The Interstate Commerce Commission was created, by the Act to Regulate Commerce of 1887, to enforce provisions directed at eliminating discriminations in rates, exorbitant rates, and pooling arrangements by and among railroads. Since that date, amendments to the basic Act, as well as sections of several statutes enacted primarily for other purposes, have affirmed the original legislative principle of encouraging competition among rival carriers and rival modes of transportation. The Hepburn Act gave the Commission control over common carrier pipe lines. The Transportation Act of 1920 vested it with control over mergers, consolidations, carrier stock issues, and intercarrier stock acquisitions, and, moreover, constituted a serious legislative attempt to develop a workable transportation program in the public interest. By the terms of the Motor Carrier Act of 1935
the ICC gained comprehensive jurisdiction over the motor-carrier industry.7 The Transportation Act of 1940 subjected domestic water carriers to its regulatory arm,8 and in 1942 freight forwarders9 were similarly subjected.10 The Civil Aeronautics Authority11 was established in 1938 as an independent body to regulate air transport.12

of 1920 marked an important departure, for previous legislative efforts to regulate transportation facilities had the limited object of preventing railroad abuses. McLean Trucking Co. v. United States, 321 U. S. 67, 80-81 (1944); Dayton-Goose Creek Ry. Co. v. United States, 265 U. S. 450, 478 (1924); Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 256, 277 (1926); J. Sharpey, op. cit. supra note 1, at 177 (“... in the exercise of the Commission's regulating functions ... shift of emphasis from the mere enforcement of restrictive safeguards to the deliberate promotion of public ends ...”).

7. 49 Stat. 543 (§§201-227, 1935), 49 U. S. C. § 301 et seq. (1940). In 1940 section 213 of the Motor Carrier Act was incorporated into section 5 of Part I of the new Interstate Commerce Act, and the other sections of the Motor Carrier Act were designated Part II of the Interstate Commerce Act.


9. Freight forwards are companies that assemble freight into sizeable quantities for shipment, collect in advance the freight charges from the shipper, and select the carrier for the shipper. See Wiprud, Justice in Transportation (1945) 34.

10. 56 Stat. 281 (§§401-422, 1942), 42 U. S. C. § 101 et seq. (Supp. 1942); incorporated into the Interstate Commerce Act as Part IV.

11. Succeeded, on July 1, 1940, by the Civil Aeronautics Board. See foreword to First Annual Report of the CAB (1941).


Discussion of the administrative record of the CAB and the controversial regulatory questions raised by such recent developments as expanding air cargo service and the exemption (from economic though not from safety regulations) of non-scheduled operators under section 416 (b) of the Civil Aeronautics Act, will not be undertaken in this article.

The American Export Airlines case is the leading interpretive case on the qualified prohibitions of section 408 against ownership or control of an air carrier by a person "engaged in any other phase of aeronautics," by a competing mode of common carrier, or by a person "controlled by or affiliated with" such a carrier. American Export Airlines, Inc.—certificate of Public Convenience and Necessity, 2 C. A. B. 16 (1940); Pan-American Airways Co. v. CAB and American Export Airlines, 121 F. (2d) 810 (C. C. A. 2d, 1943); American Export Airlines—American Export Lines—control—American Export Airlines, 3 C. A. B. 619 (1942); American Export Lines, Control of American Export Airlines, 4 C. A. B. 104 (1943); Note (1942) 10 Geo. Wash. L. Rev. 719.

Determinations by the CAB respecting applications for certificates of public convenience and necessity seem to have retarded the development of domestic air transport. See, e. g., Middleton, Transportation: Prewar and Postwar (1943) 51-52.

The air cargo situation has two main aspects: First, the efforts by air carriers, operating under such severe handicaps as weight limitations and a relatively high level of rates on freight and express they now carry, to divert patronage from the surface carriers. See The ICC's Bureau of Transport Economics and Statistics, Some Aspects of Postwar and Surface Transportation (Statement No. 454, 1945) 162-171. And secondly, competition among air carriers themselves, with certificated lines being in a superior competitive position to non-certificated operators based on such considerations as sound financial standing, established reputation, regular schedule of flights, fully developed terminal and maintenance facilities, and the additional revenue derived from air mail contracts and passenger service. See The Examiners' Report, Investigation of Nonscheduled Air Services, CAB Docket No. 1501, Aug. 1945.

Pressure has recently been brought to bear upon the CAB to withdraw the exemption granted to non-scheduled operators and air lines; or at least to make these operators furnish certain basic data, including their name, address, number of planes in use, area of operations—and render periodic financial and traffic statements. See Examiners' Report, supra, at 10. On movements toward organizing non-scheduled
For almost half a century the ICC devoted its entire time and attention to regulating the nation's railroad systems. Regulating the railroads is today no longer "the (ICC's) primary task." 13 To an even greater extent than during the war—albeit with no comparable inducements to altruism—our transportation agencies will now be relied upon to promote a more economic location of industrial plants, optimum utilization of our nation's resources, greater productivity, maximum employment opportunities, a higher national and per capita income, and a freer flow of commerce.14 The ICC, possessed of broad powers over the rate structure of rail, motor, and water carriers, the influx of new competitors into the transportation field, and carrier attempts at consolidation and integration, would seem to have been charged with a significant responsibility for furnishing the public with adequate, efficient, low-cost transportation service. It is with the discharge of this responsibility with respect to rail and motor transportation that the present article is concerned.

**THE NATIONAL TRANSPORTATION POLICY**

A definitive though somewhat bewildering declaration of Congress' policy toward the transportation industry is contained in the following excerpt from the preamble to the Transportation Act of 1940: 15


For these and other as-yet-unsolved problems in the field of aviation transport, see II LAW AND CONTEMPORARY PROBLEMS articles beginning at 452, 508, 564, 584, 598 (1946); Civil Aeronautics Administration, CIVIL AVIATION AND THE NATIONAL ECONOMY (1945) passim.


Section 55 of the Interstate Commerce Act sets forth the Congressional rate-making policy: "It is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered insofar as it is legally possible to do so, to the end that commodities may freely move.

"The Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution, the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation." 43 STAT. 801 (1925), 49 U. S. C. § 55 (1940) (emphasis supplied). See also § 1902 (e) of the Civil Aeronautics Act, 52 STAT. 1019 (1938).

"... to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient [common carrier] service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences ... or destructive competitive practices; ...—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States ... All of the provisions of this act shall be administered with a view to carrying out the above declaration of policy." (Emphasis supplied.)

The powers given to the ICC under the Interstate Commerce Act are directed toward achieving these policy aims. Thus, to prevent "destructive competition" with respect to rates, the ICC is authorized to fix minimum rates 16 and conduct any preliminary investigations and hearings deemed necessary to appraise a proposed rate change filed with it. To guard against extortionate or discriminatory rates, the Commission may establish maximum rates 17 and a suitable base for evaluating the property and capitalization on which carriers may seek a return. 18 As an aid toward fully utilizing the potentialities of each mode of transportation while achieving that degree of coordination in

The Congressional declaration of policy at the beginning of the Civil Aeronautics Act of 1938 reads as follows: "In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and


17. This power was conferred upon the ICC by the Hepburn Act, 34 Stat. 584 (1906).

ICC before any attempt by one carrier or someone "affiliated" therewith to acquire control over another carrier can take effect. Finally, to promote "safe, adequate, economical, and efficient" transportation service the ICC is vested with plenary powers to grant or withhold "certificates of public convenience and necessity," and to prescribe minimum standards of safety and service. Our national transportation system most likely to foster commercial intercourse and prosperity, the Act requires an order of approval by the

In practice, however, it is difficult to harmonize the various Congressional purposes. The Panama Canal Act, and the legislative debates thereon, announced in unequivocal terms the desire of Congress to keep each form of transportation independent of ownership or control by carriers with which it is in actual or potential competition. "The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition." Section 5 (2) (b) of the Interstate Commerce Act seems to support this policy in providing that generally proposed mergers and acquisitions of control among motor carriers be approved by the Commission if found to be "consistent with the public interest," but that if, in a transaction involving a motor carrier, the applicant is a carrier other than a motor carrier, or controlled by or "affiliated with" such a type carrier, it must show that the proposed merger or acquisition will promote the public interest by enabling the acquiring carrier to use it "to public advantage in its operations" and by not resulting in any undue restraint of competition. These criteria impose special limita-

19. 47 STAT. 456, 480 (1920), as amended by 54 STAT. 898, 905 (1940); 49 U. S. C. § 5 (1940).
21. The first important federal safety statute was the Safety Appliance Act of 1893, 27 STAT. 531 (1893), amended by 29 STAT. 185 (1897), 32 STAT. 943 (1903), and supplemented by 36 STAT. 298 (1910). Other noteworthy federal safety laws include: The Hours of Service Act, 34 STAT. 1415 (1907), as amended by 39 STAT. 61 (1919); The Accident Reports Acts, 31 STAT. 1446 (1901), 36 STAT. 330 (1910); The Boiler Inspection Act, 36 STAT. 913 (1911), as amended and supplemented by 38 STAT. 1192 (1915) and 43 STAT. 659 (1924); and the sweeping train-control-device provisions of the Transportation Act, 41 STAT. 456, 498 (1920), 49 U. S. C. § 26 (1940). See I SHARP-XAN, op. cit. supra note 1, c. 6.
22. 37 STAT. 555 (1912).
24. This is simply an expanded version of Section 213 (a) (1) of the Motor Carrier Act, 49 STAT. 543 (1935). The criterion established in the proviso of section 213 (a) (1) reads: "... unless it (the ICC) finds that the transaction will promote the public interest by enabling ..."; and while the present section 5 (2) (b) of the Interstate Commerce Act substitutes "unless it (the ICC) finds that the transaction proposed will be consistent with the public interest and will enable ..." the meaning remains the same (emphasis supplied). See Meck and Bogue, Federal Regulation of Motor Carrier Unification (1941) 50 YALE L. J. 1376, 1384.
25. "This provision [section 213 (a) (1), for the author was writing before 1940] obviously establishes a more stringent standard in connection with the authorization
tions upon acquisition or domination of carriers by other types of carriers even while leaving ample leeway to the authorized regulatory bodies to interpret such general terms as "use . . . to public advantage." It is the discretion lodged in the ICC to weigh the equities in each case and determine in what manner the particular service may best be furnished to the public which has made this phase of its administrative task so delicate. And its adjudications in "consolidation" cases have given rise to charges of bias and "railroad-mindedness."

The ICC, while according apparent recognition to the policy of the Panama Canal and Motor Carrier Acts against integrated transport companies under railroad domination, has encouraged a certain degree of rail-motor coordination, predating its decisions upon the operational economies and improved common carrier service effected thereby. In determining whether the motor carrier-applicant in a particular case is "affiliated with" a rail carrier within the meaning of section 5 (6) of the Interstate Commerce Act, the Commission has looked especially to the extent of stock ownership and the number of common officers and directors.

The Barker Motor Freight case established the doctrinal rule on the permissible scope of coordinated rail-motor service where railroad "control" or "affiliation" has been shown to exist. The applicant, a motor carrier controlled by the Pennsylvania Railroad, proposed to purchase the property and "grandfather clause" certificate of an existing motor carrier. Cognizant of the valuable service which a motor carrier can perform for a railroad under such circumstances, particularly in transporting less-than-carload freight from a key point to between-points on the rail line, but fearful of the competitive consequences if a carrier controlled by a wealthy railroad with an efficient traffic-soliciting force were permitted to enter the motor-carrier field

of acquisitions of ownership or control of motor carriers by rail, express, or water companies than with respect to the approval of combinations among motor carriers themselves." IV SHAFMAN, op. cit. supra note 1, at 112.

26. See the statement of Senator Wheeler in 79 Cong. Rec. 5655 (1935) and that of Representative Sadovski in 79 Cong. Rec. 12206 (1935) on the nature and function of the supervisory powers granted to the ICC by the various paragraphs of section 213. See also McLean Trucking Co. v. United States, 321 U. S. 67, n. 21 (1944).


28. Section 5 (6) provides: "For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier." 49 U. S. C. § 5 (6) (1940).

29. Pennsylvania Truck Lines, Inc., Acquisition of Control of Barker Motor Freight, Inc., 1 M. C. C. 101 (1936); Supplemental decisions in 5 M. C. C. 9 (1937), and 5 M. C. C. 49 (1937).
and expand its service operations over the acquired motor-carrier routes, the ICC adopted a compromise solution. It agreed to approve the acquisition provided the applicant restricted its new operations 1) to service "auxiliary or supplementary" to that performed by the Pennsylvania Railroad (in its rail operations) rather than service in competition with rail and motor carriers, and 2) to stations on the railroad's lines. 30

The Barker standard is also employed by the ICC in passing upon applications for a certificate of public convenience and necessity authorizing an extension of operating rights by a motor-carrier affiliate of a railroad. This is illustrated in the recent Willet Company case, 31 where the applicant was a wholly-owned subsidiary of the Pennsylvania Railroad so that no issue of "control by or affiliation with a railroad" was presented. There was no showing that existing transportation services in the area were inadequate to serve the needs of the public, and yet the Commission issued a certificate of public convenience and necessity. 32 The administrative report and order were based on the facts that the service to be performed by the applicant along the seven additional routes would parallel the lines of the railroad and would be merely "auxiliary or supplemental to the rail service," and that it would not compete with or prejudice the service rendered by existing certificate motor carriers. 33 The ICC's order was challenged and its enforcement enjoined by a three-judge District Court. On appeal, the Supreme Court reversed the lower court and sustained the Commission, 34 on the ground that the broad discretion granted to the Commission by Congress entitles courts to assume that its findings, unless completely unsupported by the applicable law or the facts revealed in the record, constitute an appraisal of the public convenience and necessity, with due regard having been given to 1) the improved service

30. The substantial difference in fixed costs means that motor carriers can execute short hauls more economically than railroads. As the length of the haul increases, however, the net cost of railroad service will tend to be equal to or less than that of motor carrier service provided of course that the nature of the commodity and the number of units which is hauled permit an ever-widening distribution of the fixed expenses incurred. See CONCLUSIONS ON MERCHANDISE TRAFFIC (Office of the Federal Coordinator of Transportation, 1936); JOHNSON et al., op. cit. supra note 12, at 571-2.


32. Other recent cases in which certificates have been granted to motor-carrier affiliates of railroads include: Pennsylvania Truck Lines, Extension, 42 M. C. C. 759 (1943); Frisco Transportation Co. Extension, 42 M. C. C. 219 (1943); Kansas City Southern Ry. Co. Extension, 42 M. C. C. 74 (1943); Seaboard Air Line Ry. Co. Extension, 41 M. C. C. 252 (1942).

33. In granting the authorization to Willett Company, the ICC restricted it to displacing the railroad's "peddler" cars in transporting less-than-carload freight to way stations, and the Commission forbade its engaging in any over-the-road trucking on these routes. Willett Co. of Ind., Inc., Extension, 42 M. C. C. 721, 727 (1943).

and reduced costs of the railroad, 2) the disadvantages to other motor carriers in the region, and 3) the declared policy of Congress. In a blistering dissent, Mr. Justice Douglas charged that the Court was encouraging the Commission to accord preferential treatment to railroads seeking to enter the motor carrier field to render "a pure motor carrier service," by not requiring proof 1) that existing transportation facilities in the territory were inadequate and 2) that the grant of the certificate requested would "not unduly restrain competition."

The philosophy behind the Barker doctrine seems to represent a commingling of three facets of the legislative policy toward transportation; 1) maximizing the special service advantages of each form of transportation; 2) fostering "adequate, economical, and efficient service"; and 3) "coordinating a national transportation system by water, highway, and rail." Judging from the decisions, reports, and recommendations of the ICC, as well as the recent trends toward unification evident among motor carriers, the third principle would appear to far outweigh the other two in practical influence.

**Carrier Rate Making**

The ICC was created to police the transportation field and, among other things, ensure a "reasonable" and "non-discriminatory" rate structure for localities, regions, and the nation as a whole. But from the earliest days of regulation by the ICC, the Congressional policy has favored competitive initiation and filing of rates, thus rendering individual common carriers, no less than the ICC, guardians of the public interest in low-cost transportation service.

To date, despite the significant forward strides of motor, water, and air transport, the original legislative policy of competitive rate-making has not been repudiated. Yet even the most cursory exam-
ination of carrier practices will reveal that currently freight rates are neither formulated nor adjusted in the officially sanctioned manner. Rather, they are established and filed by an elaborate, well-organized, and closely-controlled private machinery of rate bureaus and traffic-managers' committees.

Railroad rate bureaus have existed for more than seventy years as cooperative efforts by carrier executives to confer among themselves and to influence rate-making. Today the hierarchy of railroad rate bureaus, committees, and associations is highly intricate, with the nation divided into five principal territories each with a separate rate structure. Simply stated, any proposal for a tariff change is presented to the appropriate bureau, its committees conduct such investigations, hold such hearings, and solicit such testimony as they deem essential or desirable, and then it "recommends" the course of action which member lines should pursue regarding the proposed change. Any railroad in the territory agreeing to pay dues as assessed and to abide by the rules promulgated by the territorial bureau may be a member of one of its standing rate committees. Although oftentimes the territory or territories covered by a particular proposed rate are too extensive to expect identity of interest among carrier members, a representative (employee) of each member, through his committee, is entitled to vote on every suggested rate change filed with a bureau, and affecting his territory. All recommendations of standing rate committees are reviewed by appellate committees, composed solely of representatives of the dominant carriers of the territory, but a two-thirds vote by an appellate committee is required for reversal.

acquiring inter-carrier control, not to rates. For a "demonstration" that section 5 was intended simply as an emergency measure and does not represent a departure from the established policy of regulated competition in the transportation field, see Wiprud, op. cit. supra note 9, at 120-122.

Smith, Rate-Making and the Anti-Trust Laws (Aug. 4, 1945) 119 RAILWAY AGE, 208, 211. "The rate bureaus in the railroad field have a history of 50 years or more. . . . Rate bureaus sprang up to answer [the] need for technical skill in [preparing] tariffs" for publication and filing with the ICC. Hearings before Committee on Interstate and Foreign Commerce on S. 942, 78th Cong., 1st Sess. (1943) 76.

41. Rate bureaus designed to control freight rates and traffic and to limit competition among rival carriers and companies also exist in the fields of motor, water and air transportation. See Johnson et al., op. cit. supra note 12, at 601-602, 442-450, c. 44.

42. For a graphic depiction of railroad rate bureaus, committees, and freight traffic associations, see Hearings on S. 942, 78th Cong., 1st Sess. (1943), chart facing p. 77.

43. For a comprehensive account of the present-day function, organization, and operations of the Traffic Department and Traffic Advisory Committee of the Association of American Railroads, see Hearings before Committee on Interstate and Foreign Commerce on S. 942, 78th Cong., 1st Sess. (1943) 749-760. Concerning standing rate committees, see In re Trans-Continental Freight Bureau, 77 I. C. 625, 262-63 (1923).

44. See In re Trans-Continental Freight Bureau, 77 I. C. 625, 262-63 (1923). See also How Railroad Rates are Really Made, an unpublished memorandum written for the Dep't of Justice.


Rates approved by the proper committees are submitted to the territory's tariff bureau, which publishes them and then files them with the ICC. 44d

Financial superiority, plus the threats of cutting off their interchange traffic and fomenting a strike against "non-cooperating" carriers, 45 seem to constitute the entire machinery for enforcing compliance with the recommendations of rate bureaus, but in practice individual carriers have seldom tested their efficacy. 46

In general, respecting carriers which are members of a rate bureau, the only suggested rate-structure modifications filed with the ICC are those which are passed by the bureaus and their committees: The ICC never sees either proposed rate reductions which are defeated at some appellate stage in a rate bureau's process, or rates which individual carriers would have filed had there been no contracts or combinations to limit their freedom in adopting rate policies designed to develop the region they serve and/or increase their tonnage and revenues. 47

And on the rare occasions when a rate change is initiated by independent action of a carrier, there is an enforced minimum waiting period of ninety days between the date the proposal is docketed with the appropriate rate bureau and the date it is filed with the ICC. 48

45. Hearings on S. 942, 78th Cong., 1st Sess. (1943) 463. Perhaps the most accurate explanation of the effectiveness of the bureau's recommendations or the objections of fellow-members in dissuading disinterested member lines from taking independent action is that each realizes that at some future date it may need the cooperation of the others in staving off a shipper's request for reducing a freight rate which it has a pecuniary interest in preserving. The process seems similar to that responsible for concerted negative voting by the membership of AP whenever member-competitors of an applicant expressed the desire to deny him admission. See United States v. Associated Press, 52 F. Supp. 362, 370 (S. D. N. Y. 1943), aff'd in 326 U. S. 1 (1945).
46. This would be done by exercising the carrier's so-called right of individual action. "One of the most serious condemnations of the rate bureaus is that they have succeeded in almost completely suppressing all independent action in rate making. When the Interstate Commerce Commission made its investigation into the Transcontinental Freight Bureau in 1922 . . . it was able to report only 50 instances in the preceding two years when the members of that bureau had acted to publish their rates independently. During this period over 3,000 rate applications had been docketed with the bureau." Hearings on S. 942, 78th Cong., 1st Sess. (1943) 116.
An instance in which a strike was called by a motor-carrier rate bureau in Central Freight Association Territory to compel a member-carrier to raise its rates to the "recommended" level, is described but not supported by WIPRUD, op. cit. supra note 9, at 87. The indictment returned by a federal grand jury at Denver in 1943 charged two motor carrier rate bureaus and others with a conspiracy to prevent independent rate-making by individual motor-truck companies by means of "intimidation, boycott, and other coercive practices." See Hearings before Committee on Interstate and Foreign Commerce on S. 942, 78th Cong., 1st Sess. (1943) 178-9; and p. 381 supra.
47. This highlights the anomalous fact that the ICC, despite the obviously contrary Congressional intent in delegating to it sweeping regulatory powers, has permitted private organizations within the transportation industry to assume greater influence and supervisory control over rates than it itself exercises. See the record in Georgia v. Pa. R. R. Co., 324 U. S. 439 (1945); WIPRUD, op. cit. supra note 9, at 77, 86-87. See also Docket No. 28310, Consolidated Freight Classification, Mimeog. Rep. of May 15, 1945.
Most proposed rate changes, whether they originate with shippers or individual carriers, seek to reduce the prevailing rate structure. It is therefore worthy of note that railroad rate bureaus have consistently recommended against the overwhelming majority of such applications.40 This had induced farmers, manufacturers, and merchants to seek the cheaper, more competitive motor and water transport. But when these forms of carriage were subjected to regulatory legislation modeled upon provisions conceived to meet railroad problems and abuses, carriers in these industries promptly established rate bureaus whose organization and purposes closely paralleled rail-carrier bureaus.50 And, encouraged by the ICC’s tacit approval of rate bureau activities, agreements were thereafter entered into between powerful organizations, for example the Association of American Railroads and the American Trucking Association, whereby the rates for transportation by modes of carriage now recognized as competitors of the railroads were artificially related to the level of rail rates.51

Apart from their discouragement of competitive initiation and filing of rate changes, certain phases of the aforementioned rate conferences have elicited objections from several quarters.62 In the first

49. How Railroad Rates Are Really Made, an unpublished memorandum written for the Department of Justice. It is interesting as well as significant that the elaborate and well-oiled machinery of the rate bureaus is completely by-passed when a general increase in the rate level is desired. In that case the Association of American Railroads (and, it may be inferred, also the American Trucking Association) files its request directly with the ICC. Hearings on S. 942, 78th Cong., 1st Sess. (1943) 761.

A major proportion of the protests against proposed rate reductions is filed by associations of carriers. “Over 860 motor adjustments were protested by rail carriers and over 175 rail adjustments were protested by motor carriers, these adjustments representing reductions in rates. Over 90 per cent of such protests were filed by associations of carriers. One large rail-carrier association alone filed protests against more than 300 of such proposed motor-rate adjustments.” 53 I. C. C. Ann. Rep. (1944) 125 (emphasis supplied). Yet many small shippers (those unable to subscribe to a tariff-watching service) are not even informed of pending rate changes until presented with their freight bill. Hearings on S. 942, 78th Cong., 1st Sess. (1943) 73, 75. This underscores the necessity for altering some of the institutional rate-making procedures in the interest of fostering adequate, efficient, and especially low-cost transportation service. For a discussion of several of the alternatives which have been put forth, see p. 381 supra.

50. The implications of this statement apply more to motor than to water carriers, for in the water transportation field, at least as to lines engaged in foreign and coastwise trade, rate bureaus were in existence long before any attempts at federal regulation of water carriers were made; indeed, the character and effects of the activities of these bureaus were instrumental in the passage of the Shipping Act of 1916. JOHNSON et al., op. cit. supra note 12, at 534-5.

Motor-carrier rate bureaus seem to be about as well organized as those in the railroad field and far more numerous, while those among inland water carriers of freight and motor-bus and air carriers of passengers are less complex and less far-reaching in their influence. See WIPER, op. cit. supra note 9, at 82, 84.

51. On ICC inaction as to the activities of rate bureaus, see Investigation and Suspension Docket No. M-117, 3 M. C. C. 505 (1937); Central Territory Motor Carrier Rates, 21 M. C. C. 473, 487 (1940).

On the relations between the Association of American Railroads and the American Trucking Association, see Hearings on S. 942, 78th Cong., 1st Sess. (1943) at 689, 747.

52. These are summarized in Hearings on S. 942, 78th Cong., 1st Sess. (1943) 32, 251-2, 257-262.
place, all rate-committee conferences and traffic-managers' meetings are conducted secretly, in apparent defiance of the legislative preference for publicity. Also, membership on bureau committees is confined almost entirely to representatives of the leading carriers, and vitally concerned shippers are excluded altogether. Furthermore, when a bureau's standing rate committee decides to investigate a proposed rate change before making its "recommendation," only if requested can shippers present their views, regardless of their interest in or knowledge of the relation between the level of class rates and volume of traffic in the regions involved. In addition, the seven hundred member-carriers of a rate bureau often pool their accumulated funds and collective influence for the purpose of contesting a suggested rate alteration or the issuance of certificates of convenience and necessity to new carriers or the extension of the operating rights of established carriers, although only two or three carriers have a real interest therein.

Finally, the complaint is made that it is all but impossible for an administration body like the ICC to supervise rate bureaus in their manifold activities. Its staff is not large enough to gather the necessary information at first hand, and the structure and usages of rate bureaus militate against its obtaining such information from the bureaus' traffic-managers' committees. Moreover, the fact-finding procedure prescribed for the Commission is too cumbersome and expensive to be widely employed. Thus when a bureau files with the

53. See I SHARPMAN, op. cit. supra note 1, at 9; Chart of the Tariff Changes filed with the ICC and the Disposition of Requests for Suspension between 1933 and 1942, Hearings on S. 942, 78th Cong., 1st Sess. (1943) 72 (reveals that during this ten-year span an annual average of between 89,000 and 124,000 requests for tariff changes were filed with the ICC, and more than 300 each working day. Doubt is expressed as to the adequacy of the Commission's working force to analyze and appraise such a stream of proposed rate modifications, and yet it is ironic that only by doing so can it fulfill its function as an expert, continuously functioning administrative body created to safeguard the public interest in the field of transportation).

Yet one should be wary of deceptively simple generalizations about the ICC's performance with regard to rates filed with it. Thus compare the Justice Department's figure that more than 99 per cent of the proposed changes filed by the rate bureaus of the several transportation industries are approved by the ICC without investigations, or rendered effective by ICC inaction [Hearings on S. 942, 78th Cong., 1st Sess. (1943) 72, 75], with the figure that 80 to 85 per cent of the nation's freight tonnage moves on rates that have been fixed or investigated by the Commission [Smith, Rate-Making and the Anti-Trust Laws (Aug. 4, 1945) 119 RAILWAY AGE 208, 212].

The ICC is empowered, under section 15 (1) of the Interstate Commerce Act, to institute investigations and hold hearings on its own motion, or on complaint of a state railroad commissioner or even of a carrier or shipper not financially damaged, concerning a proposed change in rates or classification. The Commission may in addition fix rates which carriers are to charge, set maximum and minimum rates, or prescribe the classification scheme to be adopted. 49 U. S. C. §13 (1) (2), §15 (1) (1940).

54. By contrast, the activities of the privately established rate bureaus and committees, of course, proceed daily and at very close range.
ICC a proposed rate change,55 shippers, groups of shippers, or the ICC on its own motion may, within thirty days, register an objection thereto with the ICC’s Suspension Bureau. If after this has been done a superficial examination discloses a reasonable basis for the complaint, the situation is investigated. This will usually be followed by a hearing, to which representatives of both carriers and shippers will be invited to come and testify, and their counsel to file briefs and present oral argument. While the investigation or hearing is under way the rates in question are suspended, but nine months from the date of filing the ICC must take final action on the suggested change.56

But although time pressures and inadequate administrative facilities point to the difficulties of maintaining continuous supervision over rates, they hardly extenuate the uneconomic level of freight rates prevailing throughout the county.57 The ICC has long been vested with comprehensive powers to pass upon rates filed with it and, after investigation, to prescribe reasonable and non-discriminatory classifications and rate arrangements for railroads, or lawful upper and lower limits for their future rate schedules; and when its jurisdiction was made to embrace motor and water carriers, this broad authority over rates was commensurately extended.58

In practice, however, maximum rate pronouncements have fallen into disuse,59 and the ICC’s exercises of its minimum rate power have

55. Another method of seeking to modify the rate of any article is to change its classification. For a description of the elaborate machinery established by the railroads for classification purposes, see JOHNSON et al., op. cit. supra note 12, at 153-7.
56. If, after such an investigation, the ICC finds that the proposed rates violate the Interstate Commerce Act, it may prescribe “fair and reasonable” rates. 49 U. S. C. §15(1) (1940).

“Complaints with respect to classifications, rates or charges of motor carriers may be made to the . . . Commission by individuals, regulatory boards, organizations, or governmental bodies. The Commission has authority to suspend for an initial period of 90 days, and for an additional period of 180 days, motor freight rates either upon complaint or upon its own motion” (emphasis supplied). JOHNSON et al., op. cit. supra note 12, at 599.
57. It is true that freight and passenger rates have been increased permanently only once since 1926. See General Commodity Rate Increases, 1937, 223 I. C. C. 657 (1937), 229 I. C. C. 435 (1938); Fifteen Percent Case, 1937-1938, 226 I. C. C. 41 (1938); Ex Parte No. 148, Increased Railway Rates, Fares, and Charges, 248 I. C. C. 545 (1942), 255 I. C. C. 357 (1943). But under the scheme established under the terms of the Transportation Act of 1920 to bolster the financially distressed railroads following their return to private hands after a brief wartime period of government management and operation, the ICC ordered widespread increases in the level of railroad rates. And although the Emergency Transportation Act of 1933 repealed the mandatory sections of the Transportation Act, the rate bureaus and the rest of the railroads’ private rate machinery have succeeded in maintaining the rate “gains” made during the emergency period. See WIPRUD, op. cit. supra note 9, at 12-13.
59. It is significant that when the ICC finds a unification transaction to be “consistent with the public interest,” it bases its approval on increased adequacy, efficiency, or some other improvement in service, but never requires that resulting economies be passed along to the public in the form of lower rates. Industrial stability and minimum rates seem to concern the Commission far more than monopolistic control and excessive rates. See WILCOX, TNEC Rep., Competition and Monopoly in American Indus-
served to deprive the shipping public of the inherent advantages of flexibility and low cost afforded by motor and water transportation and to obstruct the introduction of technical improvements into the field.\textsuperscript{60} Since the advent of ICC regulation of motor and water carriers, competition between the various means of transportation has narrowed, a development which has redounded primarily to the benefit of the railroads.\textsuperscript{61} In 1938 the ICC evinced its preference for rate bureau operations over independent initiation of rates by individual carriers in adopting outright the rates filed by motor-carrier rate bureaus as the minimum rates for the industry.\textsuperscript{62}

The \textit{Cargill} case\textsuperscript{63} illustrates the role of the ICC and the courts in these developments. Presented shortly after water carriers were placed under ICC jurisdiction, the issue involved the movement of grain by barge and rail to and from the Chicago market. For many years the respondents, a group of western railroads, had published "proportional" (reshipping) rates, substantially lower than the corresponding local rates, on grain and grain products carried to Chicago by rail or water for reshipment eastward. Yet the Commission held that the railroads were justified in canceling their proportional rates from Chicago eastbound as to grain moving by Illinois Waterway barges, although it was evident that the purpose of the cancellation was to force midwestern shippers to use the railroads for their grain shipments to the east. It based its decision on the technical point that, since at the time these railroads formulated the proportional rates in issue barge lines were not subject to the ICC's jurisdiction and therefore had no rates on file with it, these proportional rates never applied to the water-
way barge traffic. On appeal a three-judge District Court set aside the order of the Commission, but the Supreme Court reversed the lower court and upheld the Commission’s action.

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

Under the influence of several centripetal pressures, the transportation field today is permeated by a philosophy of scarcity. The chief device for perpetuating this philosophy is the legislative requirement of obtaining from the ICC a certificate of public convenience and necessity 1) for all motor and water carriers desirous of serving the public at large and 2) for common carriers by rail proposing to extend, add to, or abandon any lines they currently operate. A “grandfather

64. The action of the Commission vacated a suspension order against the eastern railroads’ rate-modification proposal, and sanctioned the imposition on grain entering Chicago by barge of the higher “local” rates prevailing for ex-truck grain traffic and grain brought in by railroads under intrastate rates. Protestants maintain that the proposed schedules will be unjustly discriminatory against Chicago, the ex-barge traffic, shippers, elevator operators, and dealers interested in the ex-barge traffic, and unduly preferential in favor of other lake ports, ex-rail and ex-lake traffic. This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. The protesters’ allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates of joint barge-rail rates lower than the combinations.” Id. at 311.

The Commission concluded: (1) the railroads were “justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic and the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act; (2) “the proposed schedules are just and reasonable and are not shown to be otherwise unlawful.” Ibid.


66. Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 671 (1943). Mr. Justice Jackson, speaking for the majority, refused to upset the administrative determinations but seemed somewhat dubious about the likely future effects of these tariff changes. “much of the argument in this court has proceeded upon the assumption that the Commission’s order resulted from its belief and findings that the discrepancies between the proportional rates not cancelled in the proposed schedules and the local rates as applied to ex-barge grain were in all respects lawful, and that it actually approved or prescribed a rate structure containing such discrepancies. We do not so understand the action of the Commission.

67. 49 U. S. C. § 1 (18), § 306 (a), § 909 (a) (1940). Before commencing operations as a contract carrier—that is, one performing transportation services for only a
"competing modes of transportation and the ICC" guarantees a certificate to any transportation company which was legally operating as a common carrier on public highways or waterways when the appropriate Act took effect.\textsuperscript{68}

The legislative mandate imposes the burden of proof upon the applicant for a certificate of public convenience and necessity to show that present carrier services are inadequate to satisfy public needs over his proposed route of operations.\textsuperscript{69} In this regard, assurance or even demonstration by the applicant that he can render a service more efficient than any currently available, or at a lower cost to the shipping public, has been deemed immaterial.\textsuperscript{70} These legislative and administrative attitudes have encouraged established carriers, fearful of additional competition, to frustrate the efforts of new carriers to enter the public transportation field by expanding their facilities and improving their services, or offering to do these things, at strategic moments.\textsuperscript{71}

The position of existing certificated carriers has been further entrenched by the activities of the rate bureaus. The railroads have established so-called Motor Carrier Committees for the various freight-rate territories, whose staffs check all applications for certificates filed by motor carriers, water carriers, or freight forwarders, and whose representatives appear at Commission hearings for the purpose of advocating a denial of applications which are inimical to the interests of member-railroads.\textsuperscript{72} Motor-carrier and water-carrier rate bureaus

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\textsuperscript{68} 49 U. S. C. § 309 (1940). For the distinction between common and contract carriers, see \textit{Johnson} \textit{et al., op. cit. supra} note 12, at 566.

\textsuperscript{69} 49 U. S. C. § 306 (a) (common motor carriers), § 309 (a) (contract motor carriers) (1940). For a discussion of some of the problems raised by the "grandfather" proviso in the federal statute regulating motor carriers and the ICC's policy toward carriers claiming thereunder, see Note (1943) 43 \textit{Col. L. Rev.} 207. The "grandfather" proviso as to motor and air carriers are found respectively at 49 U. S. C. § 909 (a) (1940), and 52 \textit{Stat.} 973 (1938) § 401 (a) (e).

\textsuperscript{70} 49 U. S. C. § 307 (a) (common motor carriers), § 309 (b) (contract motor carriers), § 909 (g) (water carriers) (1940); and 52 \textit{Stat.} 973 (1938), § 401 (d) (1) (air carriers). See \textit{Norton Common Carrier Application, 1 M. C. C.} 114 (1936); \textit{C. & D. Oil Co. Contract Carrier Application, 1 M. C. C.} 329 (1936); \textit{Irven G. Saar Common Carrier Application, 2 M. C. C.} 729 (1937); \textit{Boyles & Luten Common Carrier Application, 8 M. C. C.} 593 (1938); \textit{White Circle Line Common Carrier Application, 16 M. C. C.} 516 (1939).

\textsuperscript{71} This may be derived from the scant attention given by the Commission in its reports to applicants' promises to meet the public demand for reduced rates and better service and its strabismic emphasis upon the "adequacy" of present carrier facilities judged by "the public need and convenience." \textit{Overland Stages Common Carrier Application, 1 M. C. C.} 474 (1937); \textit{Walton Contract Carrier Application, 2 M. C. C.} 474 (1937); \textit{Blain's Drive-A-Way System Common Carrier Application, 16 M. C. C.} 583 (1939). The language criteria employed by the Commission are the same regardless of whether the applicant's request is granted or denied. See, \textit{e. g.}, \textit{Coldwell Common Carrier Application, 1 M. C. C.} 394, 399 (1937).

\textsuperscript{72} \textit{WIPRUD, op. cit. supra} note 9, at 31-32. Expansions and improvements induced by such considerations are likely to be just extensive enough to satisfy the Commission as to the "adequacy" of existing carrier services for the particular commodities in the particular region involved.
may, of course, be relied upon to add their protests whenever certificates are applied for by potential competitors in their industry and region. This combination of organized interested opposition would seem to cast the burden squarely upon the authorized administrative bodies to appraise the claims of applicants and the "adequacy" of existing carrier service in the region involved.

Adjudications by the ICC, particularly regarding applications for certificates to conduct motor carrier operations, have had three significant results: an absolute lessening of the number of carriers,\(^7\) a substantial reduction of competition between existing carriers, and a strengthening of the position of the railroads relative to the other forms of transportation. Thus in 1942, of 118,480 applications for certificates and permits filed with the Commission, almost 32,000 were approved and almost 81,000 were denied or withdrawn.\(^7\) And under the Barker doctrine,\(^7\) in at least five recent cases certificates have been granted to motor-carrier subsidiaries of railroad companies without any showing as to the inadequacy of existing services. This apparent substitution of railroad convenience and necessity for public convenience and necessity has aroused violent objections, both because of express legislative declarations to the contrary and because the superiority of the commercial and financial resources of the railroads enables them to destroy competitors in the newer fields of transportation when once they have obtained a foothold therein.

Doubts have been expressed as to the desirability of the restrictive "certificate" device for motor, water, and air transport. These are growing industries, and the suppression of initiative and competition which has attended administrative application of this requirement appears to place the Government's imprimatur upon a situation which conflicts with the policy of the antitrust acts.\(^7\) Moreover, the "adequacy" criterion leaves much to be desired, since the failure by shippers to...
demand additional facilities or services may simply be due to a recognition that the prevailing rate structure, although too high to attract a normal volume of traffic, is entirely in the hands of carrier rate bureaus and two acquiescent administrative bodies. If new competitors were permitted to enter the public transportation field irrespective of the magnitude of the current market demand, their more efficient methods of operation and resulting lower rates might attract additional tonnage to such an extent as to justify continually-increasing carrier services.

**Coördination or Regulated Competition?**

Recent proposals, by the Association of American Railroads and other powerful partisan groups, for the legislative establishment of a limited number of vertically integrated transportation systems, each to render all types of transport service in a large geographic region, suggest the need for an examination of the available alternative policies for administering the transportation field. Proponents of the above plan speak of the enhanced stability, convenience, and efficiency of such richly-equipped systems and of their necessity if private investors are to continue to be attracted to the transportation industry. They propose the repeal of existing legislation which prevents the attainment of these objectives. Responsible officials and specially consti-

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81. Wall Street Journal, Sept. 11, 1943, p. 1, col. 6; Monthly Letters No. 3 and No. 5 of the Transportation Association of America (1943), whose close affiliation with the Association of American Railroads is demonstrated in S. REP. 26, Part 2, 77th Cong., 2d Sess. (1942) 42-46.

82. "In the coming months we will hear a few words many times, used in many ways, expressing many connotations: Competition; monopolies; coordination; integration; equality; uniformity. Some of these will be the Interstate Commerce or Maritime Commission's headaches, or be for the Civil Aeronautics Board and some Congress or the courts or some other agency to solve. They have the common quality that all are concerned with intercarrier relations, either relations between carriers of the same type, or between carriers of different types, individually or as groups. There are head-on conflicts in existing law and in policies of administration which must be resolved one way or the other, or be settled by compromise sanctioned by law. Both foreign and domestic commerce are affected, and certain international relations are vitally concerned." Aitchison, *After the War is Over-Transportation Problems* (1944) I C. C. PRACTITIONERS' JOURNAL 743, 746.

83. Among the legislative provisions most frequently discussed in this connection are the prohibitions against pooling and consolidations contained in the Transportation Act of 1940, the Panama Canal Act's proscription of railroad ownership or control of water carriers, and the application of the Sherman Act to transportation units.

84. Vice-President Wallace asserted that such a scheme would saddle the nation with "a permanent monopoly of public transportation under the control of the railroads" Address at Dallas, Texas, Oct. 20, 1943. Senator Truman charged that "the proposal is fundamentally based upon the concept that a permanent level or pattern of transportation has been achieved and it is now simply a question of organizing its structure and distributing its fruits." Address at Baltimore, Md., Feb. 1, 1944. See also THE RAILROAD TRAINMAN (Jan. 1944) II.
tuted bodies have voiced objection to this scheme and have suggested instead a national transportation policy which will adhere to the traditional encouragement of competition in rates and services among the various types of carriers and hostility to ownership or operation of one form of transportation by another.

Amid the heated controversies between the rival advocates, certain common elements are discernible. All sides seem to recognize that this country is committed, both by history and preference, to a framework of private ownership, management, and operation of transportation facilities. They also agree that a fresh, forthright mandate from Congress would have a wholesome effect, although few fail to appreciate the dependence of practical achievements upon the duly constituted regulatory agencies and courts. Finally, proposals offered by "outside" individuals, interested spokesmen, and public officials characteristically purport to be designed solely to promote the public interest.

The foci of disagreement concern the methods to be used in formulating rates and the future relations among the different types of carriers, particularly the role of the ICC in administering these arrangements. Five distinct approaches may be distinguished, with each attended by different consequences for the modes of transport and the established administrative bodies.

The first possibility, urged most vigorously by the Antitrust Division of the Department of Justice, is to abolish the rate bureaus, strictly enforce the prohibitions of the antitrust laws against price-fixing agreements and restraints of competition, and entrust the initiation and modification of rates entirely to the individual carriers. This is in keeping with the Congressional policy, although it has been objected to on the ground that a sudden abolition of rate bureaus would have the unfortunate effect of freezing rates at their present level except for those rate changes made by the Commission (following the filing of a


86. "Twenty-five years ago, when we were coming out of the period of Federal possession and control in the first World War, it was seriously considered whether that control should not be extended for a further period, five years or so, to let the experiment of Federal operation of the railways be carried on in normal times, as a guide to adoption of a policy for the future with respect to government ownership or operation. No suggestions as to such ownership or operation are receiving attention now. There now seems to be general agreement that the nation should continue its policy of private ownership and operation of transportation facilities and look primarily to the exercise of private initiative, and not to government ownership or management." Commissioner Aitchison, After the War is Over—Transportation Problems (1944) XI I. C. C. Practitioners' Journal 743, 745-6.
It has also been criticized as a plan to re-establish a situation which once existed in the transportation field but has long since become impracticable. To date the ICC has consistently refused either to enforce the antitrust laws or to refer rate-conspiracy cases to the Department of Justice. The Supreme Court, however, while generally denying triple-damage relief to private parties injured by reason of bureau rates on the ground that adequate provision for relief is offered by the Interstate Commerce Act, has indicated that, with the support of a specific legislative mandate, the Commission might be required to consider the policy of the antitrust acts in appraising alleged rate-making conspiracies and "consistency with the public interest" under section 5.

A second technique would be to incorporate the ICC into the rate bureaus, with some representation thereon also being afforded for shippers. By comparison with the existing scheme, this arrangement would have two prime advantages: 1) the ICC would thus be enabled to consider all rate proposals, not simply those filed with it by the carrier bureaus; and 2) shippers could then be heard as a matter of right rather than only when invited to testify.

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88. See Waters, op. cit. supra note 6, at 134-5.
91. See McLean Trucking Co. v. United States, 321 U. S. 67, 86-87 (1944), and especially the dissent of Mr. Justice Douglas at 93-95. See also Mr. Justice Douglas, speaking for the majority in Georgia v. Pennsylvania R. R. Co., 324 U. S. 439, 460, 462 (1945) ("The aim [of this bill] is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the [illegal] combination. . . . If the alleged combination is shown to exist, the decree which can be entered . . . will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the antitrust laws condemn and which are not sanctioned by the Interstate Commerce Act."); and dissenting in Interstate Commerce Commission v. Parker, 65 Sup. Ct. 1490, at 1498 (1945). ["Railroads, like other business enterprises, are subject to the antitrust laws except as Congress has created exemptions for them. Georgia v. Pennsylvania R. Co., 65 S. Ct. 716 (1945). And the antitrust policy is one of the components of the public interest which the Commission is supposed to protect in the transportation field."]
92. On the administrative level, this would result in the substitution of a single bureaucracy—that of the ICC—for the two which currently operate to ultimately determine carrier rates.
Perhaps the simplest disposal of the administrative problems involved would be achieved by instituting a complete scheme of public service regulation modeled on the French system. The ICC would then classify and prescribe the rates for all commodities shipped by freight, leaving the carriers to compete only as to services. Possession of such broad powers over rates would likely be used by the ICC in one of two ways: either to make transportation charges reflect the costs and value of the service, the volume of tonnage moving, and similar considerations; or as an instrument of economic policy to reorganize the transportation industry and influence the location and development of industry generally in the various regions of the country. Before such drastic changes could take effect, however, Congress would have to issue an explicit new mandate, and even then, because of this country's transportation background, it would be difficult to avoid ending with government operation and/or ownership of at least our railroad systems.

A suggested solution already referred to provides for the coordination of all transportation facilities over large areas: rail, motor, water, air, and pipe line. The potentialities for economic and political domination which the creation of integrated transportation systems would give to the more powerful component carriers renders the adoption of the proposal in this form very unlikely. But it is more doubtful whether such far-reaching coordination would be thwarted if organized along horizontal lines, with the ICC empowered to delimit the areas of operation for the various transportation systems and the types of service to be performed by the several modes of transportation. Objections have been made to integrated systems of any sort on the ground that the extensive power of such systems would result inevitably in their "capture" of any administrative agency or agencies established to regulate them. In any event, so extreme an ideological departure from our time-honored legislative policies toward transportation would probably require express legislative authorization.

93. See Waters, op. cit. supra note 6, at 136-7.
94. "Public interest in government ownership and operation of railroads has been recently revived in this country. . . . The present system of promotion of transportation facilities by public construction and aid has created a competitive situation which raises doubts as to the ability of private management to operate the railroads successfully. . . . It may be necessary to nationalize the railroads in order to neutralize the effects of subsidies received by their competitors." National Resources Planning Board, Transportation and National Policy (1942) 301.
95. See Waters, op. cit. supra note 6, at 136, 138.
96. Id. at 138.
97. See Wiprud, op. cit. supra note 9, at 146.
A compromise approach is also conceivable, by which competitive forces would be permitted to determine the proper territorial and functional sphere for each mode of transportation, on condition that provision be made to assure the continued existence of each, although perhaps in seriously modified form. This would involve divesting the ICC of all authority over rate-making and extensions of operating rights, and also abolishing the "prophylactic" device represented by certificates of public convenience and necessity. Two apparent advantages of such a scheme are that it would encourage 1) every individual carrier to modernize its facilities and increase its operating efficiency, and 2) each mode of transportation to maximize its inherent service advantages at the risk of being eliminated from carriage of certain articles of freight or even from whole areas. But at the same time, sufficient regulatory jurisdiction would be retained 1) to insure that none of our valuable transportation plant is eliminated completely by the forces of competition or the onrush of progress, and 2) to enforce minimum wages, standards of safety and maximum working hours. In this manner the railroads, for example, would be made aware of their obligations as public servants and penalized for their obsolete equipment, uneconomic rates, and unsound financing practices without facing destruction because of their inherent disadvantages relative to competing forms of transportation.

98. It seems a trifle naive to speak today of establishing full and free competition in the transportation field, with adversity striking where it may. Compare Mr. Arnold's "cost of progress theory," Introduction to Wiprud, op. cit. supra note 9, at xvii.

99. For example, their refusal to amortize or otherwise provide for retiring their bonded indebtedness out of earnings during periods of high profitability. Compare Smith, Rate-Making and the Anti-Trust Laws (Aug. 4, 1945) 119 RAILWAY AGE 208, 212.

100. Among the most familiar of these disadvantages are immobility, vast fixed charges, absence of recent public aids for railroad route and way, and pension and retirement funds.