THE INTERSTATE COMMERCE COMMISSION

- PAST AND PRESENT -

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March, 1993

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EXECUTIVE SUMMARY

The Interstate Commerce Commission (ICC) was created by Congress in 1887 under the Interstate Commerce Act. The primary responsibilities of the ICC were to control competition and stabilize rates for a then monopolistic rail industry. The ICC's responsibilities were later extended to motor carrier, barge, and airline industries.

In recent decades the ICC has undergone reform in its regulation of the transportation industry. The process of converting the transportation industry's highly regulated environment to a deregulated, competitive market, is the product of several legislatively enacted administrations and ICC members.

As a new administration takes office, it is important to understand the evolution of the ICC and the administration's influence on ICC operations. Powers allowing the President and the Senate's Surface Transportation Subcommittee to approve nominations for the ICC provide the most visible opportunity for influencing the ICC's philosophy and actions, and thus the regulatory environment for the transportation industry.

INTRODUCTION

The Interstate Commerce Commission (ICC) was created by Congress in 1887 as an arm of the Interior Department. The primary duty of the ICC was to control competition and rates within the railroad industry, because it was then perceived to be a natural monopoly. As technology advanced during the early 1900's other modes (eg. truck and barge) began to offer railroads competition. The trucking industry used cost and service advantages to haul commodities relatively short distances, while the barge industry used a largely subsidized inland waterway system to compete for shipping a share of the bulk commodities. The agenda of the ICC has evolved from controlling a monopolistic railroad sector to directing intra- and intermodal competition. As the ICC accepted more involvement in the transportation industry, they also accepted more responsibility for determining resource allocation.

For the first half of the 20th century the ICC and the executive branch held close to their conviction that regulation was a necessity in the transportation industry. This philosophy was challenged by the executive branch in 1950, and since then there has been a slow process directed at converting the ICC into a pro-reform group. This paper provides background for understanding the establishment, and changes in the responsibilities and philosophy of the ICC. As will be addressed in the following pages, the objective of reform for the ICC and the transportation sector has spanned across several presidencies and ICC commissioners in both major political parties.

ESTABLISHMENT OF THE ICC

The Interstate Commerce Commission (ICC) has played a key role in shaping the transportation industry in the United States. Regulation of railroads was proposed because they were able to capture economies of scale for shipping commodities, making them a natural monopoly at the end of the 19th century. Initially, the ICC was supported by railroads, shippers and economic theory in its objective of controlling competitive practices and stabilizing rates. The rail industry had tried self-policing methods - pools and cartel agreements - as a means of stabilizing rates, but these had failed. Railroads eventually supported government involvement, seeing it as a method of increasing profitability by eliminating rate cutting. Federal legislation forbidding rebates and price discrimination was also supported by many shippers who saw these practices as unfair influences on the competitiveness of their firm. So although higher rates may be associated with the greater degree of regulation, shippers were more concerned with the equity of rates relative to their competitors.

On February 4, 1887 President Grover Cleveland signed the Interstate Commerce Act (ICA). The ICA outlawed pools and rate discrimination - whether by special rates, rebates, drawbacks, or long-short haul abuses - and demanded that rates be 'reasonable and just' and published, and established the ICC as a branch of the Interior Department. The ICA created a five-member commission, and staggered the six-year terms to be served by each member, thus making it highly unlikely that one president would appoint a majority of the members. Two restrictions applied to the ICC appointments were that no more than 3 commissioners were to belong to the same political party and that no member could be connected to the railroad industry.

The ICA authorized that (1) the commission investigate any railroad engaged in interstate commerce and empowered it to compel witnesses to testify and to secure relevant books and papers, (2) if the railroad ignored an ICC decision, the ICC had to petition the appropriate U.S. circuit court 'to hear and determine the matter,' and (3) the ICC could require railroads to submit annual reports and use a uniform accounting system.

Change came quickly to the ICC as the election of 1887 'brought in' a new president, Benjamin Harrison, an ally of the railroad industry. President Harrison promptly reestablished the ICC as an independent regulatory commission. Under this new definition, the ICC was no longer under the Interior Department and the president's direct influence was greatly reduced. Although he was still given the responsibility of appointing members of the ICC, the president was no longer delegated authority to remove commissioners from office or to select the chairman. Commissioners were granted the power to select the chair from among themselves for a one-year term. President Harrison also increased the size of the ICC from five to eleven members, and extended the term of appointment by one year to seven.

EXTENSION OF ICC RESPONSIBILITIES

After these initial changes, the structure and the philosophy of the ICC remained relatively stable for several decades. The next monumental changes came when the regulatory responsibilities of the ICC were extended to the motor carrier industry. In response to the Great Depression of the 1930's, Congress extended federal legislation to the motor carrier industry. The national highway system experienced rapid growth during the first half of the 1900's. Increased accessibility to roads provided shippers with an alternative to rail transportation for marketing commodities. Cheap wages, trucks, tires, and fuel had encouraged an onslaught of new motor carrier operations and even more aggressive competition among operators. The highly competitive nature of the motor carrier industry was creating a very unstable system for rates and services.

Under the Motor Carrier Act of 1935 the ICC was given the power to outline employee qualifications, set maximum hours they could work, and establish motor carrier equipment standards. The Motor Carrier Act regulated minimum rates and accounting procedures of only contract carriers, not private carriers. Soon after the inclusion of the motor carrier industry, barge and airline industries also came under the jurisdiction of the ICC.

CHANGE IN THE STRUCTURE AND PHILOSOPHY OF THE ICC

The degree of executive influence is an important aspect in considering modifications in the ICC's philosophy. The first serious attempt to revise guidelines for the power of the executive branch over the ICC came in 1950. Although it is often a difficult task, presidents have sought to reorganize the executive branch for a variety of reasons. These reasons were identified by Lester M. Salamon as three types of reorganization goals : economy and efficiency, policy effectiveness, and tactical political advantage.

Existing law requires that economy and efficiency be the basis of reorganization. Based on recommendations of the first Hoover Commission[1], an attempt was made to award the president more authority over the ICC. Congress adopted a reorganizational plan that allowed the president to select chairpersons for each of the regulatory commissions. The ICC was exempted from this legislation as a result of strong opposition from the railroad industry.

Kennedy Administration

When President John F. Kennedy was elected a decade later, he decided to examine both the operations and philosophy of the ICC. President Kennedy sought advice from James Landis and John P. Doyle in addressing the disparity surrounding the regulatory environment of the transportation industry. In a December report for the president-elect, Landis criticized the regulatory agencies for their slow and costly procedures, for their temporary solutions, for their failure to develop broad policies and to plan for the future, for their inability to coordinate policy with other regulatory agencies, and for their weak personnel. He suggested an executive office coordinate interagency activities; a permanent chairman for the ICC be given power to appoint personnel and to reorganize the commission to give it positive direction; and to cut the workload at the commission level.[2]

The Doyle report concluded that regulatory policy *has produced a general program of preserving the status quo which is in direct opposition to the overall objective of a dynamic transportation system which can best serve the economy and defense of the country.*[3] The Doyle report proposed that Congress overhaul transportation laws, combine regulatory agencies into a federal transportation commission, and create a new executive department of transportation. The Doyle report supported that transportation regulation is necessary, but powers of regulation should be selective and flexible. The most important topic in the Doyle report was rates. The report advocated that long-run marginal cost be the floor for competitive rate cutting, that no carrier be forced to maintain rates above long-run marginal costs to protect another carrier's traffic, and that service pricing below cost was unfair in intermodal competition.[4]

In 1961, as a response to the Landis and Doyle reports, the ICC reorganized its structure and procedures. It gave the chairman additional powers to appoint personnel, assign tasks, and control the budget. In addition it created the office of vice-chairman to supervise the bureaus, that had each been administered by an individual commissioner, and reduced ICC divisions to three. But the continued annual rotation of the chair and vice-chair essentially negated gains associated with these changes.

This attempt to reorganize did little to improve a disgruntled public. Criticisms of the transportation policy and practices of the ICC were addressed by President Kennedy when he delivered his transportation message to Congress on April 5, 1962. He alleged that *a chaotic patchwork of inconsistent and often obsolete legislation and regulation has evolved from a history of specific actions addressed to specific problems of specific industries at specific times. This patchwork does not fully reflect either the dramatic changes in technology of the past half-century or the parallel changes in the structure of competition.* Kennedy called for more competition and less subsidization and regulation of all modes of transportation. He did want the ICC to continue to regulate maximum rates, but his plan eliminated ICC control of minimum bulk-rates.

Nixon Administration

Although President Kennedy's message called for a lower regulatory profile, notable response did not occur for nearly a decade. In 1969 President Nixon submitted a plan to reorganize the ICC. It was adopted by Congress as *Reorganizational Plan No. 1.* It gave the president power to directly appoint the chair of the ICC. In addition the authority of the chair was extended to include: *(1) the over-all management and functioning of the Commission, (2) the formulation of plans and policies designed to increase the effectiveness of the Commission..., (3) prompt identification and early resolution, at the appropriate level, of major substantive regulatory problems, and (4) the development and improvement of staff support to carry out the duties and functions of the Commission.*[5] Although President Nixon had success in extending executive powers in the ICC, his opportunities for reform were limited under the plan because his appointment to the position of ICC chair was a stanch opponent of deregulation.

Prior to the Reorganization Plan division chairmen had more influence, and their opposition to deregulation had been a major factor in slow response to calls for less government control of transportation.[6] The reorganization of the ICC was a major factor in the paving the road to deregulation of the transportation industry.

Ford Administration

In September, 1974 a Summit Conference on Inflation was held, and based on recommendations of 23 economists President Ford proposed deregulating the truck, railroad, and airline industries.[7] The legislation was held up in committee after being introduced to Congress. Because the ICC did not lend its support to President Ford's plan, Congress was reluctant to accept it. Ford attempted to neutralize the ICC opposition by nominating Robert J. Corber and Betty J. Christian, both advocates of reform, to seats on the ICC. In 1976 Ford also attempted to replace George Stafford by nominating Warren Rudman to the ICC's chair position. Because of the upcoming election Congress did not act on the Rudman nomination, nor did Ford pursue the approval of his deregulatory legislation.

Although sweeping deregulatory legislation was not being accepted by Congress or the ICC, public pressures to find ways to slow inflation did contribute to passage of a major piece of transportation legislation in 1974. The failure of several railroads in the northeast during 1975 and the OPEC oil crisis of 1974 forced Congress and the ICC to enact reforms and alter operations. The Railroad Revitalization and Regulatory Reform Act (4-R Act) was passed in 1976, it was the first signal that Congress may endorse major regulatory reforms. The 4-R Act allowed for more flexibility in rate-setting and eased restrictions on abandonment. The ICC interpreted the act rather restrictively until 1979 when the ICC membership changed to form pro-reform majority.[8]

Carter Administration

With his election in 1976 President Carter was viewed as an ally of those supporting continued government involvement in the transportation industry. President Carter's appointment of A. Daniel O'Neal as ICC chairman was an indication that the new president was not committed to deregulating the transportation industry. O'Neal had a reputation as an opponent of deregulation. O'Neal had instead established his interest in consumer protection. The American Trucking Association (ATA) was satisfied with the selection of O'Neal and were caught unprepared when the ICC initiated a proposal for deregulation.

A major directive for Carter and O'Neal was to increase competition within the regulated trucking industry. This was accomplished by easing entry requirements for trucking firms. By 1979 less than 2 percent of certificates of applications were rejected. When four commissioners left the ICC over the next two years the Carter administration 'silently' exhibited its commitment to smaller government and reform by not filling the vacancies. In December of 1978 Carter indicated plans for a new appointment strategy: *I am very proud that the ICC Chairman, Dan O'Neal, has been very staunch in deregulating the trucking industry. I back him in this. I realize the independence of the regulatory agencies but with my own voice and influence and, my future appointments to the ICC, my intention [is] to continue this trend*.[9]

According to the American Trucking Association (ATA), the ICC had administratively achieved two major aims of deregulation by February 1979, 16 months prior to the Congressional ratification of the Motor Carrier Act (MCA) of 1980. Under the Carter administration, the ICC had greatly relaxed entry requirements and radically changed rate-setting standards.[10] The administration had accomplished this by using its appointment power to remove ex-Chairman George Stafford, the last major internal obstacle blocking deregulation, from his position of authority.

President Carter continued to exercise appointment privileges. In 1979 he nominated Darius B. Gaskins to serve as the new chair of the ICC and Marcus Alexis and Thomas Trantum as commissioners. Each of the three new appointees had expressed support for deregulation and reform. Carter continued to personally support deregulation ideas and to select 'free market' supporters, by nominating Neil E. Goldschmidt to serve as the new Secretary of Transportation. Goldschmidt was quick to make known his support of deregulation in the industry.

Motor Carrier Act of 1980

The ATA and Teamsters formed a coalition to voice opposition to the deregulation of the trucking industry. The ATA raised about $2 million for the task of convincing Congress and the American people that deregulation was not in their best interests. In January, 1978, Warren Magnuson, an opponent of deregulation, resigned as chair of the Senate Commerce Committee. His replacement was Howard Cannon (D-Nv.), who promptly made his alliances known by indicating he would support the passage of motor carrier deregulatory reform. The House, however, did not share in the Senate's view, and allowed the ATA to write its version of the deregulation bill. The White House pressured James J. Howard, chair of the Surface Transportation Committee, to reject the ATA-sponsored bill. Eventually the House did pass a bill to deregulating the truck industry.

Although there was minimal support in Congress for the proposed motor carrier deregulation, Carter and the ICC made it known that the Commission would continue to deregulate regardless of Congressional support. In May 1979, the ICC's Motor Carrier Task Force published its initial report on regulatory reform. Based on the report O'Neal stated that *it appears that the goals of this program can be reached through administrative actions alone. While legislation confirming the administrative actions could be drafted, we do not believe it is necessary.*[11] Under pressure Congress agreed to Darius B. Gaskins' (incoming ICC chair) proposition that Congress be given until June 30, 1980 to adopt a reform bill. The ICC would wait until this date to continue the process of administratively deregulating the motor carrier industry. In July, 1980 the Motor Carrier Act was signed by President Carter. The MCA provided legislative support for many of the actions already taken administratively by the ICC.

Staggers Act of 1980

During the debate and arbitration of the MCA other major deregulatory legislation was also being deliberated. In February of 1980 the House Transportation and Commerce subcommittee Chairman James J. Florio (D-N.J.), along with Edward Madigan (R- Ill.), released the draft of a railroad deregulation bill. The major differences between the House bill and the Senate bill, that had been held up in committee since December, 1979, was that it addressed joint rates and a cost accounting system for the railroads. The railroads' main opposition to the bill was to the end of general single line rate increases.

In April the Senate passed its version of the railroad deregulation bill after it had been held up in the Senate Commerce, Science, and Transportation Committee because of an amendment by Senator Russell Long (D-La.) that would have put a cap on coal rates for electric utilities as well as other captive commodities. Twenty minutes before floor debate was scheduled Long admitted he did not have the votes needed to carry the amendment and was forced to compromise. Under the agreement, the ICC is to set a revenue-to-variable-cost ratio with regard to a particular commodity, if the charged rate exceeds this amount the ICC *may* investigate.

In July the House approved the Eckhardt-Ranhall amendments that would give the ICC jurisdiction over rail rates for three years that are 160 percent or more above variable cost where there is market dominance. While railroads opposed the amendments, the shippers-receiver groups offered support. September 9, 1980 the House passed its compromised version of the rail deregulation bill with a 337-20 vote. Although the bill had been stalled as parties tried to gain more protection for captive traffic, White House and Cabinet pressure on all parties forced a compromise. The settlement that had been reached was introduced by Harley O. Staggers (D-W.Va.), the chairman of the Interstate and Foreign Commerce Committee, and Representatives Nick J. Rahall (D-W.Va.) and Garly A Lee (R-N.Y.). The bill then cleared the House-Senate Conference, and was sent to President Carter.

On October 14, the Staggers Rail Act of 1980 was signed by President Carter. The President said the act was the *capstone of my efforts to get rid of needless and burdensome federal regulation which benefit nobody and which harm all of us.* ... the act *strips away needless and costly regulations so market forces can come into play.*[12] The critical elements of the legislation were: maximum rate regulation, long term railroad-shipper contracts, allowance for railroads to at least cover their variable costs on joint-one track, and restrictions on rate bureaus.

The conversion of the ICC from an active opponent of deregulation to its strongest proponent played a critical role in promoting the policy of deregulation in Congress.[13] Unlike Nixon's use of budgetary and reorganizational authority, Carter used persuasion to achieve his reform objectives.

THE ICC TODAY

As a new administration moves into the White House, resignations and appointments will affect the composition and philosophy of the ICC. President Clinton maintains that the Reagan-Bush republicans manipulated democratically passed laws in deregulating the transportation industry. Vice-president Gore voted against all the major deregulation legislation during his legislative service. Thus, it seems unlikely that the move to deregulate the transportation industry will experience the successes it had under the last democratic administration.

Beyond the administrative philosophy, a critical indicator of how the government will treat the deregulation issue is the composition of the ICC. The ICC has five members, with the administrative party allowed a one-person majority. To secure a seat on the ICC, individuals are originally nominated by the president. A confirmation hearing is then held before the Senate Commerce, Science, and Transportation Committee's Surface Transportation Subcommittee. Largely based on the outcome of this hearing the full Senate votes on the nominee.

Subcommittee approval of a candidate generally ensures a successful Senate vote. The chairperson of the Subcommittee is influential in the nomination proceedings. During the Bush administration, Senator J. James Exon (D-Ne.) chaired the Subcommittee, his opposition to two members - Heather Gradison and Fredric Andre - contributed to the refusal of the Senate's Commerce, Science, and Transportation Committee to approve either member for renomination.

Upon approval, the member's term begins. The ICC terms are five years long. If a member resigns before the end of a term, the individual replacing that commissioner serves the remainder of the departing commissioner's five year term.

Currently the commission membership consists of two democrats and three republicans.

The current list of Interstate Commerce Commissioners includes:

Gail McDonald (D),
J.J. Simmons III (D),
Edward J. Philbin (R),
Karen Phillips (R), and
Gregory Walden (R).

Gail McDonald was approved for her ICC seat in 1990. Ms. McDonald had the support of Senator Exon for the chair position at the ICC under the Clinton administration, and was recently named interim chair. Prior to her ICC responsibilities, she had little background in either truck or rail transportation, having worked mainly with the energy industries. Ms. McDonald stated that *the principal mission...of the ICC is to balance and accommodate the interests and needs of the people and businesses participating in the surface transportation system when those needs and interests compete and conflict.*[14] As the interim chair Ms. McDonald has indicated that the ICC will concentrate its efforts on adjudication rather than deregulation.

J.J. Simmons III began his first ICC term in 1982. He has a long history in government. He was appointed vice-chairman of the commission in 1989, under the Bush administration. Although a democrat, Mr. Simmons was a long-time friend of President Bush, contributing to his election by raising campaign funds.

Edward J. Philbin chaired the ICC during 1990-91. He took over responsibilities of Heather Gradison after the White House refused to renominate her. When he took the seat he said that he was against the ICC setting a policy independent of Congress or allowing ICC staff to make rulings that commissions rubber-stamp because they do not have the time to read the cases. Mr. Philbin is a proponent of deregulation, especially in the motor carrier industry.

Karen Phillips replaced Malcolm Sterret (a Reagan nominee) in 1988. She stated at her confirmation hearing that she favored the dissolution of the ICC. Ms. Phillips joins Mr. Philbin in supporting the move to reduce motor carrier's tariff-filing requirements and barriers to entry. The approval of Ms. Phillips to her seat was seen by some industry analysts as 'a restoration of the *Gang of Three*, Republican majority, that has been pro-industry, pro-deregulation, and anti-labor.'

Gregory Walden was named to a vacant seat in the ICC in January, 1993. He was named to the post by outgoing president Bush. The appointment did not require Congressional approval because the president has the power to fill vacancies at independent regulatory agencies while Congress is not in session. Mr. Walden will serve for up to one year without Senate confirmation or until a successor is nominated and approved.

SUMMARY

The ICC was created in 1887 as an arm of the Interior Department. Its primary responsibility was to regulate a then monopolistic rail industry. Today the ICC is an independent regulatory agency that is an influential force in intra- and intermodal competition for the entire transportation industry. The responsibilities and the philosophies of the ICC were at times quite rigid, but public pressure has forced the ICC to consider flexible decision making, directed at the long-term health of the entire transportation industry.

A new administration will likely change the administrative and congressional philosophy toward the transportation industry. The extent to which deregulation is supported will probably affect the direction of ICC decisions. The ultimate strategy for handling deregulation has been in past administrations, however, held by the ICC members. Thus, nominations by President Clinton and the Senate's Surface Transportation Subcommittee confirmation process will be the primary mechanisms for steering the future regulatory environment of the transportation industry.

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