

the ICC

from A to Z

By Bernard F. Diederich

Without exaggeration, the *mother* of all federal regulatory programs has got to be the Act to Regulate Commerce¹ and its progeny, the Interstate Commerce Commission (ICC). Spanning the centuries from 1887, the institution withstood more than 100 years of changing times to 1995 and now resides post-sunset within the Surface Transportation Board and the U.S. Department of Transportation. But what a history ... worthy of a review of its highlights here.

Spawned by public outrage at the conduct of the railroads and their willingness and ability to exact exorbitant rates for cargo transportation, Congress reacted in 1887 with establishment of the first independent regulatory agency—the ICC, which had authority to regulate the interstate rates charged by railroads, to ensure that the rates would be just and reasonable.² Significantly, the new statute required the railroads to make their rates public, file them with the new ICC, and most important, adhere to the published tariffs.³ But after that auspicious start, the ICC expanded greatly, existed as a regulatory powerhouse in the 1940s and 50s, and then began a regulatory decline into the 80s and 90s.

The Formative Years

While the initiating act established a comprehensive regulatory regime over the rail industry (giving the ICC authority to regulate interstate rail rates; prohibiting the railroads from not only discriminating in rates or services between persons, localities or traffic but also from charging a higher rate for a shorter distance that was included within a longer haul over the same line in the same direction),⁴ the Congress also gave the new agency expanded powers as new issues arose. In 1893, the ICC was given jurisdiction over rail safety.⁵ After a couple U.S. Supreme Court cases deprived the commission of its ability to effect future rail rates, Congress moved by expanding ICC jurisdiction. With the passage of the Elkins Act in 1903 and the Hepburn Act in 1906, the ICC could prohibit rebates; could impose civil and criminal penalties for intentional acts of discrimination and intentional violations of published tariffs; was given jurisdiction of express, sleeping-car, and steamship companies, as well as fuel pipelines; could determine and prescribe maximum rates; and could establish through-routes and joint rates among noncompeting carriers and prescribe their divisions; and forbade the issuance of free passes except for clergy.⁶ In 1910 Congress passed the Mann-Elkins Act, which gave the commission, on its own motion, the power to suspend rail tariffs pending an investigation of their lawfulness.⁷ And during the period from 1889 until World War I, the power of the ICC was further enhanced.⁸

Following World War I, the trucking industry enjoyed tremendous growth.⁹ In 1904, there were but 700 trucks operating in the United States, most powered by steam and electrical engines. After the war, in 1918, the nation had more than 600,000 trucks.¹⁰ But with problems surrounding over-capacity, highway safety, labor rates, customer service, and bankruptcies, many states were moved to regulate motor carriers, limit entry, and establish requirements that rates be reasonable.¹¹ However in 1925, the Supreme Court handed down a decision that stripped the states of their ability to regulate interstate trucker movement.¹² Bus operations were also of significant national concern (“wildcatters” were cutting rates below compensatory levels and victimizing customers).¹³ Reacting to a clear need for legislation, Congress promulgated the Motor Carrier Act of 1935, adding bus and trucking companies to the ICC jurisdiction, giving it authority over entry and rates of motor carriers of passengers and commodities, with added power to establish requirements for the qualifications of drivers, maximum hours of service, and standards of equipment.¹⁴

Advances in transportation equipment and facilities fashioned transportation industry trends. Due to the development of a national highway system in the 1920s (hard-surface roads), along with the pneumatic tire, the internal combustion engine, and assembly-line production, motor carriers became an increasingly viable competitor to railroads.¹⁵ With the advent of the auto, urban transit also began to decline; bus and rail began to experience a loss of ridership in the 1930s.¹⁶

Three years after adding motor carriers to ICC jurisdiction, Congress added airlines to the federal regulatory regime with the creation of the Civil Aeronautics Act of 1938 and a new regulatory body, the Civil Aeronautics Authority (a year later changed to the Civil Aeronautics Board), modeled after its older sibling, the ICC.¹⁷

The economic regulation of transportation, whether by the ICC over the surface modes, or the CAB of airlines, embraced three principal clusters of activities: (1) carrier entry and exit in that the agency prescribed what routes the carrier could serve; (2) the appropriate price that the carrier could charge for the transport services; and (3) antitrust immunity for acceptable carrier mergers, acquisitions, consolidations, interlocking directorates, and intercarrier agreements (with states that regulated the intrastate aspects of the industries often undertaking the same oversight).¹⁸

The Transportation Act of 1940 extended ICC jurisdiction to water carriers; the Transportation Act of 1942 added ICC jurisdiction over freight forwarders.¹⁹

By 1952, the ICC had jurisdiction over railroads, ferries, pipelines, bridges, internal and coastal shipping, trucks, and interstate



bus lines. The Transportation Act of 1958 gave the ICC jurisdiction over passenger train discontinuances, previously under the authority of the state commissions (state authorities had allowed discontinuance of through trains with states).

The Zenith

At a snapshot of its regulatory reach, it was expertly estimated in the mid 1970s that the ICC had jurisdiction over some 18,000 rail, motor, and water carriers, brokers, and freight forwarders.²⁰ The ICC had a maximum of 2,700 employees at its peak, with a high mark of 11 commissioners and the largest numbers of administrative law judges of any federal agency.²¹ The largest number of proceedings before the ICC involved motor carriers, which comprised the largest single mode of transportation subject to ICC jurisdiction (more than 17,000).²²

The ICC served as a model structure for other regulatory agencies. The ICC commissioners and their staffs were full-time regulators who could have no economic ties to the industries they regulated. And, like the ICC, later agencies tended to be organized as multiheaded, independent commissions with staggered terms for the commissioners. The other federal level agencies patterned after the ICC include:

- Federal Trade Commission (1914)
- Federal Communications Commission (1934)
- U.S. Securities and Exchange Commission (1934)
- National Labor Relations Board (1935),
- Civil Aeronautics Board (1938)
- Postal Regulatory Commission (1970)
- Consumer Product Safety Commission (1975)
- Federal Energy Regulatory Commission (1977)

In recent decades, this regulatory structure of independent federal agencies has gone out of fashion; the agencies created after the 1970s generally have single heads appointed by the president and are divisions inside executive cabinet departments (for example, the Occupational Safety and Health Administration (1970) or the Transportation Security Administration (2002)). The trend was the same at the state level, though less pronounced.²³

No ICC review, however brief, would be complete without discussion of its infamous *yak fat* case. Recollect that ICC regulations required trucking companies to file their rates, or "tariffs," with the ICC 30 days before they became effective. Anyone was allowed to protest these rates, including competing companies or the railroads. The Hilt Truck Line of Omaha had ICC authority to haul meat to Chicago and was approached by a customer who wanted it to haul drums of lard in the market. Hilt submitted an application to the ICC to haul the product, and the railroads protested, in customary fashion, claiming that they were serving the customer and the area already. Fed up with railroad opposition to every trucking rate filed, Hilt then filed a bogus tariff seeking to haul 80,000-pound truckload lots of Tibetan yak fat to Chicago at 45 cents per 100 pounds. Of course, several railroads protested the application. The railroads claimed that they were already hauling millions of tons of yak fat, and that allowing a trucking company in would cut into their business. The railroads also claimed that the truckers could not haul yak fat for the rate they proposed and that the lower rate would devastate the market. Of course, the ICC rubber stamped the railroads' protest and ruled in their favor. The story appeared in various newspapers and business magazines. In truth, there was not a single yak within 10,000 miles of Omaha. The yak fat issue ultimately became one of the prime arguments for deregulating the trucking industry and an example of what was wrong with the excessive procedural morass into which the ICC had degenerated.²⁴

The Decline

In the matter of rail mergers, the ICC functioned at a slow pace. Proceedings in connection with the proposed merger of the Chicago, Rock Island & Pacific Railroad and Union Pacific Railroad dragged on for 10 years, during which time the Rock Island fell apart and ceased to be the desirable merger partner that UP had courted. Over-regulation of railroads reached the point that the ICC could (and did) require railroads that lost money to continue operations. In 1962, President John Kennedy delivered a message on transportation to Congress in which he criticized the regulatory structure, which resulted in successor Lyndon Johnson establishing the U. S. Department of Transportation in 1966. The DOT was to develop and coordinate policies that would encourage a national transportation system. Some rate-making and regulatory functions remained with the ICC. However, the Federal Railroad Administration would be born out of the DOT for the sole purpose of dealing with railroad affairs, with a focus on safety.²⁵

By the mid-1970s, the political mood in Washington had shifted against economic regulation. Regulatory failure took much of the blame for the anemic state of the rail industry. To restore the health of the rail industry, Congress passed the Regional Rail Reorganization [3R] Act of 1973, the Rail Road Revitalization and Reform [4R] Act of 1976, and the Staggers Rail Act of 1980. Collectively, the legislation limited the ICC's jurisdiction over rail rate-making, circumscribing its ability to regulate rates unless the traffic in question was "market

dominant." Rail exit from unprofitable markets also became easier. The legislation also partially exempted state jurisdiction over rail rates and operations.²⁶ Railroads were free to raise or lower rates at will unless, with respect to an increase, the rates would be lowered below a "reasonable minimum."

In the mid-1970s, retailer Sears Roebuck led a public relations campaign against the onerous paperwork and costly burdens of regulation, and somehow trucking became a focus of the regulatory reform campaign.²⁷ After lengthy hearings in 1980, Congress passed both the Motor Carrier Act and the Household Goods Transportation Act to liberalize entry and rates of trucking companies. Although not intended to create deregulation, the new legislation was so interpreted by the existent ICC commissioners.²⁸ By 1979 the ICC was granting 98 percent of the applications filed for motor carrier operating authority.²⁹ The Bus Regulatory Reform Act of 1982 significantly liberalized entry, exit, and pricing of the U.S. bus industry and largely preempted the states.³⁰ The Surface Freight Forwarder Deregulation Act of 1986 deregulated freight forwarders, other than those handling household goods. The Trucking Industry Regulatory Reform Act of 1994 removed most of the remaining barriers to entry in the trucking industry (except regulation of safety and insurance) and eliminated the requirement of tariff filing.³¹ With strong lobbying by United Parcel Service, Kentucky's largest employer, Sen. Wendell Ford (D.-Ky., 1974-99) added a rider to the FAA Authorization Act of 1994 preempting state regulation of intrastate motor carriers.³² Five years later, Congress passed the Motor Carrier Safety Improvement Act of 1999, which created a new Motor Carrier Safety Administration within DOT.

Federal regulation of the transportation sector of the U.S. economy has served various purposes, namely, to remedy market deficiencies (such as lack of effective competition, or to remedy destructive competition), to override the market to achieve broader social purposes, and to ensure uniformity in the face of regulatory efforts by the states.³³

In the late 1970s and early 1980s, Congress began to pare and refine federal transportation regulation to reflect contemporary industry conditions and evolving ideological attitudes. The result was to reduce significantly the federal presence in the interstate transportation industry.³⁴

The policy objectives driving transportation regulation changed significantly from those of 1887. Congress initially instituted regulation under the ICC largely to protect the public from the monopolistic abuses of the railroads. Between 1920 and 1975, however, the goal of the national transportation policy shifted to protection of the transportation industry from the deleterious consequences of unconstrained competition. Then, just as market failure had given rise to economic regulation, regulatory failure gave rise to deregulation.³⁵ Thus, in the last quarter of the 20th century and into the 21st, regulatory policy was meant to stimulate competition to enhance consumer welfare. Managed competition across a number of infrastructure industries was dropped in favor of market forces. Transportation, as the first major industry to be regulated, and nearly a century later the first to be deregulated, has been at the forefront of this dramatic evolution in economic policy.

Legislative regulatory reform began in the railroad industry and continued, as highlighted above, through the air, motor carrier, bus, and freight forwarder industries. The ICC Termination Act of 1995 sunsetted the ICC, deregulated and amended certain

functions, and transferred jurisdiction over rail, motor, bus, broker, freight forwarder and pipeline services to the newly created Surface Transportation Board and DOT.

As Professor Paul Stephen Dempsey, Ph.D., astutely observes:

In the 19th century, market failure gave birth to transport regulation. The public interest in transportation was deemed paramount. Nearly a century after economic regulation was born, an expanding, even inflationary economy, coupled with a perceived failure of the regulatory mechanism, gave birth to deregulation. Undoubtedly, the pendulum of American policy will swing again. Like transportation itself, public policy in this vital industry is in perpetual movement.³⁶

Indeed, transportation is in an ever-dynamic state. ☉



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Endnotes

¹Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

²*Id.* §§ 11-12.

³*Id.* § 6.

⁴*Id.* § 4.

⁵George M. Chandler, *The Interstate Commerce Commission—The First Twenty-five Years*, 16 *TRANSP. L. J.* 53, 57 (1987). Congress passed the first Safety Appliance Act in 1893.

⁶Elkins Act, ch. 708, 32 Stat. 84, §§ 1, 4 (1903).

⁷Mann-Elkins Act, ch. 309, 36 Stat. 539, § 13 (1910).

⁸Paul Stephen Dempsey, *The Social And Economic Consequences of Deregulation* 5, 14 (1989).

⁹*Id.* 15.

¹⁰Paul Stephen Dempsey, *Transportation: A Legal History*; 30 *Transp. L.J.* 235, 273-74 (2003).

¹¹*Id.* 269.

¹²See *Buck v. Kuykendall*, 267 U.S. 307 (1925).

¹³William E. Thomas, *Rollin' On ... To a Free Motor Carrier Regulation 1935-1980*, 13 *TRANSP. L.J.* 13, n. 520, at 49 (1983).

¹⁴Daniel W. Baker & Raymond A. Greene Jr., *Commercial*

Zones and Terminal Areas: History, Development, Expansion, Deregulation, 10 *TRANSP. L.J.* 171, 174, n. 13(1978).

¹⁵Dempsey, *Transportation History*, *supra* note 10, at 274.

¹⁶*Id.* at 276.

¹⁷Dempsey, *Social & Economic Consequences*, *supra* note 8, at 18.

¹⁸Dempsey, *Transportation History*, *supra* note 10, at 292-93.

¹⁹*Id.* at 294.

²⁰Dempsey, *Transportation Regulation*, 10 *VANDERBILT J. TRANSPORTATION LAW* 505, 509 (1977).

²¹Dempsey, *Transportation History*, *supra* note 10, at 327-28 & 346.

²²*Id.* at 340.

²³Interstate Commerce Commission, Wikipedia.

²⁴Dempsey, *Transportation History*, *supra* note 10, at 328; Frank N. Wilner, *Comes Now the Interstate Commerce Practitioner* (1993) at 151-52.

²⁵*Id.*

²⁶Dempsey, *Transportation History*, *supra* note 10, at 326.

²⁷*Id.* at 342.

²⁸*Id.* at 343.

²⁹*Id.* at 347.

³⁰Paul Stephen Dempsey, *Interstate Trucking: The Collusion of Textbook Theory and Empirical Reality*, 20 *TRANSP. L.J.* 185, 230, n. 170 (citing 49 U.S.C. 10922) (1992).

³¹Dempsey, *Transportation History*, *supra* note 10, at 350.

³²Paul Stephen Dempsey & Laurence E. Gesell, *Air Commerce and The Law* 81, at 208 (2004).

³³Dempsey, *Transportation History*, *supra* note 10, at 364.

³⁴*Id.*

³⁵See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 *COLUM. L. REV.* 1343, 1397-1403 (1998); Paul Stephen Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 *WASH. & LEE L. REV.* 1, 13-35 (1989).

³⁶*Id.* at 366. See also Paul Stephan Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortious Path from Regulation to Deregulation of America's Infrastructure*, 95 *Marquette University Law School* 1151-1189 (2012).