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Regulation - The Balance Point

W. D. BREWER*

In 1887, the Congress established the Interstate Commerce Commission as the first Federal regulatory agency in the United States. Created under the power to regulate commerce among the States, the Commission served as the arm of Congress in overseeing the Nation's interstate surface transportation industry. As such the Commission became the forerunner in concept and structure of numerous other regulatory agencies having oversight of the public sector of the economy. This initial regulatory framework which eventually evolved to cover four modes—railroads and their related companies, motor carriers, water carriers, and oil pipelines—comprehends a privately-owned system with all appropriate private initiatives.

The Intent:

The Interstate Commerce Commission has a mandate from Congress to regulate even-handedly the varied needs of the several modes in harmony with the complex requirements of the shipping and traveling public. The purposes of the national transportation policy,** the underlying philosophy of the Interstate Commerce Act, are:

* Vice Chairman, Interstate Commerce Commission, at the time of this writing—Ed. The views expressed in this article are those of the author rather than officially those of the Interstate Commerce Commission.

** 49 U.S.C. preceding § 1.

- fair and impartial regulation of all modes of transportation so as to recognize and preserve the inherent advantages of each;
- promotion of safe, adequate, economical and efficient service;
- fostering sound economic conditions in transportation and among the several carriers;
- encouraging the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;
- cooperation with the several States;
- encouraging fair wages and equitable working conditions; and
- all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

This regulatory mission, in my judgment, is to safeguard the public interest within a free, competitive, and privately-owned transportation system, through the striking of balances between diverse and often conflicting interests. In the exercise of its administrative and quasi-judicial powers in Fiscal Year 1973, the Commission considered 22,784 formal and informal cases.¹ The greater portions of this heavy caseload involved motor carrier entry or licensing and carrier rate proposals. Hence, any discussion must focus on the impelling public need for fair balancing of interests in these major areas of entry and rate regulation.²

1

MOTOR CARRIER ENTRY

From Need:

Following earlier rail regulation,³ the Motor Carrier Act of

1. Figure includes 8,831 formal cases, principally involving rates, operating rights and finance proceedings, and 13,953 informal cases acted on under public observation but without the need for public hearing. 87 ICC ANN. REP. xi (1973).

2. See Breisacher, *Reflections On Some Ancient Freight Bills circa 150 A.D.*, Vol. 1, No. 1, TRANSPORTATION JOURNAL 23 (Fall 1961). One learns therefrom that entry and ratemaking controls of surface transportation stem back to 48 B.C. when Julius Caesar conquered Egypt. About 200 years later, those who specialized in the transportation of grains from the villages of the district of Theadelphia to harbors or canals leading to the Nile, or to the Nile itself for water movement to Alexandria, were members of "guilds" and furnished camels and donkeys either as "public" or "private" animals. Those who were "public" transporters were required always to have ready from 3 to 11 animals for public use.

3. The Windom Committee of 1874, appointed to investigate the best manners of securing cheaper transportation between interior and seaboard points, emphasized that competition was the best regulator of the level of rates, and called, among other things, for the construction of more rail-

1935^{3a} initiated Federal regulation of interstate for-hire motor carriage. Even prior to World War I, several States⁴ began their regulation of intrastate motor operations. Kindred legislation had been enacted in 44 states by the end of 1928. Both Federal and State regulation were needed, and the aims of the new laws were remedial. There can be no nostalgia for the transportation scenario of the 1930's featuring nomadic interstate truckers and bus operators providing erratic service at variable rates, sometimes among competing shippers. The *Doyle Report*⁵ details disadvantages of motor transportation exempt from economic regulation.

- (1) Increased highway hazards because of low safety standards of exempt carriers.
- (2) Inferior marketing service because of less ability to divert shipments on telephoned and telegraphed instructions to a more profitable market, which should be available when regulated carriers are used.
- (3) Less financial responsibility, particularly with reference to adequate cargo insurance. Less economic stability of participating carriers.
- (4) In some instances, frequent and substantial fluctuations in rates according to the ratio of supply of trucks and the size of the crop to be moved in a given locality.
- (5) Discrimination among shippers in regard to rates.
- (6) Less stability in markets, in particular such products as potatoes and grain.

roads and extension of inland waterways to add to the competition. Later the Cullom Committee emphasized the evils of discrimination in rates, rather than the level of the rates, and favored mild regulation. The Interstate Commerce Act grew largely from the report of that committee, and it merely prohibited unjust and unreasonable, unjustly discriminatory, and unduly prejudicial rates. Regulation expanded with the passage of the Hepburn Act of 1906 which empowered the Commission to prescribe maximum rates. The Transportation Act of 1920 granted authority to prescribe minimum as well as maximum rates. The Motor Carrier Act of 1935, part II of the Interstate Commerce Act, in addition to entry, incorporated the substance of the rate provisions then applicable to railroads. In The Transportation Act of 1940, the Congressional declaration of a national transportation policy was added as a preamble to the Act.

3a. 49 U.S.C. §§ 301-327 (1964). The act is now part II of the Interstate Commerce Act.

4. Pennsylvania in 1914, Colorado, Wisconsin, and New York in 1916, and Utah and California in 1917.

5. *National Transportation Policy*, a Report Prepared for the Committee on Interstate and Foreign Commerce, United States Senate, by the Special Study Group on Transportation Policies in the United States, January 3, 1961, 522.

- (7) The tendency to cut rates because of excessive competition, resulting in inadequate income for the exempt carriers, leading to high turnover and attendant economic waste.
- (8) Lack of protection of the shipper in regard to both insurance claims and rates which regulated status provides.

One may speculate whether deregulation, as urged from time to time, would adversely affect motor carrier financial stability and bring back objectionable trends of the 1930's. A look at some areas of transportation exempt from regulation by the Commission reveals troublesome conditions. There has been dramatic testimony urging regulation of the motor transportation of livestock:⁶

Mr. Chairman, let me prove this by quoting from insurance firm letters: 'The insurance experience with such carriage has been poor. From an underwriting standpoint, it is not considered desirable business.' AND 'Our company insures approximately 80 truck lines. In cooperation with various insurance carriers, we have made a study of exempt trucking operators and made comparisons primarily with respect to their safety records. We are convinced . . . that these carriers and the livestock haulers in particular have very poor safety records. This conclusion is borne out factually in that only a few insurance companies will entertain this particular class of business and then only at a surcharge rate.' AND 'We confine our underwriting in the area of Class I Motor Carriers who generate gross revenues of approximately \$1.5 million or more. Since there are not many livestock carriers of this size, we have none written . . . The level of premium for livestock carriers would be proportionately higher per unit than that of a regulated motor carrier. In addition, he is faced with the same inflationary cost factors as the regulated carrier but does not have the benefit of the tariff regulations. From an insurance standpoint, regulated carriers have . . . consistently produced lower loss ratios than unregulated carriers.'

Competition:

There are some who argue that motor carrier licensing creates monopolies and prevents competition both in service and pricing. Entry control enables sufficient stability in the expectation of traffic to encourage investments and conformity to the standards required of a common carrier providing the shipping public with adequate service when needed. Regulatory policies against destructive competition do not as a matter of course preclude new competitors for the available traffic. Operating rights issued by this Commission are held by 16,281 motor carriers. New and competing operating authorities are issued to common carrier applicants demonstrat-

6. Statement of Ben Butler, President of Hunt Transportation, Inc., before the Subcommittee on Surface Transportation, Senate Committee on Commerce, on S. 2362 on Surface Transportation Act of 1971, March 15, 1972.

ing a valid need by the shipping or traveling public for their proposed, new, additional or improved transportation. For Fiscal Year 1973, 5,240 applications for motor carrier authority were filed at the Commission, with the resultant granting in whole or in part of 4,299 of such applications. Of these, 507 grants were made to new entrants into regulated interstate motor carriage.

Deregulation:

Arguments are advanced from time to time in favor of eliminating in whole or in part the Federal licensing of interstate motor carriage. Often new standards are urged to encourage easier entry or to broaden the commodity and territorial scope of operating authorities, for example, either to reduce the incidence of empty backhauling^{6a} of vehicles or to enable more flexible operations under grants of authority limited by commodity or territorial restrictions.

The issuance of motor carrier operating authority is not aimed merely at maintaining financial stability of carriers but also to enable reliable service for shippers and receivers in even the most remote and sparsely populated areas. The issuance of certificates of public convenience and necessity to a motor common carrier of property carries with it a duty to provide service to the shipping public within the scope of such authority. Security from destructive competition is vital to assure service where the volume of traffic is limited or for other reasons the available freight is unattractive. Motor transportation for shippers and areas where there might otherwise be none is an important end product of regulation. Random operations by common carriers would not achieve the same remedial effects:

A certificate of public convenience and necessity is not a certificate authorizing common carriers to roam wherever they choose. Indeed, when the Interstate Commerce Act was amended in 1935 to give the ICC jurisdiction over trucking activities, it was thought that destructive competition could be prevented, as well as the 'public interest' promoted, by restricting routes and stabilizing rates. * * * To allow common carriers to transport goods by whatever route they choose would be to invite the kind of chaos that the Act was intended to forestall.⁷

6a. Return movement of empty vehicles.

7. *Mars Express, Inc. v. David Masnik, Incorporated*, 401 F.2d 891, 894 (2d Cir. 1968).

As the previously recited figures show, present standards allow relatively free entry and expansion of operations. The Commission allows the entry of new contract or common carriers where there are deficiencies in the existing services and reasonable transportation needs of the shipping and traveling public are not being met.⁸

Grants are made commensurate with the quantum of need for additional service both as to the commodities and points involved. To do otherwise can introduce harmful competition. The Supreme Court, in a proceeding involving the merger of several motor carriers and the effect of the merger on competition said:

The premises of motor carrier regulation posit some curtailment of free and unrestrained competition. The origins and legislative history of the Motor Carrier Act adequately disclose that in it Congress recognized there may be occasions when 'competition between carriers may result in harm to the public as well as in benefit; and that when a [carrier] inflicts injury upon its rival, it may be the public which ultimately bears the loss.' Cf. *Texas & Pacific Ry. Co. v. Gulf, C&SF Ry. Co.*, 270 U.S. 266, 277 (footnotes omitted).⁹

The issuance of two-way authority, standing alone, does not assure any motor carrier a return load for the reasons that traffic may be diverted to competing operators and other modes of transportation and that seasonal factors as well as variable industrial and consumer needs, production schedules, and marketing trends can fluctuate the volume of available freight.

There have been frequent suggestions that carriers, private as well as for-hire, should be free to transport any available commodity without regard to their regulated status as a return or backhaul movement. Free entry into backhaul transportation in the absence of a demonstrated public need therefor would have the impact of deregulation and restore elements of unbridled destructive competition with all the attendant uncertainties about rates, service and discrimination. The traffic of authorized carriers would become vulnerable to erosion and diversion to other for-hire and private carriers. Thus outsiders would benefit from the syphoning of backhaul freight without sharing the responsibility of the appropriately licensed common carrier to provide service

8. Compare *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). The considerations weighed in deciding an application for operating rights include (1) whether the new operation will serve a useful public purpose, responsive to a public need; (2) whether this purpose can be served as well by existing carriers; and (3) whether this purpose can be served by applicant with the new operation proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

9. *McLean Trucking Co. v. U.S.*, 321 U.S. 67, 83-84 (1944).

within the scope of its certificates even when there is a paucity of freight. The performance by private carriers of for-hire operations on return movements would be especially destructive to the stability of the existing for-hire motor carriage system which is balanced not only to assure fairness in competition among carriers but primarily in service to the public.¹⁰ Certainly the proprietary transportation of a manufacturer cannot be expected impartially to handle for-hire backhaul traffic in which either competing manufacturers or their customers have an interest.

New Impetus:

Sound entry standards have become increasingly vital in context of our Nation's petroleum shortage. New or extended operations of established motor carriers which are unnecessarily duplicative of the measure of service needed by shippers are wasteful. Empty and circuitous transportation, as are likely to be prompted by unbridled entry of new carriers into an already competitive field, need be avoided to assure maximum efficiency and sensible regulation. Hence, grants of operating rights are made with an awareness of not only the shippers' requirements and the nature and scope of transportation available to fill those needs but also whether the operations are economically feasible.

Motor carrier operations which are territorially balanced reduce risks of empty backhauls and are a valid consideration in licensing.¹¹ There is enough managerial flex within the sweep of interstate motor carrier procedure for the carriers' achievement of efficiency in individual operations. The carrier may seek balancing authority. That is not to say that balanced licensing reflects the automatic availability of return haul traffic. In our free system, the carrier enjoys the discretion of initiating proposals for new

10. The Commission in Geraci Contract Carrier Application, 7 M.C.C. 369 (1938), and Ralph A. Veon, Contract Carrier Application, 92 M.C.C. 248 (1963), has taken a position against issuing motor carrier operating authority to non-transportation companies operating their own private carriage. Private carriage operations with determinable and steady traffic flows and less expenses for solicitation and other costs associated with commercial operations have inherent competitive advantages over for-hire carriers.

11. Compare Rogers Cartage Co., A Corporation—Extension, 110 M.C.C. 139 (1969), and General Policy Statement of November 23, 1973, reemphasizing the principles therein discussed.

authority and has the primary responsibility towards managing an economical enterprise with a minimum of empty return movements. Permanent grants of authority generally are made upon the carrier's demonstration of public need for transportation which is insufficiently met by existing facilities. Additionally, where shippers have immediate and urgent service requirements and there are no motor carriers capable of meeting that need, temporary authority is issued to the applicant carrier.¹² Motor carriers desiring to transport recyclable commodities in furtherance of recognized pollution control programs are licensed under simplified procedures which foster such transportation.¹³ Thus, carriers have several options to attain balanced authority. In some situations, carriers seek an alternative to backhaul authority by leasing equipment to others with appropriate authority for the return movement. Moreover, exempt agricultural and horticultural commodities may provide return loads during certain seasons. Policies promoting greater efficiencies have been announced¹⁴ and require carriers in presenting their licensing applications to submit evidence on the extent of empty operations, if any, which would be the by-product of their proposals.

Regulatory policies and practices are regularly reexamined and adjusted either to reflect changed circumstances or to facilitate better service. Superhighway and deviation rules were modified to enable regular-route motor common carriers to avail themselves of shorter distances than over routes described in their certificates.¹⁵ Obsolete and unnecessary restrictions in operating authorities and published tariffs have been removed when inimical to the public interest.¹⁶

Tacking or combining separate authorities at common service points has developed in the industry with Commission approval. Nonetheless, our fuel crisis demands that unduly circuitous operations which carriers may elect to perform must be curbed. A motor carrier with rights to transport general commodities between Washington, D.C., and Pittsburgh, for example, which also holds authority for the same commodities between Pittsburgh and

12. Interstate Commerce Act, 49 U.S.C. § 310a(a) (1970)—When major stoppages of transportation have occurred, for example, during labor strikes, the Commission has issued general temporary orders allowing its field offices to issue temporary authority on very short notice.

13. Transportation of "Waste" Products for Reuse, 114 M.C.C. 92 (1971).

14. Interstate Commerce Commission, General Policy Statement Concerning Motor Carrier Licensing Procedures, November 15, 1973.

15. Superhighway and Deviation Rules, 49 C.F.R. § 1042 (1973).

16. Removal of Truckload Lot Restrictions, 106 M.C.C. 455 (1968), and Restrictions on Service by Motor Common Carriers, 111 M.C.C. 151 (1970).

New York City, is now allowed to perform a Washington-New York service by observing the gateway point of Pittsburgh. Accordingly, the circuitry of observing the Pittsburgh gateway arises from the voluntary decisions of the carrier. On the other hand, gateway observance restrictions are imposed in rights stemming from the acquisition, including merger, of different operations so as to continue the character of each merged segment and not to disturb the existing competitive scheme where there has been no convincing evidence of public need to do so. With the need to conserve petroleum, appropriate steps are being initiated to end excessively circuitous gateway operations. Rules are now proposed to prevent irregular-route motor carriers in the future from combining their authorities. Carriers now performing operations through gateways would continue to do so where the most direct highway distance between the points to be serviced is not less than 80 percent of the highway distance between such points over the carriers' authorized routing through the gateway.¹⁷ In essence, circuitries no greater than 20 percent would be allowed to continue. Moreover, there are existing procedures which permit carriers to eliminate the required observance of a gateway where it is determined that such elimination would not implement a new competitive service.^{17a}

In Sum:

Entry regulation is designed to nurture the quantum and quality of motor transportation which is needed by the shipping and traveling public without voids in service to any individual, commercial or industrial segment, or region of this country. There is nothing in our Nation's experience to believe that a similarly

17. Motor Common Carriers of Property, Routes and Service, 119 M.C.C. 170 (1973).

17a. Authority permitting elimination of gateways may be granted solely upon proof of operating economies where applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with existing carriers; but where elimination of the gateway requirement would allow a new service or would provide the applicant with a substantial new competitive advantage to the detriment of existing carriers, proof of public need in the usual manner is necessary. *Bowman Transp., Inc., Ext.-Substitution of Gateways*, 100 M.C.C. 314 (1965), and cases cited therein.

comprehensive and reliable motor transportation system would have developed without entry regulation.

Before turning to rate regulation, it is noteworthy that one prophecy made prior to the 1935 Act remains timely:¹⁸

Motor transportation of passengers and property is demanded today by the exigencies of social and industrial life. The relief granted by the public carriers to private individuals eliminating the necessity of driving and parking a car in congested areas bids fair to become more appreciated.

II

CARRIER RATE PROPOSALS

The system of ratemaking prescribed by Congress places the initial responsibility upon the carriers to publish rates. The regulatory role of the Commission is basically that of a check on carrier ratemaking proposals, a check designed to safeguard the public against unjust and unreasonable rates and practices, unjust discrimination, undue preference or prejudice, and destructive or unfair competition. Central to all these is the requirement that rates be made public by tariff publication. Also relevant is the rule of ratemaking which in essence requires a balancing of carrier revenue needs and the public interest in adequate and efficient service.¹⁹

Competition:

Carrier competition has always had a pronounced effect on rate-making, and, rather than collapsing under the Commission's administration, competition is alive and well and has become increasingly potent intermodally. No enterprise as deeply affected by the public interest as transportation should be completely free of regulation, which is needed to protect the public either from the ruthless monopoly power of a single firm or from the abuses which follow when industry becomes too highly competitive. In either case the remedial purpose of regulation is the same: to protect the public.

18. J. GEORGE, *MOTOR CARRIER REGULATION IN THE UNITED STATES*, 265 (1929).

19. The rule of ratemaking, which has particular significance in general revenue increase proceedings, provides that "the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers . . .; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." Interstate Commerce Act, 49 U.S.C. § 15a(2) (1970).

The Commission has summed up its policy on rate competition in the following terms: "Within reasonable limits, the public is entitled to the reduced rates brought about by competition."²⁰ In other words, carriers are free to a large extent to determine whether they desire to meet competitive rate reductions, so long as the resulting rates are not inimical to the statutory safeguards enforced by the Commission. The Commission will not prevent a carrier from reducing its rates in order to protect the traffic of another carrier or mode, although it may disapprove rate reductions where necessary to prevent destructive competition or ruinous rate wars.²¹ These safeguards secure the benefits that flow from free competition and protect the public from those who would abuse that freedom. The regulatory oversight is thus designed to guarantee that private commerce and progress take place within the bounds of fair play.

History:

Turning to the 19th century, we find widespread rail abuses which led to the creation of the present system of rate regulation. The post Civil War railroad expansion was a period characterized by instability of rates, discriminations, destructive competition, and rebates and passes. The practice of granting passes consisted of nothing more than allowing certain shippers the privilege of riding free—a privilege which came to be looked upon by every large shipper almost as a vested right.²² A rebate was a portion of the transportation charge which a carrier would secretly refund, particularly in order to secure the traffic of a certain shipper. This not only discriminated against the other carriers in competition for the same traffic, but had the effect, in many cases, of placing the shipper's competitors at a distinct disadvantage. Because the larger carriers could offer larger rebates, and because the larger shippers could offer more incentives to induce rebates, both the

20. *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 539 (1945).

21. See *I.C.C. v. New York N.H. & H.R. Co.*, 372 U.S. 744, 759 (1963), and *Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania*, 323 I.C.C. 746, 752-754 (1965).

22. See, generally, *Interstate Commerce Commission Activities 1887-1937*, 28 (1937); *FIRST ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION*, 7-8 (1887).

small carriers and the small shippers suffered while business became more concentrated.

Rate cutting played havoc with shippers and carriers alike, in localities where rail competition still existed.

In the late [eighteen] sixties, cattle were moved from Buffalo to New York for \$1 per car. Between 1866 and 1870 the first class rate for shipments from Chicago to New York varied between 25 cents and \$2.15 per 100 pounds, and in some instances the first four classes took the same rate. It is asserted, however, that the rate was really did not start until the seventies. During that decade it is recorded that cattle moved free of charge from Chicago to Pittsburgh, and for \$5 per car from Chicago to New York. Nor was the cutthroat game which continued into the eighties confined to freight traffic as is indicated by the dollar rate for immigrants traveling from New York to Chicago and by other examples.²³

Rates were often made secretly or subject to change without notice, with the result that ordinary contracts between shippers and receivers became a risky undertaking. Discriminatory rates favored one locality and worked hardships to another; individual shippers were favored at the expense of their rivals.

This historical sequence of rail carrier misconduct and public grievance, followed by State and then Federal reforms, was virtually duplicated in the later development of motor carrier rate problems and their administrative treatment. Thus, it was only natural that the proven system of rail rate regulation should have been adopted by the Motor Carrier Act of 1935.^{23a} After lengthy debate^{23b} it became apparent to Congress that Federal action was required and that the pricing of transportation clearly fell within the ambit of regulation necessary for a sound transportation system wherein the valid interest of shippers, carriers, and other segments of the public could be fairly balanced. In retrospect, the preservation of fair competition was, in my judgment, the indis-

23. *Interstate Commerce Commission Activities 1887-1937*, 27 (1937). See also *FOURTH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION* 210-224 (1890).

23a. Note 3a *supra*.

23b. See P. McCollester and F. Clark, *FEDERAL MOTOR CARRIER REGULATION*, 81-87 (1935); *FORTIETH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION*, 41-42 (1926); *MOTOR BUS AND MOTOR TRUCK OPERATION*, 140 I.C.C. 685, 746 (1928); *REGULATION OF TRANSPORTATION AGENCIES, SECOND REPORT OF THE FEDERAL COORDINATOR OF TRANSPORTATION*, S. Doc. No. 152, 73d Cong., 2d Sess. (1934). An account of the report's preparation and of the early days of ICC motor carrier regulation will be found in the comments of Charles S. Morgan in Senate Comm. on Commerce, 89th Cong., 1st Sess., "An Evaluation of the Motor Carrier Act of 1935 on the Thirtieth Anniversary of its Enactment" 4-18 (Comm. Print 1965); *COORDINATION OF MOTOR TRANSPORTATION*, 182 I.C.C. 263, 371-372.

pensable ingredient for building a strong transportation base for our economy.

Ratemaking:

Carriers initiate rates by publishing them in tariffs^{23c} which are filed with the Commission at least 30 days prior to the date they are to become effective, unless a shorter period is authorized by special permission.²⁴ A protest challenging the lawfulness of the proposed rate may be filed by any person.^{24a} Shippers and other interested members of the public thereby in self-interest share a part of the responsibility to see to it that rate adjustments proposed by carriers conform with the law. The Commission also has a responsibility at this stage of the ratemaking process to analyze informally the lawfulness of the protested rate proposal. If it appears therefrom that the proposed rates are reasonable and otherwise lawful, they are permitted to become effective without formal investigation. On the other hand, if the opinion is reached that the tariff schedules would result in unlawful rates, we subject them to an investigation. Ordinarily, we also suspend the operation of the investigated schedules for the maximum 7 months permitted by law.²⁵ As a less severe alternative, a rate may be investigated without suspension.

Where a proposed increase is thus allowed to become effective, and the rates are later found unlawful, refunds to shippers may be ordered. Similarly, when a suspended increase becomes effective prior to the conclusion of the investigation, the Commission may require the proponent rail carrier to keep an account and,

23c. Interstate Commerce Act, 49 U.S.C. §§ 6(1), 317(a), 318(a), 906(a), 906(e), and 1005(a) (1970).

24. Interstate Commerce Act, 49 U.S.C. §§ 6(3), 317(c), 318(a), 906(d), 906(e), and 1005(d) (1970). During the fiscal year ending June 30, 1973, the Commission received and reviewed 329,215 tariff and schedule publications.

24a. Interstate Commerce Act, 49 U.S.C. §§ 15(7), 316(g), 318(c), 907(g), 407(i), and 1006(e) (1970).

25. *Id.* The protestant has the burden of proving the unlawfulness of a new rate. The proponent carrier has the burden of proof regarding a changed (reduced or increased) rate which the Commission places under investigation prior to its effective date. If a rate is allowed to become effective prior to an investigative order, protestants have the burden of proof.

in the event the increase is subsequently found unlawful, to refund such amount as is found not justified.^{25a}

The initial decision whether to suspend or not usually falls to a body of Commission staff experts who make up the Board of Suspension.^{25b} An additional safeguard is that in every case there is provided an opportunity to appeal to the Commission through its rate division.^{25c} Thus, the existing rate structure has evolved through the responsible efforts of the carriers, the shippers, and other interested members of the public, in cooperation with the Commission. There is a fourth group that has a responsibility in this area and that is the Congress of the United States which makes the laws that govern the Commission's actions.

A decision to suspend and investigate requires a full evidential hearing with written findings of fact.^{25d} In some cases this can be accomplished by the submission of written statements by the parties^{25e} and the issuance of an employee board report setting forth findings of fact and conclusions of law. The board's findings and conclusions are subject to appeal to the division.^{25f} Other cases may be assigned for oral hearing before an administrative law judge, although concurrent verified written statements may also be required.^{25g}

Regarding objectionable rates which are already in force or were formerly effective, the Act gives shippers and carriers another remedy, the formal complaint.^{25h} The complaint procedure is a second line of defense, a continuing check on the existing rate structure whereby the Commission, carriers, and the shipping public may test that the proper rates are being assessed and that such rates are lawful.²⁶

25a. Interstate Commerce Act, 49 U.S.C. § 15(7) (1970).

25b. Interstate Commerce Act, 49 U.S.C. § 17(2) (1970).

25c. Interstate Commerce Act, 49 U.S.C. § 17(6) (1970).

25d. Interstate Commerce Act, 49 U.S.C. §§ 15(7), 316(g), 318(c), 407(i), and 1006(e) (1970).

25e. 49 C.F.R. § 1100.45 (1973).

25f. Interstate Commerce Act, 49 U.S.C. § 17(6) (1970).

25g. 49 C.F.R. § 1100.55 (1973).

25h. Interstate Commerce Act, 49 U.S.C. §§ 16, 304a(2), 316, 317, 908, 1006, and 1006(a) (1970).

26. The complaining parties usually seek money damages, but sometimes ask for future relief. Complainants may ask the Commission to prescribe a new rate or practice for the future and, at the same time to prevent a continuation of existing rates or practices, to enter a cease and desist order. Either a shipper or carrier may contest the rate. The shipper may object to paying a given rate because it is either (1) unjust and unreasonable, unjustly discriminatory, or unduly prejudicial, or (2) inapplicable. The first series of grounds means that the legal rate was charged but for

General Revenue Cases:

A request for a general increase is based on systemwide revenue needs²⁷ instead of those concerning only particular movements, commodities, or segments of traffic. Unlike ordinary rate proposals, a general increase is normally sought as a percentage increase applicable to all or nearly all rates maintained either within a ratemaking territory or nationwide by all or nearly all carriers of a single mode.

In large measure, a request for a general increase must be gauged by the rule of ratemaking which again provides for a balanced treatment: first, that carriers be permitted to charge rates sufficient to meet their revenue needs and to enable them to fulfill their service mission, and second, that the public is entitled to adequate and efficient service at the lowest cost consistent with the furnishing of such service.

If the question were simply one of determining how much revenue the carriers needed to offset their increased costs, percentage increases would not arouse so much controversy. Those opposing the general increase proposal give the Commission tangible insight into the problems stemming therefrom. For example, a straight percentage increase places a greater burden on the long-haul traffic and higher rated commodities. Conversely, a flat monetary amount puts most of the burden on short-haul traffic and low rated commodities. Selective commodity-by-commodity increases may cause discrimination and generally cause captive traffic to bear a greater burden. The Commission attempts to

one or more of the specified reasons it was unlawful. The second alternative is that at the outset the wrong rate was charged, or, in other words, the legally applicable rate was not assessed. While the carrier is required to charge the applicable published rate, disputes sometimes arise over which rate is in fact applicable due to the complexity in many instances of the tariff rules for determining the proper rate. Carriers may also complain that shippers have not paid the applicable rate, or that a shipper's inaccurate description of a shipment caused an inapplicable rate assessment.

27. Ordinarily a general increase is designed to improve the carriers' gross revenues where those revenues have been eroded by increased operating expenses. However, there may be variances, as in *Ex Parte No. 267, INCREASED FREIGHT RATES, 1970 AND 1971*, 339 I.C.C. 125 (1971), whereby the Commission approved an increase which was designed, in part, to improve the railroads' rate of return and not merely to avoid an erosion of their level of earnings. *Id.* at 161-162 and 182.

balance the interests of the shippers and the carriers by the imposition of holddowns or maximums to prevent unjust discriminations or undue preferences and prejudices so as to preserve competitive port, market, and commodity relationships. Accordingly, it is not merely a question of how much revenue carriers need, but how to fairly and equitably distribute the total increases over the various segments of traffic.

The environmental impact of a proposed general increase has become a more pronounced consideration, for example, as it applies to commodities which are recyclable. Consideration of impact questions may require a delicate balancing of priorities—environmental, economic, social, and other factors.²⁸ In so doing we must balance our efforts to protect the environment with the need to protect our economy. We must be able to discern those environmental goals which are worthwhile and genuine as well as those economic needs which are essential to our survival. As Mr. Chief Justice Burger expressed it:

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.²⁹

Turning from the elements of general revenue proceedings and environmental matters to the solution of other profound needs of the system, the Commission has instituted investigations³⁰ into the railroad freight rate structure to deal with the questions of the possible self-defeating nature of general increases with respect to generating revenue, disparities and distortions in the basic rate structure, uneven effects of general increases on individual railroads, the lack of railroad incentive to improve service in line with shipper requirements, and the current method of determining the rate base for measuring the railroads' rate of return. The Comis-

28. See *Calvert Cliffs' Coord. Com. v. United States A.E. Com'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971), and *City of New York v. United States*, 344 F. Supp. 929, 940 (S.D.N.Y. 1972).

29. *Aberdeen & Rockfish R. Co. v. SCRAP*, 409 U.S. 1207, 1217-1218 (1972).

30. Ex Parte No. 270, INVESTIGATION OF RAILROAD FREIGHT RATE STRUCTURE, 340 I.C.C. 868 (1971), and 345 I.C.C. 1 (1937); Ex Parte No. 270 (Sub-No. 2), INVESTIGATION OF RAILROAD FREIGHT SERVICE, 341 I.C.C. 1 (1971); and Ex Parte No. 271, NET INVESTMENT—RAILROAD RATE BASE & RATE OF RETURN, 340 I.C.C. 829 (1971).

sion began these investigations in view of the contentions, offered in recent rail general increase proceedings, that the application of percentage increases misaligns rate relationships. The Commission intends to gain an overview with the ultimate object of taking whatever corrective action is shown to be necessary to bring the rate structure into balance.

IN CONCLUSION:

Our historical experience justifies the oversight of interstate surface carrier entry and rate competition to balance both the needs of our free enterprise transportation system and the diverse needs of the shipping and traveling public. I have optimism for the future growth and development of the transportation industry in terms of technological advances and concepts for refining the quality of service. I am equally optimistic that, as in the past, the Commission will meet its future responsibilities to the public good and to the efficient flow of commerce which is the lifeblood of this Nation. As for the continuity of a need for protection of the public interest, there is much wisdom in the obvious truth that:

There appears to be no chance of unregulated competition operating in the national interest until the Golden Rule becomes the universally accepted law of business relations.³¹

31. *Doyle Report, supra*, at 157.