DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Study on Interstate Commerce Commission Functions

AGENCY: Department of Transportation.

ACTION: Notice.

SUMMARY: Section 210(b) of the ''Trucking Industry Regulatory Reform Act of 1994,'' (Act) requires the Secretary of Transportation to study possible organizational changes to the Interstate Commerce Commission (ICC), including some specified in the Act, that lead to government, transportation, or public interest efficiencies. A draft report to the Congress on this matter has been completed and the Department is presently seeking public comment on its recommendations.

DATES: Comments are due by March 13, 1995.

ADDRESSES: Comments may be mailed to Docket 49848, Office of Documentary Services (C–55), U.S. Department of Transportation, Plaza Level, 400 Seventh Street, S.W., Washington, D.C. 20590–0001. To expedite consideration of the Docket, please submit an original and five copies. The DOT study of ICC functions referenced in this notice may be obtained from the Documentary Services Division, U.S. Department of Transportation, Room PL–401, 400 7th Street, S.W., Washington, D.C. 20590, 202–366–9322. The Report is available on the World Wide Web Server as gopher.dot.gov/11/general/iccreprt.wp5. For the convenience of those without access to the computer network, the executive summary of the report is included herein.

FOR FURTHER INFORMATION CONTACT: Edward Rastatter, 202–366–4420; Robert Stein, 202–366–4846; or Paul Smith, 202–366–9285.

SUPPLEMENTARY INFORMATION: Section 210(b) of the Act requires DOT to study the feasibility and efficiency of merging the ICC into the DOT as an independent agency, combining it with other Federal agencies, retaining the ICC in its present form, eliminating the agency and transferring all or some of its functions to DOT or other Federal agencies, and other organizational changes that lead to government, transportation, or public interest efficiencies. DOT has already conducted extensive outreach effort beginning with a Federal Register notice of November 1, 1994, seeking comment on the ICC's report, required in Section 210(a) of the Act, and continuing with numerous meetings with carriers, shippers, and trade associations. This study by DOT considers the cost savings that might be achieved, the efficient allocation of resources, the elimination of unnecessary functions, and responsibility for regulatory functions. DOT must submit its findings for public comments, and then submit the results of its study, together with any recommendations to the Congress. Consequently, the Department is presently seeking public comment on its draft recommendations.

In order to make sure our report is most useful to the Congressional Committees, we expect to make a legislative proposal available to them on an expedited basis. Any changes resulting from the public comment period would be incorporated in our final report and modifications to our legislative proposal.

Executive Summary

Background

This report examines a range of policy issues dealing with the economic regulation of surface transportation service (primarily freight) in the United States.

Freight transportation represents a core element of our national economy. It provides U.S. manufacturers and consumers with access to domestic as well as global markets and has a dramatic impact on economic growth and on our international competitiveness.

The surface freight transportation industry includes many different sectors—trucking, railroads, barges, pipelines, buses, and intermediaries such as freight forwarders and brokers. The structure and performance of each sector have been considered in discussing options for economic regulation.

The industry has changed dramatically in the past several decades. Regulatory policy has both led and responded to these changes. A new regulatory principle, recognizing competition as the best regulator of transportation, has been embodied in bipartisan legislation enacted in each of the past three decades. Federal economic regulation has increasingly been reserved for glaring instances of market failure or as a tool to pursue broader social purposes.

Deregulation has resulted in more efficient operations for carriers and better service at lower rates for shippers. As a result of the Staggers Rail Act of 1980, the railroad industry—which teetered on the brink of financial failure in the late 1970's—has been revitalized and is now a viable competitive sector of the economy. Deregulation of air cargo, trucking, and ''piggyback'' traffic has led to spectacular growth in intermodal traffic.

The trucking industry has also been transformed. Many new firms have entered the industry, and both new and existing carriers have been given greater flexibility to meet customers' needs. Improvements in the reliability of trucking service have enabled manufacturers to enhance productivity by placing greater reliance on just-in-time manufacturing techniques.

The principal rationale for the remaining regulatory structure is to protect competition and the interests of shippers. However, ongoing changes in the nature of the transportation industry clearly indicate that the current level of Federal economic regulation of surface freight transportation burdens the public interest. Further reductions in regulation are needed.

The Process

This report is mandated by the Trucking Industry Regulatory Reform Act of 1994, P.L. 103–311 (TIRRA), which requires that the Interstate Commerce Commission (ICC) and the Department of Transportation (DOT) conduct studies to be used as the basis for considering further policy changes related to the regulation of surface transportation.

Section 210(a) of TIRRA requires the ICC to examine its functions and responsibilities and to report within 60 days of enactment recommendations on which of these functions should be continued, modified, or eliminated. The ICC report (completed on October 25, 1994), provides a detailed treatment and analysis of the full panoply of existing functions and responsibilities of the agency. Section 210(b) requires DOT to study the feasibility and efficiency of merging the ICC into DOT as an independent agency, combining it with other Federal agencies, retaining the ICC in its present form, eliminating the agency and transferring all or some of its functions to DOT or other Federal agencies, and other organizational changes that would be expected to lead to government, transportation, or public interest efficiencies.

The Department has given serious consideration to the recommendations of the Commission in assessing the merits of eliminating or restructuring the current functions and responsibilities of the ICC. This report reflects a different view from that taken by the ICC and generally concludes that government should retain fewer functions.

DOT's approach to conducting this study ensured full participation by all affected parties including carriers,

shippers, intermediaries, labor, the insurance industry, and government agencies identified as potential locations for necessary ICC functions. The Department solicited comment from the public on the ICC's study and held outreach meetings with all sectors of the industry, as well as government agencies.

DOT also sponsored a conference on the transportation industry of the future. The focus of this conference, which was open to the public, was to discuss the likely evolution of the transportation industry over the next fifteen years (1995–2010) and to identify and evaluate options for regulatory policies that would enable the industry to operate efficiently, as well as provide sufficient protection to the shipping public.

DOT Recommendations

Antitrust Immunity

Federal economic regulation of transportation predates the antitrust laws and has its roots in the late nineteenth century, when railroads had a virtual monopoly for most freight. Although the ''public utility'' model of regulation was subsequently applied to all of the other modes subject to the Interstate Commerce Commission's jurisdiction, it is now limited primarily to regulation of ''captive'' rail traffic.

The trucking, rail freight, household goods, intercity bus, water carrier, and other surface transportation industries still subject to economic regulation by the ICC and FMC are competitive (either entirely or with respect to most of the markets they serve). Over the past two decades, recognition of the intrinsic competitive nature of these industries has resulted in bipartisan legislative efforts to reduce regulation of surface transportation, including the number of activities that are accorded immunity from the antitrust laws by the ICC.

Because of the existence of competition between and within these industries, they bear little resemblance to utilities having local franchise monopolies. Even the freight railroads face vigorous competition, often from other modes, in the majority of the markets they serve. Accordingly, it is appropriate to rely on the antitrust laws rather than burdensome and unnecessary regulation to police these industries.

There are two categories of arrangements among firms to which the antitrust laws normally apply. The first is the cartel-type arrangement to fix prices or allocate markets, which has no redeeming value. Such activity should never be permitted to occur. The second category includes arrangements that can have beneficial aspects that may enhance competition. The legality of the latter type is evaluated under a ''Rule of Reason'' inquiry that weighs all its relevant effects. If the activity is, on balance, beneficial, it is not illegal and does not need immunity from the antitrust laws; if it is, on balance, beneficial, the antitrust laws will not prohibit it. Accordingly, we recommend *eliminating all antitrust immunity* for these industries.

Following are some examples of how certain types of transportation activities would be analyzed under the antitrust laws.

- *Rate setting.* A rate bureau agreement to impose a general rate increase on shippers is a classic horizontal price-fixing arrangement, a ''naked restraint'' on competition. There is no legitimate reason to continue to permit such *per se* unlawful collective activity.
- *Joint ventures.* Joint rate agreements between two or more firms providing similar services in different geographic markets do not generally, if ever, violate the antitrust laws; antitrust immunity is not needed in order for the activity to occur. As far as household goods van lines and their agents are concerned, as long as there are a sufficient number of other firms capable of performing the services in question, joint ventures between the van lines and their agents should not significantly lessen competition and should not violate the antitrust laws. Therefore their agreements do not need antitrust immunity.
- *Other joint operating activity.* The ''Rule of Reason'' standard used by the Department of Justice in analyzing most kinds of joint activity under the antitrust laws is not significantly different from the ''public interest'' standard used by the ICC. For example, the Commission may approve pooling arrangements among common carriers only where they are demonstrated to promote better service or efficiencies and will not ''unreasonably'' or ''unduly'' restrain competition. Arrangements that meet this test do not need antitrust immunity.
- *Industry guides and standards.* Compilations such as mileage guides can provide useful information to both shippers and carriers. On the other hand, collective agreement to adhere to such schedules could have anticompetitive effects. Such arrangements should be subject to the antitrust laws and deemed unlawful if their beneficial effects are outweighed by any anticompetitive effects. Activities that are no more restrictive than necessary to achieve the desired results are not likely to be challenged by the Department of Justice under the antitrust laws.
- *Information gathering and dissemination.* Carriers can use common entities to gather and publish information about demand, capacity, and unilaterally-established rates, without competitors agreeing on specific actions that would violate the antitrust laws.

Railroads

The Staggers Act of 1980 has transformed the railroads from a declining industry poised on the brink of financial ruin to a healthy one that provides excellent service to shippers at rates that are, on average, well below those of 25 years ago. The legislation introduced significant rate deregulation, allowing pricing flexibility where competition is effective to protect shippers from abuse. It also retained significant protections for shippers in situations where competition is either absent or weak. The critical freedoms of the Staggers Act must be maintained if the rail industry is to remain financially successful. Equally important, the basic shipper protections that were incorporated in 1980 are still needed today to ensure that rates and services for captive traffic are reasonable. However, there are many aspects of the rail regulatory system that can be revised, modified or even eliminated in light of today's, and tomorrow's, competitive realities. DOT believes that the following regulations are either outdated or unnecessary to accomplish the Staggers Act's objectives, and should be *eliminated:*

- *Antitrust immunity for industry agreements.* The antitrust laws provide sufficient flexibility to ensure smooth and efficient intercarrier operations.
- *Rail-shipper contract requirements.* Rail contracts should be treated in the same manner as contracts for other modes of transportation.
- *Rate discrimination regulation.* These restrictions are a holdover from the era of collective ratemaking, and are no longer necessary in today's competitive market.
- *Commodities clause.* This prohibition on carriers transporting their own commodities is an impediment to shipper ownership of short line carriers.
- *Rail car supply and interchange practices.* These practices can be established without antitrust immunity. However, the existing rules phasing-in car hire deregulation should be continued until deregulation is complete.

• *Oversight of rail financial practices such as interlocking directorates, issuance of securities, etc.* Regulations covering financial practices of railroads should be the same as those applied to other industries.

• *Rate caps on recyclables.* It is not equitable to require special treatment for particular classes of shippers.

• *Rail merger standards, line sales, transfers and trackage rights under the Interstate Commerce Act.* As with transactions in other US industries, these rail-related consolidations and sales should be reviewed by the Department of Justice, under the Standards of the Clayton Act.

The following rail function would, unless otherwise noted, be *retained and transferred to DOT:*

• *Maximum rate regulation* as provided by the Staggers Act.

• *Exemption authority* has been extremely useful for removing rail traffic from regulation.

• *Line construction authority* for new lines crossing another railroad.

• *Competitive access* provisions for captive shippers.

• *Labor protection* provisions would be administered by the Department of Labor.

• *Line sales* of non-carriers (determination of carrier/noncarrier status).

• *Reasonable practices* in cases where rate regulation is retained.

• *Abandonment* regulations, feeder-line development program, and financial assistance to facilitate purchases or subsidy agreements for lines proposed for abandonment.

• *Dispute resolution* between passenger and freight railroads.

• *Rails-to-trails* program for abandoned rail lines.

• *Preemption* of state regulation of rail rates, routes, and services.

• *Recordation of liens* would be continued, but administered differently.

Motor Carriers

Trucking. The interstate trucking reforms of 1980 have provided billions of dollars in annual savings and enhanced U.S. competitiveness in world markets. Another significant barrier to further efficiencies in the trucking industry was removed beginning in January 1995, as a result of Public Law 103–305, which prohibits the states from imposing economic regulation on trucking.

Most of the remaining trucking regulations administered by the ICC are needless and burdensome requirements that have no place in today's competitive, cost-conscious environment. Although TIRRA substantially reduced the requirements for entry into the business of hauling regulated commodities and removed the requirement that motor common carriers file their independently-set rates with the ICC, it stopped short of doing away with these requirements altogether.

Our reviews have found no useful function served by the remaining economic regulation of trucking by the ICC, and we recommend that it all be *eliminated,* except for those functions enumerated below. In particular, we recommend an end to all antitrust immunity, all filing of tariffs and rate regulation, all distinctions between common and contract carriers, and control over mergers and transfers.

We recommend that only the following regulations be *retained:*

• *Motor carrier licensing.* All interstate private and for-hire carriers would be subject to the same safety and insurance requirements, administered by DOT/FHWA.

• *Mexican carriers.* DOT, in conjunction with the states, would monitor Mexican carriers' safety and insurance compliance, as well as their access to U.S. markets, as NAFTA is phased in.

• *Undercharge resolution.* Adjudication of existing undercharge claims under the Negotiated Rates Act of 1993 (NRA) would be continued over a transition period until the issue ceases to exist. We also recommend that the NRA be amended to designate claims for undercharging as an ''unreasonable practice,'' as long as any tariff filing is required.

• *Household goods, household goods freight forwarders, and transporters of personally-owned automobiles.* Existing ICC consumer protection authority would be transferred to the Federal Trade Commission (FTC). FTC would not become involved routinely in individual cases, but would be able to monitor the industry and take action if there should be a pattern of abuses, as it does in other industries.

• *Owner-operator leasing rules.* These rules would also be transferred to the FTC, but there would be no agency involvement in adjudicating individual claims between carriers and owner-operators. There would be general FTC oversight, and owner operators would be given a right of private action to enforce the rules and the opportunity to collect treble damages in case of violations.

• *Loss and damage claims.* Convert the Carmack amendment into a Federal liability regime with a statutory liability limit, and eliminate ICC dispute settlement functions. Issues would be resolved privately, as with any other contract dispute.

Intercity Buses. Although the charter and tour sector of the bus industry has grown, the financial condition of the regular route carriers is marginal, reflecting intense competition with the airlines, the private automobile, and Amtrak. Continued regulation by either the ICC or state regulatory bodies can hurt, but cannot help this industry. We recommend that all ICC economic regulation of the intercity bus industry be eliminated. DOT/FHWA would be responsible for monitoring bus safety and insurance (with state enforcement authority), and the existing procedure for ICC preemption of state bus regulation would be amended to provide outright preemption, such as that provided for motor carriers of property by P.L. 103–305.

Transportation Intermediaries

Freight forwarders and brokers are only two types of a wide panoply of transportation intermediaries, including ocean freight forwarders and non-vessel operating common carriers (NVOCCs). This is an important segment of the industry that creates value for both shippers and carriers. The rather minimal regulation of all types of transportation intermediaries should be harmonized. We recommend that all regulation of surface freight forwarders and brokers be eliminated and that they be treated the same as air freight forwarders, which are free of any regulation of their rates, routes, or services, subject only to cargo liability rules—to the extent they are considered carriers.

Pipelines

ICC has authority to regulate transportation by pipelines of commodities such as coal and fertilizer. However, there is significant intermodal competition for such traffic and there have been virtually no complaints concerning competitive problems. We recommend that ICC regulation of pipelines be eliminated and any competitive problems be handled under the antitrust laws.

Intermodal Transportation

The ICC has the authority to prohibit the acquisition of a water carrier or a motor carrier by a rail carrier. ICC may also prescribe joint rates and through routes on intermodal rail-water movements. The deregulation legislation of 1977–80 has resulted in an enormous increase in intermodal traffic. However, there are still some remaining hindrances that could impede intermodal acquisitions. There is no

longer any economic rationale for these restrictions. We recommend elimination of all restrictions against intermodal ownership and removal of Federal jurisdiction over intermodal rates, routes, and practices.

Domestic Water Carriers

The ICC has authority to regulate water carriage both within the contiguous states and between the continental U.S. and its possessions (the domestic offshore trades). Most of the water traffic within the contiguous states is already exempt from regulation, and competition is sufficient to prevent abuses. We recommend an end to all ICC regulation of such traffic.

Regulatory authority over the domestic offshore trades is already shared between the ICC and the Federal Maritime Commission (FMC). When an offshore movement is intermodal and employs a joint through rate, ICC regulation applies, but is minimal. Other types of movements are regulated by the FMC. This bifurcation makes no sense. We recommend eliminating all economic regulation (including tariff filing) by both the ICC and the FMC in the contiguous states and in the domestic offshore trades. The provisions of the Intercoastal Shipping Act, 1933, should also be repealed. Any continuing jurisdiction over non-tariff-related malpractices in the domestic trades, such as boycotts of shippers by carriers, would be transferred to DOT.

Federal vs. State Interests

Surface transportation in the U.S. is a national system. The ''Commerce Clause'' of the Constitution of the United States (Article 1, Section 8, Paragraph 3) grants the power to Congress ''to regulate commerce with foreign nations and among the several States.'' This provisions allows Congress to regulate a huge volume of trade moved via land, water, and air. The recommendations outlined above would reduce or eliminate Federal oversight by repealing Federal laws that constrict the efficient and competitive operation of the surface freight transportation system. It is also essential to preclude conflicting state laws or procedures that could overturn the benefits of Federal deregulation, as has been done in previous legislation affecting the airline industry in 1978 and the trucking industry in 1994.

Administration of Remaining ICC Functions

TIRRA identified a wide range of organizational choices for relocating ICC functions. These included retaining the ICC in its current form, merging the ICC into DOT as an independent agency, merging ICC into DOT but not as an independent agency, eliminating the ICC and transferring all or some of its functions to DOT or other Federal agencies, and combining the ICC with other Federal agencies (e.g., the Federal Maritime Commission). Each of these alternatives was extensively examined in the Department's study.

Given the dramatic reductions in regulatory authority recommended in this report, it is clear that there is no longer any need to maintain the ICC as an independent agency. Further, given that the functions to be retained are quite diverse (e.g., motor carrier leasing, railroad rate oversight), we do not believe that it makes sense to consolidate these functions, either in a separate agency or in a discrete agency within DOT. It may be appropriate to house them in a new rail regulatory unit within the organizational structure of DOT, with labor protection at the Department of Labor.

However, there is no need for such an office to remain completely independent. Most of the remnant regulatory functions are similar to activities currently administered by DOT (or other agencies) without any independent or insulated staff. For those few functions where there is a special need for ''insulated'' decision-making (such as resolution of disputes between passenger and freight railroads), administrative procedures can be readily established.

Careful planning of the transition of functions is important. This includes examination of staffing requirements, workload and workflow, space and other physical resources, and processes for performing specific functions within the new organizational framework. It is critical to the transportation industry, shippers, and the economy that transition plans maintain continuity and integrity for any remaining regulatory functions. The Administration proposes that the transition occur during FY 1996.

Dated: February 22, 1995.

John N. Lieber,

Deputy Assistant Secretary for Transportation Policy.

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