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


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carriers. Comparable tribunals at the state level exercise roughly co-ordinate powers over intrastate transportation. 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.

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.

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. 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.

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. 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.

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. Furthermore, many commission 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."

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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. 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.

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. 95 1/2, §§ 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, 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. 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) and hence to grant authority to motor carriers, although in a substantial number of cases presenting the issue applications have been denied. 


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 Trucking, Inc., 76 M.C.C. 308, 310 (1958); Southwest Bulk Handle, 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-Robinson Convoy Co., 19 M.C.C. 629, 636 (1939); Brooks-Gillespie Motors, Inc, 10 M.C.C. 151, 154 (1938); Edvin A. Bowles, 1 M.C.C. 589, 591 (1938); cf. Leviston Transfer & Storage Co., 8 Wash. Dept Pub. Works 155, 156 (1927); C. F. Dappman, 8 Wash. Dept Pub. Works 136 (1927); Roy L. Parks, 7 Wash. Dept Pub. Works 132 (1926); Michela Coal & Dock Co., 41 Wis. Pub. Serv. Comm'n 557 (1956).

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. 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.


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; Oriole 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, 265, 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: the existing carriers, for example, may maintain terminals too far distant from shippers' plants, or their equipment may not be suitable for the commodities involved.

(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 Lilenthal & 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 with 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. Planigan, 19 Wash. Dep't Pub. Serv. 63 (1942).


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, but some of the state commissions always grant the existing carrier an opportunity to


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. 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. 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.

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. 590, 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. Dept’ Pub. Serv. 61 (1940); Service Auto Freight Co., 6 Wash. Dept’ 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, 369 (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. Dept’ Pub. Works 63, 64 (1922). A wholly different approach was taken in Tex-O-Kan Transp. Co., 77 M.C.C. 715, 719 (1958).

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.

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).


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. 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 experience and occasionally grants the certificate largely on the grounds of priority of application. 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. 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

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30 Ryder Tank Line, Inc., supra note 29, at 420. See also C. G. Deppe, 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.

measures are automatically entitled to licenses thereunder.\textsuperscript{32} The ICC at times has seemed generous,\textsuperscript{33} and at other times restrictive,\textsuperscript{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.

\textbf{Revocation of Licenses}

In the federal system, at least, certificates and permits continue in effect until revoked by formal proceedings.\textsuperscript{35} Mere nonuser will not of itself work a revocation.\textsuperscript{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.\textsuperscript{37}

\textbf{Scope of Authority Granted to Carriers}

\textit{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.\textsuperscript{38}

\textsuperscript{32} Interstate Commerce Act §§206(a)(1), 209 (applies to both common and contract carriers); Ill. Ann. Stat. ch. 95 1/2, § 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, \textit{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, \textit{op. cit. supra} note 11, at 407.


\textsuperscript{35} Interstate Commerce Act § 212(2); see Harper 179-80; Auerbach 109.


\textsuperscript{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.\textsuperscript{39} It has been said that haulers licensed to carry general commodities are usually larger firms than those carrying special commodities,\textsuperscript{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.\textsuperscript{41} In other instances the commodities are defined by the type of equipment used to haul them \textsuperscript{42} 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.\textsuperscript{43} Finally, the named commodities


\textsuperscript{40} Id. at 37, 43, 128, 130.

\textsuperscript{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); McGaughery 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.

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

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

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, 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.
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. 87 (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. 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. 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. It must also find that the competitive situation will not be changed by the enlargement of the carrier's authority, and by regulation it is established that the latter


48 Interstate Commerce Act § 208(a). Compare Interstate Commerce Act § 1(20); I.LL. ANN. STAT. ch. 951/2, § 2125.5(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).

requirement will not be met if the alternate route is less than ninety per cent of the distance of the service route.\(^6\) 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.\(^5\) Note again, however, that the narrow scope of the certificates with respect to routes tends to make entry easier when new applications are considered.\(^5\) 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.\(^5\)

**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.\(^6\) In a good many instances, however, the ICC has protected competing truckers by imposing restrictions against such tacking.\(^5\) If tacking be considered a form of vertical integration and if, under doctrines of "soft" competition,
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. Accordingly, the Commission promulgated stringent rules limiting the leasing of equipment by motor carriers. 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.

Other Restrictions

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


E.g., ILL. ANN. STAT. ch. 95½, § 282.5 (Smith-Hurd 1958).
tions as to the type of equipment which the trucker may utilize, the weight or bulk of shipments which he may haul, the classes of shippers whom he may serve and even the times when he may render service. The implications of such restraints are generally the same as those which restrict the commodities which may be hauled by licensed carriers.

**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. The touchstone to its categorization still lies in the ancient concept of "holding out." The common carrier is one who advertises

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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).


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.


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. 6

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); 111. ANN. STAT. ch. 952, § 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).


71 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 1960.
devotion of his services for considerable periods of time to the needs of a limited number of individual shippers and the furnishing of exclusive or specialized transportation. It follows that the contract carrier cannot "hold himself out" as available to the public generally, although he may aggressively seek traffic within the limits of his permit. Roughly comparable restraints are laid upon contract carriers by state legislation, which occasionally has created subdivisions of the category.

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. Dept Transp. 1955).


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).

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.

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 ten-mile 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).


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. 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. Many states treat private carriers in the same manner as the federal agency, but others impose various, more stringent kinds of controls.

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. At the present time private carriers are hauling a large proportion of the freight moving on the highways and their share is increasing. The very possibility of private carriage therefore exerts competitive pressure upon the licensed haulers, 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.
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 53, 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 Intercarrier Competition, 63 HARV. L. REV. 1349, 1358 (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, which are bitterly resisted by the licensed carriers. The principal exempt commodity under the federal scheme consists of agricultural products which have not been processed. 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. 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, 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. Although the ICC proceeds against the so-called "gypsies" when violations become

88 Interstate Commerce Act § 203(b).
90 Interstate Commerce Act § 203(b).
92 Interstate Commerce Act § 203(b).
known, the Teamsters claim that the Commission has been relatively ineffective. 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. Under the Interstate Commerce Act and under most state statutes 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 licenses 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. In the second place, it will ordinarily

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


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.


refuse to approve the transfer of dormant "rights." 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. 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.

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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 Stern 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. 146 (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, although it will act to protect that value against competitive encroachment. As a result, it may disapprove transfers on the theory that the parties are motivated by speculative purposes or it may impose limitations upon the value to be assigned the "rights" in connection with a conveyance of a motor carrier's business. It may require, too, that the acquiring carrier amortize the value of the licenses purchased.

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. Under the applicable regulatory legislation motor carriers may only merge or consolidate with ICC approval.

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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.
107 See cases cited note 105 infra. Compare Auerbach 234.
108 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.
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

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\(^{111}\) "[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.


and other sources to the effect that the Commission has been too free in permitting mergers and that the result has been a trend toward “concentration” in the trucking industry.

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). The ICC, while disapproving some such acquisitions for reasons not connected with competition, seems generally disposed to approve applications of this character.

116 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).

117 See Bigham & Roberts, Transportation Principles and Problems 271 (1952); Broehe, 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).


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. Chadick, 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 integration 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, 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.

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.


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. In the motor field the ICC has often approved mergers of carriers whose routes were separated by distance, 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.

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, or railroad application for a certificate to initiate new motor service. 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.


\(^{125}\) 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. 305, 315 (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. The advantage of improved rail traffic must be weighed against the possible or potential injury to existing motor carriers. As for new entry into trucking, on its face the Interstate Commerce Act appears to leave the ICC wide discretion. 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, 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. Those rules

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


\footnote{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.}


\footnote{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.}

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. 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. 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 operations and from time to time they attempt directly to order the carrier to render continuous and adequate service. 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. Here, indeed, is the anomaly of a public utility obligation enforced by an antitrust method.

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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


\(^{141}\) See Mass. Ann. Laws ch. 159B, § 18 (1959); Miss. Code Ann. § 7633 (1956); Wash. Rev. Code § 81.80.190 (1952); Bigham & Roberts, op. cit. supra note 116, at 270; Harper 222; Hudson & Constantin 574. See notes 11-24 infra 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.

\(^{142}\) Consult Nutting & Kuhn, supra note 141, at 479, 481.

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

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.

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148 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.
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.¹⁶¹ Pursuant to this statutory requirement the ICC has disapproved mergers and acquisitions where overcapitalization might, in its view, result.¹⁸² A showing of financial strength may be an element in determining the “fitness” of a would-be licensee,¹⁶³ and the Commission’s denial of entry to applicants in instances wherein

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


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

**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. In general, trade associations are forbidden to take action affecting prices or exerting authority more appropriately exercised by governmental departments.

**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." Regulations specifically provide for the filing of tariffs for common motor carriers by such organizations. The bureaus not only prepare and file the tariffs but also actively engage in discussing the rates embodied therein.

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164 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).

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


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.


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.\(^1\) 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 action\(^2\) or barred the entry of new carriers as participants.\(^3\) It does not appear that the existence and operation of the bureaus has always resulted in rate uniformity,\(^4\) although such disparity as exists may perhaps be accounted for by service differentials.

\(^1\) 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. 95/2, § 282.26 (Smith-Hurd 1958).


\(^3\) 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' & Warehousmen's Ass'n, supra note 162, at 230 (dictum).

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 cases\(^{167}\) and even the rate bureaus are allowed to be heard before that tribunal\(^{168}\) (under some limitations).

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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.\textsuperscript{169}

\section*{Rates}

\textbf{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.\textsuperscript{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.

\section*{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 carriers\textsuperscript{171} and has recently been amended with respect to contract carriers.\textsuperscript{172} Its purpose, at least in part, is to make competition more "perfect" by eliminating uncertainty and misinformation.\textsuperscript{173} As ad
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.176 Pursuant thereto the ICC has from time to time exercised its power to disapprove proposed rate increases.176 An examination of its deci-

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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 contract 177 as well as common 178 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


177 Interstate Commerce Act § 218.

178 Interstate Commerce Act § 216.


180 See 49 C.F.R. §§ 187.8(g), .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," and the fact that a rate might cover out-of-pocket costs has not usually sufficed to place it in that category. 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. The ICC has shown a tendency to protect common carriers from the reduced rates


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 Millinocket 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); Midwest 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 Ports 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).


of the contract carriers\textsuperscript{184} and to protect rail carriers from all types of motor carrier competition.\textsuperscript{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.\textsuperscript{186} As a result the rates of motor carriers

\begin{itemize}

  \item 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, 251, 273-74 (1933) (railroads against railroad 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 England Rate Bureau, Inc., 30 M.C.C. 651 (1941) (contract carrier); Trunk Line Over Freight Forwarders, 4 M.C.C. 68, 80 (1937) (common carriers against common carriers competition); 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


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 (1956); Bigham, supra note 184, Mich. I.C.C. 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. & Smaller Carriers, 298 I.C.C. 196 (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), 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 forces 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, but in the more common situation some managerial discretion survives the Commission's intervention. 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, 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 capital 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: "whenever the Commission shall be of the opinion that any . . . 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); Washington 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.


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).


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.\textsuperscript{194} What it does insist upon is that rates be “compensatory,”\textsuperscript{196} by which it apparently means that they must be higher than out-of-pocket costs and make at least some contribution toward overhead expenses.\textsuperscript{196} In determining whether rates are compensatory it fre-

\textsuperscript{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; Sharpman, op. cit. supra note 185, at 620; Taff, op. cit. supra note 188, at 347; 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, 365 (1956); Compare All Commodities, Less Than Carloads, Between Met., Mass., & N.H., 255 I.C.C. 85, 89 (1942); Groceries From Boston to Met. & N.H., 248 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).

\textsuperscript{196} See Commodities Between Points in Ill., 304 I.C.C. 120, 121 (1958); Rubber Soling, 333 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, Fac. 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); 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. Dept. Pub. Serv. 56, 57 (1940); Seattle Truck Owners’ Ass’n, 47 P.U.R. (n.s.) 441 (Wash. Dept. Pub. Serv. 1942).

\textsuperscript{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 152-154, 180-88 supra. What it does insist upon is that rates be “compensatory,” by which it apparently means that they must be higher than out-of-pocket costs and make at least some contribution toward overhead expenses. In determining whether rates are compensatory it fre-

\textsuperscript{196} See Rogers, “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 152-154, 180-88 supra. What it does insist upon is that rates be “compensatory,” by which it apparently means that they must be higher than out-of-pocket costs and make at least some contribution toward overhead expenses. In determining whether rates are compensatory it fre-

Furthermore, the ICC is apt to judge the legality of one

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rate by the existing (and presumably lawful) rate applicable to a similar commodity \(^2\) or to the same commodity along similar routes \(^3\) or by the rates published by another type of carrier for the identical service. \(^4\) 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. \(^5\)


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 HUDSON & 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. Such reparations would bear at least a superficial similarity to the (treble) damages available under section 4 of the Clayton Act. We now learn, however, that the ICC does not possess this power.

Divisions

If motor carriers desire to set joint rates they may do so. When the carriers file such rates the ICC may then fix the divisions among the several participating truckers. 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. 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 Act and that the 1935 amendments bringing motor carriers under its sweep also contain vigorous prohibitions upon

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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. 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. 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. This activity, of course, is particularly compatible with enforcement of the Robinson-Patman Act.

**Discrimination Against Particular Localities**

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

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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, 645, 650-51; Hearings on the Report of the Presidential Advisory Committee on Transport Policy and Organization Before a Subcommittee of the 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, 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, 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, particularly if a formal equality of shipper or carrier (same dollar rate regardless of service differences) can be achieved. 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.

**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

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


consumers of some goods pay a great deal more for shipment than do purchasers of other commodities.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{226} The Commission's zeal in this respect has spread to other relationships: it prohibits a single


\textsuperscript{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.

\textsuperscript{225}Interstate Commerce Act § 210. Compare ILL. ANN. STAT. ch. 95/4, § 282.8 (Smith-Hurd 1958); MASS. ANN. LAWS ch. 159B, § 8 (1959); MISS. CODE ANN. § 7650 (1955); WASH. REV. CODE § 81.80.260 (1951).

firm from holding both regular and irregular route authority or both private and common (or contract) carrier authority and withholds nonexempt authority from operators furnishing exempt services.

Common control of several motor carriers has been condemned, as has affiliation with brokers and shippers. 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.

**Quantity Discounts**

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

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and the Commission exhibits some interest in relating the discounts to the cost savings effected by the carriers. 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. It is likely to disapprove such rates, however, if they are not deemed compensatory or if the competition to be met is unlawful. 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."

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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.\textsuperscript{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.\textsuperscript{243} Consumers, therefore, are protected only by competition, and it follows that the antitrust laws must be applicable in some degree to the trade.\textsuperscript{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.\textsuperscript{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.\textsuperscript{246} Nevertheless, as we have seen, the regulatory agencies do not fully

\textsuperscript{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).


\textsuperscript{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. 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; 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.

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 antitrust 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).


left to the free forces of competition.\textsuperscript{250} An alternative, of course, lies in an extension of controls to the point where antitrust is pushed from the picture,\textsuperscript{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.

\textsuperscript{250} E.g., Pegrum, The Economic Basis of Public Policy for Motor Transport, 28 \textit{Land Econ.} 244, 246, 252, 254-55, 256 (1952).