santa Fe Trail Transp. Co.*, 79 M.C.C. 300, 307, 309-10 (1959); *Southern Pac. Transp. Co.*, 77 M.C.C. 754, 756 (1958); *Southern Pac. Transp. Co.*, 51 M.C.C. 695 (1950); *Rock Island Motor Transit Co.*, *supra* note 131, at 482; Fulda, *supra* note 130, at 187.

have occasionally been relaxed, as in cases where no existing motor carrier or rail service is available to the point in question;¹³³ but in general the ICC has vigorously enforced a "soft" competition policy of keeping railroads out of the trucking industry.¹³⁴

¹³³ Santa Fe Trail Transp. Co., 75 M.C.C. 385, 388 (1958); Burlington Truck Lines, Inc., 75 M.C.C. 322, 327 (1958); Burlington Truck Lines, Inc., 75 M.C.C. 258, 264 (1958); Rock Island Motor Transit Co., 63 M.C.C. 91, 100-07, 109-12 (1954). Compare Campbell Sixty-Six Express, Inc., 46 M.C.C. 222 (1946).

Occasionally, commissions grant other dispensations from the restrictions mentioned in the text. Pickup & Delivery Limits at Los Angeles, 299 I.C.C. 347, 353-54 (1956); Trailers on Flat Cars, 296 I.C.C. 219, 226-31 (1955); New York Cent. R.R., 79 M.C.C. 113, 120 (1959); Pacific Motor Trucking Co., 77 M.C.C. 605, 623 (1958); Pacific Motor Trucking Co., 34 M.C.C. 249, 297 (1942). See James, *Control of One Form of Transportation By Another*, 12 ICC PRAC. J. 214, 222-23 (1944).

Combinations among other forms of transportation have also been the subject of commission action. See H. E. Savage, Jr., 265 I.C.C. 157, 167 (1947); McLean Trucking Co., 70 M.C.C. 601 (1957). Compare Refund Provisions, Lake Cargo Coal, 299 I.C.C. 659, 664 (1957); C. F. Deppman, 8 Wash. Dep't Pub. Works 136, 140 (1927). See also KOONTZ & GABLE, *PUBLIC CONTROL OF ECONOMIC ENTERPRISE* 171 (1956); 70 ICC ANN. REP. 11 (1956); 62 ICC ANN. REP. 57 (1948); Lilienthal & Rosenbaum, *Motor Carrier Regulation in Illinois*, 22 ILL. L. REV. 47, 68-69 (1927). Even the overlap of noncarrier business has raised problems. See Wright Motor Lines, Inc., 77 M.C.C. 423, 426 (1958); Alterman Transp. Lines Inc., 77 M.C.C. 407, 409, 411 (1958); *Hearings on S. Res. 50 Before the Subcommittee on Domestic Land and Water Transport of the Senate Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 352 (1950); Business Week, June 22, 1957, pp. 168, 176.

¹³⁴ New York Cent. R.R., 61 M.C.C. 457, 462 (1953); Union Pac. R.R., 15 M.C.C. 101 (1938); Cleveland, Columbus & Cincinnati Highway, Inc., 5 M.C.C. 479, 482 (1938). See HARPER 165.

Sometimes railway diversification into the trucking field has been approved. See Pacific Motor Trucking Co., 34 M.C.C. 249 (1942); Kansas City So. Transp. Co., 10 M.C.C. 221, 238 (1938); Merchants Freight Lines, Inc., 17 Ill. Commerce Comm'n 559, 562 (1937); Rock Island Motor Transit Co., 9 Ill. Commerce Comm'n 177 (1928); Northern Pac. Transp. Co., 18 Wash. Dep't Pub. Serv. 58 (1941). HUDSON & CONSTANTIN 516. Compare Pickup & Delivery Limits at Los Angeles, 299 I.C.C. 347, 352, 354 (1956); Commodities From Cal. to Ariz., 245 I.C.C. 545, 560-64 (1941); Associated Transp., Inc., 38 M.C.C. 137, 163 (1942); Burlington Transp. Co., 33 M.C.C. 759, 763-68 (1942). And see TAFF, *COMMERCIAL MOTOR TRANSPORTATION* 589 (1955). Certificates have been more frequently granted when the railroad proposed to substitute trucks for abandoned rail operations. Great No. Ry., 77 M.C.C. 1 (1958); Texas & Pac. Motor Transp. Co., 47 M.C.C. 425 (1947); Walter I. Kohn, 45 M.C.C. 6 (1946); Kansas City So. Transp. Co., 28 M.C.C. 5, 8-15 (1941); Indiana R.R., 21 M.C.C. 73, 77 (1939); cf. West Bros., Inc. v. Illinois Cent. R.R., 222 Miss. 335, 75 So. 2d 723 (1954). Many observers have expressed fear that railways would drive out the "independent" truckers if permitted to enter the motor carrier field. There is evidence to support the view that the railroads enjoy a competitive advantage. See, e.g., *Alcoholic Liquors*, 304 I.C.C. 87, 92 (1958) (*semble*); Pegrum, *supra* note 116, at 249, 262. On the other hand, it appears that motor carriers enjoy advantages of their own; some observers have regarded the truckers as possessing more imaginative and aggressive management. WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 648 (1955); WILLIAMS, *THE REGULATION OF RAIL-MOTOR RATE COMPETITION* 5 (1958). Thinking on this subject is often muddled. Thus, in *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419 (1951), the Court wrote: "Such limitation [of motor carrier operation by railroads] was in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads." *Id.* at 432. Such an argument leaves the reader wondering which form of transportation might be able to cripple the other in the absence of protectionism. There is little evidence as to the effect of railway entry into the trucking business. Many observers tend to think the present barrier should be removed. Pegrum, *Public Policy in Motor Transport*, in *BUSINESS ORGANIZATION AND PUBLIC POLICY* 457 (Levin ed. 1958); TROXEL, *ECONOMICS OF TRANSPORT* 325-48, 398, 418-43 (1955); Grubbs, *supra* note 86, at 22.

SERVICE

Control of Service

In the unregulated sector of the economy the managers of a business enterprise are free to select their customers; they are under no obligation to serve all comers and may refuse to deal with those whom they do not like.¹³⁵ One of the cardinal features of a public utility is its duty to serve all would-be customers, a duty commonly crystallized into statutory form.¹³⁶ As the distinction between a common and contract carrier indicates, and as the nature of the transport business suggests, however, the truckers are not in quite the same position as, say, the railroads with respect to the obligation to provide regular and universally available service.

Duty to Serve

The state regulatory commissions exercise considerable control over abandonment of motor carrier operations¹³⁷ and from time to time they attempt directly to order the carrier to render continuous and adequate service.¹³⁸ One gains the impression, however, that the principal administrative weapon in enforcing the carrier's duty to serve is the licensing power: if existing carriers are not rendering adequate service, the commission simply allows other truckers to enter into competition over the same routes.¹³⁹ Here, indeed, is the anomaly of a public utility obligation enforced by an antitrust method.

¹³⁵ *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *But cf. United States v. Parke, Davis & Co.*, 80 Sup. Ct. 503 (1960).

¹³⁶ Interstate Commerce Act § 216(b); ILL. ANN. STAT. ch. 95½, § 282.14(a) (Smith-Hurd 1958); MISS. CODE ANN. § 7657 (1956).

¹³⁷ ILL. ANN. STAT. ch. 95½, § 282.12(a) (Smith-Hurd 1958); WIS. STAT. ANN. § 194.26 (1957). See *Ragland Transfer Co.*, 9 Ill. Commerce Comm'n 529 (1930); HARPER 220-21; TAFF, *op. cit. supra* note 134, at 516. Compare *Boston & Maine Transp. Co.*, 20 M.C.C. 581, 586 (1939); WILCOX, *op. cit. supra* note 134, at 633.

¹³⁸ *Consolidated Freight Lines, Inc. v. Department of Pub. Serv.*, 200 Wash. 659, 94 P.2d 484 (1939); *Davenport Hotel, Inc.*, 17 Wash. Dep't Pub. Serv. 46 (1937). See MISS. CODE ANN. § 7637(a) (1956); HARPER 220. There is some evidence of similar activity at the federal level. *John Hrncair, Jr.*, 78 M.C.C. 467 (1958); *T. M. McLaughlin*, 73 M.C.C. 637, 640 (1957); *Galveston Truck Line Corp.*, 73 M.C.C. 617, 625, 627-28 (1957); *Red Ball Motor Freight, Inc.*, 52 M.C.C. 453, 456 (1951); 49 C.F.R. § 220.1(a) (1949). Compare *Petroleum Prods. Between Western Truck Line Points*, 243 I.C.C. 7, 13 (1940); S. Doc. No. 78, 79th Cong., 1st Sess. 15 (1945).

¹³⁹ *Davidson Transfer & Storage Co. v. United States*, 42 F. Supp. 215, 218, 219 (E.D. Pa.), *aff'd per curiam*, 317 U.S. 587 (1942). See *Auerbach* 61. Other oblique means of circuitous enforcement of a duty to serve are illustrated by *Coastal Tank Lines, Inc.*, 79 M.C.C. 101, 107-08 (1959); *Akers Motor Lines, Inc.*, 52 M.C.C. 395 (1950); *Willamette Hauling Co. v. Kuykendall*, 43 Wash. 2d 731, 263 P.2d 827 (1953); ILL. ANN. STAT. ch. 95½, § 282.12(b) (Smith-Hurd 1958). The ICC has promulgated regulations with respect to the interchange of equipment among motor carriers. 49 C.F.R. § 207.5 (Supp. 1959). Similar provisions are found in

Safety

Both federal ¹⁴⁰ and state ¹⁴¹ agencies are active in enforcing safety measures for the protection of the users of highways. Conceivably an accident prevention program could be carried to the point where it had considerable economic implications.¹⁴² The fact that motor carriers are required to carry insurance against the recovery of judgments for bodily injuries or damage to property suggests that possibility.¹⁴³

Quality of Service

In the unregulated sector of the economy, of course, the antitrust laws leave the maintenance of quality wholly to the forces of competition. In the trucking field, statutory authority is sufficiently broad to permit considerable administrative control.¹⁴⁴ Whatever power it may have

ILL. ANN. STAT. ch. 95½, § 282.14(c) (Smith-Hurd 1958); MISS. CODE ANN. § 7658 (1956); WASH. REV. CODE § 81.80.240 (1951). Compare Motor-Rail-Motor Traffic in East & Midwest, 219 I.C.C. 245 (1936). And a commission's authority to control entry into competition may be utilized to compel the establishment of through routes and joint rates. See United Truck Lines, Inc., 78 M.C.C. 777 (1959); C. & H. Transp. Co., 77 M.C.C. 645, 648 (1958); Home Transp. Co., 77 M.C.C. 593 (1958); cf. West Shore Express, Inc. v. Public Serv. Comm'n, 264 Wis. 65, 58 N.W.2d 407 (1953). Compare Puget Sound Freight Line, 7 Wash. Dep't Pub. Works 195 (1926). See also BIGHAM & ROBERTS, *op. cit. supra* note 116, at 270; HARPER 222; HUDSON & CONSTANTIN 574. See notes 11-24 *supra* and accompanying text for indirect control with respect to the adequacy of existing service with or without interlining; notes 208-09 *infra* and accompanying text with respect to fixing of divisions.

¹⁴⁰ See Penn-Dixie Lines, Inc., 76 M.C.C. 697 (1958); Ace Lines, Inc., 76 M.C.C. 667 (1958); Interstate Commerce Act § 204(a)(3); 49 C.F.R. §§ 194, 195 (Supp. 1959); 72 ICC ANN. REP. 96 (1958); 71 ICC ANN. REP. 95 (1957).

¹⁴¹ See MASS. ANN. LAWS ch. 159B, § 18 (1959); MISS. CODE ANN. § 7633 (1956); WASH. REV. CODE § 81.80.210 (1952); BIGHAM & ROBERTS, *op. cit. supra* note 116, at 199; HARPER 224, 244-45; Nutting & Kuhn, *Motor Carrier Regulation—The Third Phase*, 10 U. PITT. L. REV. 477, 485-87 (1949); Poe, *Regulation of Highway Carriers In California*, 30 So. CAL. L. REV. 131, 134 (1957).

¹⁴² Consult Nutting & Kuhn, *supra* note 141, at 479, 481.

¹⁴³ Interstate Commerce Act § 215; 49 C.F.R. § 174 (Supp. 1959); cf. ILL. ANN. STAT. ch. 95½, § 282.17(a) (Smith-Hurd 1958); MISS. CODE ANN. § 7654 (1956); WASH. REV. CODE § 81.80.190 (1952); HARPER 240; TAFF, *op. cit. supra* note 134, at 473; 50 ICC ANN. REP. 71-72 (1936). See 62 ICC ANN. REP. 57 (1948).

¹⁴⁴ Interstate Commerce Act §§ 204(a), 209(b). Note the controls over forms of bills of lading set forth in 39 Stat. 538 (1916), as amended, 49 U.S.C. §§ 81-124 (1958). That enactment also governs the rights of transferees of bills and the like. Compare Inside Pickup & Delivery, 66 M.C.C. 319 (1956). State controls may be found in, e.g., ILL. ANN. STAT. ch. 95½, §§ 282.4(1), .5(d) (Smith-Hurd 1958); WIS. STAT. ANN. § 194.29 (1957). See Gateway City Transfer Co. v. Public Serv. Comm'n, 253 Wis. 397, 34 N.W.2d 238 (1948); Railway Express Agency, 42 Wis. Pub. Serv. Comm'n 20, 21 (1957); Moland Bros. Trucking Co., 40 Wis. Pub. Serv. Comm'n 44, 46 (1955); Beaver Distrib. Co., 38 Wis. Pub. Serv. Comm'n 42, 44 (1953); Truman Houser, 19 Wash. Dep't Pub. Serv. 73 (1943); F. N. & F. E. Young, 19 Wash. Dep't Pub. Serv. 72 (1943). Compare E. J. Miller, 5 Wash. Dep't Pub. Works 575 (1924). See also HARPER 219; Lilienthal & Rosenbaum, *supra* note 133, at 71. The ICC lacks authority to compel motor carriers to establish through routes and joint rates. If, however, the carriers themselves interline, the ICC may fix divisions of the joint rates. Interstate Commerce Act § 216. See text accompanying notes 208-09 *infra*.

with respect to direct enforcement of quality standards, however, the ICC appears little disposed to attempt its exercise.¹⁴⁵ As indicated above, its principal weapon is the threat of licensing competitors;¹⁴⁶ which, however, it sometimes employs under a delayed procedure whereby the existing carrier is given an opportunity to improve his service.¹⁴⁷

Innovation

No one can compel an improvement in the quality of service which amounts to an innovation. To the extent that the ICC does not obstruct voluntary innovations in business methods, however, it may be regarded as acquiescing in a philosophy of "hard" competition; while to the extent that innovation is thwarted, competing firms may be sheltered pursuant to "soft" competition principles. It is difficult to appraise the performance of the Commission in this regard. It has ample authority to permit innovation and perhaps often does so.¹⁴⁸

¹⁴⁵ HUDSON & CONSTANTIN 561; S. Doc. No. 78, 79th Cong., 1st Sess. 156 (1945).

¹⁴⁶ See Davidson Transfer & Storage Co. v. United States, 42 F. Supp. 215 (E.D. Pa.), *aff'd per curiam*, 317 U.S. 587 (1942); Daniel Hamm Drayage Co., 78 M.C.C. 603, 607 (1958); Strickland Transp. Co., 77 M.C.C. 655, 666-71 (1958); Dallas & Mavis Forwarding Co., 73 M.C.C. 31, 33-35 (1958); Liquid Transp., Inc., 76 M.C.C. 685, 686-88 (1958); K & W Boat Transp., Inc., 76 M.C.C. 403, 405-08 (1958); Marine Motor Transp., Inc., 76 M.C.C. 308, 311 (1958); Nalon Co., 73 M.C.C. 391, 393 (1957); *cf.* State *ex rel.* Dep't of Pub. Works v. Inland Forwarding Corp., 164 Wash. 412, 416, 2 P.2d 888, 891 (1931). Compare Harold D. Wagner, 77 M.C.C. 777, 781 (1958); Deiona Trucking Co., 73 M.C.C. 399, 400-01 (1957). See also FAIR & WILLIAMS, *op. cit. supra* note 116, at 521; HARPER 96-97, 109-10; HUDSON & CONSTANTIN 497; Nelson, *Patterns of Competition and Monopoly in Present Day Transport*, 26 LAND ECON. 232, 239 (1950). On the other hand, an attempt is sometimes made to maintain or improve service by the exclusion of competition so as to prevent deterioration of revenues. *E.g.*, Oil Field Equip., 300 I.C.C. 409, 425 (1957). See HARPER 197; Fulda, *supra* note 100, at 1268.

¹⁴⁷ Midwest Transfer Co., 77 M.C.C. 675, 678-81 (1958); *cf.* West Bros., Inc. v. H & L Delivery Serv., Inc., 220 Miss. 323, 70 So. 2d 870 (1954). See HARPER 109. See note 22 *supra* and accompanying text. There is also evidence that competition exists between motor carriers on a service basis, and that the quality of the service is affected thereby. See Stopping In Transit, 303 I.C.C. 83, 84 (1958); Bakery Goods, 303 I.C.C. 75, 76 (1958); Automobiles From Evansville, 245 I.C.C. 339, 346 (1941); TROXEL, *op. cit. supra* note 134, at 419.

¹⁴⁸ See ICC v. Parker, 326 U.S. 60, 70, 72 (1945); McLean Trucking Co. v. United States, 321 U.S. 67, 82, 86 (1944); American Trucking Ass'n v. United States, 56 F. Supp. 394, 399 (E.D. Pa. 1944), *rev'd on other grounds*, 326 U.S. 77 (1945); Automobile Parts, 304 I.C.C. 81, 82 (1958); Truck Trailers On Flat Cars, 297 I.C.C. 395, 398-400 (1955); H. E. Savage, Jr., 265 I.C.C. 157, 164-68 (1947); Pick-Up & Delivery Serv., 218 I.C.C. 441, 475 (1936); E. Brooke Matlack, Inc., 79 M.C.C. 495, 499 (1959); R. J. Coker, 79 M.C.C. 255, 257-58 (1959); Everts' Commercial Transp., Inc., 78 M.C.C. 717, 762 (1959); Aalco Express Co., 78 M.C.C. 567, 572 (1958); City Express, Inc., 78 M.C.C. 497, 500 (1958); Carl Subler Trucking, Inc., 77 M.C.C. 633, 639 (1958); Diamond Transp. Sys., Inc., 76 M.C.C. 397, 400-02 (1958); Lee L. Monroe, 73 M.C.C. 743, 745-46 (1957); Kansas City So. Transp. Co., 28 M.C.C. 5, 10 (1941); *cf.* Madison Milk Producers Co-op. Dairy, 39 Wis. Pub. Serv. Comm'n 274, 277 (1954). Compare Irving Nudelman, 22 M.C.C. 275, 282 (1940); All Am. Bus Lines, Inc., 18 M.C.C. 755, 776-86 (1939); Pan-American Bus Lines Operation, 1 M.C.C. 190, 203, 208-10 (1936). See HARPER

On the other hand, its protectionist attitudes are sometimes responsible for halting improvements in motor carrier service.¹⁴⁹

FINANCE

Unlike the unregulated industries, which fall under only a minimum of control (primarily directed at the prevention of fraud and the like) as regards the sale of securities and financing in general, motor carriers are commonly subject to administrative limitations on their financing.¹⁵⁰ Under the federal legislation the ICC is specifically directed not to approve a transaction which will result in an increase of total fixed charges except upon a specific finding that such increase will not be contrary to public interest.¹⁵¹ Pursuant to this statutory requirement the ICC has disapproved mergers and acquisitions where overcapitalization might, in its view, result.¹⁵² A showing of financial strength may be an element in determining the "fitness" of a would-be licensee,¹⁵³ and the Commission's denial of entry to applicants in instances wherein

96; *Auerbach* 239; 72 ICC ANN. REP. 45 (1958); 71 ICC ANN. REP. 5, 77-78 (1957); 65 ICC ANN. REP. 55-56 (1951); *Business Week*, June 22, 1957, pp. 168, 171; *Hearings on the Report of the Presidential Advisory Committee on Transport Policy and Organization Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 6 (1955).

¹⁴⁹ See *Acme Fast Freights, Inc.*, 299 I.C.C. 315, 326-27 (1956); *Clifford James*, 79 M.C.C. 275-77 (1959); *Hill Lines, Inc.*, 79 M.C.C. 149, 161-62 (1959); *Luper Transp. Co.*, 78 M.C.C. 591, 596 (1958); *Telischak Trucking, Inc.*, 77 M.C.C. 672, 674 (1958); *Nicholas Tusco, Jr.*, 77 M.C.C. 492 (1958); *Dundee Truck Line, Inc.*, 77 M.C.C. 399, 402 (1958); *Carl Subler Trucking, Inc.*, 77 M.C.C. 395, 397-98 (1958); *Van-Pak, Inc.*, 77 M.C.C. 389, 393 (1958); *AA Auto Delivery, Inc.*, 77 M.C.C. 365, 372-74 (1958); *Driver Serv., Inc.*, 77 M.C.C. 243, 254 (1958); *Dallas & Mavis Forwarding Co.*, 77 M.C.C. 31, 34 (1958); *Bluff City Transfer & Storage Co.*, 76 M.C.C. 199, 207-08 (1958); *Asbury Transp. Co.*, 53 M.C.C. 5, 8 (1951). See also *E. J. Miller*, 4 Wash. Dep't Pub. Works 86, 89 (1922); *HARPER* 96, 150; *TAFF*, *op. cit. supra* note 134, at 501; *TROXEL*, *op. cit. supra* note 134, at 767. *Adams*, *supra* note 115, at 528; *George*, *Supreme Court Views Federal Authorization and Merging of Motor Carriers*, 26 LAND ECON. 274, 282 (1950); *Nelson*, *The Role of Regulation Reexamined*, in NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 197, 233 (1942); *Note*, *Protection of Public Service Enterprises From Competition*, 33 HARV. L. REV. 576, 581 (1920); S. Doc. No. 78, 79th Cong., 1st Sess. 3, 90 (1945).

¹⁵⁰ Interstate Commerce Act §§ 20(a)(2)-(11). Compare *Interstate Commerce Act* § 214; *Kipps Express & Van Co.*, 5 Ill. Commerce Comm'n 488 (1926). See *HUDSON & CONSTANTIN* 153; 50 ICC ANN. REP. 80 (1936); *Pegrum*, *supra* note 116, at 253.

¹⁵¹ Interstate Commerce Act § 5(2)(e).

¹⁵² *E.g.*, *Dixie Highway Express, Inc.*, 75 M.C.C. 311, 319 (1958). Compare *Pic-Walsh Freight Co.*, 75 M.C.C. 297, 302 (1958); *Delta Motor Line, Inc.*, 75 M.C.C. 245, 248 (1958); *Takin Bros. Freight Line, Inc.*, 75 M.C.C. 236, 241 (1958); *Commercial Carriers, Inc.*, 75 M.C.C. 215 (1958); *Youngstown Cartage Co.*, 75 M.C.C. 205, 209 (1958); *Standard Freight Lines, Inc.*, 75 M.C.C. 15, 19 (1957); *Thomas M. Jenkins*, 57 M.C.C. 249 (1950); *John B. O'Connor*, 55 M.C.C. 145, 150 (1948). See *Clark*, *The Uses of Diversity*, 48 PROCEEDINGS AM. ECON. ASS'N 474, 479 (1958). Other financial transactions were considered in *Ryder Sys., Inc.*, 295 I.C.C. 626, 635-36 (1957); *Hancock-Trucking, Inc.*, 295 I.C.C. 603, 611 (1957); *Dixie Highway Express Inc.*, 75 M.C.C. 311, 319 (1958).

¹⁵³ *HARPER* 92, 98, 101-02; *Business Week*, June 22, 1957, pp. 168, 174.

it finds the existing service adequate is a measure designed to protect both the carrier already in the field and his would-be competitor.¹⁵⁴ Like other public utilities, motor carriers are required to submit bales of statistical reports to the regulatory authorities.¹⁵⁵

TRADE ASSOCIATIONS

Unregulated Industries

We cannot here pause to outline the impact of the antitrust laws on the activities of competitors joined together in association. Volumes have been written on that subject.¹⁵⁶ In general, trade associations are forbidden to take action affecting prices or exerting authority more appropriately exercised by governmental departments.¹⁵⁷

Rate Bureaus

In the trucking field it is readily apparent that the ICC and predecessor agencies have encouraged the formation of groups of competing motor carriers into "bureaus."¹⁵⁸ Regulations specifically provide for the filing of tariffs for common motor carriers by such organizations.¹⁵⁹ The bureaus not only prepare and file the tariffs but also actively engage in discussing the rates embodied therein.¹⁶⁰

¹⁵⁴ See text accompanying notes 16-24 *supra*; HARPER 96, 98. In rate-making as well, commissions find ample opportunity to express their solicitude for the solvency of carriers. See text accompanying notes 192-204 *infra*.

¹⁵⁵ 49 C.F.R. §§ 187.44(a), 205.12(a), 206.3 (Supp. 1959); *Commodities Between Points In Illinois*, 304 I.C.C. 120, 121 (1958). Compare 72 ICC ANN. REP. 29 (1958); 70 ICC ANN. REP. 122-23 (1956); 66 ICC ANN. REP. 77 (1952); 62 ICC ANN. REP. 60 (1948); 61 ICC ANN. REP. 112-13 (1947); 60 ICC ANN. REP. 94 (1946).

¹⁵⁶ *E.g.*, LAMB & KITTELLE, *TRADE ASSOCIATION LAW AND PRACTICE* (1956).

¹⁵⁷ *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *Riss & Co. v. Association of Am. R.R.*, 170 F. Supp. 354, 365-72 (D.D.C. 1959); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 805, 807, 816 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959); Hale, *Agreements Among Competitors*, 33 MINN. L. REV. 331, 386-89 (1949). But compare *Local 24, Teamsters Union v. Oliver*, *supra* at 291, 294.

¹⁵⁸ 50 ICC ANN. REP. 74 (1936). Compare *National Classification Comm.*, 299 I.C.C. 519, 522 (1956); *Increase In Rates of Common Carrier Motor Vehicle Operators*, 16 Wash. Dep't Pub. Serv. 46, 47 (1937); HUDSON & CONSTANTIN 591; Homberger, *Coordination of Road and Rail Transport*, 17 J. LAND & P.U. ECON. 216, 218 (1941); Nelson, *supra* note 146, at 238.

¹⁵⁹ *Increases, Transcontinental-Intermountain Coast*, 304 I.C.C. 15 (1958); 49 C.F.R. § 187 (1949). See HARPER 187; NATIONAL RESOURCES PLANNING BOARD, *TRANSPORTATION AND NATIONAL POLICY* 416 (1942); Arpaia, *The Attitude of the Several Forms of Transportation Toward Regulation*, 20 ICC PRAC. J. 853, 859 (1953).

¹⁶⁰ See Daggett, *Railroad Traffic Associations and Antitrust Legislation*, 38 PROCEEDINGS AM. ECON. ASS'N 452, 464 (1948); 70 ICC ANN. REP. 7 (1956); *Special Master's Report to the Supreme Court of the United States*, 17 ICC PRAC. J. 864, 869 (1950).

Reed-Bulwinkle Amendment

The scope of permissible trade association activity among carriers is spelled out in a recent amendment to the Interstate Commerce Act.¹⁶¹ That legislation provides for Commission approval of the organization of the bureau and impliedly condones discussion of rate problems. However, it forbids the ICC to approve the organization of any bureau wherein a member is restrained from taking independent action. The Commission has approved the organization of bureaus in the absence of a structure which inhibited independent action¹⁶² or barred the entry of new carriers as participants.¹⁶³ It does not appear that the existence and operation of the bureaus has always resulted in rate uniformity,¹⁶⁴ although such disparity as exists may perhaps be accounted for by service differentials.

¹⁶¹ Interstate Commerce Act § 5(a); see particularly § 5(a)(6). Compare *Atcheson, T. & S.F. Ry. v. Aircoach Transp.*, Ass'n, 253 F.2d 877, 883 (D.C. Cir. 1958); Interstate Commerce Act §§ 5(11), 22(2); ILL. ANN. STAT. ch. 95½, § 282.26 (Smith-Hurd 1958).

¹⁶² Central States Motor Common Carriers, 299 I.C.C. 773, 778-79 (1957); Motor Carriers Tariff Bureau, Inc., 299 I.C.C. 739, 742 (1957); National Classification Comm., 299 I.C.C. 519, 522 (1956); Heavy & Specialized Carriers Tariff Bureau, 298 I.C.C. 731, 736 (1956); Pacific Inland Tariff Bureau, Inc., 298 I.C.C. 485, 486 (1956); Central & So. Motor Carriers, 298 I.C.C. 411, 415-16 (1956); Midwest Motor Freight Bureau, 297 I.C.C. 659, 664-65 (1956); Southern Motor Carriers, 297 I.C.C. 603, 609-10, 617 (1956); Niagara Frontier Tariff Bureau, Inc., 297 I.C.C. 494, 495 (1955); National Motor Freight Traffic, 292 I.C.C. 45, 49-50 (1954); Middle Atl. Conference, 283 I.C.C. 683, 690 (1951); Household Goods Carriers' Bureau, 277 I.C.C. 443, 450 (1950); Independent Movers' & Warehousemen's Ass'n, 277 I.C.C. 229 (1950); Central States Motor Freight Bureau, Inc., 278 I.C.C. 581, 583-84 (1950) (dictum). See 67 ICC ANN. REP. 54 (1954).

¹⁶³ Middle Atl. Conference, *supra* note 162. With respect to the expulsion of existing bureau members consult Heavy & Specialized Carriers' Tariff Bureau, *supra* note 162, at 733; Pacific Inland Tariff Bureau, Inc., *supra* note 162, at 487; Central & So. Motor Carriers, *supra* note 162, at 417; Southern Motor Carriers, *supra* note 162, at 606-07; Interstate Freight Carriers' Conference, Inc., 296 I.C.C. 141 (1955). Bureaus have been permitted to make agreements with other bureaus. Central & So. Motor Carriers, *supra* note 162, at 418; Southern Motor Carriers, *supra* note 162, at 610-11; Indiana Motor Rate & Tariff Bureau, Inc., 297 I.C.C. 593, 598 (1955). Compare Central States Motor Common Carriers, *supra* note 162, at 778. Agreements with other types of carriers, however, are forbidden. Interstate Commerce Act § 5(a)(4); Pacific Inland Tariff Bureau, Inc., *supra* note 162, at 486; Independent Movers' & Warehousemen's Ass'n, *supra* note 162, at 230 (dictum).

¹⁶⁴ See *Export Blacks*, 304 I.C.C. 93 (1958); *Automobile Parts*, 304 I.C.C. 81 (1958); *Wire Rope*, 304 I.C.C. 69 (1958); *Chemicals From Detroit*, 303 I.C.C. 40 (1958); *Chemicals From Michigan*, 303 I.C.C. 37, 38 (1958); *Chemicals, Groceries, Roofing*, 303 I.C.C. 31 (1958). Compare *Livingston & Levitt, Competition and Retail Gasoline Prices*, 41 REV. ECON. & STATISTICS 119, 127 (1959). Evidence of rate uniformity will be found in *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 803 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959); *Foodstuffs From Chicago*, 303 I.C.C. 113, 114 (1958); *Vegetable Oil, Shortening*, 298 I.C.C. 665, 667 (1956); *Troxel*, *op. cit. supra* note 134, at 717; *Williams*, *op. cit. supra* note 134, at 118; *Morrison, Rate Policy of Interstate Commerce Commission for Back-hauls*, 19 J. LAND & P.U. ECON. 329, 388 (1943); *Nelson, The Role of Regulation Reexamined*, in NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 197, 219, 222 (1942); *Georgia v. Pennsylvania R.R.*, *Special Master's Report*, 17 ICC PRAC. J. 864, 869 (1950). Compare *National Motor Freight Traffic*, 292 I.C.C. 45, 49 (1954); *Middle Atl. Conference*, 283 I.C.C. 683, 687 (1951); *Allied Van Lines, Inc.*, 46 M.C.C. 159, 205-07 (1946).

Intervention

One striking feature of proceedings before the ICC is the degree to which competitors are permitted to intervene and take part. Under Commission regulations, for example, a motor carrier proposing an alternate route deviation must give notice to its rivals by publication.¹⁶⁵ And it is clear that competitors have standing to attack ICC decisions in the courts.¹⁶⁶ Existing carriers almost invariably appear as protestants in Commission licensing cases¹⁶⁷ and even the rate bureaus are allowed to be heard before that tribunal¹⁶⁸ (under some limitations). Nothing

¹⁶⁵ See 49 C.F.R. §§ 211.1(d)(4) (Supp. 1959), 187.9(e)(4), (5) (1949); cf. Illinois Cent. R.R., 5 Ill. Commerce Comm'n 5 (1925). Compare Riss & Co. v. Association of Am. R.R., 170 F. Supp. 354, 357-58, 367 (D.D.C. 1959).

¹⁶⁶ 28 U.S.C. § 1336 (1958); Alton R.R. v. United States, 315 U.S. 15, 18-20 (1942); Baltimore Transfer Co. v. ICC, 114 F. Supp. 558, 560, 562 (D. Md.), *aff'd per curiam*, 346 U.S. 890 (1953); Brooks Transp. Co. v. United States, 93 F. Supp. 517 (E.D. Va. 1950), *aff'd per curiam*, 340 U.S. 925 (1951); Interstate Common Carrier Council v. United States, 84 F. Supp. 414, 422 (D. Md.), *aff'd per curiam*, 338 U.S. 843 (1949); Hudson Transit Lines, Inc. v. United States, 82 F. Supp. 153, 154 (S.D.N.Y. 1948), *aff'd per curiam*, 338 U.S. 802 (1949); General Transp. Co. v. United States, 65 F. Supp. 981, 983 (D. Mass.), *aff'd per curiam*, 329 U.S. 668 (1946); cf. A.B. & C. Motor Transp. & Co. v. Department of Pub. Util., 329 Mass. 719, 110 N.E.2d 377 (1953); Davis v. Clevinger, 127 Wash. 136, 219 Pac. 845 (1923); Motor Transp. Co. v. Public Serv. Comm'n, 253 Wis. 497, 34 N.W.2d 787 (1948). See *Asche v. Rosenfield*, 405 Ill. 108, 116, 121, 89 N.E.2d 885, 889, 891 (1950) (dictum).

¹⁶⁷ See *Amarillo-Borger Express, Inc. v. United States*, 138 F. Supp. 411, 414 (N.D. Tex. 1956), *judgment vacated and remanded with directions to dismiss as moot per curiam*, 352 U.S. 1028 (1957); *Springs, Motor Vehicle*, 304 I.C.C. 98 (1958); *Exports Blacks*, 304 I.C.C. 93 (1958); *Alcoholic Liquors*, 304 I.C.C. 87 (1958); *Automobile Parts*, 304 I.C.C. 81 (1958); *Petroleum Prods.*, 304 I.C.C. 60 (1958); *Iron & Steel*, 304 I.C.C. 7 (1958); *Alcoholic Liquors*, 300 I.C.C. 159 (1957); *Arnold Ligon*, 79 M.C.C. 31 (1959); *Everts' Commercial Transp., Inc.*, 78 M.C.C. 717, 750 (1959); *Zero Refrigerated Lines*, 78 M.C.C. 671, 672 (1959); *Speedway Transps., Inc.*, 76 M.C.C. 275 (1958); *Youngstown Cartage Co.*, 75 M.C.C. 205 (1958); *C. & H. Transp. Co.*, 75 M.C.C. 166, 168-69 (1958); *Pacific Intermountain Express Co.*, 60 M.C.C. 301 (1954); *Clark Transp. Co.*, 53 M.C.C. 237 (1951); *Asbury Transp. Co.*, 53 M.C.C. 5 (1951); *Glass Milk Bottles*, 29 M.C.C. 191 (1941); *Fred Lindeman*, 29 M.C.C. 183 (1941); *Premium Coal Co.*, 28 M.C.C. 251 (1941); cf. *Asche v. Rosenfield*, 405 Ill. 108, 89 N.E.2d 885 (1950); *Raymond J. Paskowicz*, 40 Wis. Pub. Serv. Comm'n 226, 227 (1955); *Miss. CODE ANN. § 7660* (1956). See *TAFF, op. cit. supra* note 134, at 509; 67 ICC ANN. REP. 3 (1954). But see *WILLIAMS, op. cit. supra* note 134, at 179. A rival carrier may even initiate proceedings. *Ger-mann Bros. Motor Transp., Inc.*, 78 M.C.C. 791 (1959); *Dealers Transit, Inc.*, 78 M.C.C. 613 (1958); *Moss Trucking Co.*, 78 M.C.C. 332 (1958); *Telischak Trucking, Inc.*, 77 M.C.C. 672 (1958); *Alterman Transp. Lines, Inc.*, 77 M.C.C. 407, 411 (1958). Compare *Modern Transfer Co.*, 76 M.C.C. 443 (1958). Shippers may also participate. *E.g.*, *Pacific Intermountain Express*, 57 M.C.C. 341, 343 (1950) (trade association of shippers); *Associated Transps., Inc.*, 54 M.C.C. 528, 529 (1952); cf. *Increases, Pac. Northwest*, 54 M.C.C. 125, 126 (1952) (Office of Price Stabilization).

¹⁶⁸ *Springs, Motor Vehicle*, 304 I.C.C. 98 (1958); *Asbestos, Waste*, 304 I.C.C. 53 (1958); *Iron & Steel*, 304 I.C.C. 32 (1958); *Chemicals, Groceries, Roofing*, 303 I.C.C. 31 (1958); *Rubber Soling*, 303 I.C.C. 17 (1958); *Southern Motor Carriers Conference*, 300 I.C.C. 317 (1957); *Middlewest Motor Freight Bureau*, 300 I.C.C. 145, 146 (1957); *Freight Forwarder Rates Within Official Territory*, 298 I.C.C. 536 (1956); *Central & So. Motor Carriers*, 298 I.C.C. 411, 418-20 (1956); *Southern Motor Carriers*, 297 I.C.C. 603, 615-16 (1956); *Central States Motor Common Carriers*, 297 I.C.C. 497, 501 (1955), *aff'd*, 299 I.C.C. 773 (1957); *Middle Atl. Conference*, 283 I.C.C. 683, 688-90 (1951); *Walter C. Benson Co.*, 61 M.C.C. 128 (1952); *Bakery*

in such activity appears justifiable under antitrust principles, except to the extent that participation by competitors results in a degree of protection compatible with "soft" competition.¹⁶⁹

RATES

Antitrust Principles

Under the stern command of the Sherman Act any tampering with prices by competitors is illegal even if the levels fixed are maximum and not minimum.¹⁷⁰ It is true that resale price maintenance, the Robinson-Patman Act and other exceptions to a policy of "hard" competition must be taken into account. Nevertheless, whatever affirmative action regulatory agencies take with respect to motor carrier rates can be considered as raising a presumption of conflict with the free-play-of-the-market philosophy underlying the Sherman Act.

Publication of Tariffs

An exception to the foregoing rule may perhaps be found in the universal requirement that public utility enterprises file their rates with the regulatory body concerned. Such legislation is applicable to motor carriers¹⁷¹ and has recently been amended with respect to contract carriers.¹⁷² Its purpose, at least in part, is to make competition more "perfect" by eliminating uncertainty and misinformation.¹⁷³ As ad-

Goods & Chemicals, 54 M.C.C. 551 (1952); Transcontinental & Rocky Mountain Increases, 54 M.C.C. 377, 378 (1952); Malt Beverages, Containers, 54 M.C.C. 200 (1952); Middle Atl. Conference, 54 M.C.C. 189 (1952); William Jefferson Vaughn, 53 M.C.C. 15 (1951); John F. La Mere, 55 M.C.C. 501 (1949); Kanas City So. Transp. Co., 28 M.C.C. 5, 14 (1941); cf. Donald J. Wilinski, 41 Wis. Pub. Serv. Comm'n 274, 276 (1956). Limitations upon rate bureau participation are found in Central States Motor Common Carriers, 299 I.C.C. 773, 777 (1957); Midwest Motor Freight Bureau, 297 I.C.C. 659, 665-66 (1956); Indiana Motor Rate & Tariff Bureau, Inc., 297 I.C.C. 593, 599-600 (1955); Feraco, Inc., 76 M.C.C. 135, 140 (1958).

¹⁶⁹ In some instances, protestants before commissions have been able to block the issuance of rival certificates. *E.g.*, Battery Boxes, 304 I.C.C. 27 (1958). Note also that advisory opinions are rendered by the regulatory agencies. See *Brooks Transp. Co. v. United States*, 93 F. Supp. 517, 519 (E.D. Pa. 1950), *aff'd per curiam*, 340 U.S. 925 (1951); *Dealer's Transit, Inc.*, 79 M.C.C. 85 (1959); *G. & M. Motor Transfer Co.*, 43 M.C.C. 497 (1944); Hutchinson, *Interpretative Advice Available to Practitioners and the Public From the Interstate Commerce Commission*, 11 AD. L. BULL. 90, 92 (1958). Compare text accompanying note 45 *supra*.

¹⁷⁰ *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

¹⁷¹ Interstate Commerce Act §§ 217(a), (b); compare § 216(g); ILL. ANN. STAT. ch. 95½, § 282.14(g) (Smith-Hurd 1958); MISS. CODE ANN. § 7666 (1956); WASH. REV. CODE § 81.80.150 (1955). See HARPER 189, 233; TAFE, *op. cit. supra* note 134, at 407.

¹⁷² Interstate Commerce Act, § 218(a); 49 C.F.R. § 187.7(e) (1949); cf. ILL. ANN. STAT. ch. 95½, § 282.15(a) (Smith-Hurd 1958); MASS. ANN. LAWS ch. 159B, § 7 (1959); MISS. CODE ANN. § 7667 (1956). See HARPER 188, 232; Poe, *supra* note 141, at 134.

¹⁷³ Great emphasis is laid upon clarity and specificity in the tariffs of motor carriers. See 40 C.F.R. §§ 187.29(a); .35(a); .36(a)(1) (1949); Oil Field Equip., 300

ministered by the ICC, however, the requirement of publication has acquired a "sticky" character: many copies of the documents are required and the time schedules suggest that frequent changes in pricing are discouraged.¹⁷⁴ Of course publication is also designed to prevent discrimination and hence can be regarded in some degree as compatible with "soft" competition principles.

Maximum Rates

The ICC and comparable state agencies enjoy, of course, authority to place ceilings upon common motor carrier pricing.¹⁷⁵ Pursuant thereto the ICC has from time to time exercised its power to disapprove proposed rate increases.¹⁷⁶ An examination of its deci-

I.C.C. 409, 429 (1957); Acme Fast Freight, Inc., 299 I.C.C. 315 (1956); Distillate Fuel Oil, 296 I.C.C. 37, 43-44 (1955); Emery Transp. Co., 53 M.C.C. 783, 794 (1952); Dairy & Packing House Prods., 51 M.C.C. 77, 84 (1949); United Parcel Serv., 43 M.C.C. 689, 696 (1944); Petroleum Prods. From Wyo., 32 M.C.C. 453 (1942); cf. Floe v. Cedergreen Frozen Pack Corp., 37 Wash. 2d 886, 892-93, 226 P.2d 871, 876 (1951); Pacific Inland Tariff Bureau v. Schaaf, 1 Wash. 2d 210, 213, 95 P.2d 781, 782 (1939); Papetti v. Alicandro, 317 Mass. 382, 58 N.E.2d 155 (1944); Nemasket Transp. Co., 88 P.U.R. (n.s.) 337, 338 (Mass. Dep't Pub. Util. 1950); Verne E. Thayer, 54 P.U.R. (n.s.) 406 (Wash. Dep't Pub. Serv. 1944). See TAFF, *op. cit. supra* note 134, at 412, 415-17, 419, 421. There has been an active controversy as to whether the actual (as opposed to the minimum) rates of contract carriers need be disclosed to the public. Auto Transp., Inc., 51 M.C.C. 600 (1950), *appeal dismissed*, 101 F. Supp. 132, 135 (opinion of the court), 137 (dissenting opinion) (W.D. Okla. 1951), *aff'd per curiam*, 343 U.S. 923 (1952); Glass Milk Bottles, 29 M.C.C. 191, 192 (1941); Filing of Contracts by Contract Carriers by Motor Vehicle, 20 M.C.C. 8, 15-17 (1939); cf. Mt. Tom Motor Lines, Inc. v. McKesson & Robbins, Inc., 325 Mass. 45, 89 N.E.2d 3 (1949); Trudeau v. Pacific States Box & Basket Co., 20 Wash. 2d 561, 148 P.2d 453 (1944). See HUDSON & CONSTANTIN 610; Taff, *The Competition of Long-Distance Motor Trucking*, 46 PROCEEDINGS AM. ECON. ASS'N 508, 514 (1956); Grubbs, *supra* note 86, at 24.

¹⁷⁴ See 49 C.F.R. §§ 187.8(b), .44(e) (1949); Filing of Contracts by Contract Carriers by Motor Vehicle, *supra* note 173; C. S. Walsh Motor Transp., 84 P.U.R. (n.s.) 159, 160 (Mass. Dep't Pub. Util. 1950). See also HARPER 185; HUDSON & CONSTANTIN 610. But compare *id.* at 591; 50 ICC ANN. REP. 75 (1936).

¹⁷⁵ Interstate Commerce Act §§ 216(b), (d), (e), 218(b); Texas & Pac. Ry. v. United States, 289 U.S. 627, 648 (1933); ILL. ANN. STAT. ch. 95½, § 282.4 (Smith-Hurd 1958); MASS. ANN. LAWS ch. 159B, § 1 (1959); WIS. STAT. ANN. §§ 194.19, .36 (Supp. 1959); HARPER 186. The ICC does not, however, enjoy such power as regards the maximum rates of contract carriers, nor do several state tribunals. See Interstate Commerce Act §§ 216(e), 218 (b); cf. WASH. REV. CODE § 81.80.140 (1955). See also HARPER 208.

¹⁷⁶ Increases, Transcontinental-Intermountain Coast, 304 I.C.C. 15, 20, 23 (1958); Transcontinental & Rocky Mountain Increases, 54 M.C.C. 377 (1952); Central Territory General Increases, 49 M.C.C. 4 (1948); cf. State *ex rel.* Allied Daily Newspapers v. Public Serv. Comm'n, 44 Wash. 2d 1, 265 P.2d 270 (1953). See HARPER 197; HUDSON & CONSTANTIN 604; TROXEL, *op. cit. supra* note 134, at 445, 450, 455, 489, 700; Business Week, June 22, 1957, pp. 168, 170. Compare Increased Freight Rates, 300 I.C.C. 633 (1957); Increased Freight Rates, 299 I.C.C. 429, 450 (1956); Rath Packing Co., 296 I.C.C. 693, 713 (1955), *aff'd sub nom.* Capitol Packing Co. v. United States, 167 F. Supp. 420 (1958); Detroit-Pittsburgh Motor Freight, Inc., 79 M.C.C. 197, 203 (1959). See also *Hearings, supra* note 148, at 11. Representative state action will be found in: Dump Truck Owners' Ass'n, 9 P.U.R.3d 363 (Mass. Dep't Pub. Util. 1955); Short Line of Mass., Inc., 1 P.U.R.3d 120, 175-77 (Mass. Dep't Pub. Util. 1953); Dump Truck Owners' Ass'n, 88 P.U.R. (n.s.) 316 (Mass. Dep't Pub. Util. 1951); Increases in Intra-State Rates, 18 Wash. Dep't Pub. Serv.

sions suggests, however, that the control of maximum rates is not its primary concern in the motor carrier field. So far as volume of work is concerned, the level of maximum rates seems to attract only a minor portion of the Commission's attention.

Minimum Rates

What does occupy the attention of the ICC—and here it has full authority over contract¹⁷⁷ as well as common¹⁷⁸ carriers—is the fixing of minimum prices. By statutory directive the minimum rates for contract carriers shall give no advantage to such a carrier in competition with a common carrier which the Commission may find to be undue, or inconsistent with the public interest and the national transportation policy.¹⁷⁹

Pursuant to the statutory prescriptions the ICC has been active in disapproving proposed lower rates for both classes of carriers, and in that way has kept the minima above levels to which they might fall under the impact of competitive conditions.¹⁸⁰ The Commission has

56 (1941); Seattle Truck Owners' Ass'n, 18 Wash. Dep't Pub. Serv. 56, 57 (1941); Increase in Rates of Common Carrier Operators, 16 Wash. Dep't Pub. Serv. 46 (1937); Washington Motor Freight Ass'n, 16 Wash. Dep't Pub. Serv. 42 (1937); Wisconsin Household Goods Carriers' Bureau, 42 Wis. Pub. Serv. Comm'n 710 (1957); Increases & Adjustments in the Rates & Charges for Common Motor Carriers, 37 Wis. Pub. Serv. Comm'n 14 (1952).

¹⁷⁷ Interstate Commerce Act § 218.

¹⁷⁸ Interstate Commerce Act § 216.

¹⁷⁹ Interstate Commerce Act § 218(b); cf. ILL. ANN. STAT. ch. 95½, §§ 282.15(b), (c) (Smith-Hurd 1958); MISS. CODE ANN. § 7668 (1956). See HARPER 137, 189, 197; Mansfield, *The Minimum Rate Power and the Control of Carrier Competition*, 45 YALE L. J. 1406, 1408 (1936). The relationship between minimum rates and contract rates under the statute as it then stood was considered in *Bottemueller v. Wilson & Co.*, 57 F. Supp. 766, 767 (W.D. Mo. 1944). See also *Motor Cargo, Inc. v. United States*, 124 F. Supp. 370, 371, 375 (Ct. Cl. 1954); cf. *Mt. Tom Motor Line, Inc. v. McKesson & Robbins, Inc.*, 325 Mass. 45, 50-51, 89 N.E.2d 3, 7 (1949); *Papetti v. Alicandro*, 317 Mass. 382, 391, 58 N.E.2d 155, 159-60 (1944); *Betterman v. American Stores Co.*, 367 Pa. 193, 197-98, 202, 80 A.2d 66, 70, 72, cert. denied, 342 U.S. 827 (1951); *Trudeau v. Pacific States Box & Basket Co.*, 20 Wash. 2d 561, 573-77, 148 P.2d 453, 459-61 (1944); *Nemasket Transp. Co.*, 88 P.U.R. (n.s.) 337 (Mass. Dep't Pub. Util. 1950).

¹⁸⁰ See 49 C.F.R. §§ 187.8(q), .9(a), .45(e)(4), (5) (1949); *Foodstuffs From Chicago*, 303 I.C.C. 113, 114 (1958); *Manufactured Tobacco From Ky., N.C. & Va. to the South*, 292 I.C.C. 427, 437 (1954); *Pick-up & Delivery in Official Territory*, 218 I.C.C. 441, 475, 480, *injunction denied*, 17 F. Supp. 655 (D.D.C. 1936); *Coordination of Motor Transp.*, 182 I.C.C. 263, 320-27 (1932); *Bakery Goods & Chemicals, Eastern Points*, 54 M.C.C. 551, 561 (1952); *Class & Commodity Rates, N.Y. to Phila.*, 51 M.C.C. 289 (1950); *Midwestern Motor Carrier Rates*, 27 M.C.C. 297, 319 (1941); *Trunk Line Territory Motor Carrier Rates*, 24 M.C.C. 501, 516 (1940); *New England Motor Carrier Rates*, 8 M.C.C. 287, 320 (1938); *Central Territory Motor Carrier Rates*, 8 M.C.C. 233, 257 (1938), *aff'd on rehearing*, 28 M.C.C. 349 (1941); WILLIAMS, *op. cit. supra* note 134, at 153; NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 409, 423 (1942); 69 ICC ANN. REP. 14 (1955); 68 ICC ANN. REP. 4 (1954); 63 ICC ANN. REP. 60 (1949); 52 ICC ANN. REP. 83 (1938);

insisted that rates be "compensatory,"¹⁸¹ and the fact that a rate might cover out-of-pocket costs has not usually sufficed to place it in that category.¹⁸² The Commission likes to see rates which cover the "full" costs of providing the service in question, and the argument that a reduced rate would afford a carrier a backhaul load making some contribution to its overhead has not proven persuasive.¹⁸³ The ICC has shown a tendency to protect common carriers from the reduced rates

S. REP. No. 1039, 82d Cong., 1st Sess. 6 (1951); Arpaia, *supra* note 159, at 856, 857-58; Auerbach 283. Compare Petroleum From Mobile to Hattiesburg, 298 I.C.C. 669, 671 (1956). Regulatory agencies sometimes take rather elaborate precautions to prevent price cutting. *E.g.*, 49 C.F.R. §§ 176.3(c), 187.200 (Supp. 1959). See Oil Field Equip., 300 I.C.C. 409 (1957).

¹⁸¹ Export Blacks, 304 I.C.C. 93, 97 (1958); Alcoholic Liquors, 304 I.C.C. 65, 67 (1958); Dairy & Packing House Prods., 303 I.C.C. 96, 98 (1958); Chemicals From Detroit, 303 I.C.C. 40, 41-42 (1958); Chemicals From Michigan, 303 I.C.C. 37, 38-39 (1958); Feed From the Twin Cities, 303 I.C.C. 34, 35-36 (1958); Lard & Related Articles From New York to Buffalo, 299 I.C.C. 474 (1956); Malt Beverages Containers Milwaukee to Cleveland, 54 M.C.C. 200, 204 (1952); Seeds From Montana, 30 M.C.C. 547, 550 (1941); Tallow From Tulsa to Mo., Ill., Ind., & Ky., 19 M.C.C. 751, 753 (1939); Fifth Class Rates Between Boston & Providence, 2 M.C.C. 530, 547 (1937). See HUDSON & CONSTANTIN 593; WILLIAMS, *op. cit. supra* note 134, at 56; Mansfield, *supra* note 179, at 1415.

In many cases rates have been approved on the grounds that they were compensatory. *E.g.*, Springs, Motor Vehicle, 304 I.C.C. 98, 100 (1958); Automobile Parts, 304 I.C.C. 81, 82 (1958); Refrigerating Mach., 304 I.C.C. 75, 78 (1958); Aluminum Chloride, 304 I.C.C. 55, 56 (1958); Washing Compounds, 303 I.C.C. 14, 15 (1958); Phonograph Records, 300 I.C.C. 344, 346 (1957); Consolidated Freight Ways, Inc., 300 I.C.C. 155, 158 (1957); Middlewest Motor Freight Bureau, 300 I.C.C. 245, 247-48 (1957); Paving Equipment From Chicago to Philadelphia, 299 I.C.C. 179 (1956); Groceries From Boston, 248 I.C.C. 199, 200 (1941); Automobiles From Wis. to Minn., 246 I.C.C. 114 (1941); Petroleum Prods. Between Western Trunk Line Points, 243 I.C.C. 7, 12-13, 14 (1940); Plumbers' Goods From No. Pac. Ports, 237 I.C.C. 181 (1940); Electrical Appliances From Knoxville, 237 I.C.C. 86, 88 (1940); Malt Beverages Between Portland & Washington Points, 237 I.C.C. 34 (1940); Pig Lead From New York Piers to Scranton, 66 M.C.C. 793, 795 (1956). See also Bottle Caps, 300 I.C.C. 619, 622 (1957) (dissent). Compare Dump Truck Owners' Ass'n, 88 P.U.R. (n.s.) 316 (Mass. Dep't Pub. Util. 1951).

¹⁸² Gypsum Board Paper, 304 I.C.C. 125, 127 (1958); Battery Boxes, 304 I.C.C. 27, 30 (1958); Bakery Goods, 303 I.C.C. 75, 79 (1958); Chemicals From Detroit, *supra* note 181, at 42; Chemicals From Michigan, *supra* note 181, at 39; Malt Beverages, 303 I.C.C. 1, 4 (1958); Drugs in Southern Territory, 246 I.C.C. 563, 571-72 (1941); Petroleum From So. Atl. Ports to Southeast, 245 I.C.C. 23 (1941); Trunk Line Territory Motor Carrier Rates, 28 M.C.C. 369, 371 (1941); Refrigerator Material From Memphis to Dayton, 4 M.C.C. 187, 190 (1938). Compare C. A. Conklin Truck Line, Inc., 41 Wis. Pub. Serv. Comm'n 360 (1956). See Nicholson, *Motor Carrier Costs and Minimum Rate Regulation*, 72 Q.J. ECON. 139, 144, 148 (1958). Compare Iron & Steel, 300 I.C.C. 42 (1957); All Commodities Less Than Carloads, 255 I.C.C. 85 (1942); Leather From Middlesboro to Chicago, 18 M.C.C. 265, 268 (1939). See also *Hearings*, *supra* note 148, at 11; Edwards, *Application of Market Pricing Factors in the Division of Traffic*, 45 PROCEEDINGS AM. ECON. ASS'N 621, 625 (1955).

¹⁸³ Gypsum Board Paper, *supra* note 182, at 128; Rags N.O.I., 304 I.C.C. 123, 125 (1958); Export Blacks, 304 I.C.C. 93, 97 (1958); Milk From Iola, 304 I.C.C. 13, 14 (1958); Bakery Goods & Chemicals, Eastern Points, 54 M.C.C. 551, 561 (1952). See HUDSON & CONSTANTIN 605; Locklin, *Freight Rates and Related Problems in NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY* 87, 110 (1942). Compare Automobile Parts, 304 I.C.C. 49, 51 (1958); Ammonium Nitrate, 304 I.C.C. 9, 12 (1958).

of the contract carriers¹⁸⁴ and to protect rail carriers from all types of motor carrier competition.¹⁸⁵ In part it does so by placing the burden of proof on the would-be rate cutter to establish that his proposed tariff is compensatory in character.¹⁸⁶ As a result the rates of motor carriers

¹⁸⁴ Returned Containers, 304 I.C.C. 47, 48 (1958); Bottle Caps From Baltimore, 300 I.C.C. 619 (1957); Consolidated Freight Ways, Inc., 300 I.C.C. 155, 158 (1957); Malt Beverages, Containers, 54 M.C.C. 200, 203 (1952); Middle Atl. Conference, 54 M.C.C. 189, 198 (1952); Contracts of Contract Carriers, 1 M.C.C. 628, 629 (1937); cf. ILL. ANN. STAT. ch. 95½, §282.15(b) (Smith-Hurd 1958). See also HARPER 198-99, 202-06, 208; HUDSON & CONSTANTIN 596; Auerbach 299; Bigham, *Regulation of Minimum Rates in Transportation*, 61 Q.J. ECON. 206, 216 (1947); Nutting & Kuhn, *supra* note 141, at 482; Poe, *supra* note 141, at 146-47; *Hearings, supra* note 133, at 854. Compare Rates & Classifications, 12 P.U.R. (n.s.) 460 (Wash. Dep't Pub. Serv. 1958). Consider the following cases concerning the common carriers which were protected against other forms of competition, principally against railroad competition: Texas & Pac. Ry. v. United States, 289 U.S. 627, 633 (1933) (railroads against railroad competition); Stephenson v. Binford, 287 U.S. 251, 273-74 (1932) (railroads against motor common carriers competition); Oil Field Equip., 300 I.C.C. 409, 433 (1957); Tire Fabric Between So. & No., 299 I.C.C. 685 (1957); Refund Provisions, Lake Cargo Coal, 299 I.C.C. 659 (1957); Paving Equipment From Chicago to Phila., 299 I.C.C. 179 (1956); Carbon Black From the Southwest, 298 I.C.C. 721, 726 (1956); Commodities Between Minnesota & North Dakota, 298 I.C.C. 146, 148 (1956); Twine From the So. to Midwest, 298 I.C.C. 3, 8 (1956); Brass & Bronze Articles, 270 I.C.C. 791 (1948); All Freight Rates to Points in So. Territory, 253 I.C.C. 623, 631 (1942); All Freight to Pacific Coast, 248 I.C.C. 73, 83 (1941); Automobiles From Evansville, 245 I.C.C. 339, 345 (1941); Petroleum & Petroleum Prods., 241 I.C.C. 21, 43-44 (1940) (railroads against motor common carrier competition); Pick-Up & Delivery in Official Territory, 218 I.C.C. 441, 480, *injunction denied*, 17 F. Supp. 655 (D.D.C. 1936); Freight Transit Co., 78 M.C.C. 427, 432 (1958); New England Rate Bureau, Inc., 30 M.C.C. 651 (1941) (contract carrier); Trunk Line Territory Carrier Rates, 24 M.C.C. 501, 514 (1940) (other common carrier); Rates Over Freight Forwarders, 4 M.C.C. 68, 80 (1937) (common carriers against common carriers); cf. South Bay Motor Freight Co. v. Schaaf, 3 Wash. 2d 466, 101 P.2d 584 (1940) (boat-truck against all-truck competition); Centennial Flouring Mills Co., 28 P.U.R. (n.s.) 48 (Wash. Dep't Pub. Serv. 1939). See 64 ICC ANN. REP. 4 (1950). See generally Coordination of Motor Transp., 182 I.C.C. 263, 367-74 (1932).

¹⁸⁵ Petroleum From Mobile to Hattiesburg, 297 I.C.C. 687, *aff'd*, 298 I.C.C. 669 (1956). See OPPENHEIM, THE NATIONAL TRANSPORTATION POLICY AND INTER-CARRIER COMPETITIVE RATES 48 (1945); III-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 100-01 (1931); Burck, *The Great U.S. Freight Cartel*, Fortune, Jan., 1957, pp. 102, 200; Langdon, *The Regulation of Competitive Business Forces: The Obstacle Race in Transportation*, 41 CORNELL L.Q. 57, 59-83 (1955); Mansfield, *supra* note 179, at 1416; Nelson, *The Role of Regulation Re-examined*, in NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 197, 202-03 (1942). Compare Eastern Cent. Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944); Malone Freight Lines, Inc. v. United States, 107 F. Supp. 946 (N.D. Ala. 1952), *aff'd per curiam*, 344 U.S. 925 (1953); Alcoholic Liquors, 304 I.C.C. 87, 92 (1958); Refrigerating Mach., 304 I.C.C. 75 (1958); Aluminum From Quebec, 300 I.C.C. 226 (1957); Iron & Steel Articles—Eastern Common Carriers, 68 M.C.C. 717, 740, 744-45 (1957); Transcontinental & Rocky Mountain Increases, 54 M.C.C. 377, 383 (1952). See Williams, *The ICC and the Regulation of Inter-carrier Competition*, 63 HARV. L. REV. 1349, 1361 (1950).

¹⁸⁶ Iron & Steel Articles, 304 I.C.C. 32, 33 (1958); Dairy & Packing House Prods., 303 I.C.C. 96, 98 (1958); Bakery Goods, 303 I.C.C. 75, 79 (1958); Chemicals, Groceries, Roofing, 303 I.C.C. 31, 34 (1958); Malt Beverages, 303 I.C.C. 1, 3 (1958); Coffee From Denver, 300 I.C.C. 406 (1957); Exceptions Rating, Hardware & Goods, 300 I.C.C. 311, 312 (1957); Middlewest Motor Freight Bureau, 300 I.C.C. 145 (1957); Iron & Steel, 300 I.C.C. 42, 44 (1957); Drugs in So. Territory, 256 I.C.C. 563, 571 (1941); Pick-Up & Delivery in Official Territory, 218 I.C.C. 441, 481-82 (1936) (protecting motor carriers); Canned Goods From Colo. to Amarillo & Lubbock, 30 M.C.C. 227 (1941); Premium Coal Co., 28 M.C.C. 251, 253 (1941). See 64 ICC ANN. REP. 4-5 (1950). See also Petroleum From Mobile to Hattiesburg, 298 I.C.C.

as a whole must tend somewhat to exceed free market levels.¹⁸⁷ Another factor tending to inhibit "hard" competitive conditions is the Commission's insistence that motor carriers keep their books of account according to a prescribed system.¹⁸⁸

Yet it is apparent that the managers of motor carrier enterprises enjoy some freedom to price their product; there is a zone of reasonableness within which rates may move up and down without incurring ICC disapproval.¹⁸⁹ At times there are indications that prices are

669, 672 (1956); Malt Beverages Containers From Milwaukee to Cleveland, 54 M.C.C. 200, 204 (1952) (dictum). Compare Dump Truck Owners' Ass'n, 88 P.U.R. (n.s.) 316 (Mass. Dep't Pub. Util. 1951). *Contra*, Floyd J. Martella, 66 M.C.C. 125 (1955); W. M. Miller, 27 Miss. Pub. Serv. Comm'n 531 (1939). See generally *Hearings*, *supra* note 148, at 12-13.

¹⁸⁷ See Battery Boxes, 304 I.C.C. 27, 30 (1958); Chemicals From Mich., 303 I.C.C. 37, 38 (1958); Chemicals, Groceries, Roofing, 303 I.C.C. 31, 33-34 (1958). See also HARPER 185; TROXEL, ECONOMICS OF TRANSPORT 400, 439, 467 (1955); WILLIAMS, THE REGULATION OF RAIL-MOTOR RATE COMPETITION 225 (1958); Bigham, *supra* note 184; Nicholson, *supra* note 182, at 150; *Hearings on S. Res. 50 Before the Subcommittee on Domestic Land and Water Transport of the Senate Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 878 (1950). Compare *Hearings*, *supra* note 148, at 4; Nelson, *Revision of National Transport Regulatory Policy*, in BUSINESS ORGANIZATION AND PUBLIC POLICY 471 (Levin ed. 1958); Mansfield, *supra* note 179, at 1419; Pegrum, *The Economic Basis of Public Policy for Motor Transport*, 28 LAND ECON. 244, 247-48 (1952). In protecting one carrier against another the ICC is apt to insist that their rates be equal in terms of dollars. *E.g.*, Alcoholic Liquors, 304 I.C.C. 87, 92 (1958); Battery Boxes, *supra* at 30 (1958); Commodities Between Minnesota & N.D., 298 I.C.C. 146, 147 (1956); Iron & Steel Articles—Eastern Common Carriers, 68 M.C.C. 717, 745 (1957); Pig Lead From New York Piers, 68 M.C.C. 793 (1956). In other instances, the ICC has taken account of variations in the value of service and has held that a formal equality of dollar rates is not necessary to protect the sheltered carrier. Alcohol From Weston to Ind., Ky. & Md., 296 I.C.C. 735 (1955), *rev'd on reconsideration*, 298 I.C.C. 595 (1956); Drugs or Medicines, 296 I.C.C. 525 (1955); Tires Between Points in the So., 243 I.C.C. 767 (1941); Granite From Vt. to Truck Line & New England Points, 243 I.C.C. 555, 561 (1941); Naval Stores From Miss. to Gulf Ports, 235 I.C.C. 723 (1940); Iron & Steel Articles, 68 M.C.C. 717 (1957). Compare Consolidated Freight Ways, Inc., 300 I.C.C. 155 (1957); Freight Forwarder Traffic in Official Territory, 298 I.C.C. 450 (1956), *aff'd*, 301 I.C.C. 65 (1957); Grain & Grain Prods. Within the W. Dist., 298 I.C.C. 261 (1956); Unfinished Piece Goods From & Within the So., 292 I.C.C. 772 (1954); Petroleum & Petroleum Prods. From Cal. to Ariz., 241 I.C.C. 21, 40-41, 43, 44 (1940); New England Motor Rate Increases, 66 M.C.C. 215 (1956); Middle Atl. Conference, 54 M.C.C. 189 (1952).

¹⁸⁸ Pursuant to Interstate Commerce Act §§ 204 (a) (2), 220 (c), (d); 49 C.F.R. §§ 182.01-2, .01-19(a), .01-23(a) (Supp. 1959). See TAFF, COMMERCIAL MOTOR TRANSPORTATION 266-67 (1955); 63 ICC ANN. REP. 71-72, 73, 76 (1949). Compare MISS. CODE ANN. § 7675 (1956); Poe, *supra* note 141, at 134. As a consequence of the elaborate reports required, the ICC has available to it a multitude of statistics. See, *e.g.*, 68 ICC ANN. REP. 11 (1954). Query, however, whether the data are of real value. See TROXEL, *op. cit. supra* note 187, at 460; TROXEL, *Cost Behavior and the Accounting Pattern in Public Utility Regulation*, 57 J. POL. ECON. 413, 427 (1949).

¹⁸⁹ See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 460-61 (1945) (dictum); *Texas & Pac. Ry. v. United States*, 289 U.S. 627, 657 (1933) (dissenting opinion); *Oil Field Equip.*, 300 I.C.C. 409, 443 (1957); Hale, *Commissions, Rates and Policies*, 53 HARV. L. REV. 1103, 1104-05 (1940). Note also that the very rate proceedings reviewed in the several preceding paragraphs of text indicate that motor carriers enjoy at least some initiative in proposing rates, and in the exercise of that initiative force of competition play a role. Compare *Union City Transfer*, 68 M.C.C. 131 (1956). See HARPER 186, 188, 206, 218; HUDSON & CONSTANTIN 607; WILCOX, PUBLIC POLICIES TOWARD BUSINESS 557 (1955); WILLIAMS, THE REGULATION OF RAIL-MOTOR RATE COMPETITION 112, 201, 209, 215 (1958); Matson, *Contract Motor Carrier Regulation*

rigidly controlled,¹⁹⁰ but in the more common situation some managerial discretion survives the Commission's intervention.¹⁹¹ To that extent the regulation may be said to be neutral with respect to the enforcement of Sherman Act policies.

Theory of Rate-Making

Operating under a statutory mandate which requires it to give consideration to the inherent advantages of transportation by different types of carriers, to the effect of rates upon the movement of traffic, and to the maintenance of adequate and efficient transportation service at the lowest cost consistent with the production of revenues sufficient to enable the carriers to provide such service,¹⁹² the ICC has not arrived at any clear-cut formula with respect to rates. It pays little attention to the notion of a "fair return" on capital¹⁹³ which plays so large a role

by the Interstate Commerce Commission, 11 GEO. WASH. L. REV. 79, 89 (1942); Nicholson, *supra* note 182, at 144; 64 ICC ANN. REP. 10 (1950). The statute itself contemplates at least the possibility of a zone wherein managerial discretion can be effective. Thus in Interstate Commerce Act § 216(e) it is prescribed that: "when-ever . . . the Commission shall be of the opinion that any . . . rate . . . is . . . unjust or unreasonable, or unjustly discriminatory . . . it shall determine and prescribe the lawful rate . . . or the maximum or minimum, or maximum and minimum rate . . ." Furthermore, the number of tariff adjustments is large and may indicate that there is some fluidity in motor carrier pricing. See BIGHAM & ROBERTS, TRANSPORTATION PRINCIPLES AND PROBLEMS 383 (1952); 72 ICC ANN. REP. 34, 35 (1958); 71 ICC ANN. REP. 34 (1957); 66 ICC ANN. REP. 130 (1952); 65 ICC ANN. REP. 136-37 (1951); 54 ICC ANN. REP. 115 (1940). References to managerial discretion on the part of the trucking firms indicate at least some ability to meet competition. See Texas & Pac. Ry. v. United States, 289 U.S. 627, 636 (1933) (by implication); Atchison Chamber of Commerce, 304 I.C.C. 35, 40, 41 (1958); Washing Compounds, 303 I.C.C. 14, 15 (1958); Coordination of Motor Transp., 182 I.C.C. 263, 283-309, 328-48 (1932); 63 ICC ANN. REP. 6 (1949). See also Langdon, *supra* note 185, at 59.

¹⁹⁰ See McLean Trucking Co. v. United States, 321 U.S. 67, 80-81, 83 (1944); Ontario Freight Lines Corp. v. United States, 76 F. Supp. 526 (D.N.J. 1948); Carl Subler Trucking, Inc., 77 M.C.C. 707, 713 (1958); New England Motor Rate Increases, 66 M.C.C. 215, 232 (1956). Compare Clive Anderson, 41 Wis. Pub. Serv. Comm'n 119, 121 (1956); Washington Motor Freight Ass'n, 15 Wash. Dep't Pub. Serv. 172 (1935); WIS. STAT. ANN. § 194.22 (Supp. 1959). See also 72 ICC ANN. REP. 37 (1958); HARPER 54, 58-59, 60-61, 64-65, 67, 147, 186-87, 188, 202-03, 207, 216, 247; JONES & BIGHAM, PRINCIPLES OF PUBLIC UTILITIES 288-89 (1931); TAFF, *op. cit. supra* note 188, at 431; TROXEL, *op. cit. supra* note 187, at 344; Arpaia, *supra* note 159, at 857; Bigham, *supra* note 184, at 208; Dickinson, *Rate Conferences in the Railroad Industry Under the Sherman Act and the Act to Regulate Commerce*, 12 LAW & CONTEMP. PROB. 470, 491 (1947); Mansfield, *supra* note 179, at 1416; *Hearings, supra* note 148, at 6; *Hearings on Mergers and Possible Growth of Concentration in the Trucking Industry Before the Senate Select Committee on Small Business*, 85th Cong., 1st Sess. 41-51 (1957).

¹⁹¹ Undoubtedly, a good deal of competition is diverted away from rates and into service channels by existing regulation. NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY 414 (1942).

¹⁹² Interstate Commerce Act § 216(i). See OPPENHEIM, *op. cit. supra* note 185, at 25. Compare ILL. ANN. STAT. ch. 95½, § 282.14(i) (Smith-Hurd Supp. 1959); MISS. CODE ANN. § 7664 (1956); WASH. REV. CODE § 81.80.020 (1951).

¹⁹³ Note, however, provisions of both statute and regulations looking to use of the "fair return" method by prohibiting inclusion of the value of a license in a rate

in the regulation of some utilities and practically never mentions the carriers' problem of attracting sufficient capital to maintain and enlarge their facilities.¹⁹⁴ What it does insist upon is that rates be "compensatory,"¹⁹⁵ by which it apparently means that they must be higher than out-of-pocket costs and make at least some contribution toward overhead expenses.¹⁹⁶ In determining whether rates are compensatory it fre-

making valuation. Interstate Commerce Act § 216(h); 49 C.F.R. § 182.01-19(f) (1) (Supp. 1959). See *Naval Stores From Miss. to Gulf Ports*, 235 I.C.C. 723, 740 (1940). Compare *Miss. CODE ANN.* § 7663 (1956). See also *TROXEL, op. cit. supra* note 187, at 104, 394, 470; *Roberts, Some Aspects of Motor Carrier Costs*, 32 *LAND ECON.* 228, 238 (1956); Note, 60 *HARV. L. REV.* 118, 119 (1946). It is nevertheless clear that the "fair return" method could be used; indeed, some states have employed it. *E.g.*, *Seattle Truck Owners' Ass'n*, 18 *Wash. Dep't Pub. Serv.* 56, 57 (1940); *Seattle Truck Owners' Ass'n*, 47 *P.U.R.* (n.s.) 441 (*Wash. Dep't Pub. Serv.* 1942).

¹⁹⁴ See *Rose, "Cost of Capital" in Public Utility Rate Regulation*, 43 *VA. L. REV.* 1079, 1095 (1957). Note, however, the administrative solicitude for motor carrier solvency which reflects something like the attraction-of-capital theory. See text accompanying notes 152-54, 180-88 *supra*. Perhaps attraction of capital is not a problem when there is an amplitude of applicants for all licenses which a commission desires to issue.

¹⁹⁵ *Coffee From Denver*, 300 I.C.C. 406, 498 (1957); *Southern Motor Carriers' Rate Conference*, 300 I.C.C. 317, 330 (1957); *Wool From W. Points to Denver, Chicago & St. Louis*, 52 M.C.C. 167 (1950); *Aluminum Pistons From Colorado & Wyo. to Central Freight Ass'n & W. Trunk Line Territories*, 52 M.C.C. 145 (1950); *Increases, Cal., Ariz., N.M., & Tex.*, 51 M.C.C. 747, 760 (1950); *Middle W. General Increases*, 48 M.C.C. 541 (1948); *New England, 1946 Increased Rates*, 47 M.C.C. 509 (1947); *Glass Milk Bottles From Elmira, N.Y., to Mo., Pa., & W. Va.*, 29 M.C.C. 191, 193 (1941); *HARPER* 184, 194; *HUDSON & CONSTANTIN* 597-99; *SHARFMAN, op. cit. supra* note 185, at 620; *TAFF, op. cit. supra* note 188, at 547; *WILCOX, op. cit. supra* note 189, at 634, 646; *Langdon, supra* note 185, at 61; *Williams, supra* note 185, at 1357; *cf. C. A. Conklin Truck Line, Inc.*, 41 *Wis. Pub. Serv. Comm'n* 360, 363 (1956). Compare *All Commodities, Less Than Carloads, Between Me., Mass., & N.H.*, 255 I.C.C. 85, 89 (1942); *Groceries From Boston to Me. & N.H.*, 248 I.C.C. 199 (1941); *Commodities Between El Paso, Tex., Colo. & N.M.*, 237 I.C.C. 113, 116 (1940); *Electrical Appliances From Knoxville, Tenn.*, 237 I.C.C. 86, 88 (1940). Note the stress laid on the "needs" of the carriers for revenues. *E.g.*, *Transcontinental & Rocky Mountain Increases*, 54 M.C.C. 377, 385 (1952).

¹⁹⁶ See *Commodities Between Points in Ill.*, 304 I.C.C. 120, 121 (1958); *Rubber Soling*, 303 I.C.C. 17, 19, 20 (1958); *Pick-Up & Delivery Serv.*, 218 I.C.C. 441, 490 (1936) (dissenting opinion); *Transcontinental & Rocky Mountain Increases*, 54 M.C.C. 377, 382, 384 (1952); *Increases, Pac. Northwest*, 54 M.C.C. 125, 132 (1952); *Increases, Cal., Ariz., Colo., N.M. & Tex.*, 51 M.C.C. 747 (1950); *Central Territory Gen. Increases*, 49 M.C.C. 4, 9, 10 (1948); 49 C.F.R. § 176.10 (1949); *BIGHAM & ROBERTS, op. cit. supra* note 189, at 383, 384; *FAIR & WILLIAMS, ECONOMICS OF TRANSPORTATION* 526 (1950); *TROXEL, op. cit. supra* note 187, at 44, 50, 53-54, 115-17; *Matson, supra* note 189, at 89; *Nicholson, supra* note 182, at 148; 70 *ICC ANN. REP.* 125 (1957); *S. Doc. No. 78, 79th Cong., 1st Sess.* 141 (1945); *cf. State ex rel. Allied Daily Newspapers v. Public Serv. Comm'n*, 44 *Wash. 2d* 1, 265 *P.2d* 270 (1953); *Floe v. Cedergreen Frozen Pack Corp.*, 37 *Wash. 2d* 886, 896, 226 *P.2d* 871, 877 (1951); *Clintonville Transfer Line, Inc. v. Public Serv. Comm'n*, 248 *Wis. 59*, 65, 21 *N.W.2d* 5, 9 (1945); *Wisconsin Household Goods Carriers' Bureau*, 42 *Wis. Pub. Serv. Comm'n* 710, 711 (1957). Note that despite disparity in costs among the several motor carriers affected by a given rate proceeding, commissions are apt to make the rates uniformly applicable to all concerned. *Increases Transcontinental, Intermountain Coast*, 304 I.C.C. 15, 24 (1958); *New England Motor Rate Increases*, 66 M.C.C. 215, 230 (1956); *Transcontinental & Rocky Mountain Increases*, 54 M.C.C. 377, 385 (1952); *Increases Cal., Ariz., Colo., N.M. & Tex.*, 51 M.C.C. 747, 761 (1950); *New England, 1946 Increased Rates*, 47 M.C.C. 509, 516 (1947); *cf. Dump Truck Owners' Ass'n*, 9 *P.U.R.3d* 363, 366-67 (*Mass. Dep't Pub. Util.* 1955). See *MOSSMAN & MORTON, PRINCIPLES OF TRANSPORTATION* 217 (1957); *Auerbach* 272.

quently looks to the "operating ratios" of the motor carriers affected.¹⁹⁷ When particular routes or commodities are involved it may compare the revenue per truck-mile with the cost per truck-mile anticipated on the route.¹⁹⁸ Value of service as a rate-making principle finds its chief expression in the imposition of higher rates upon more valuable commodities.¹⁹⁹ While the notion of a compensatory rate remains its chief guide, the Commission does not always shut its eyes to the possibility that such rates may divert traffic from other carriers: the notion of "fair shares" in the division of traffic is not absent from the Commission's decisions.²⁰⁰ Furthermore, the ICC is apt to judge the legality of one

¹⁹⁷ The "operating ratio" is the percentage of gross revenues consumed by direct costs. See *Increases Transcontinental, Intermountain Coast*, *supra* note 196, at 18, 24; *Increases, Pac. Northwest*, 54 M.C.C. 125 (1952); *Taff*, *op. cit. supra* note 188, at 203, 204; *Pegrum*, *supra* note 187, at 248; *Roberts*, *supra* note 193, at 237; *cf. Dump Truck Owners' Ass'n*, 88 P.U.R. (n.s.) 316 (Mass. Dep't Pub. Util. 1951). Compare *County Bd. v. United States*, 101 F. Supp. 328, 330 (E.D. Va. 1951) (dictum).

¹⁹⁸ See *Commodities Between Points in Ill.*, 304 I.C.C. 120, 122 (1958); *Bakery Goods*, 304 I.C.C. 72, 74 (1958); *Dairy & Packing House Prods.*, 303 I.C.C. 96, 97 (1958); *Commodities Between Cent., Midwest, & Southwest*, 303 I.C.C. 85, 86 (1958); *Bakery Goods*, 303 I.C.C. 75, 77 (1958); *Unfinished Cotton Piece Goods in the So.*, 61 M.C.C. 367 (1952); *Premium Coal Co.*, 28 M.C.C. 251, 252 (1941); *BIGHAM & ROBERTS*, *op. cit. supra* note 189, at 411; *TROXEL*, *op. cit. supra* note 187, at 114-15.

¹⁹⁹ See notes 222-24 *infra* and accompanying text. See also *HUDSON & CONSTANTIN* 535; *Bigham*, *supra* note 184, at 214, 220. In some degree, of course, the value-of-service concept reflects competition of other carriers or shippers. See *Commodities Between Cent., Midwest, & Southwest*, 303 I.C.C. 85, 86 (1958); *Phonograph Records*, 300 I.C.C. 344, 346 (1957); *Increases, Middle Atl. & New Eng.*, 49 M.C.C. 357 (1949); *Hearings*, *supra* note 148, at 9; *WILLIAMS*, *op. cit. supra* note 189, at 16.

²⁰⁰ See *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 203, 210 (1944); *Aluminum From Quebec*, 300 I.C.C. 226, 228 (1957); *Gasoline — Fuel Oil From Friendship to Va. & W. Va.*, 299 I.C.C. 609 (1957); *Increased Freight Rates E. & W. Terr.*, 299 I.C.C. 429, 440-50 (1956); *Petroleum From Chattanooga Group to Scottsboro, Ala.*, 299 I.C.C. 117 (1956); *Books From Kingsport, Tenn. to Chicago, Ill.*, 297 I.C.C. 627 (1956); *Proposed Increases Refrigeration Charges*, 297 I.C.C. 505, 553 (1956); *Iron & Steel to Iowa, Minn., Mich., & Wis.*, 297 I.C.C. 363, 389 (1955); *Timing Gear Chains From Ithaca to Cleveland*, 297 I.C.C. 208, 209 (1955); *Freight In Trailers On Flatcars*, 296 I.C.C. 431, *rev'd on new facts*, 297 I.C.C. 601 (1955); *Nebraska Intrastate Freight Rates & Charges*, 296 I.C.C. 319 (1955); *G & A Truck Line, Inc.*, 292 I.C.C. 724, 725 (1954); *Drugs & Chemicals From Evansville to N.Y. & Philadelphia*, 292 I.C.C. 526 (1954); *Emery Transp. Co.*, 292 I.C.C. 346 (1954); *CARTER, STATE REGULATION OF COMMERCIAL MOTOR CARRIERS IN NORTH CAROLINA* 144 (1958); *OPPENHEIM*, *op. cit. supra* note 185, at 4-15; *WILCOX*, *op. cit. supra* note 189, at 619, 620, 634; *Hearings*, *supra* note 148, at 7-8, 11 (1955); *Auerbach* 229, 289; *Burck*, *supra* note 185, at 102, 194, 200, 202; *Fishwick*, *The I.C.C.'s Regulation of Rail-Motor Competition: A Study in Administrative Law*, 41 VA. L. REV. 559, 565, 569 (1955); *Huntington*, *The Marasmus of the I.C.C.: The Commission, The Railroads and the Public Interest*, 61 YALE L.J. 467, 492-99 (1952); *Langdon*, *supra* note 185, at 62, 64, 70, 82-83; *Nelson*, *Revision of National Transport Regulatory Policy*, in *BUSINESS ORGANIZATION AND PUBLIC POLICY* 472 (Levin ed. 1958); *Pegrum*, *Public Policy in Motor Transport*, in *BUSINESS ORGANIZATION AND PUBLIC POLICY* 456 (Levin ed. 1958); *cf. Washington Motor Freight Ass'n*, 16 Wash. Dep't Pub. Serv. 42, 43 (1936); *Rates & Classifications Covering the Transportation of Property*, 12 P.U.R. (n.s.) 460 (Wash. Dep't Pub. Serv. 1936). See also cases cited at notes 238-41 *infra* with respect to meeting competition and the degree to which the ICC permits an attempt at diversion or retention of traffic. Compare *ICC v. Parker Motor Freight*, 326 U.S. 60, 73 (1945); *Increased Freight Rates*, 300 I.C.C. 633, 667 (1957); *Southern Motor Carriers' Rate Conference*, 300 I.C.C. 317, 327 (1957); *Household Machinery From Louisville, Ky. to Chicago, Ill.*,

rate by the existing (and presumably lawful) rate applicable to a similar commodity²⁰¹ or to the same commodity along similar routes²⁰² or by the rates published by another type of carrier for the identical service.²⁰³ Thus the Commission's theories of rate-making show little resemblance to the models of a fully competitive system operating under the Sherman Act alone.²⁰⁴

299 I.C.C. 744 (1957); Commodities From Northeastern Territory to Chicago & N.Y., 299 I.C.C. 633, 635 (1957); Darlington & Co., 299 I.C.C. 393, 397-99 (1956); Paying Equip. From Chicago to Philadelphia, 299 I.C.C. 179, 180 (1956); Petroleum Prods. From Chattanooga to Tenn., 299 I.C.C. 175 (1956); Vegetable Oil Shortening From Columbus to E. Points, 298 I.C.C. 665, 668-69 (1956); Intra-state Rates On Bituminous Coal Within Ohio, 298 I.C.C. 85 (1956); New England Motor Rate Bureau, 297 I.C.C. 465, 470 (1955); Drugs or Medicines From Greensboro, N.C. to Pittsburgh, 296 I.C.C. 552 (1955); Canned Goods From the Pac. Coast to Group J, 296 I.C.C. 467, 470-71 (1955); Iron or Steel Cans From Chicago, Ill. to New York, N.Y., 296 I.C.C. 362, 366 (1955); Bakery Goods From Glidden, Ga. to Suffolk, Va., 296 I.C.C. 143 (1955); Distillate Fuel Oil From Utah, 296 I.C.C. 37 (1955); Maryland & Pa. R.R., 295 I.C.C. 719, 729 (1958); Chicago Junction Case, 295 I.C.C. 113 (1955); Unfinished Piece Goods From Within the So., 292 I.C.C. 772, 776 (1954); Fibre Brushes From Aurora, Ill. to Harrison, N.J., 292 I.C.C. 384 (1954); Petroleum in No. Pac. Coast Territory, 292 I.C.C. 317, 332-34 (1954); Brass & Bronze Articles Between Southwestern & W. Trunk Line Territories, 270 I.C.C. 791, 795 (1948); Petroleum Haulers of New England, Inc., 269 I.C.C. 6 (1947); Automobiles From Evansville, Ind. to the So., 245 I.C.C. 339 (1941); Malt Beverages Between Portland & Wash. Points, 237 I.C.C. 34, 37 (1940); Naval Stores From Miss. to Gulf Ports, 235 I.C.C. 723, 733-34 (1944); Class Rates Between Middle Atl. & New England Territories, 67 M.C.C. 741, 773 (1956).

In some instances the "inherent advantages" principle has been given recognition in rate-making and rate cuts by lower cost types of carriers have been allowed. See *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 91-93 (1957); *Malone Freight Lines, Inc. v. United States*, 143 F. Supp. 913, 916 (N.D. Ala. 1956); *Refrigerating Machinery*, 304 I.C.C. 75, 78 (1958); *Aluminum From La. to Miss.*, 299 I.C.C. 39, 40 (1956); *Carbon Black Southwest to the United States & Can.*, 298 I.C.C. 721 (1956); *Freight Forwarder Traffic In Official Territory*, 298 I.C.C. 450, 454-55 (1956); *Compressors From Tecumseh, Mich. to Springfield, Mass.*, 297 I.C.C. 797, 799-80 (1956); *Paint Materials Between St. Louis & Chicago*, 296 I.C.C. 521, 523 (1955); *Carts, Wire & Steel From Jackson, Mich. to Chicago*, 296 I.C.C. 78 (1955); *Manufactured Tobacco From Ky., N.C., & Va. to the So.*, 292 I.C.C. 427, 437 (1954); *Groceries From Boston to Me. & Vt.*, 248 I.C.C. 199, 202 (1941); *Automobiles From Evansville, Ind. to the So.*, 245 I.C.C. 339, 345 (1941); *Pacific Intermountain Express Co.*, 57 M.C.C. 341, 377 (1950).

²⁰¹ *Furniture From Marietta*, 304 I.C.C. 83, 85, (1958); *Chromic Acid & Shades*, 300 I.C.C. 336, 338 (1957). Compare *Pads, etc., From Indiana to N.Y. & Pa.*, 298 I.C.C. 141 (1957); *Acoc Laboratories, Ltd.*, 298 I.C.C. 138 (1956).

²⁰² *Refrigerating Mach.*, 304 I.C.C. 75, 77 (1958); *Bakery Goods*, 304 I.C.C. 72, 73 (1958); *Asbestos Waste*, 304 I.C.C. 53, 55 (1958); *Battery Boxes*, 304 I.C.C. 27, 30 (1958). Compare *Bakery Goods*, 303 I.C.C. 75, 77 (1958); *Dairy & Packing House Prods.*, 303 I.C.C. 96, 98 (1958); *Feed From the Twin Cities*, 303 I.C.C. 34, 36 (1958).

²⁰³ *Alcoholic Liquors*, 304 I.C.C. 87, 92 (1958); *Foodstuffs From Chicago*, 303 I.C.C. 113, 114 (1958); *Merchandise Between Ind. & Ill., Ohio, Mich.*, 61 M.C.C. 447 (1953); *Increases, Cal., Ariz., Colo., N.M. & Tex.*, 1949, 51 M.C.C. 747, 751 (1950); *Glass Milk Bottles From Elmira, N.Y. to Md., Pa. & W. Va.*, 29 M.C.C. 191 (1941); *Premium Coal Co., Minimum Charges on Steel Cylinders & Couplings*, 28 M.C.C. 251 (1941).

²⁰⁴ As this review indicates, the techniques of price fixing in the motor carrier field are in a state of confusion. It is difficult to ascertain any set of consistent practices. See *HUNSON & CONSTANTIN* 596; *TROXEL, op. cit. supra* note 187, at 52-54, 57-61, 173-80, 418, 446-47, 469. See *Langdon, supra* note 185, at 60-61; *Pegrum, supra* note 187, at 252, 259.

Reparations

Until recently it was thought that the ICC had power to fix motor carrier rates retroactively and to award shippers recovery of excess charges collected by the truckers.²⁰⁵ Such reparations would bear at least a superficial similarity to the (treble) damages available under section 4 of the Clayton Act.²⁰⁶ We now learn, however, that the ICC does not possess this power.²⁰⁷

Divisions

If motor carriers desire to set joint rates they may do so.²⁰⁸ When the carriers file such rates the ICC may then fix the divisions among the several participating truckers.²⁰⁹ The activities of the Commission in this regard do not appear to have been extensive.

DISCRIMINATION

The Robinson-Patman Act

No attempt will be made here to describe the assault which section 2 of the Clayton Act, as amended, makes upon the practice of price discrimination.²¹⁰ But it is worth remembering, in comparison, that the discrimination problem lies at the heart of most public utility regulation; that discrimination controls were deeply embedded in the original Interstate Commerce Act²¹¹ and that the 1935 amendments bringing motor carriers under its sweep also contain vigorous prohibitions upon

²⁰⁵ See *United States v. T.I.M.E., Inc.*, 252 F.2d 178 (5th Cir. 1958), *rev'd*, 359 U.S. 464, 476 (1959); *United States v. Canfield Driveway Co.*, 159 F. Supp. 448, 456 (E.D. Mich. 1958); *Eddy Paper Corp.*, 304 I.C.C. 132, 133 (1958); *Sugardale Provision Co.*, 304 I.C.C. 57, 58, 59 (1958); *Royal Mfg. Co.*, 66 M.C.C. 237 (1955); *Hausman Steel Co.*, 32 M.C.C. 31 (1942). See also *United States v. Garner*, 134 F. Supp. 16, 19 (E.D.N.C. 1955) (dictum). Compare *T & M Transp. Co. v. Shattuck Co.*, 148 F.2d 777, 779 (10th Cir. 1945); *R.C.A. Truck Lines, Inc. v. Georgia Rug Mill Inc.*, 88 Ga. App. 658, 77 S.E.2d 442 (1953); *Papetti v. Alicandro*, 317 Mass. 382, 58 N.E.2d 155 (1944); *Interstate Commerce Act* §§ 204(a), 216(j); *MISS. CODE ANN.* § 7665 (1956).

²⁰⁶ Compare *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922).

²⁰⁷ *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 470, 471, 474 (1959).

²⁰⁸ *East South Joint Rates*, 44 M.C.C. 747 (1945); *Hausman Steel Co.*, 32 M.C.C. 31, 34 (1942). Cf. *MISS. CODE ANN.* § 7656 (1956). Compare *Refund Provisions, Lake Cargo Coal*, 299 I.C.C. 659, 662-63 (1957).

²⁰⁹ *Motor-Rail Motor Traffic in E. & Midwest*, 219 I.C.C. 245, 273-74 (1936); *Rockport, Langdon & No. Ry.*, 33 M.C.C. 315, 317-18 (1942); *Interstate Commerce Act* §§ 216(c), (e), (f), 219; cf. *Seattle Pick-up & Delivery*, 18 Wash. Dep't Pub. Serv. 49 (1940); *Brantie Auto Truck Co.*, 5 Wash. Dep't Pub. Works 315 (1925); *Pool Car Shipments*, 41 P.U.R. (n.s.) 220 (Wash. Dep't Pub. Serv. 1941). See *HARPER* 200; *HUDSON & CONSTANTIN* 573. Compare *MISS. CODE ANN.* § 7661 (1956).

²¹⁰ See *Levi, The Robinson-Patman Act*, *American Bar Ass'n, Section on Anti-trust Law, Proceedings* 60 (1953).

²¹¹ *Interstate Commerce Act* §§ 3, 4.

discrimination of most types. It was there declared unlawful for any common carrier to give undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, or to subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage.²¹² The ICC has worked vigorously to enforce that legislative mandate.

Discrimination Among Rival Shippers

The Commission has exhibited no end of zeal in stamping out discrimination among competing users of motor carrier service.²¹³ Indeed, it has carried its efforts to the point where more distant shippers may be subsidized in order to permit them to sell competitively in markets nearer their rivals.²¹⁴ This activity, of course, is particularly compatible with enforcement of the Robinson-Patman Act.²¹⁵

Discrimination Against Particular Localities

The Commission has also moved actively to stamp out geographic discrimination.²¹⁶ While the motor carrier industry is not directly

²¹² Interstate Commerce Act §§ 216(d), 222(c). Compare ILL. ANN. STAT. ch. 95½, § 282.14(d) (Smith-Hurd 1958); MASS. ANN. LAWS ch. 159, §§ 6A, 19 (1959); MISS. CODE ANN. §§ 7659, 7670, 7679 (1956); WASH. REV. CODE § 81.80.230 (1952); WIS. STAT. ANN. § 194.21 (1957). And see Clayton Act § 10 forbidding dealings by a common carrier with an affiliated corporation.

²¹³ See ICC v. North Pier Terminal Co., 164 F.2d 640 (7th Cir.), *cert. denied*, 334 U.S. 815 (1948); Intrastate Rates on Bituminous Coal Within Ohio, 298 I.C.C. 85, 107-08, *aff'd*, 147 F. Supp. 622 (1956); Inside Pick-up & Delivery, 66 M.C.C. 319, 323-24 (1956) (dissent); New England Motor Rate Increases, 66 M.C.C. 215 (1956); Emery Transp. Co., 53 M.C.C. 783, 790 (1952); *cf.* Hessler Bros. 1 Ill. Commerce Comm'n 263, 268 (1922); Intercity Transp. Co., 85 P.U.R. (n.s.) 200, 203 (Mass. Dep't Pub. Util. 1949); C. S. Walsh Motor Transp. Co., 84 P.U.R. (n.s.) 159, 160 (Mass. Dep't Pub. Util. 1950); Fruit Delivery Co., 18 Wash. Dep't Pub. Serv. 51 (1940); Washington Motor Freight Ass'n, 16 Wash. Dep't Pub. Serv. 42 (1936); United Parcel Serv. v. Public Serv. Comm'n, 240 Wis. 603, 4 N.W.2d 138, 143 (1942). And see HARPER 188-89; Mansfield, *supra* note 179, at 1410; 70 ICC ANN. REP. 96 (1956). Compare Atchison Chamber of Commerce, 304 I.C.C. 35, 40 (1958); Commodities From Northeastern Territory to Chicago & From Wis. to N.Y., 299 I.C.C. 633 (1957); Darlington & Co., 299 I.C.C. 393, 399 (1956); New Automobiles in Interstate Commerce, 259 I.C.C. 475 (1945); Petroleum Prods. Between W. Trunk Line Points, 243 I.C.C. 7 (1940); Motor-Rail-Motor Traffic in E. & Midwest, 219 I.C.C. 245, 268 (1936); Dairy & Packing House Prods. From Iowa, Neb. to Chicago, 51 M.C.C. 77, 85 (1949).

²¹⁴ *E.g.*, Wire Rope, 304 I.C.C. 69, 71 (1958). Compare Increases, Cal., Ariz., Colo., N.M., & Tex., 51 M.C.C. 747, 755 (1950). See HARPER 270.

²¹⁵ Whether motor carriers need to be controlled with respect to discrimination has been questioned. BIGHAM & ROBERTS, *op. cit. supra* note 189, at 186; TROXEL, *op. cit. supra* note 187, at 180-81, 643, 650-51; *Hearings on the Report of the Presidential Advisory Committee on Transport Policy and Organization Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 10 (1955).

²¹⁶ See ICC v. North Pier Terminal Co., 164 F.2d 640, 642 (7th Cir.), *cert. denied*, 334 U.S. 815 (1948); Rubber Soling, 303 I.C.C. 17, 18, 20 (1958); Refund Provisions, Lake Cargo Coal, 299 I.C.C. 659, 665-66 (1957); Autos, Barge Proportional From Evansville to Guntersville, 297 I.C.C. 251, 258 (1955); Roasted Coffee

subject to the "long and short haul" clause of section 4 of the Interstate Commerce Act,²¹⁷ the Commission regularly holds that through rates are prima facie unreasonable to the extent that they exceed the combination of local rates on the same route,²¹⁸ a precept which covers much of the same ground in converse fashion. On the other hand, when other factors are deemed controlling, the ICC has on occasion shut its eyes to discrimination,²¹⁹ particularly if a formal equality of shipper or carrier (same dollar rate regardless of service differences) can be achieved.²²⁰ Here again, while the law governing unregulated industries is not free from confusion, the activities of the ICC are not unlike those of the Federal Trade Commission in enforcing the Robinson-Patman Act.²²¹

Discrimination Against Commodities

By way of contrast, it is well understood that motor carriers are entitled to charge different rates for the carriage of different classes of goods regardless of the costs involved. Both the formal regulations and the decisions of the ICC plainly reflect approval of a system under which

From & to Points in Texas, 292 I.C.C. 777 (1954); Commodities From Cal. to Ariz. & N.M., 245 I.C.C. 545, 556-58 (1941); Increases, Middle Atl. & New England, 49 M.C.C. 357, 366 (1949); Middle W. General Increases, 48 M.C.C. 541, 558-60 (1948); cf. C. S. Walsh Motor Transp. Co., 84 P.U.R. (n.s.) 159 (Mass. Dep't Pub. Util. 1950); Northwest Motor Freight Bureau, 18 Wash. Dep't Pub. Serv. 56 (1940); Increases & Adjustments for Common Motor Carriers, 37 Wis. Pub. Serv. Comm'n 14, 18 (1952). See also *Auerbach* 278-80.

²¹⁷ Interstate Commerce Act § 4. See Office Supplies From Gloucester, Mass. to Chicago, 245 I.C.C. 669 (1941); HARPER 189.

²¹⁸ United States v. T.I.M.E., Inc., 252 F.2d 178, 180 (5th Cir. 1958), *rev'd on other grounds*, 359 U.S. 464 (1959); Eddy Paper Corp., 304 I.C.C. 132, 134 (1958); Sugardale Provision Co., 304 I.C.C. 57, 58-59 (1958); Class Rates Between Middle Atl. & New England Territories, 67 M.C.C. 741, 761-62 (1956); Restrictions—Cent. & W. States, 66 M.C.C. 661 (1956); Long Island Arbitraries, 63 M.C.C. 375 (1953); Electric Storage Batteries From Kan. to Mo., 46 M.C.C. 729 (1947); cf. Washington Highway Freight Tariff Bureau, 17 Wash. Dep't Pub. Serv. 56 (1938). See also BIGHAM & ROBERTS, *op. cit. supra* note 189, at 410.

²¹⁹ See Texas & Pac. Ry. v. United States, 289 U.S. 627, 636-37 (1933); Atchison Chamber of Commerce, 304 I.C.C. 35, 40-41 (1958); Grain From Groups I & J to Pac. Coast, 299 I.C.C. 129 (1956); Sugar From Mass. to Pa., 298 I.C.C. 79, 82 (1956); Nebraska Interstate Freight Rates & Charges, 296 I.C.C. 319, 325-26 (1955); Bakery Goods From Glidden, Ga. to Suffolk, Va., 296 I.C.C. 143, 145 (1955); New Automobiles in Interstate Commerce, 259 I.C.C. 475, 541, 547 (1945); Motor-Rail-Motor in E. & Midwest, 219 I.C.C. 245, 268-69, 270 (1936); cf. Rates & Classifications Covering Transp. of Property, 12 P.U.R. (n.s.) 460 (Wash. Dep't Pub. Serv. 1936). And see 72 ICC ANN. REP. 32 (1958).

²²⁰ See Furniture From Marietta, 304 I.C.C. 83, 86 (1958); Wire Rope, 304 I.C.C. 69, 71 (1958); Petroleum Prods., 304 I.C.C. 60, 62 (1958); Aluminum Chloride, 304 I.C.C. 55, 56 (1958); Twine From the So. to the Midwest, 298 I.C.C. 3 (1956); Malt Beverages From Portland to Wash. Points, 237 I.C.C. 34, 37-38 (1940). See also TROXEL, *op. cit. supra* note 187, at 397, 666. Compare Texas & Pac. Ry. v. United States, 289 U.S. 627 (1933); Malt Beverages, 303 I.C.C. 1, 4 (1958); Aluminum From La. to Miss., 299 I.C.C. 39 (1956); Paint Materials From St. Louis to Chicago, 296 I.C.C. 521 (1955); Detroit-Pittsburgh Motor Freight, Inc., 79 M.C.C. 197, 203 (1959).

²²¹ See Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945). Compare Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944).

consumers of some goods pay a great deal more for shipment than do purchasers of other commodities.²²² While from time to time the Commission may disapprove a rate on the ground that it is discriminatory against a particular class of traffic,²²³ it generally encourages the truckers to make shippers of more valuable commodities pay more than do those of goods bearing a lower ratio of value to mass.²²⁴ Here it should be noted in comparison that section 2 of the Clayton Act only applies to commodities of "like grade and quality."

Preventive Action

Not content with merely curative measures, the ICC, acting under legislative direction,²²⁵ has taken affirmative steps to prevent the existence of situations in which discrimination might readily arise. Most pointedly, it has refused to let motor carriers occupy a "dual status"; that is, it has refused to license a single entity as both a common and contract carrier. The notion is that such a dual licensee might favor one shipper by giving him the benefit of lower contract carrier rates while charging common carrier rates to others.²²⁶ The Commission's zeal in this respect has spread to other relationships: it prohibits a single

²²² Alcoholic Liquors, 304 I.C.C. 65, 67 (1958); Malt Beverages, 303 I.C.C. 1, 3 (1958); Consolidated Freight Ways, Inc., 300 I.C.C. 155, 157 (1957); Petroleum From So. Atl. Ports to Southeast, 245 I.C.C. 23, 29 (1941); Merchandise Between Ind. & Ill., Ohio, Mich., 61 M.C.C. 447, 453 (1953); 49 C.F.R. §§ 187.27(c) (1), .28(f), .36(a) (1), .37(a), .38(b) (1949); cf. WASH. REV. CODE § 81.80.220 (1952); Floe v. Cedergreen Frozen Pack Corp., 37 Wash. 2d 886, 226 P.2d 871 (1951). See also BIGHAM & ROBERTS, *op. cit. supra* note 189, at 394; MOSSMAN & MORTON, *op. cit. supra* note 196, at 216, 218, 344-45; TAFF, *op. cit. supra* note 188, at 415. Compare Increased Freight Rates, 300 I.C.C. 633 (1957); Southern Motor Carriers' Rate Conference, 300 I.C.C. 317, 330 (1957); Brass & Bronze Articles, S.W. & W.T.L. Territories, 270 I.C.C. 791, 795 (1948); Vermont-N.H. Increased Rates, 49 M.C.C. 81, 84 (1949); Bell Potato Chip Co., 43 M.C.C. 337, 346-47 (1944).

²²³ Southern Motor Carriers' Rate Conference, *supra* note 222, at 326; Middle W. General Increases, 48 M.C.C. 541, 559 (1948); Increased Common Carrier Truck Rates in the E., 42 M.C.C. 633, 651 (1943); cf. Dump Truck Owners' Ass'n, Inc., 9 P.U.R.3d 363, 366 (Mass. Dep't Pub. Util. 1955); Intercity Transp. Co., 85 P.U.R. (n.s.) 200, 203 (Mass. Dep't Pub. Util. 1949).

²²⁴ In economic terms, it is difficult to understand why discrimination against commodities is preferable to discrimination against localities. Compare TROXEL, *op. cit. supra* note 187, at 246, 623, 639.

²²⁵ Interstate Commerce Act § 210. Compare ILL. ANN. STAT. ch. 95½, § 282.8 (Smith-Hurd 1958); MASS. ANN. LAWS ch. 159B, § 8 (1959); MISS. CODE ANN. § 7650 (1956); WASH. REV. CODE § 81.80.260 (1951).

²²⁶ Darwin Clark, 78 M.C.C. 121, 126 (1958); Lindner Bros. Trucking, Inc., 77 M.C.C. 651, 652 (1958); Stanford S. Block, 49 M.C.C. 651-55 (1949); Jacobs Transfer Co., 46 M.C.C. 265, 269-70 (1946); C. A. Conklin Truck Line, Inc., 44 M.C.C. 463, 468-69 (1945); Leonard Tornetta, 40 M.C.C. 339, 342 (1945); Marion Trucking Co., 37 M.C.C. 305 (1941); Transport Co., 36 M.C.C. 61, 79-80 (1940); J. W. Birkett, 15 M.C.C. 432 (1938); Tony A. Minardi, 15 M.C.C. 412, 414 (1938); cf. Pacific Northwest Motor Freight Lines, Inc., 19 P.U.R.3d 132 (Wash. Pub. Serv. Comm'n 1957); United Parcel Serv., 12 P.U.R.3d 22, 36-37 (Wash. Pub. Serv. Comm'n 1955); David Wood, 62 P.U.R. (n.s.) 361, 363 (Wash. Pub. Serv. Comm'n 1945). Compare Acme Fast Freight, Inc., 299 I.C.C. 315 (1956); Oil Carriers Co., 79 M.C.C. 169, 170 (1959); Everts' Commercial Transp., Inc., 78 M.C.C. 717, 764 (1959); G. G. Parsons, 76 M.C.C. 249, 252 (1958); Pic-Walsh Freight Co., 75 M.C.C. 297, 303-04 (1958); Royal Mfg. Co., 66 M.C.C. 237, 239 (1955); Jack Cooper, Jr., 52 M.C.C.

firm from holding both regular and irregular route authority²²⁷ or both private and common (or contract) carrier authority²²⁸ and withholds nonexempt authority from operators furnishing exempt services.²²⁹ Common control of several motor carriers has been condemned,²³⁰ as has affiliation with brokers²³¹ and shippers.²³² Little in the antitrust laws bears resemblance to such a degree of preventive action, except possibly decisions attacking various forms of integration on the theory that they permit a single firm to "sell" a commodity to itself at a lower price than its rivals must pay.²³³

Quantity Discounts

The ICC has readily accepted the notion of reduced prices for large shipments, particularly those of truckload size.²³⁴ Indeed, the concept of commodity rates is itself closely knit into the concept of quantity discounts.²³⁵ Not all such discounts have been approved,²³⁶ however,

461, 464-65 (1951); Arco Auto Carriers, Inc., 49 M.C.C. 731, 772 (1949); Fine & Jackson Trucking Corp., 48 M.C.C. 11, 14-16 (1948); Willett Co., 46 M.C.C. 35, 43 (1945); Mt. Tom Motor Line, Inc. v. McKesson & Robbins, Inc., 325 Mass. 45, 89 N.E.2d 3 (1949); Rugg v. Davis, 320 Mass. 388, 69 N.E.2d 579 (1946); George Kress, 64 P.U.R. (n.s.) 126 (Wash. Dep't Transp. 1946); Forrest Helton, 19 Wash. Dep't Pub. Serv. 73 (1942); E. L. Middaugh, 7 Wash. Dep't Pub. Serv. 175, 176 (1926); Samuel M. Crone, 2 Wash. Dep't Pub. Serv. 562 (1922); Clintonville Transfer Line, 39 Wis. Pub. Serv. Comm'n 6, 7 (1954); Interstate Commerce Act §§ 223, 225; HUDSON & CONSTANTIN 612-13 (1958); 55 ICC ANN. REP. 30-31 (1941). See CARTER, *op. cit. supra* note 200, at 150; HARPER 168, 171.

²²⁷ Intermediate Rules, 300 I.C.C. 135, 137, 138 (1957); Allied Van Lines, Inc., 40 M.C.C. 557, 567-68 (1946). Compare David Jones, 50 M.C.C. 601 (1948).

²²⁸ Charles F. Geraci, 7 M.C.C. 369, 372 (1938); *cf.* F. M. Young, 19 Wash. Dep't Pub. Serv. 72 (1942). See Taff, *The Competition of Long-Distance Motor Trucking*, 46 PROCEEDINGS AM. ECON. ASS'N 508, 516 (1956). Compare Wright Motor Lines, Inc., 77 M.C.C. 423, 426 (1958); Herbert B. Fuller, 77 M.C.C. 223, 227 (1958); Juliano Bros., 48 M.C.C. 747, 759 (1948); Brooks-Gillespie Motors, Inc., 14 M.C.C. 631, 632-33 (1939); Good Roads Co., 10 M.C.C. 183, 186-87 (1938).

²²⁹ Frozen Foods Express, 79 M.C.C. 109 (1959).

²³⁰ Ashland Transfer & Storage Co., 76 M.C.C. 537 (1958); Bernard F. Rauch, 44 M.C.C. 83, 85 (1944); H. M. Florman, 35 M.C.C. 521, 523-24 (1940). Compare Ryder Sys., Inc., 70 M.C.C. 329 (1956); Jack Cooper, Jr., 52 M.C.C. 461, 464 (1951); H. & K. Motor Transp., Inc., 37 M.C.C. 621 (1941).

²³¹ Interstate Commerce Act § 211(a); Bluff City Transfer & Storage Co., 76 M.C.C. 199, 207 (1958); Knowles Storage & Moving Co., 48 M.C.C. 386, 390 (1948). Compare Practices of Property Brokers, 49 M.C.C. 277, 329-30 (1949); Martin Transfer Co., 4 M.C.C. 191, 192 (1938). See 72 ICC ANN. REP. 47 (1958).

²³² Arkansas Cal. Express, Inc., 79 M.C.C. 527, 530 (1959). Compare Beard-Laney, Inc. v. United States, 83 F. Supp. 27, 31, 33-34 (E.D.S.C.), *aff'd per curiam*, 338 U.S. 803 (1949); Carl Subler Trucking, Inc., 79 M.C.C. 365, 368 (1959).

²³³ *E.g.*, United States v. New York Great A. & P. Tea Co., 173 F.2d 79 (7th Cir. 1949).

²³⁴ Petroleum Prods., 304 I.C.C. 60, 62 (1958); Retained Containers, 304 I.C.C. 47, 48 (1958); 49 C.F.R. §§ 187.28(d), .37(d) (2) (1949). See BIGHAM & ROBERTS, *op. cit. supra* note 189, at 383; TAFF, *op. cit. supra* note 188, at 418; WILCOX, *op. cit. supra* note 189, at 557. Compare American Trucking Ass'n v. United States, 355 U.S. 141, 154 (1957).

²³⁵ See Atchison Chamber of Commerce, 304 I.C.C. 35, 41 (1958); Auerbach 283. Compare Freight Forwarder Rates, 298 I.C.C. 536 (1956); Sugar From Mass., 298 I.C.C. 79, 81-82 (1956).

²³⁶ See Tire Fabric, 299 I.C.C. 685, 689 (1957); New England, 1946 Increased Rates, 47 M.C.C. 509, 516 (1947); *cf.* United Parcel Serv., 12 P.U.R.3d 22, 38-39 (Wash. Pub. Serv. Comm'n 1955).

and the Commission exhibits some interest in relating the discounts to the cost savings effected by the carriers.²³⁷ In this process it performs substantially as does the Federal Trade Commission in enforcing the proviso to section 2 of the Clayton Act.

Meeting Competition

Another defense known to the Clayton Act is recognized by the ICC: the Commission often allows motor carriers to reduce their rates to meet those of rail carriers, private carriers and the like.²³⁸ It is likely to disapprove such rates, however, if they are not deemed compensatory²³⁹ or if the competition to be met is unlawful.²⁴⁰ And it looks with a jaundiced eye upon undercutting a rival's rates in order to gain traffic: the reduction must be "no lower than necessary."²⁴¹

²³⁷ See Pulpboard From Richmond, 300 I.C.C. 534, 536 (1957); Southern Motor Carriers' Rate Conference, 300 I.C.C. 317, 326-27 (1957); Class Rates, 67 M.C.C. 741, 784-85 (1956); 60 ICC ANN. REP. 40 (1946). Compare Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194, 214, 215 (1944) (Mr. Justice Frankfurter, dissenting); Chicago & Wis. Points Proportional Rates, 17 M.C.C. 573, 578-79 (1939), *aff'd sub nom.* United States v. Chicago Heights Trucking Co., 310 U.S. 344 (1940); Louis Allis Co., 42 Wis. Pub. Serv. Comm'n 441, 444-45 (1957).

²³⁸ Refrigerating Mach., 304 I.C.C. 75, 78 (1958); Bakery Goods, 304 I.C.C. 72, 73 (1958); Ammonium Nitrate, 304 I.C.C. 9, 12 (1958); Phonograph Records, 300 I.C.C. 344, 346 (1957); Can Ends & Tin Plate, 300 I.C.C. 182, 184 (1957); Stoves From Ala., 4 M.C.C. 641 (1938). See TROXEL, ECONOMICS OF TRANSPORT 659, 695 (1955); WILLIAMS, *op. cit. supra* note 189, at 26; Auerbach 270-71; Nicholson, *Motor Carrier Costs and Minimum Rate Regulation*, 72 Q.J. ECON. 139, 141 (1958); Williams, *The ICC and the Regulation of Inter-carrier Competition*, 63 HARV. L. REV. 1349, 1355 (1950). Compare Texas & Pac. Ry. v. United States, 289 U.S. 627, 635-36 (1933); Darling & Co., 299 I.C.C. 393, 399 (1956); Bituminous Coal Rates, 299 I.C.C. 247 (1956); Grain From Groups I & J, 299 I.C.C. 129, 134 (1956); Vegetable Oil Shortening, 298 I.C.C. 665 (1956); Grain & Grain Prods., 298 I.C.C. 261, 277 (1956); Sugar From Mass., 298 I.C.C. 79 (1956); Scrap Tobacco, 297 I.C.C. 424 (1955); Glassware From Horseheads, N.Y., 297 I.C.C. 237, 238-40 (1955); Oleo-margarine From Columbus, Ohio, 296 I.C.C. 356 (1955); Nebraska Interstate Freight Rates, 296 I.C.C. 319, 324-25 (1955); Petroleum in No. Pac. Coast Territory, 292 I.C.C. 317, 334-35 (1954) (dissent); Seeds From N.D. Points, 33 M.C.C. 663 (1942); Evans Motor Freight Line, 27 Miss. Pub. Serv. Comm'n 537 (1939); MASS. ANN. LAWS, ch. 159B, § 6 (1959).

Permission to meet competition has been denied when no need for the reduced rate was established. National Cottonseed Prods. Ass'n, 297 I.C.C. 471, 473-74 (1955) (rail rates); Iron & Steel, 297 I.C.C. 363, 387-88 (1955) (rail rates); *id.* at 390 (concurring opinion); Paint Between Houston & New Orleans, 297 I.C.C. 283 (1955) (rail rates); Autos, Barge Proportional, 297 I.C.C. 251, 257 (1955) (barge rates); *cf.* Intercity Transp. Co., 85 P.U.R. (n.s.) 200, 203 (Mass. Dep't Pub. Util. 1949).

²³⁹ *Cf.* Iron & Steel Articles, 68 M.C.C. 717, 743-45 (1957); Wooden Chairs, 24 M.C.C. 447, 449-50 (1940). See MOSSMAN & MORTON, *op. cit. supra* note 196, at 348; WILCOX, *op. cit. supra* note 189, at 644-46; Morrison, *Rate Policy of Interstate Commerce Commission for Back-Hauls of Trucks*, 19 J. LAND & P.U. ECON. 329, 332 (1943). Compare Battery Boxes, 304 I.C.C. 27, 30 (1958); Feed From the Twin Cities, 303 I.C.C. 34, 36 (1958); Stopoff Charges, 296 I.C.C. 45, 48, *aff'd*, 297 I.C.C. 349 (1955); Office Supplies, 245 I.C.C. 669, 672-73 (1941); Shoddy Lining, 33 M.C.C. 513, 515 (1942).

²⁴⁰ Roasted Coffee, 292 I.C.C. 777, 781 (1954). See Iron & Steel, 304 I.C.C. 7, 8 (1958) (dictum).

²⁴¹ Refrigerating Mach., 304 I.C.C. 75, 78 (1958); Alcoholic Liquors, 300 I.C.C. 159, 161 (1957); Wool From W. Points, 52 M.C.C. 167, 174 (1950); Seeds From Mont., 30 M.C.C. 547, 548 (1941). But see *Hearings, supra* note 215, at 8-10. Compare the following rail cases: Books From Kingsport, Tenn., 297 I.C.C. 627, 630-33

CONCLUSIONS

Controls over motor carriers have introduced rigidities and monopoly elements into that industry.²⁴² It cannot be denied that the ICC and state agencies afford existing truckers a large measure of protection from the normal forces of competition. On the other hand, the commissions appear unable to affect some highly significant features of motor carriage: the level of rates and the quality of service, to cite two vital examples, are largely uncontrolled.²⁴³ Consumers, therefore, are protected only by competition, and it follows that the antitrust laws must be applicable in some degree to the trade.²⁴⁴ This result, it may be remarked, is no more anomalous than application of antitrust to any domestic industry which is sheltered by a tariff.

On paper, it is true, regulatory agencies appear to be vested with ample authority to protect the public with respect to almost any aspect of motor carriage. Hence it could be argued that antitrust enforcement is unnecessary—if protection of the public is required, let the appropriate commission act accordingly. This view is consistent with a recent decision in the field of insurance.²⁴⁵ And, indeed, it is clear that the legislators intended to endow regulatory commissions with wholly adequate powers: there is nothing to indicate an intent that important aspects of motor carriage should be left to the free play of competition.²⁴⁶ Nevertheless, as we have seen, the regulatory agencies do not fully

(1956); Timing Gear Chains, 297 I.C.C. 208, 209-10 (1955); Cough Medicine, 297 I.C.C. 174 (1955); Building Material, 296 I.C.C. 309 (1955); Cigarboxes From Newark, N. J., 296 I.C.C. 68 (1955); G & A Truck Line, Inc., 292 I.C.C. 724 (1954); All Commodities, 255 I.C.C. 85, 89 (1942); Drugs in So. Territory, 246 I.C.C. 563 (1941); Automobiles From Wis., 246 I.C.C. 114, 117-18 (1941) (dissent); Plumbers' Goods, 237 I.C.C. 181, 185 (1940) (dissent); Naval Stores, 235 I.C.C. 723, 739-40 (1940) (dissent). Undercutting was, however, allowed in Petroleum in No. Pac. Territory, 302 I.C.C. 219 (1957); Household Mach., 299 I.C.C. 744, 746 (1957); Petroleum Prods., 299 I.C.C. 175 (1956); Grain From Groups I & J, 299 I.C.C. 129, 134 (1956); Alcohol From Weston, Mo., 298 I.C.C. 595 (1956); Agricultural Implements, 297 I.C.C. 756 (1956); Carts, Wire & Steel, 296 I.C.C. 78, 80 (1955); Unfinished Piece Goods, 292 I.C.C. 772, 775 (1954); Manufactured Tobacco, 292 I.C.C. 427 (1954); Commodities Between El Paso, Tex., Colo. & New Mexico, 237 I.C.C. 113, 116 (dictum), *aff'd*, 238 I.C.C. 411 (1940). The theory of the foregoing cases is that rail rates may be set slightly below motor carrier rates to compensate for the extra service (door to door) rendered by the motor carriers.

²⁴² *Hearings on Administered Prices Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. pt. 10 at 4965 (1959).

²⁴³ See Nelson, *Revision of National Transport Regulatory Policy*, in *BUSINESS ORGANIZATION AND PUBLIC POLICY*, 478-79 (Levin ed. 1958).

²⁴⁴ See *Riss & Co. v. Association of Am. R.R.*, 170 F. Supp. 354, 362-63 (D.D.C.), *motion for leave to file petition for cert. denied*, 361 U.S. 804 (1959); *Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937).

²⁴⁵ *FTC v. National Cas. Co.*, 357 U.S. 560, 564-65 (1958).

²⁴⁶ Compare the phenomenon known as "mushrooming." Walker, *Wartime Economic Controls*, 58 Q.J. Econ. 503, 516 (1944).

utilize their authority. This fact is probably to be explained by the very complexity of the situation. The task is too vast for regulation on any scale we can conceive. In the motor carrier field the mere multiplicity of rates, routes and services renders all-exhaustive regulation a task of appallingly formidable proportions. Failure to actualize statutory authority can thus be explained on the ground of impossibility.²⁴⁷ To the extent that authority is not exercised, we may conclude that it cannot be exercised—if it cannot be exercised, we must rely upon competition—and if we must rely upon competition, antitrust enforcement is required.

It does not follow that the full thrust of every antitrust principle can be enforced against the truckers. One who holds a common carrier certificate should not be prosecuted as a monopolist under section 2 of the Sherman Act; trade associations should be governed by the specific provisions of the Reed-Bulwinkle amendment rather than section 1 of the Sherman Act;²⁴⁸ above all, there is no room for application of doctrines of "soft" competition to motor carriers. The commissions themselves afford a full measure of such protectionism and enforcement of the Robinson-Patman Act could only create chaos in an area already confused. In short, the antitrust laws should not be applied when intervention has occupied the field and conflict with regulation would result.²⁴⁹

Inevitably many nice questions will arise as to what constitutes such conflict. An agreement among carriers to limit service to one shipment per day, for example, might fall within the purview of the antitrust laws if the controlling commission possesses no actual power to direct frequency of service. A different conclusion might well be reached with respect to an agreement to divide territory. In each case the courts must ascertain whether conflict will arise, and it is our hope that the preceding analysis of controls over carriers will shed light on such questions.

Undeniably this situation creates an amount of confusion. Truckers cannot know whether their activities will be challenged under the anti-trust laws until some court passes upon the precise problem presented. If the confusion is found intolerable, resort may be had to the counsel of those who have urged that regulation be removed and the industry

²⁴⁷ This "impossibility" probably should be classified as the "imperfection" of ignorance. See HALE & HALE, *MARKET POWER* 417-23 (1958).

²⁴⁸ See *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877, 886 (D.C. Cir. 1958).

²⁴⁹ Compare *United States v. Canfield Driveaway Co.*, 159 F. Supp. 448 (E.D. Mich. 1958). Note also that the remedy sought may effect the relief available. See, e.g., *Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 185 S.E. 479 (1936).

left to the free forces of competition.²⁵⁰ An alternative, of course, lies in an extension of controls to the point where antitrust is pushed from the picture,²⁵¹ although, as indicated above, the possibility of such an achievement appears remote. In the absence of such changes, we can only proceed by individual examination of the various types of conduct which may be challenged under antitrust statutes. The task may be painful; it is, however, not wholly hopeless.

²⁵⁰ E.g., Pegrum, *The Economic Basis of Public Policy for Motor Transport*, 28 LAND ECON. 244, 246, 252, 254-55, 256 (1952).

²⁵¹ See Arpaia, *What Price Regulation?*, 22 I.C.C. PRAC. J. 659 (1955).