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## Unleashing the Greyhounds - The Bus Regulatory Reform Act of 1982

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# UNLEASHING THE GREYHOUNDS — THE BUS REGULATORY REFORM ACT OF 1982

WILLIAM E. THOMS\*

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“. . . I've got to get into the courthouse and I've got to get in this afternoon. And it's up to you to get me through. You're a

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common carrier, subject to the rules of the railroad commission.”

“That’s what I’m trying to do,” said Juan, “and one of the rules of the commission is don’t kill the passengers.”

—John Steinbeck,  
*The Wayward Bus*, p.137

## I. INTRODUCTION

Ships have launched a thousand tales and the railroad train has inspired nostalgia, romance, mystery, folk song and melodrama. Even the over-the-road truck has given birth to the entire genre of country and western ballad. No movie of life among the glamorous rich would be complete without the obligatory scenes of dashing jet planes and handsome crews. No comparable literary tribute has arisen to the intercity bus, despite the fact of its ubiquity in modern life. Buses serve more communities than airplanes and Amtrak combined, are part of the national experience (everyone has been, if not an intercity bus passenger, at least a rider on a school charter) and are often the only link a small city has with the outside world. Perhaps a certain amount of opprobrium has attached to what has become regarded as the poor man’s intercity transportation, and so its literary celebration is limited.

## II. THE RISE OF INTERCITY BUS LINES

The growth of the bus industry is rather different from the history of trucking. The industry is passenger-oriented and has developed into a duopoly, with Greyhound and Trailways the predominant operators. The Greyhound system began in the Iron Range of Minnesota in the 1920’s, and expanded through merger with other bus lines until a nation-wide system was formed. Until recently, Trailways was a loose association of once-independent bus lines and many former railroad subsidiaries. Protected from antitrust considerations by law and the Interstate Commerce Commission policy, the two were allowed to expand to the extent where they have national preeminence today, with a mere differentiated fringe of local operators. Railroad companies, seeking a solution to the problem of passenger operations, once bought heavily into bus companies, but most sold their interests to Greyhound or Trailways.<sup>1</sup> Some independent companies have flourished, mostly in the

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1. Until recently Bangor & Aroonstook was one of the few railroads that still operated its own bus company. However, in January, 1984, the I.C.C. allowed for

Midwest and Southeast, but most operate as feeders with some affiliation with one or the other national systems.

Bus companies provide a low-cost, labor-efficient, fuel-efficient system of transportation that unfortunately reached its peak in the early 1970's and is fighting to hold on to its share of the market today. By using public highways for transport, and by using very rudimentary terminals (except in major cities), the bus companies have been able to avoid the costly infrastructure that long plagued railroad passenger service. There were low costs and fast depreciation in the industry, since the major expenses were buses and the cost of drivers. Somehow, the Amalgamated Transit Union and other labor organizations were persuaded to allow the driver to do loading and unloading work en route and thus station costs were minimized. Except for major cities, the bus depot was an agency station, located in a drug store or gas station, with the agent collecting a commission for bus tickets sold. Development of a long-distance motor coach by General Motors (with the engine underneath the passenger compartment and room for baggage to boot) and the increasing mileage of all-weather highways supplied by the taxpayer gave opportunities for the industry to grow.

For all the advantages, bus travel never achieved its full potential in the United States. Vehicles were often cramped and crowded, unlike the more luxurious European coaches. Bus companies, writing off the luxury market, concentrated on cheap transportation and neglected many amenities. A system of mail buses, such as provides services to German small towns, never developed in this country, and most small communities have no access to intercity buses. Worst of all, the bus industry, unwilling to short-haul itself, never moved toward a system of intermodal transportation. It is very difficult to switch from bus to rail or bus to air modes in this country, although most other nations regard all transport as part of an integral system, with intermodal terminals in the centres of cities.

Today's intercity bus companies derive much of their earnings from charter service or package express. On many carriers, the intercity carriage of passengers is a marginal activity, maintained to keep the franchise.

The bus industry, like the trucking industry, has greatly benefitted from the development of the interstate system of super-highways, which allowed it to compete with and sometimes surpass

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the discontinuance of this bus service. TRAINS, March 1984 at ...

the speed of passenger trains. The decline of rail passenger service and its curtailment with the institution of Amtrak in 1971<sup>2</sup> left many communities totally reliant on buses for passenger transportation, yet bus revenues did not appreciably increase during the 1970's. Presumably, the former rail passengers now drive or take the plane.

### III. THE CALL FOR REGULATION

Up until 1925, motor carriers, if they were regulated at all were totally under state control (very much like the system of provincial control which now exists).<sup>3</sup> Carriers operating in different states had to obtain authority from each jurisdiction through which they passed (they still must obtain license plates today).

This system of state regulation was drastically changed by the decision of the Supreme Court in *Buck v. Kuykendall*.<sup>4</sup> This case involved a motor carrier who applied to the state of Washington for authority to operate between Seattle and Portland. The application was denied, with Washington's regulatory commission stating that there was already adequate rail and highway service between the two cities.

The Supreme Court, on appeal, held that such a denial was beyond the authority of the state of Washington. Inasmuch as the trucks crossed the Columbia River into Oregon, they were operating in interstate commerce. Constitutionally, a state could not forbid, limit or prohibit competition in interstate commerce. (At the time the state of Oregon was willing to grant Buck authority to operate in that state).

The effect of *Buck* was to wipe out state controls on entry for motor carriers and to limit state regulation of interstate service to historic police power areas of motor vehicle safety and highway conservation.<sup>5</sup> At the time of the *Buck* decision, some forty states required operators of trucks to obtain certificates of public convenience and necessity, regardless of whether they operated in interstate or intrastate commerce. The *Buck* decision impelled efforts to seek a federal solution to the problem of the regulation of inter-

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2. See Thoms, *Clear Track for Deregulation*, 12 *TRANSP. L.J.* 183, 196-200 (1982).

3. Motor Vehicle Transport Act, Section 3.2 (1954) (See Can. Stat.).

4. 267 U.S. 307 (1925).

5. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 *TRANSP. L.J.* 91, 93 (1976).

state motor carriage. The Interstate Commerce Commission already exerted plenary powers over the operations of railroads. It was logical that Congress should look to that body for the expertise necessary to regulate this new form of transportation.

The rationale which advocates of regulation stressed included several arguments which favored continuity of service over competition. Unlike the financial barriers to entry into the railroad industry, such as construction costs, there were few financial barriers to entry into the trucking business. During the depression years, an unemployed bus owner might drive just for gas money, or to make payments on the bus. When the inevitable happened and the bus needed repairs, the driver might withdraw from the market, but another operator would be there to take his place. This cut-rate transportation was a threat to established bus lines and railroads alike.

The reasons for justifying entry controls were given in the following order of importance.

#### A. *Prevention of an Oversupply of Transportation*

ICC Commissioner Eastman stated in hearings before the Senate Interstate Commerce Committee in 1935:

The most important thing, I think, is the prevention of an oversupply of transportation in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it. In the case of railroads that was done in 1920 by the provision that prior to any new construction a certificate of convenience and necessity must be secured from the Commission. In my judgment it would have been much better if there had been such a provision many years before. It would have prevented certain railroad construction which tends to weaken the railroad system and situation at the present time. The States have, I think, in all cases, found the necessity in their regulation of motor transportation to provide for that prevention of an oversupply. It is a provision which has been adopted in most of the foreign countries that I have inquired into; in other words, the granting of certificates or permits in order to prevent an oversupply which weakens the situation.<sup>6</sup>

In other words, many experts held the belief that if too many motor carriers competed on the same route, the situation would

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6. *Hearings on S. 1629, S. 1632, and S. 1635 Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (1934).*

arise where no one could make any money out of the service. It was this rationale which caused the ICC, for 45 years, to protect incumbent carriers against new competitors.

### *B. Equality of Regulation*

At this time, railroads were fully regulated. It was thought to be unfair to continue this regulation while the motor carriers, operating on parallel and competing routes, would be unregulated. In addition, intrastate carriers were regulated by the individual states; it seemed unfair to allow the owner of a bus which crossed a state line to be able to disregard state law.<sup>7</sup>

### *C. Interdependence of Entry Controls and Enforcement*

Suspension or revocation of a carrier's license is a useful enforcement tool. Thus, most of the studies prior to 1935 which dealt with regulation assumed that control of entry would be part of the system. Most states operated on such a regulatory scheme.

Interestingly, most of the concern voiced by Congress was about bus operators. The Motor Carrier Act of 1935 required brokers of passenger transportation to deal only with certified carriers. The ICC had found in a 1928 report that although intercity bus service was generally satisfactory, so-called "wildcatters" were cutting fares below compensatory levels and otherwise engaging in reprehensible practices.<sup>8</sup> Federal regulation was supposed to end such practices but no thought was given to whether or not such entry control was necessary for the prevention of these practices.

Utility-type regulation was thus adopted for an industry which had few of the characteristics of a natural monopoly. Continuity of service was one lauded characteristic. The bus rider would rather have the certainty of having the Greyhound every day at a fixed schedule than have rate competition but uncertain service. Small towns would prefer to have a guarantee of service by a single carrier than sporadic competitive efforts by a number of struggling operations. Motor carriers should be sufficiently solvent to pay claims or fix up their equipment.

Furthermore, in 1935 free and unbridled competition with the freedom to run a competitor out of business had a bad name. The New Deal had made an effort to cartelize industry through the Na-

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7. Webb, *supra* note 5, at 93.

8. *Motor Bus and Truck Operations*, 140 I.C.C. 685, 702 (1928).

tional Recovery Act. The failure of the Blue Eagle to meet Constitutional norms<sup>9</sup> still did not diminish the faith and enthusiasm for government regulation to support prices and buttress the economy. Provisions of a safe and solvent highway transportation system was considered to be a complement to regulation of railways and city transit systems. The ICC, with 50 years of expertise in transportation regulation, was considered just the body to do the job.

#### IV. THE MOTOR CARRIER ACT OF 1935

Enactment of the Motor Carrier Act of 1935<sup>10</sup> more than doubled the jurisdiction of the Interstate Commerce Commission and changed its focus from a railroad agency to one concerned with all surface transportation.<sup>11</sup> As an umbrella agency, the Commission was charged with protecting not only the public but the economic existence of rail, motor and water carriers.

Those individuals and firms lucky enough to be operating buses on the highways at the time of enactment of the Motor Carrier Act were grandfathered into certificates and protected from further competition. Otherwise, carriers had to run the gauntlet of ICC procedures in order to obtain authority that would allow them to haul for hire. Trucks and buses were considered under the same regulatory scheme, and a similar regime was adopted for the entry of air carriers in the Federal Aviation Act of 1958.<sup>12</sup>

##### A. Control of Entry

A common carrier has the obligation to serve all customers fairly and equally and hold itself open to the general public for carriage of people or goods.<sup>13</sup> This is the same common-law obligation which had attached to the nation's railroads. Common carriers were required to have a certificate from the ICC stating that the public convenience and necessity required services. The term "public convenience and necessity" is not defined in the Interstate Commerce Act. In an early decision, *Pan American Bus Lines Op-*

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9. 295 U.S. 495 (1935).

10. Pub. L. No. 74-255, 49 Stat. 543 (1935).

11. Dempsey, *Entry Control Under the Interstate Commerce Act*, 13 WAKE FOREST L. REV. 729, 735 (1977).

12. Pub. L. No. 85-726, 72 Stat. 731 (1958) (current version at 49 U.S.C. § 1301 (1982)).

13. See generally, 13 AM. JUR. 2D, *Carriers* § 175 (1964).



erations,<sup>14</sup> the ICC established three considerations to be weighed in determining whether an applicant's proposed operations would satisfy this criterion:

1. Is there a public demand or need for the service?
2. Can and will this need be served as well by existing carriers?
3. Can the new operation serve the public demand without endangering the operation of existing carriers?<sup>15</sup>

Professor Paul Dempsey of the University of Denver School of Law suggests that this test boils down to balancing the advantages to shippers or passengers of the new motor carriers as opposed to the actual or potential disadvantages to existing carriers which might result from the institution of particular shipping operations.<sup>16</sup>

An applicant to begin intercity bus service would make an application to the ICC, with supporting statements from prospective passengers or users of package express service. These statements would testify to a need for the proposed service and willingness to use it. Usually, the application was protested by existing common carriers who feared diversion of traffic. Sometimes the application was amended, after a conference with protestants, to limit the authority sought. In these cases, the protestant might withdraw his opposition. Even in the absence of opposition, however, the carrier had to establish a *prima facie* case of the need of proposed operations.<sup>17</sup> Protestants were required to demonstrate their operating authority and their willingness and ability to handle the applicant's traffic. The applicant might, in turn, show that population or business along the route had increased to the extent that there was enough business for the newcomer as well as existing carriers.<sup>18</sup>

In addition to the public need for the service, the Commission looked at the services of existing carriers. The Commission imposed an affirmative duty on shippers to inform themselves about which carriers served their routes before they sought additional motor carriers. But when a carrier proposed a unique type of transportation service which existing carriers did not or would not offer, the ICC often concluded that the public should have the

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14. 1 M.C.C. 190 (1936).

15. *Id.* at 203.

16. Dempsey, *supra* note 11, at 735.

17. Road Runner Trucking, Inc., Extension—Meat, 124 M.C.C. 245, 248 (1976).

18. Dempsey, *supra* note 11, at 737.

benefits of the new service, even if it might divert traffic from existing carriers.<sup>19</sup> The rule at the ICC was to allow existing carriers to handle the traffic which was within their authorized territory.

The ICC was wary of allowing too many carriers in a market, for fear of diluting the traffic to the level where no one would survive. This concern for competitors was limited to motor carrier protestants. Railroads were unsuccessful in blocking competitive motor carrier service, since the Commission long believed that passengers should have the benefits of both modes, wherever possible.

When there had been an increase in traffic, the ICC was more willing to allow new carriers to serve a market. The last part of the *Pan-American* tripartite test was whether or not new carriers could serve the market without endangering other carriers. Competition has not been a major factor in ICC considerations until recently. In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*,<sup>20</sup> the United States Supreme Court decided that the benefits of competitive service to consumers might outweigh the discomforts which existing certified carriers could feel as a result of new entry, and that a policy of facilitating competitive market structure and performance was entitled to consideration.

The successful applicant would be awarded a certificate of public convenience and necessity, enabling him to carry passengers, their baggage, packages and newspapers on regular routes. Until 1967, such a grant also automatically included the right to operate charter service from on-route points to anywhere in the United States.

### B. Control of Rates

ICC control of rates has been a method of regulating competition which is as important for stabilizing the structure of the industry as entry restrictions. Rate regulation of motor carrier services is based upon the principles of regulating railroad rates, and is similar to utility rate regulation. The Motor Carrier Act of 1935 provided as follows:

1. Publication of rates and fares is required and there must be strict observance of tariffs.
2. Rates and fares are to be reasonable and not unjustly discriminatory.

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19. *Id.* at 739. See *Kroblin Refrig. Xpress, Inc., Extension—Morrow*, 125 M.C.C. 354 (1976).

20. 419 U.S. 281 (1974).

3. Carrier practices and regulations relating to fares and charges are to be just and reasonable.
4. Notice of at least 30 days is required for changes in rates and fares.
5. Proposed rates and fares may be suspended by the Commission for a period not exceeding seven months.
6. The Commission has power to prescribe the maximum, minimum or actual rate to be charged in lieu of a rate found unreasonable or otherwise unlawful.
7. The Commission has the power to hear complaints and institute investigations pertinent to its Congressional mandate.<sup>21</sup>

A rate system which avoids fluctuations was believed to produce solvent carriers and more reliable services. It also makes rates a predictable matter in figuring transportation costs. Common carrier bus companies were required to adhere to the fares and rates published in their tariffs filed with the ICC.

Under the Motor Carrier Act of 1935, bus fares were essentially carrier-made rates, subject to the approval of the Interstate Commerce Commission. The carrier would initiate a rate by publishing it in tariffs which were filed with the Commission between 30 and 45 days before they were to become effective.<sup>22</sup> A protest to this rate could be made by any interested party, except that a rate bureau (association of bus companies) could not protest a rate filed by one of its members. If the Commission agreed that the proposed rates were reasonable, they could go into effect without an investigation. However, if the Commission decided that the proposal might result in unlawful rates, it could investigate the rate and suspend the change. Where a proposed increase was not suspended but was investigated and later found unlawful, it was ordered cancelled. The ICC is without power to order refunds of motor carrier rates.<sup>23</sup> After a rate had gone into effect without investigation, passenger and package shippers would challenge its lawfulness by filing a complaint. If the rate was found to be unlawful, it could be cancelled by the ICC.<sup>24</sup>

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21. O'Neal, *Price Competition and the Role of Rate Bureaus in the Motor Carrier Industry*, 10 *TRANSP. L.J.* 309, 317 (1978).

22. 49 U.S.C. § 10702 (1979).

23. O'Neal, *supra* note 21, at 320.

24. *Id.* at 321.

### C. Route Regulation

Generally, bus companies are limited to operation over fixed, regular routes. The Commission's philosophy seems to have been that local communities along these lines could thus depend on regular service by the bus for handling small shipments and passengers, usually on a fixed schedule, every day. There were some deviations allowed: a small town within a mile or two of the designated route could be served, and trucks or buses could deviate from the designated highway if a parallelling Interstate highway was built. (Greyhound and many other intercity bus lines did just that which resulted in discontinuance of service to small towns once located on the Greyhound route). Charter operators did not have to adhere to regular routes. When a carrier had two separate grants of authority, but both included a single point, the operator could "tack" the two authorities together through the "gateway" city. Thus, a carrier who had rights to operate between New Orleans, Louisiana and Charlotte, North Carolina, and who later acquired authority to haul between Charlotte and Raleigh, North Carolina, could transport passengers between New Orleans and Raleigh, provided that he first operated through Charlotte.

### D. Fitness

A threshold qualification for any carrier to receive authority from the ICC is a finding that the carrier is fit, willing and able to perform properly the proposed service and to comply with the provisions of the Interstate Commerce Act.<sup>25</sup> The showing of public need is not enough; there must be some weeding out of carriers whose conduct demonstrates an inability or unwillingness to perform motor carrier operations lawfully. The carrier has the burden of proof in refuting its prior behavior if it is applying for additional authority, despite having formerly been in violation of the Act. Fitness concerns the financial capabilities of the applicant, its unwillingness to obey the rules of the Commission, and its ability to safely and properly perform the proposed services.<sup>26</sup>

The ICC may grant temporary authority to a motor carrier while questions relating to fitness are resolved. Temporary authority is a useful device by which the ICC awards operating rights for

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25. Dempsey, *supra* note 11, at 759. See also Dempsey, *supra* note 11, at 759, n. 34.

26. Associated Transport, Inc., Extension—TVA Plant, 125 M.C.C. 69 (1976).

a limited time while certain conditions prevail. A railroad strike or natural disaster might result in temporary authority to motor carriers to provide increased service to an area. For example, in 1979, the ICC granted unrestricted temporary authority to intercity bus operators during a period of acute gasoline shortages.

The scheme contained in the Motor Carrier Act of 1935 encompassed a broad regulation of activities of intercity motor carriers, similar to government regulation of railroads and, later, airlines. Highways may have been built with public money, but their use was restricted to carriers lucky enough to have received authority from the ICC. Some of the authority was obtained by applications for certificates of public convenience and necessity, but many carriers trace their authority to the fact that an ancestor was driving a bus on the highways in early 1935. Similarly, no rhyme nor reason existed for the awarding of most authority, which was fragmented in nature. The original grants of authority coincided with the routes serviced in 1935. Later grants were awarded when there was public need and where the competitive balance was not upset by the new arrival.

## V. THE ROAD TO DEREGULATION

### A. *State of the Industry*

In 1980, the intercity bus industry was overwhelmingly dominated by Greyhound Lines and, to a lesser degree, by the Trailways system. A series of smaller carriers (Gulf Transit and Jack Rabbit Lines were among the larger of these) filled the interstices, most of them living off connecting traffic from the "Big Two." Greyhound served all 48 contiguous states with a Canadian subsidiary providing connections north of the border; Trailways generally did not venture north or west of Minneapolis. The railroad subsidiaries, which once served as a vehicle for diversion of the rails' unwanted passenger traffic, had pretty much faded from the scene.<sup>27</sup>

Because of the companies' policy of letting concessionaires sell tickets in drug stores, restaurants, etc., bus stations were rudimentary and cheap to operate. Thus, most small towns along major

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27. The December 1983 *Russell's Bus Guide* shows the Bangor & Aroonstook Railroad as the only railroad still offering bus service along its lines, and few, if any, train connections listed in the schedules. One of the largest rail subsidiaries, Gulf Transit, was sold by Illinois Central Industries in the late 1970s. In January, 1984 the I.C.C. allowed Banger & Aroonstook Railroad to discontinue its bus service. TRAINS, March 1984.

highways enjoyed daily bus service in each direction. Labor costs were lower than those of rival carriers operating under the Railway Labor Act<sup>28</sup> because of a lack of competing craft unions and craft organization of bargaining units. Drivers were required to sell cash fares en route and to load and unload baggage and express, except at major company-owned terminals in large cities. As a result, a lone operator on a bus produced labor savings not possible to passenger trains or airplanes, which required upward of five crew members.

A regular-route certificate of public convenience and necessity was virtually always given to applicants seeking to operate an intercity bus. Need for the route had to be established, and protesters mollified. Once granted, the bus company was restricted to a particular highway or highways and was not allowed to deviate more than a minimal amount from a prescribed route. The reason for this rigor was that would-be passengers could station themselves along the highway and be assured that sooner or later a bus would come along to pick them up. A regular route system was developed which eventually covered, through interconnections, the entire continental United States, Canada and Mexico. It is now possible to make a continuous bus journey from Alaska to Panama.<sup>29</sup>

The bus network grew from a replacement for branchline passenger trains to a transcontinental network connecting major cities, usually at lower rates than rail coach. The interurban electric railway fell by the wayside in the 1930's and the bus lines grew at its expense. The Interstate Highway System enabled buses (until enactment of the 55-mile-per-hour speed limit) to match passenger train speeds; unfortunately, it also allowed the buses to bypass small towns which depended upon them for service.

Buses had more sources of revenue than from intercity passengers. The elimination of less-than-carload-lot rail freight service and rising less-than-truckload motor freight rates opened a large market to buses handling package express. Since the ICC certificates allowed the buses to carry parcels and baggage in the same

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28. Rail and air carriers and their employees are regulated by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1981). Motor carriers under private ownership come under the jurisdiction of the National Labor Relations Board by virtue of the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1981). Public agencies operating buses, such as New Jersey Transit, are governed by the appropriate public employees' collective bargaining law of the involved state.

29. *Russell's Bus Guide*, December 1983.

vehicles as the passengers, new double-deck buses were developed which had increased cargo space. Often the bus company was the only scheduled freight service to a small community, and a quick parts shipment business made it possible for local repair shops to cut inventory. Rates could be lower and service faster than parcel post, Railway Express, or even United Parcel Service if both the shipper and the consignee were willing to come to the bus depot to send and receive their packages.

Another concomitant of the intercity regular-route motor carriage of passengers was the opportunity for charter service. In the Motor Carrier Act of 1935 charter operations were included within the definition of common carriage, and authority to conduct such trips was routinely included in the grant of authority.<sup>30</sup> Once a carrier had received authority to serve, for example, Chicago to Minneapolis via a certain highway, it also had incidental authority to conduct charter trips from any point along that route to any other point within the United States. Many regular-route carriers complained about the loss of charter business when new entrants sought routes, not because of any potential profitability of regular service, but because of the opportunity to thereby conduct charter operations to any point in the country. Congress thereupon amended Section 208(c) of the Motor Carrier Act in 1966 to require that any charter authority granted after January 1, 1967 had to be specifically authorized by the Interstate Commerce Commission upon a finding of public convenience and necessity requiring such charter service.<sup>31</sup>

By 1980, the industry was mainly a duopoly, but one that provided service to every state and most communities of the United States. However, bus traffic was becoming less popular and the industry was not as profitable as it might have been. The bus industry did not deliver the mails and thereby serve every small community, as is done in Germany, nor did it strive for luxury services such as are encouraged elsewhere in Europe. Although speed and comfort had increased, passenger loads were beginning to resemble those on the railroads in their declining years of passenger service. More reliance was placed on the charter and express sides of the market. Some states, such as New Jersey, were entering the market to provide transportation in the wake of the exit of private carriers from the state. There were two strong bus systems, but no one was

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30. Webb, *supra* note 5, at 99.

31. Pub. L. No. 89-904, § 208(c), 80 Stat. 1521 (1966).

thinking of starting a third and few entrepreneurs were hustling to get into the business.

## B. *The Competition*

### 1. *Airlines*

The air carriers received a licensing scheme in 1938 very much like that of the motor carriers.<sup>32</sup> The Civil Aeronautics Authority, later the Civil Aeronautics Board, determined carriers' routes and rates and supervised service requirements. A good example of a regulated oligopoly, the CAB allowed no new airlines to serve trunk routes from 1938 to 1978.<sup>33</sup>

Originally it was believed that airlines concentrated on the long-haul market and buses on the short-haul and that there would be very little economic, demographic competition between the two modes. The passenger train was the dominant mode of intercity public transportation until World War II. The advent of jet planes of large seating capacity changed the position of air carriers, who began to seek out others than the luxury class of passengers.

In the 1960's, airlines began to experiment with discount fares. Particularly aiming their marketing efforts at the newly affluent group of youthful travelers, the airlines began offering half-fare standby discounts to young people between 12 and 22. This made air fare about on a par with bus tariffs, and since the planes travelled 10 times faster than buses, students opted for the skies. The bus industry complained to the Civil Aeronautics Board, which found the fares "unjust and unreasonable."<sup>34</sup>

This utility-type regulation came to an end with the passage of the Airline Deregulation Act of 1978.<sup>35</sup> This law brought about freedom of entry and route selection as well as ratemaking freedom to the airline industry, encouraged the growth of low-cost carriers, and brought about the sunset of the Civil Aeronautics Board at the

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32. McCarran-Lea Act, 52 Stat. 973 (1938) as amended by Federal Aviation Act, Pub. L. 85-726, 72 Stat. 731 (1958) (codified at 49 U.S.C. § 1302 (1970)).

33. Dempsey, *The Rise and Fall of the Civil Aeronautics Board*, 11 *TRANSP. L.J.* 91, 115 (1979).

34. Domestic Passenger Fare Investigation, Phase 5—Discount Fares, C.A.B. Order 72-12-18 (Dec. 5, 1972). See also *Transcontinental Bus System, Inc., v. C.A.B.*, 383 F.2d 466, 481 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968).

35. Pub. L. No. 95-504 § 2, 92 Stat. 1705 (1978), amending 49 U.S.C. §§ 1301-1551 (1980).



end of 1984.<sup>36</sup>

The elimination of regulation of the airlines meant that the intercity bus competed with a deregulated airplane for the city-to-city traffic. Since only in a few markets (New York-Philadelphia, Chicago-Milwaukee, New Orleans-Baton Rouge) could the bus match the plane's downtown-to-downtown time, the plane's advantage became preeminent in long-distance city pairs.

Also, between the major cities, the bus companies were abandoning the small towns market. With the completion of the Interstate Highway Systems, small towns which had long ago lost rail passenger service and had never built airports were now losing local bus service as well. It was just too much time and trouble to get off the superhighway to have the bus stop at these places.

## 2. *The Railroads*

After World War II, the carriage of passengers and railway express traffic ceased to be a profit center for the railroads. Interstate passenger fares were regulated by the Interstate Commerce Commission, and after the passage of the Transportation Act of 1958,<sup>37</sup> the discontinuance of rail passenger service became an ICC concern as well.<sup>38</sup> This jurisdiction over interstate passenger trains ended with the establishment of the Amtrak system by virtue of the Rail Passenger Service Act of 1970.<sup>39</sup>

Amtrak as now constituted is theoretically a private corporation,<sup>40</sup> but it is heavily dependent upon government subsidy. Its first act in 1971 was to cut in half the number of passenger trains then operating.<sup>41</sup> However, most of the passengers involved took to the air or to their own private cars and the bus industry did not receive a large surge of passengers. There have been cutbacks and extensions of the Amtrak network in the past thirteen years, but few intermodal arrangements have been made with buses. Bus companies have generally been unwilling to shorthaul themselves. In the late 1970's the bus industry made an effort to try to get

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36. 49 U.S.C. § 1551 (1980).

37. 49 U.S.C. § 10901 (1980). See generally G. HILTON, *THE TRANSPORTATION ACT OF 1958* (1970).

38. Thoms, *Regulation of Passenger Train Discontinuances*, 22 J. PUB. L. 103 (1973).

39. 45 U.S.C. § 501 *et. seq.* (Supp. V 1981).

40. 45 U.S.C. § 541 (Supp. V 1981).

41. See W. THOMS, *REPRIEVE FOR THE IRON HORSE*, 46-53 (1973).

Congress to eliminate or sharply curtail the passenger train system, but since that time the bus industry has muted its criticism and concentrated instead on getting its own regulatory reform package through Congress.<sup>42</sup>

By 1980, the bus industry found itself competing with an unregulated and government-subsidized passenger train system on intercity routes. Furthermore, the ICC exempted from regulation commuter railroads whose trains were subject to the authority of a State governor.<sup>43</sup> (The Long Island Rail Road, the Metro-North Commuter Railroad, and the New Jersey Transit rail operation *each* operate more trains and carry more passengers daily than Amtrak does). Buses compete head-to-head more with Amtrak than with state-supported commuter trains, but in both cases the competition was felt by the bus operators to be unfair. (Except for a few specialized cases involving ferries—such as in San Francisco harbor—buses do not face competition from water carriers of passengers in the United States).

The case for bus deregulation was stated by former ICC Commissioner Charles A. Webb:

. . . .The chief reason given for requiring certificates of public convenience, citing the railroad experience, was to prevent an oversupply of transportation. The second most important reason advanced in the legislative history for controlling entry was to establish regulatory equality as between unregulated interstate motor carriers of passengers and regulated passenger carriers, both rail and motor. Equality of regulation as between rail and motor carriers of passengers no longer exists since AMTRAK is not subject to the entry, rate and finance provisions of the Interstate Commerce Act. Equality of regulation as between intrastate and interstate motor carriers was a sound objective in 1935 when the States were responsible for regulating the vast majority of operations. Since intercity bus transportation is predominantly interstate today, it is reasonable to assume that regulatory inequalities resulting from an easing of federal controls on entry would be alleviated by state action or by appropriate language of preemption in the Federal statute.<sup>44</sup>

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42. Phillips, *From Anti-Amtrak to Pro-Bus*, TRAINS, Jan. 1976, p.6.

43. 49 U.S.C. § 10504 (1980).

44. Webb, *supra* note 5, at 105.

### 3. *Trucking Companies.*

Buses and trucks were guided by the same regulatory scheme until 1980. At that time the Motor Carrier Act of 1980<sup>45</sup> eased, but did not eliminate, the barriers to entry to new motor freight carriers. One of the principal changes was a shifting of the burden of proof from applicant to protestant in motor carrier cases.<sup>46</sup> This made it much easier for trucking companies to get authority to operate over routes already served by a competitor.

Specifically excluded from the liberalizing provisions of the Motor Carrier Act were the bus companies, which were to operate for another two years under the 1935 Act. Whatever may be the benefits of competition, Congress did not feel that the time was ripe to tinker with America's most comprehensive passenger transportation system.

### 4. *Auto Rentals.*

The rental car industry competes in providing transportation to points served by buses. Usually, the auto rental is much more expensive and therefore is chosen by business people who need the convenience of a car and are willing to pay for it. However, on weekend unlimited-mileage rates it may well be cheaper (particularly if more than one person is traveling) and more convenient to rent a car than to take the bus. This is because the auto livery business is essentially a five-day-per-week trade. In order to get some use out of the cars which otherwise would sit idle in the lot from Friday afternoon to Monday morning, the competing auto rental firms are willing to cut rates to whatever will move the cars, making up any losses on the weekday trade. Buses, on the other hand, usually charge the same fare every day of the week.

Auto rental firms have generally escaped regulation because, technically, they are not in the transportation business, but rather in the car-leasing business. They let you borrow a piece of machinery; what you do with it is your own business. They trade their pedigree to the livery stables rather than to the sailing ship, steam engine and stage-coach of the common carriers.

### C. *Arguments for Deregulation*

After the deregulation of rail passenger service, air freight op-

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45. 49 U.S.C. §§ 10101 *et. seq.* (1981).

46. 49 U.S.C. § 10922(b)(1) (1981).

erations and the passenger airlines, and after Amtrak and the commuter authorities were freed from any vestige of government regulation, and after regulatory controls over rail, water, and motor freight carriers were eased, transportation economists turned their attention to the intercity bus companies.

The main reason for considering deregulation of buses was to place them on equal footing with their competitors. Deregulation was the stated policy of three administrations and it had its charms. It enabled politicians to embrace something that promised both consumer satisfaction and the elimination of a layer of bureaucracy. Deregulation of the other modes had had the support of both the Congressional left and right.<sup>47</sup> This was before any of the airline or trucking bankruptcies; deregulation was a popular cause, regulation had few friends. In an era of inflation, deregulation was hoped to bring down consumer costs and hold down wage settlements. In an era of fuel shortages, deregulation was thought to be helpful to fuel-efficient buses.

In addition to deregulation, the benefits of competition were extolled. The industry could stand some shaking up; new applicants (possibly minority businessmen excluded by the old regulated environment) could come forward. Price competition would drive fares down and force the carriers to be efficient. Customers could shop around for the best fare or package express rate.

Finally, the flexibility of ease of entry and exit would mean that the bus could go where the people wanted to without the necessity for circuitous routes required by tacking.<sup>48</sup> Eliminating circuitry would save fuel and ease the energy crunch. During the 1979 fuel crisis following the Iranian hostage-taking, the ICC granted bus companies temporary authority to serve anywhere in the country.<sup>49</sup> Florida deregulated its entire intrastate motor carrier indus-

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47. Thoms, *Rollin' On . . . To A Free Market*, 13 *TRANSP. L.J.* 43, 68-69 (1983).

48. *Id.* at 71. "Tacking" is a means of combining two different authorities by operating through a common point. It requires, of course, that the vehicle actually drive through that common point, even though it may be far from the direct route from origin to destination.

49. Temporary authority is within the ICC's jurisdiction to grant when there is a strike, interruption of service or other emergency. It was used during the 1979 Iran crisis when it appeared that there would not be enough fuel for private cars, and when Amtrak was under a government-mandated program to reduce the size of its network. Trailways was a major beneficiary of this temporary authority provision. The I.C.C. granted temporary authority again in the Greyhound strike of 1983.

try, letting the buses pick and choose which routes and communities they wanted to serve.<sup>50</sup> Economists pointed out that the buses, with inexpensive terminals and using the public roads, carried few of the indicia of natural monopoly and would best profit in a competitive environment.

#### D. Buses Are Different

Some critics, including this writer,<sup>51</sup> pointed out a few differences between the bus companies and airlines, rental cars and other forms of transportation. These differences may have changed the basis for favoring deregulation.

Rather than having several competing sellers of transportation, the market nationwide is dominated by the "Big Two"—or possibly "Big One and One-Half" would be correct, as in some areas Trailways and the independents are merely the tail to Greyhound's "Big Dog."

Arrayed against the duopoly of the bus system are customers who are in no position to bargain at arm's length. Bus travelers are often poor people with few alternatives. Many do not own cars. Many are too young, too old, or too infirm to drive. While the chartering party may well have sufficient leverage to bargain with the bus company, the buyer of a single ticket usually does not; nor does the small shipper who relies on package express.

Deregulation of air and rail has brought some benefits to the traveling public, but it also has meant that many cities, towns and rural areas have lost scheduled service. Now only the bus is left for the carriage of persons and small shipments. If deregulation meant, as carriers hoped, that they could exit marginal areas, it would remove the last means of public transportation giving access to these towns. Historically protection of these local interests was the role of state public service commissions, but it was just those local commissions that the deregulators wished to preempt.<sup>52</sup>

## VI. THE BUS REGULATORY REFORM ACT OF 1982

Complete deregulation was not the prescription Congress ordered for the ailing bus lines. Instead, motivated by pressures from

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50. Freeman, *Survey of Motor Carrier Deregulation in Florida*, 50 I.C.C. PRAC. J. 51 (1982).

51. Thoms, *supra* note 47, at 83.

52. Thoms, *Administrative Law: Deregulation and Preemption*, 1 U.N.D. FACULTY L.J. 135 (1982).

bus industry lobbyists who wanted freedom to meet rate competition and freedom from uneconomic service requirements imposed by state public service commissions, Congress passed and sent to President Reagan the Bus Regulatory Reform Act of 1982, to bring a relaxation of economic regulation of the intercity motor bus industry. The bill was signed into law on September 20, 1982.<sup>53</sup>

### A. *Entry-Exit Requirements*

With regard to certificates of public convenience and necessity, the new Act is similar to the 1980 trucking law, in that the Commission is authorized to grant a certificate to any person who is fit, willing and able to provide intercity bus transportation, unless the Commission finds that the transportation is not consistent with the public interest.<sup>54</sup> The burden of proof has been switched to protestants. The jurisdiction of the ICC is extended to intrastate bus service.<sup>55</sup> "Fitness-only" certificates shall be granted to carriers seeking to serve towns with no existing bus service, or for service substituting for discontinued passenger train or airline service.<sup>56</sup> Protests are limited to carriers actually serving the applied-for route, or those with rival applications.

A rider to the bus deregulation bill prohibits the ICC from granting certificates for bus or truck service to foreign bus carriers unless the President has certified that the applicant's country does not discriminate against United States carriers. This was added in response to complaints by domestic motor carriers that United States companies were not being given rights to compete in Canadian and Mexican markets, as those countries had not deregulated entry to the motor carrier system.<sup>57</sup>

The Commission has been directed to remove closed-door and other restrictions from existing certificates held by bus carriers.<sup>58</sup> Companies may charter a partial load, i.e. handle charter and regular passengers within the same bus.<sup>59</sup>

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53. Pub. L. No. 97-261 96 Stat. 1102 (1982).

54. 49 U.S.C.A. § 10922(c)(1)(A) (1983).

55. 49 U.S.C.A. § 10922(c)(2)(A) (1983).

56. 49 U.S.C.A. § 10922(c)(4) (1983).

57. 49 U.S.C.A. § 10922(1) (1983).

58. 49 U.S.C.A. § 10922(i) (1983).

59. 49 U.S.C.A. § 10922(j)(2)(A) (1983).

### B. Rate Provision

Antitrust immunity for rate bureaus is to be whittled down by the Bus Regulatory Reform Act. Since January 1, 1983, rate bureaus have not been allowed to consider any joint rates. An exception is made for general rate increases or decreases. Carriers are still required to file tariffs and abide by them; and, the rate bureaus may still publish tariffs, file independent actions for individual members and provide support services for member carriers.<sup>60</sup>

A 10% up, 20% down zone of reasonableness is established for ratemaking by this Act. One year after the effective date of the act the zone was expanded to 15% increase and 25% decrease and two years after the law goes into effect, the zone will increase to 20% up and 30% down.<sup>61</sup> After three years the Commission may not suspend a rate on the grounds that it is too high or too low.<sup>62</sup>

### C. Preemption of State Authority

A provision of the new law provides that a carrier seeking to discontinue intrastate service may petition the ICC if the state has not acted within 120 days of the bus carrier's petition for state authority to discontinue service. If the state has denied the bus carrier's request, the carrier may appeal to the ICC.<sup>63</sup> The public has no such appeal if the state agency grants the request for discontinuance. (This procedure is similar to that found in old section 13(a)(2) of the Interstate Commerce Act, now 49 U.S.C. 10909, pertaining to discontinuance of intrastate passenger trains). In addition, the Commission is authorized to preempt state authority if it finds there is discriminatory state regulation of rates and practices.<sup>64</sup>

The major provisions of the new bus law provide for greater freedom to enter markets, flexibility in setting fares, increased ability to exit markets if the service burdens interstate commerce, preemption of certain state regulatory controls and the elimination of antitrust immunity in the determination of rates.

The law also provides for labor protection similar to that afforded in the rail and airline industries. Laid-off bus drivers and

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60. 49 U.S.C.A. § 10706(e)(3)(E) (1983).

61. 49 U.S.C.A. § 10708(d)(4) (1983).

62. 49 U.S.C.A. § 10708(e) (1983).

63. 49 U.S.C.A. § 10935(a) (1983).

64. 49 U.S.C.A. § 11501(e) (1983).

other employees are put on a preferential hiring list.<sup>65</sup> No substantial displacement allowances are scheduled to be paid to the former employees; evidently, Congress already felt stung by the labor protection costs of the Conrail legislation.<sup>66</sup> Nonetheless, some labor protection provisions were necessary to ensure against labor's opposition to the deregulation bill. The major opposition was found in the ranks of legislators from rural states who feared loss of service to small towns and cities without air or rail passenger service. These fears are justified. Whereas the old Motor Carrier Act of 1935 left it to the states to determine the needs of their citizens for local service, the new Bus Act proclaims that the Commission may overrule a state regulatory agency's ruling applicable to bus transportation if the ICC finds that the rate or ruling prescribed by a state agency "causes unreasonable discrimination against or imposes an unreasonable burden on interstate commerce."<sup>67</sup> The one-sided appeal process for carriers means virtually unrestrained freedom to exit markets, given the pro-deregulation tendencies of the current membership of the Interstate Commerce Commission.<sup>68</sup>

It should be emphasized that what has happened to the bus industry is not deregulation but reregulation. The Federal government has preempted state authority over motor carriage. It is now easier for a new carrier to gain entry and easier for existing carriers to offer promotional discount fares or to raise regular rates for its captive travelers. But the ICC still stands as the ultimate arbiter of the motor coach industry. It is neither removed from the picture (as with Amtrak) nor abolished (as with the Civil Aeronautics Board).

## VII. EXPERIENCE SINCE THE BUS ACT

On the face of it, little has changed in the passenger transportation scene since the passage of the Bus Regulatory Reform Act of 1982. Greyhound still dominates the transport scene, with Trailways following a distant second. States have entered the bus busi-

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65. Bus Regulatory Act of 1982, Pub. L. No. 97-261, § 27, 96 Stat. 1126 (1982).

66. Thoms, *What Price Labor Protection?*, TRAINS, June 1982, at 47.

67. 49 U.S.C.A. § 11501(e) (1983).

68. See P. DEMPSEY, *TRANSPORTATION DEREGULATION—ON A COLLISION COURSE?* 38-45 (1983).



ness, usually in commuter service areas.<sup>69</sup> Intermodal terminals are still few and far between, although some through-ticketing between Amtrak and motor carriers is found.<sup>70</sup> The companies seem to have given up on their fight to curtail Amtrak's activities.<sup>71</sup> Few intercity bus companies serve airports; and commuter airlines, rather than buses, have been the beneficiaries of the trunk airlines' discontinuances of service to smaller cities.

Trailways moved to expand its system in certain areas served formerly by Greyhound alone, such as upstate New York. Greyhound, on the other hand, has used the appeal provisions of the Act to have the ICC review the decisions of state regulatory authorities which refused to allow the big carrier to discontinue marginal routes. At least one international route has fallen by the boards, as Greyhound successfully appealed an unfavorable Minnesota Public Service Commission decision to the Interstate Commerce Commission and has discontinued an East Grand Fork-Noyes route that formed a vital part of a through Fargo-Winnipeg line.<sup>72</sup> In some cases lines abandoned by Greyhound have been picked up by local operators. Fares have generally risen throughout the Greyhound system, although some promotional fares have been offered.

The most dramatic event to follow bus deregulation was not directly related to the Regulatory Reform law. Greyhound's drivers struck the system in November 1983, protesting management's new contract offer which would cut wages more than 10% and shift the cost of some fringe benefits from the employer to the employees. The strike, settled 47 days later, was a defeat for the union.<sup>73</sup> During the strike, Greyhound began partial operations with temporary replacements—but not all over the system. (Service did not return to North Dakota until shortly before New Year's Eve).

69. New Jersey Transit is now the largest state-owned bus line. In 1984, orders were completed for the largest number of intercity buses from one factory—Motor Coach Industries of Pembina, N.D. These buses are to be owned by the Port Authority of New York and New Jersey and leased to NJ Transit. *Grand Forks Herald*, January 12, 1984, at 1, col. 1.

70. Intermodal through rates and routes are the preferred policy of Congress. See 45 U.S.C.A. § 546(j) (1983).

71. Amtrak's rates now have to meet some type of criterion concerning passenger loss per mile, which meets some of the bus companies' objectives. See, 45 U.S.C.A. § 564(d) (1983).

72. ICC Order MC-1515, Sub. 340 (1983). See *TRAFFIC WORLD*, Nov. 21, 1983, at 19.

73. *TRAFFIC WORLD*, Nov. 17, 1983, at 34; *Id.* Nov. 21, 1983, at 19.

Upon resumption of service, Greyhound offered  $\frac{1}{3}$  off tickets to be used on future trips.

Greyhound's actions in reducing its labor costs came on the heels of a similar effort by Continental Airlines, which had used a bankruptcy petition as a way of avoiding its collective bargaining contracts. Greyhound cited reduced-fare competition from the airlines as a reason for its actions and said it needed a lower wage structure to remain competitive in intercity markets.

Temporary authority was given to local carriers to operate during the strike by the ICC or state public service commissions,<sup>74</sup> but these carriers by and large ceased operations when Greyhound was back in business. It is suggested that many of those carriers derived substantial revenue from their Greyhound connections and did not care to antagonize the big carrier.

For whatever reason, Greyhound has not faced too much additional competition due to the relaxed entry provisions of the bus deregulation law. The situation can be contrasted with the new entrants in aviation. Even though a luxury bus costs less than 10% of the price of an airliner, the skies have been filled with new carriers—from the no-frills service of People Express to the aristocratic pretensions of luxurious Regent Air. By contract, few new bus liveries are being painted on the sides of the latest models off the assembly lines at the Motor Coach Industries plant in Pembina, N.D. Of course, neither airlines nor bus lines have brought forth a new nationwide system—and many critics of the industry suggest that the new entrants are apt to do no more than skim the cream off available traffic.<sup>75</sup>

The major means of intercity transportation in the United States is the private automobile. Without a government policy favoring a strong intermodal passenger transportation system, the surface passenger may well regard himself as a second-class citizen. It is to be hoped that a deregulated bus system will not leave him bereft of any affordable transportation.

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74. Sometimes the new carriers end up having the larger company's unwanted service delegated to them. See *TRAFFIC WORLD*, Jan. 9, 1984, at 26; Temporary Auth. Order, N.D. P.S.C., Nov. 1983.

75. See *DEMPSEY*, *supra* note 68, at 27-29.