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PUBLIC UTILITY REGULATION AND THE FEDERAL ANTITRUST LAWS

THE current vigorous enforcement of the federal anti-trust laws by the Government has pointed to the necessity of examining the general problems involved in the relationship of these antitrust laws to regulation by the several federal public utility commissions.

The subject will be considered along with three broad topics: the philosophy underlying the conflict between free enterprise and monopoly; the nature of the federal anti-trust acts; and the relation of the federal antitrust laws and their enforcement to public utility regulation by national agencies.

I.

Rival Theories—Free Competition vs. Monopoly

The possibility of dual regulation of the public utilities, *i.e.*, control by both the regulatory commission and the antitrust authorities, has been the subject of strong comment by a number of both public utilities and antitrust authorities. Thus, E. A. Smith, Senior Attorney of the

*The opinions expressed in this article are the personal ones of the writer and are not to be construed as reflecting the views of any federal agency.

Illinois Central System, enunciated the following apropos of this matter in an address delivered at the annual convention of the Public Utility Law Section of the American Bar Association:¹

An eternal question in economics and consequently in legislative policy and law, is whether competition or regulation better protects the public interest in commerce and industry. Students of public utility law have assumed that the state legislatures and the Federal Congress made the choice between what Chief Justice Stone once called "rival philosophies" in so far as public utilities are concerned when they passed laws providing for the comprehensive regulation of public utilities and carriers.

But the antitrust division of the United States Department of Justice now thinks otherwise. That division is now urging for the first time in almost half a century that carriers regulated by the Interstate Commerce Commission are subject to regulation in respect to the same rates by the division through its power to enforce the Sherman Antitrust Act. This contention raises novel and important questions of great concern, not only to carriers but to shippers. It presents the question whether the nation's carriers are to be subjected to two different and inconsistent policies of regulation, one administered by an agency of Congress, and the other by an agency of the Executive.

In his provocative book on transportation, subtitled an exposé of monopoly control, written about five years ago, Arne Wiprud, formerly a Special Assistant to the Attorney General in the Antitrust Division, Department of Justice, flatly stated:²

There is a widespread belief that public utilities, particularly transportation, are immune from the provisions of the antitrust laws because they are regulated industries. This view is maintained despite the fact that courts have repeatedly and consistently refused to recognize such a plea whenever carriers have been charged with violations of the antitrust laws.

¹ Smith, *The Application of the Antitrust Laws to Regulated Industries*, 14 I. C. C. PRACT. JOUR. 181 (1946).

² WIPRUD, *JUSTICE IN TRANSPORTATION* 101 (1945).

However, Charles D. Drayton in his book, *Transportation Under Two Masters*, written about a year later, was diametrically opposed to Wiprud, contending that:³

The real purpose of that act [Sherman Antitrust Act] was to preserve competition in a field *not subject to any sort of regulation* and wherein the only restraint upon the fixing of unreasonable prices was competition. (Emphasis supplied.)

Mr. Justice Stone added the judicial touch to this controversy between the two authorities seeking control of certain aspects of utilities' activities when he stated in a leading antitrust case that there was "a choice between rival philosophies" and that "it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."⁴

It appears that there is no unanimity among those who have studied the problem of dual control of regulated industries. The proponents of the theory that there should be dual regulation in this field of business feel that there should be "continuing oversight of its regulatory agencies"⁵ by the Antitrust Division under the Federal antitrust acts. The opponents of dual regulation, on the other hand, believe that such control would have the "effect of forcing indiscriminate, helter-skelter, hit-or-miss competition"⁶ of the regulated enterprises. Precedent favors the proponents.

II.

The Nature of the Three Federal Antitrust Acts

The Sherman Antitrust Act of 1890 was designed to prohibit restraints of trade and monopolies in interstate com-

3 DRAYTON, *TRANSPORTATION UNDER TWO MASTERS* 13 (1946).

4 *United States v. Trenton Potteries Co. et al.*, 273 U. S. 392, 397, 398, 47 S. Ct. 377, 71 L. Ed. 70 (1927).

5 WIPRUD, *op. cit. supra* note 2, at 170.

6 DRAYTON, *op. cit. supra* note 3, at 3.

merce. The basic provisions of the Act are Sections 1 and 2. Section 1 provides:⁷

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Act provides:⁸

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Several comments on these two sections are noteworthy. In a book entitled *The Bottlenecks of Business*, Mr. Thurman Arnold, the then head of the Antitrust Division, stated:⁹

This is the plain intention of Congress in providing for criminal penalties, i.e., to put a hazard on private combination—to compel businessmen to move with caution.

And Mr. Wiprud noted that "All of the important prosecutions by the Department of Justice, however, are under the original"¹⁰ Act—i.e., the Sherman Act as distinguished from the Clayton Act of 1914. The comments on this act by Drayton are also of interest.¹¹

⁷ 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. § 1 (1946).

⁸ 26 STAT. 209 (1890), as amended, 15 U. S. C. § 2 (1946).

⁹ ARNOLD, *THE BOTTLENECKS OF BUSINESS* 141 (1940).

¹⁰ WIPRUD, *op. cit. supra* note 2, at 101.

¹¹ DRAYTON, *op. cit. supra* note 3, at 15.

Under the Sherman Act . . . no administrative body was appointed; *we repeat, the object was not regulation but extirpation of "trusts" capable of suppressing competition.* Jurisdiction remained in the courts to entertain complaints against persons or "trusts" seeking to restrain or monopolize trade. The Act contemplated that the natural forces of competition should be permitted to protect the public against higher prices likely to result from such practices. It was assumed that economic progress would be promoted under the theory of the survival of the fittest. If one competitor suffered extinction in this battle royal it was assumed that such incidental loss would not have widespread effect. The general public interest was of paramount importance.

The conduct condemned by the Sherman Act falls into two general categories: (1) restraint of trade, and (2) monopoly. What is restraint of trade and what is monopoly are left undefined by the statute. It is only when this statute is read in the light of the body of judicial authority contained in the antitrust cases decided since 1890, that there is given to it concrete meaning not apparent on its face. The Department of Justice, specifically the Antitrust Division, has the powers to enforce this act. It is the function of a prosecuting authority to develop the most effective method of using the procedure which has been given it. The tools of the Antitrust Division are the grand jury and the suit in equity. Violators of the first three sections of the Act are subject to criminal penalty.¹² The fourth section gives the Government the additional power to enforce the Act by civil proceedings, without penalty.¹³

¹² The third section applies the Sherman Act specifically to the District of Columbia. There, interstate commerce is not necessary.

¹³ 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. § 4 (1946). It provides in part: "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited . . . and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

In expressly providing for civil as well as criminal enforcement, the Sherman Act departs from the ordinary conception of the enforcement of the criminal law. But, an anti-trust violation is not an ordinary crime. Violation is an economic offense. The criminal procedure puts a hazard on unreasonable business combinations by penalizing past misconduct, while the civil action gives the court of equity power to maintain competition in the future, or to reestablish it when it has been destroyed.

Concerning enforcement, one more comment from Arnold's book is quite pertinent:¹⁴

A large permanent staff in the field is not necessary. One or two men located in the larger cities to receive complaints . . . would be sufficient. . . . With such an organization we could change what is now an unorganized protest into an intelligently organized enforcement movement. With various existing consumer groups, such as farmers, consumer associations, trade associations, women's clubs, state and *federal officials*, retailers, manufacturers, wholesalers and unemployed persons disseminating information gathered by the resident field staff, profiteering would become unprofitable. (Emphasis supplied.)

From this, it would seem that the Justice Department expects other federal officials to cooperate in the antitrust enforcement.

Now what about the Clayton Act of 1914? Wiprud stated that "the provisions of the Clayton Antitrust Act, passed in 1914, supplement the Sherman Act."¹⁵ Arnold added:¹⁶

That is all there is to the Act [Sherman Antitrust Act] itself. Supplementing these provisions, the Clayton Act was passed in 1914. *The Department of Justice and the Federal Trade Commission have concurrent jurisdiction to enforce this Act*, the Department by judicial proceedings and the Commission by administrative proceedings subject to court review. Administrative power was conferred upon

¹⁴ ARNOLD, *op. cit. supra* note 9, at 203.

¹⁵ WIPRUD, *op. cit. supra* note 2, at 101.

¹⁶ ARNOLD, *op. cit. supra* note 9, at 136.

the Commission upon the theory that this procedure is more adequate to deal with some of the business problems presented than the judicial process. (Emphasis supplied.)

Section 2 of the Clayton Act relates to price discrimination.¹⁷ Henderson in his excellent book on the Federal Trade Commission commented upon this section:¹⁸

Putting aside for the moment a definition of the word "unfair," it is obvious that a case involving such practices may be dealt with, according to the circumstances, under Section 5 of the Federal Trade Commission Act, or under Section 2 of the Clayton Act, or under both sections. If the price tactics involve discrimination, a question arises under Section 2 of the Clayton Act, which prohibits discrimination in price where the effect may be to substantially lessen competition or tend to create a monopoly. If the discriminatory price tactics are aimed against one or more competitors, the same state of facts may also give rise to a proceeding under Section 5 of the Federal Trade Commission Act. If no discrimination is involved, but merely an "unfair" manipulation of the general price level, the case can be dealt with, if at all, only under Section 5 of the Federal Trade Commission Act. The typical case, however, could be dealt with under either section, and it is the usual practice of the Commission, unless there are special reasons to the contrary, to include in the same complaint a count charging discrimination under the Clayton Act, and a count charging an unfair method of competition.

Section 3 of the Clayton Act deals with exclusive or "tying" contracts and is particularly noteworthy because this type of contract is used by all sorts of businesses, regulated as well as unregulated.¹⁹ Section 7 of the Clayton

¹⁷ 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13(a) (1946).

¹⁸ HENDERSON, *THE FEDERAL TRADE COMMISSION* 247 (1924).

¹⁹ 38 STAT. 731 (1914), 15 U. S. C. § 14 (1946): "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged thereof, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, mer-

Act forbids intercorporate stockholding between competing corporations, whether directly or through a holding company, where the effect may be to substantially lessen competition between the corporations involved, to restrain trade, or to tend to create a monopoly.²⁰ Section 8 prohibits interlocking directorates between companies of which any one has a capital surplus and undivided profits over \$1,000,000 where the companies are competitors.²¹

The above sections of the Clayton Act, together with Section 5 of the Federal Trade Act,²² are under the permanent administration of the Federal Trade Commission. The administration of Sections 7 and 8 present a somewhat peculiar situation. When two competitors consolidate, or by agreement restrict or eliminate competition, there is a definite wrong to the public which relies upon competition as the regulator of the quality and price of commodities. Such conduct, it would appear, is peculiarly within the province of the Sherman Act, with which, of course, the Federal Trade Commission has no concern. Yet, the FTC, under Sections 7 and 8, has a part in the administration of the consolidations.

The procedure before the Federal Trade Commission has been delineated by Henderson:²³

All formal proceedings before the Federal Trade Commission must be set in motion by a complaint issued by

chandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

²⁰ 38 STAT. 731 (1914), 15 U. S. C. § 18 (1946).

²¹ 38 STAT. 732-3 (1914), as amended, 15 U. S. C. § 19 (1946).

²² 52 STAT. 111, 1028 (1938), 15 U. S. C. § 45 (1946). In part it provides: "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts, to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921 . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

²³ HENDERSON, *op. cit. supra* note 18, at 49.

the Commission, and served on the person complained of, embodying the Commission's charges and setting a day for a hearing. No one else can initiate a complaint. An individual aggrieved by an act of unfair competition or by a practice condemned in the Clayton Act may of course bring the matter to the Commission's attention and request that a complaint issue, but he does not thereby become a formal party to the proceeding. He has no remedy if the Commission refuses to issue a complaint, and no control over the prosecution of the case if a complaint is issued.

The Federal Trade Commission is authorized to file a complaint only when it "shall have reason to believe" that the above-mentioned sections have been or are being violated. There appears to be no limitation upon the means by which the Commission acquires information of the violations. It might be acquired by personal observation of the commissioners, from the daily press, or through, as is the case in practice, sources of information organized by the Commission.

It is to be emphasized that under both the Clayton Act and the Federal Trade Commission Act, all that the Commission's order can do is to direct the respondent to "cease and desist" from the unfair practice, and if the order concerns Section 7 or 8 of the Clayton Act, to divest of itself of the stock held or require the resignation of the directors chosen contrary to law. The Commission cannot compel restitution, and no damages can be awarded or mandatory order entered. Where an unfair act has already accomplished its purpose, and there is no threat of repetition, the Commission cannot give relief.

III.

National Regulatory Functions and Federal Antitrust Enforcement

The regulation of the transportation industry by the Interstate Commerce Commission in its relation to the

three Federal antitrust acts furnishes significant materials for the study of the dual control situation.

The Interstate Commerce Commission has ruled in numerous cases that it has nothing to do with the enforcement of the Sherman Antitrust Act.²⁴ In fact, it was claimed that the Commission is without authority to determine if the antitrust act has been violated, and the most it could do would be to lay the proof disclosed by investigation before the Attorney General. In one of these cases, the Commission succinctly stated:²⁵

It is suggested that the rates now in force . . . are unlawful because the lower rates were withdrawn as the result of an agreement between the defendant companies, which violates the anti-trust law. . . .

The real difficulty is that the Commission has no authority to administer the anti-trust law [Sherman Act], or even to determine whether that law has been violated. A court of general jurisdiction could do so, *but not an administrative body whose power is limited by the law which created it.* (Emphasis supplied.)

Over forty years later, the Supreme Court of the United States reached the same conclusion as to the powers of the Interstate Commerce Commission under the Sherman Act. In the opinion of that case, which approved consolidation of railroads thereby creating a partial monopoly, Mr. Justice Rutledge opined:²⁶

To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to

²⁴ *Sprigg v. Baltimore and O. R. R.*, 8 I. C. C. 443 (1900); *China & Japan Trading Co. v. Georgia R. R.*, 12 I. C. C. 236 (1907); *Warren Mfg. Co. v. Southern Ry.*, 12 I. C. C. 381 (1907).

²⁵ *Sprigg v. Baltimore and O. R. R.*, *supra* note 24, at 456.

²⁶ *McLean Trucking Co. v. United States et al.*, 321 U. S. 67, 79-80, 64 S. Ct. 370, 88 L. Ed. 544 (1944).

execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned . . .

Not only has the Interstate Commerce Commission stated that it had no power to enforce the Sherman Law, but it had, quite early, declared that proceedings to enforce the act are only cognizable in the courts.²⁷

The Federal Trade Commission Act specifically exempts common carriers from the corrective as distinguished from the investigative action of the Federal Trade Commission. Prior to the approval of the Motor Carrier Act of 1935,²⁸ motor carriers were subject to the jurisdiction of the FTC in both investigative and corrective action directed against unfair trade practices forbidden by the Federal Trade Commission Act. But the situation has changed. In an

²⁷ *Central Yellow Pine Ass'n. v. Illinois Cent. R. R.*, 10 I. C. C. 505, 540-1 (1905); "We deem it unnecessary to express an opinion as to whether this concert of action in fixing the advanced rate amounts to an unlawful agreement under the so-called 'Anti-Trust Act'—the enforcement of that act being a matter properly cognizable by the courts." Also see *Tift v. Southern Ry.*, 10 I. C. C. 548, 579 (1905).

²⁸ 49 STAT. 543 (1935), 49 U. S. C. §§ 301, 302 (1946).

article written in 1935, the Honorable Robert E. Freer, a member of the Commission, commented:²⁹

Because of the broad definition of the phrase "acts to regulate commerce," contained in the Federal Trade Commission Act, there seems to be no doubt but that interstate common carriers by motor vehicle, upon becoming subject to the jurisdiction of the Interstate Commerce Commission, immediately cease to be longer subject to any part of the Federal Trade Commission Act, except those paragraphs of Section 6 which provide that the Federal Trade Commission, may, upon application to the Attorney General or under direction of the President or the Congress, investigate and report facts relating to violations of the anti-trust acts.

Mr. Freer added:³⁰

The debates in Congress in connection with the Federal Trade Commission Act would indicate that it was the purpose of Congress in 1914 not to have the Federal Trade Commission enter in any way the domain of the regulatory power of the Interstate Commerce Commission.

He substantiated this statement by noting the remarks of Representative Covington, Chairman of the subcommittee which prepared the bill (FTC Act), who stated that the committee had no desire to encroach upon the regulatory province of the ICC. In relating the duties of Interstate Commerce Commission to the Federal Trade Commission Act, it must be realized that the interstate *contract motor carriers*, although they also became subject to the jurisdiction of the Interstate Commerce Commission under the Motor Carrier Act of 1935, are subject to the concurrent jurisdiction of the Federal Trade Commission since only *common carriers* were expressly exempted in the Federal Trade Commission Act.

There is not much doubt that the Interstate Commerce Commission has now become the enforcing authority of the Clayton Act obligations of interstate carriers subject to

²⁹ Freer, *The Relation of Federal Anti-Trust Laws to Interstate Motor Transportation*, 2 FED. B. J. 247 (1936).

³⁰ *Id.* at 248.

the jurisdiction of that Commission under the Motor Carrier Act of 1935. This is reasoned on the basis that Section 11 of the Clayton Act of 1914 vests in the Interstate Commerce Commission the enforcement of Sections 2, 3, 7, and 8 of the Clayton Act "where applicable to common carriers."³¹ As noted above, Section 2 prohibits discrimination in prices;³² Section 3 contains prohibitions against "tying" or exclusive leases, sales, or contracts;³³ Section 7 restricts certain stock acquisitions;³⁴ and Section 8 forbids interlocking directorates.³⁵ Section 11, it is to be noted, also vests the enforcement of Sections 2, 3, 7 and 8 of the Clayton Act in the Federal Communications Commission "where applicable to common carriers engaged in wire or radio communication or radio transmission of energy"; in the Civil Aeronautics Authority "where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938"; in the Federal Reserve Board "where applicable to banks, banking associations and trust companies"; and in the Federal Trade Commission "where applicable to all other character of commerce." Public utilities such as electric and gas companies, are not provided for in a similar fashion by Section 11.

The best summary of the relation of the Interstate Commerce Commission's regulatory functions to Federal anti-trust enforcement is to be found in the already-mentioned article by Commissioner Freer, who stated:³⁶

³¹ 38 STAT. 734 (1914), 15 U. S. C. § 21 (1946). It provides in part: "That authority to enforce compliance with sections two, three, seven and eight of this Act [Clayton Act] by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended. . . ." The rest of the Section provides for similar enforcement authority of wire and radio communication and transmission carriers, air carriers, banks and trust companies by the national agencies vested with the general regulatory powers over the subjects.

³² 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1946).

³³ 38 STAT. 731 (1914), 15 U. S. C. § 14 (1946).

³⁴ See note 20 *supra*.

³⁵ See note 21 *supra*.

³⁶ See FREER, *supra* note 29, at 248.

I expect to suggest to you that the Interstate Commerce Commission regulation displaces that of the Federal Trade Commission in respect of unfair competition of common carriers leaving contract carriers subject to both; that it transfers enforcement duties under the Clayton Act from the Federal Trade Commission to the Interstate Commerce Commission in respect of common carriers, but leaves in the Federal Trade Commission those duties in respect to contract carriers, and that while the Sherman Act still applies to all motor carriers, common and contract carriers are in some particulars given exemption therefrom because of the ICC regulation.

Since this resumé was written by one of the heads of the Federal Trade Commission who was intimately concerned with the exercise of duties given to his agency in relation to the work of the Interstate Commerce Commission, it is of especial significance.

The Federal Communications Commission also has an additional role in the enforcement of the antitrust acts. By the provisions of Section 313 of the Communications Act of 1934, the Commission is authorized to withhold radio station construction licenses from violators of the anti-trust laws.³⁷ This section makes the federal antitrust laws applicable to radio communication and apparatus.³⁸ The

³⁷ 48 STAT. 1086 (1934), 47 U. S. C. § 311 (1946). In part it provides: "The Commission (FCC) is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313 of this title, and is authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive tariff arrangements, or by any other means, or to have been using unfair methods of competition. . . ."

³⁸ 48 STAT. 1087 (1934), 47 U. S. C. § 313 (1946). It provides in part: "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceeding brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any

validity of the provisions of Section 311 have already been tested in the Supreme Court in the case of *National Broadcasting Co. v. United States et al.*³⁹ There Mr. Justice Frankfurter stated:⁴⁰

That the Commission [Federal Communications Commission] may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity" . . . Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce.

Closely following the above statement, the learned Justice commented on the functions of the Communications Commission, by quoting with approval from the Commission's Report on Chain Broadcasting:⁴¹

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. . . ."

This pronouncement makes the Sherman Act truly assume the characteristics of a "charter of freedom,"⁴² which affects the national Government in all its works.

matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease. . . ."

³⁹ 319 U. S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1943).

⁴⁰ *Id.* at 222-3.

⁴¹ *Id.* at 223.

⁴² Hughes, C. J., in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 359, 53 S. Ct. 471, 77 L. Ed. 825 (1933).

*United States v. Borden Company et al.*⁴³ illustrates in a more positive manner the influence of the antitrust laws upon the regulatory functions of a Government agency. There the Secretary of Agriculture ran afoul of the federal anti-monopoly statutes by the overzealous application of the Agricultural Marketing Agreement Act of 1937.⁴⁴ The Supreme Court, through Chief Justice Hughes, said:⁴⁵

That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.

The Securities and Exchange Commission's functions under the Public Utility Holding Company Act of 1935⁴⁶ were scrutinized in a law review article published about a year ago:⁴⁷

Two other features of the Utility Act are worthy of mention whenever antitrust problems are being considered. The first is the effective reliance under the Utility Act upon an administrative body for enforcement. The SEC was given the task of solving the "essentially economic and administrative problems for which in the Sherman Act cases (the court) had no assistance except that of opposing counsel." Congress had intended that the FTC perform a similar function under the Sherman Act, since the courts and the Department of Justice were not considered as fitted for the reconstruction and constant supervision over business organizations required. The failure of the courts

⁴³ 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181 (1939).

⁴⁴ 48 STAT. 31 (1933), as amended, 50 STAT. 246 (1937), 7 U. S. C. § 601 (1946).

⁴⁵ See note 43 *supra*, 308 U. S. at 200.

⁴⁶ 49 STAT. 803 (1935), 15 U. S. C. § 79 *et seq.* (1946).

⁴⁷ Trienens, *The Utility Act as a Solution to Sherman Act Problems*, 44 ILL. L. REV. 337 (1949).

to call upon the FTC for advice may indicate the desirability for placing the primary responsibility upon an expert body rather than upon the Department of Justice and the courts.

In view of the hitherto vigorous Government antitrust campaign, the foregoing statement appears more as an expression of pious hope rather than an indication of a current trend.

Section 10(h) of the Federal Power Act in establishing the basis on which licenses are to be issued by the Federal Power Commission provides:⁴⁸

Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

The origins of this section appear to go back as far as 1914, an unprecedented year for the champions of the anti-monopoly theory. It is quite possible that "restraint of trade" in this section connotes the same thing that is meant by the phrase in the Sherman Antitrust Act. Legislative terminology has a rather enduring quality. The Justice Department and not the Commission has the duty of enforcing the federal antitrust laws. But here, under Section 10(h) the Commission has a similar duty to perform in the public interest. Proper performance of this duty would necessitate a prohibition on a licensee selling electrical energy in restraint of trade. Thus the Antitrust Division in the "Blue book" on the federal antitrust laws considers this section as a related law.⁴⁹

Section 20(a) of the Natural Gas Act relating to the "Enforcement of Act; Regulations and Orders" provides:⁵⁰

The Commission may transmit such evidence as may be available concerning such acts or practices [under the

⁴⁸ 41 STAT. 1068 (1920), as amended, 49 STAT. 842 (1935), 16 U. S. C. § 803 (1946).

⁴⁹ CCH, *THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES*, 6, 53 (1949).

⁵⁰ 52 STAT. 832 (1938), 15 U. S. C. § 717(s) (1946).

Natural Gas Act] or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

This provision recognizes that the Federal antitrust laws *are applicable* to the natural-gas companies. The fact that the Federal Power Commission is a regulatory body and may have its own particular conceptions of regulation makes no difference if the transaction involved is a violation of antitrust laws.

The belief, still existing in some quarters, that public utilities are immune from the provisions of the federal antitrust laws because they are industries already being regulated by national administrative agencies is entirely unfounded. From the early years of the operation of the Sherman Act, the Supreme Court has refused to recognize the immunity of carriers which have been charged with violations of the antitrust acts.⁵¹ The other public utilities must, therefore, be considered in no better position than the carriers in the application of these laws. As a matter of fact, the writers of a number of authoritative law review articles have pointed out that the antitrust laws have been applied with greater strictness to carriers than to unregulated industries. One author declared:⁵²

But the railroad cases really are in a class by themselves. They are public utility cases. The units were tangibly immense. And there was a recognition that the units themselves were monopolistic. This might have led the court to the conclusion that the Sherman Act did not apply or if it did apply then it did so with greater leniency than elsewhere. But the contrary was the result. Possibly the feeling was that it is better not to add one monopoly to another. . . . And the basis for the treatment is probably the same—a franchise has been given;

⁵¹ *Georgia v. Pennsylvania R. R., et al.*, 324 U. S. 439, 456, 65 S. Ct. 716, 89 L. Ed. 1051 (1945); *McLean Trucking Co. v. United States*, 321 U. S. 67, 86, 64 S. Ct. 370, 88 L. Ed. 549 (1944).

⁵² *Levi, The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153, 157 (1946-47).

it is necessarily monopolistic; an attempt to extend the franchise will be carefully scrutinized.

Another writer remarked:⁵³

To this liberal interpretation given the Sherman and Clayton Acts when applied to most branches of commerce, the literal interpretation applied when railroads are involved is in striking contrast. It would seem more natural, with the great power of control afforded the Interstate Commerce Commission over the rates and services of the carriers, that the emphasis on competition would diminish and public protection be sought in the supervision of the Commission. However, the decisions of the Court tend to the opposite. . . .

Nor does approval of a transaction by a regulatory commission exempt the transaction from the antitrust laws.⁵⁴

Further, the regulatory and administrative agencies are required to observe all other laws in the performance of their particular duties. Thus, in *Southern Steamship Co. v. National Labor Relations Board*, the Supreme Court enunciated the following principle:⁵⁵

It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

More specifically, in the *National Broadcasting Co.* case,⁵⁶ the Federal Communications Commission was required, in the exercise of its own statutory duties, to take account of the antitrust laws.

⁵³ See note, *Application of the Sherman and Clayton Acts to Holding Companies Organized by Parent Railroad Corporations*, 78 U. OF PA. L. REV. 652, 654 (1929).

⁵⁴ *Georgia v. Pennsylvania R. R.*, 324 U. S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945).

⁵⁵ 316 U. S. 31, 47, 62 S. Ct. 886, 86 L. Ed. 1246 (1942).

⁵⁶ See note 39 *supra*.

In view of the foregoing, the rule may be generalized: industries, although regulated by specific federal agencies, are not immunized from the purview of the federal anti-trust laws.

Conclusion

Since the carriers and public utilities appear to be within the purview of the federal antitrust laws, it is pertinent to know what the regulatory commissions vested with the administration and regulation of public utility enterprises are expected to do in dealing with antitrust matters. These regulatory bodies are not required to enforce the antitrust laws. All they can do is to lay the proof of an apparent antitrust violation before the Department of Justice. The supporters of the idea that the antitrust authorities should "keep hands off" regulated industries contend that the complete regulation of public utilities would be better accomplished through an administrative tribunal which would be continuously in session and capable of applying from day to day its accumulated experience and expert knowledge of the many and complex questions arising in the regulation of the rates and services of a public utility. Further, they claim that under the Sherman Act there is no such continuous or orderly regulation. But none was contemplated. The object of the Act was not regulation, but the extirpation of "trusts," and that the Sherman law has continually adhered to the classical school of economics which taught that the natural forces of competition should be permitted to protect the public against economic maladjustments resulting from the monopolization of trade. The adherents of this view usually conclude by stating emphatically that the application of the free competition theory as envisioned by the Sherman Act would be disastrous to the public utilities and would result in "cut-throat" competition.⁵⁷

⁵⁷ For an example of such an argument see DRAYTON, *op. cit. supra* note 3, at 15.

They also suggest that administrative body in the proper exercise of its mandatory duties is outside the provisions of the antitrust acts. In support of this proposition is *Parker v. Brown*,⁵⁸ which decided the validity of the enforcement of a state agricultural proration program:⁵⁹

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . .

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .

There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." . . .

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .

Armed with their argument, which is quite sound, and with the above noted decision, certain regulatory bodies are content to disregard antitrust matters, provided they properly and efficiently carry out their statutory duties. In view of the Supreme Court's pronouncements in the *Southern Steamship Company* and *National Broadcasting Company* cases it is rather difficult to state with certainty that the "do-nothing" attitude is a safe course. It must be admitted that the Department of Justice and the Anti-trust Division appear to have been unconcerned about commissions operating under effective organic acts in a very efficient manner. Thus, one authority on transportation has lamented that the Justice Department trusts the Fed-

⁵⁸ 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

⁵⁹ *Id.* 317 U. S. at 350-1.

eral Communications Commission to regulate in respect to telephone and telegraph rates, but does not do so in the matter of carrier rates.⁶⁰ But in this instance, Wiprud has indicated the reason for the antitrust authorities' concern with the Interstate Commerce Commission: "The Interstate Commerce Act does not provide within itself the remedies for the correction of all the evils in rate making which might constitute a violation of the Sherman Act."⁶¹ On the other hand, as far back as twenty years ago, a writer on the antitrust laws as related to public utilities declared:⁶²

What of other types of public service? An increasingly large amount of natural gas is crossing state lines; so also of electricity, about ten percent of which already passes in interstate commerce. There has been considerable restraint of competition in these fields, both by contracts and by direct or indirect mergers. As yet we have no judicial decision on them, as there has been no prosecution, although a series of official investigations is still going on and certain politicians are loudly pounding the tomtoms against "the power trust." What will be the attitude of the Supreme Court of the United States? Will it be as strict as it has been against the transportation utilities, or will it consider that changing times require a different concept of contemporary public policy. Only the future can tell.

Two decades later, the questions raised in the above quotation are still germane, and provide especial concern to those who feel that the antitrust authorities have no business meddling in matters already under regulation.

A really good "out" is, of course, statutory exemption. By this means a regulatory agency can relieve itself from interference from what some utility experts designate as "outmoded" and "archaic" antitrust laws. Wiprud wrote:⁶³

"Regulated" industries are not per se exempt from the Sherman Act. *The regulatory statute must provide for relief*

⁶⁰ See SMITH, *supra* note 1, at 194.

⁶¹ WIPRUD, *op. cit. supra* note 2, at 118.

⁶² Hadley, *Public Utilities and the Anti-Trust Law*, 10 B. U. L. REV. 351 (1930).

⁶³ WIPRUD, *op. cit. supra* note 2, at 114.

in specific terms. And those terms must be followed before immunity can be obtained from the prohibitions of the Sherman Act. (Emphasis supplied.)

He continued:⁶⁴

Since the Antitrust Act is a general prohibition against price fixing, it is applicable in the absence of specific exemption in some other statute. Therefore it is not a question of whether the Interstate Commerce Commission Act prohibits the practice, as the Commission contends, but whether the practice is *sanctioned* by that act.

This method of securing immunity from the antitrust laws is not novel, and has already been achieved through several provisions of law.⁶⁵

The very best manner of coping with the antitrust situation, it is suggested, is for a regulatory agency to set up a definite plan for cooperation with the antitrust enforcement authorities of the Justice Department. In one leading law review article, the authors stated:⁶⁶

It has recently been reported that Mr. Arnold [then head of the Antitrust Division] and Secretary Hopkins [Commerce] have worked out an arrangement whereby the Department of Commerce will assist defendants who wish to open negotiations for settlement by consent [*i.e.*, consent decrees]. The assistance presumably extends to advice on what terms should go into the proposed decree. Whether or not this practice should be formalized by statute as the Antitrust Division has proposed, it gives promise of minimizing the contentiousness of future antitrust proceedings.

Surely, if such an arrangement appeared workable, the administrative and regulatory commissions can devise their

⁶⁴ *Id.* at 116.

⁶⁵ For example, § 5(8) of the Interstate Commerce Act (Bullwinkle Bill) excepting the carrier rate bureaus, STAT. 482 (1920) as amended, 49 U. S. C. § 5 (1946); § 29 of Merchant Marine Act, 41 STAT. 1000 (1920), 46 U. S. C. 885 (b) (1946), from § 1 of the Clayton Act, 38 STAT. 730 (1914), 15 U. S. C. § 12 (1946); § 8(b) of the Agriculture Marketing Act of 1937, 50 STAT. 246 (1937), 7 U. S. C. 608 b (1946) as amended 61 STAT. 208 (1947), 7 U. S. C. 608 b (Supp. 1949), excepting marketing agreements; permitting agricultural producers to act together in associations under § 1 of the Capper-Volstead Act, 42 STAT. 388 (1922), 7 U. S. C. § 291 (1946).

⁶⁶ Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decree*, 53 HARV. L. REV. 386, 392 (1939).

own methods and plans for bringing antitrust matters to the attention of the Department of Justice.

Perhaps the time is not too far distant when the "naive assumption of a sharp dichotomy between competition and monopoly,"⁶⁷ usually made when antitrust cases are decided in the courts, will disappear. A new assumption, more realistic of the actual market-place, could then be made in antitrust cases, particularly those involving industries where a conflict between free competition and sovereign-granted monopoly is ever in issue. If this happens, then Mr. Bernard Baruch will not have to pose the question, as he did in the "Foreword" of Drayton's *Transportation Under Two Masters*, that "It is difficult to see why any branch of the Government, like the Department of Justice, should take action against the railroads which were already subject to the regulation by the Interstate Commerce Commission."⁶⁸ There would also be less occasion to criticize the motives for the Government's antitrust enforcement policy.⁶⁹ If the arbitrary and academic division between concepts of competition and monopoly largely disappears, there could be a more realistic approach to the antitrust problems of the regulated industries. Antitrust authorities and regulatory commissions could meet on common ground to preserve the time-honored antitrust acts. To date this has not been realized in a satisfactory manner.⁷⁰

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⁶⁷ See note, *Preservation of Competition through Federal Antitrust Laws*, 51 HARV. L. REV. 694, 701 (1937).

⁶⁸ See DRAYTON, *op. cit. supra* note 3, at IX.

⁶⁹ MASON, *The Current Status of the Monopoly Problems in the United States*, 62 HARV. L. REV. 1284 (1949).

⁷⁰ The conflict between the antitrust authorities and regulatory commissions is continually cropping up in litigation in Federal courts. The more recent case of *United States v. Inter-Island Steam Nav. Co. et al.*, 87 F. Supp. 1010 (D. C. Hawaii 1950) involved, among other things, the question of primary jurisdiction of the Civil Aeronautics Board under the Sherman Act. The federal district court took a dim view of administrative prerogative

And in the *United States v. Railway Express Agency, Inc.*, 89 F. Supp. 981 (Del. 1950) the district court also took the view that it had plenary jurisdiction in antitrust matters even if there were administrative questions involved.