Entry Control and the Federal Motor Carrier Act of 1980

DONALD V. HARPER*

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* Professor of Transportation and Logistics, College and Graduate School of Business Administration, University of Minnesota.

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I. Introduction

The Motor Carrier Act of 1980 was signed into law by President Jimmy Carter on July 1, 1980. This event was the culmination of a long and controversial effort to reform economic regulation (*e.g.*, regulation of entry, prices, and quality of service) of the interstate for-hire motor trucking industry. It was the first substantial change in the federal regulatory system for motor trucking since the enactment of the Motor Carrier Act of 1935, which instituted federal economic regulation.

From its inception in 1935, there was criticism of federal economic regulation of motor trucking, principally on the ground that the industry (1) was comprised of a large number of relatively small carriers, (2) was basically "competitive," and (3) had none of the characteristics of "public utility" type industries that were usually deemed proper candidates for economic regulation.[1] However, the Interstate Commerce Commission (ICC), which was given the task of carrying out the regulatory system established by Congress, proceeded to establish and develop an elaborate system of regulation.

Efforts to reform the system began to show life in the early 1970's when the U.S. Department of Transportation (DOT) and the President demonstrated serious interest in general transportation regulatory reform (not just in motor trucking) and, ultimately, important members of Congress joined the movement. In the meantime, the ICC, with strong support from the Carter administration, substantially reinterpreted the law in favor of reduced regulation.[2] The bill that was signed by President Carter in July, 1980, was the result of a three-year legislative battle.

Contributing to the eventual success of the reform movement, in addi-

1. Early criticism of economic regulation of motor trucking may be found in Nelson, *New Concepts in Transportation Regulation*, in Transportation and National Policy 197 (National Resources Planning Board 1942) (printed by U.S. Gov't Printing Off.), and Pegrum, *The Economic Basis of Public Policy for Motor Transport*, 28 Land Econ. 244 (1952).

2. An excellent discussion of the administration of the 1935 Motor Carrier Act before and after 1977 through 1979 is Kahn, *Motor Carrier Regulatory Reform—Fait Accompli*, 19 Transp. J. 5 (1979). Recent statutory and administrative changes in federal air and motor truck economic regulation and their impact through 1979 are described in Dempsey, *Erosion of the Regulatory Process in Transportation—The Winds of Change*, 47 ICC Prac. J. 303 (1980).

tion to the support of the executive branch and the personal support of the President and the support of the ICC, were (1) the alleged connection between economic regulation of motor trucking and energy use inefficiency and inflation, (2) the strength of the consumer movement which was anti-transportation regulation (but pro-regulation of consumer safety and other consumer matters), (3) the prior success in enacting airline regulatory reform, and (4) the anti-government, anti-regulation sentiment in the country.

It is the purpose of this article to summarize the entry control provisions of the new Act, to compare them with the legislation that preceded it, and to evaluate the new provisions in terms of their probable effectiveness in achieving the goals that Congress had in mind when passing the legislation.

II. The Issues Involved in Regulatory Reform

The issues involved in the movement toward less or no economic regulation were several.[3] However, the principal criticisms of regulation were that entry control, operating restrictions on carriers, and rate regulation resulted in inadequate incentive to the carriers to exercise managerial initiative and to strive for efficiency. And it was argued that regulation led to poor service, wasteful use of energy (because of under-utilization of vehicles), and high transportation prices. Reformers, therefore, wanted freer entry, freer exit, and more reliance on the market place to determine prices in the motor trucking industry. The critics of economic regulation charged that the reasons for bringing the motor trucking industry under economic regulation do not exist in modern times and, in fact, some critics claimed that such reasons *never* existed at all.[4]

The principal defenders of regulation were the regulated motor trucking companies themselves, as represented by the American Trucking As-

3. There is a tremendous amount of literature on the subject of the need for, criticisms of, and reform of economic regulation of transportation in general. The arguments for and against economic regulation of motor truck transportation are set forth in Steinfeld, *Regulation Versus Free Competition—The Current Battle Over Deregulation of Entry Into the Motor Carrier Industry*, 45 ICC Prac. J. 590 (1978), and Burck, *The Pros and Cons of Deregulating the Trucking Industry*, Fortune, June, 1979, at 146.

4. Writings critical of economic regulation of motor truck transportation include the following: Nelson, *New Concepts in Transportation Regulation*, in Transportation and National Policy 197 (National Resources Planning Board 1942) (printed by U.S. Gov't Printing Off.); Pegrum, *The Economic Basis of Public Policy for Motor Transport*, 28 Land Econ. 244 (1952); Nupp, *Control Over Entry As an Economic and Regulatory Problem*, 35 ICC Prac. J. 591 (1968); Sloss, *Regulation of Motor Freight Transportation: A Quantitative Evaluation of Policy*, 1 Bell J. Econ. & Management Sci. 327 (Autumn 1970); Barrett, *Competition and Controls*, 40 ICC Prac. J. 551 (1973); Palmer, *A Further Analysis of Provincial Trucking Regulation*, 3 Bell J. Econ. & Management Sci. 655 (Autumn 1973); *see also* Senate Comm. on Commerce, Science, & Transportation, Motor Carrier Act of 1980, S. Rep. No. 641, 96th Cong., 2d Sess. (1980); House Comm. on Public Works & Transportation, Motor Carrier Act of 1980, H.R. Rep. No. 1069, 96th Cong., 2d Sess. (1980).

sociations (ATA), which waged a long war against reform. The defenders based their arguments on the claim that freer entry and exit and pricing would result in an excessive number of carriers, destructive pricing, and a deterioration of services to the public. This argument was based in large part on experiences prior to the institution of regulation in 1935. They claimed that carriers would abandon service to undesirable traffic and places, particularly smaller towns, and concentrate their efforts where the traffic was more lucrative. They also disputed arguments that there would be better truck utilization and more efficient use of energy under less regulation, contending that the amount of traffic available is fixed and would be shared by more operators and vehicles under less regulation, resulting in lower load factors and less efficient use of energy. Some defenders of regulation also argued that the survivors in the competitive struggle that would follow regulatory reform would be the giant trucking companies, and that the public would suffer from monopolistic practices at their hands. The defenders of regulation, in other words, were not entirely unified in their arguments—some arguing that there would be a perennial problem of excessive competition and destructive competitive practices and others arguing that the eventual result would be monopoly.[5] Both sides of the controversy offered estimates of the "costs" of regulation to the public or the "benefits" of regulation to the public, none of which had much validity because of the difficulty in making such estimates.

III. An Introduction to the New Legislation

Perhaps because it promised an end to a long, drawn-out controversy over regulatory reform, the bills that became the Motor Carrier Act of 1980 passed with large majorities in both the House of Representatives and the Senate. The ATA actually supported the enactment of the bill that was ultimately passed because it was preferable to a more extreme measure. The ATA also preferred the new law to further destruction of economic regulation by the ICC.

The Motor Carrier Act of 1980 amends and supplements subtitle IV of

5. Arguments in defense of economic regulation of motor truck transportation are presented in the following: Flott, *The Case Against the Case Against Regulation*, 40 ICC Prac. J. 281 (1973); American Trucking Ass'ns, Inc., Transportation—Regulation or Disaster? (1975) (published by the American Trucking Ass'ns, Inc., Washington, D.C.); Hynes, *Small Business and the Deregulation of the Motor Common Carriers*, 15 Transp. J. 74 (1976); N. Glaskowsky, B. O'Neal, & D. Hudson, Motor Carrier Regulation: A Review and Evaluation of Three Major Current Regulatory Issues Relating to the Interstate Common Carrier Trucking Industry (1976) (American Trucking Ass'ns Foundation, Washington, D.C.); American Trucking Ass'ns, Inc., Trucking Regulation: In the Public Interest (1979) (American Trucking Ass'ns, Inc., Washington, D.C.); *see also* Senate Comm. on Commerce, Science, & Transportation, Motor Carrier Act of 1980, S. Rep. No. 641, 96th Cong., 2d Sess. (1980); House Comm. on Public Works & Transportation, Motor Carrier Act of 1980, H.R. Rep. No. 1069, 96th Cong., 2d Sess. (1980).

Title 49, United States Code,[6] containing thirty-six sections dealing with a variety of subject areas including entry control, rate regulation, financial responsibility of carriers, exemptions from regulation, for-hire transportation by agricultural cooperatives, intercorporate private transportation, discrimination, through routes and joint rates, interchanging trailers with railroads, carrier relations with freight forwarders, security issues, mergers, pooling of traffic and revenue, loading and unloading trucks, time limits on ICC procedures, and state regulation and state taxation of motor trucking. With the exception of the philosophy of the Act and the oversight provision, the remainder of this article deals with the entry control provisions of the new law.

In signing the Act of 1980, President Carter said he believed the legislation will reduce consumer costs by as much as eight billion dollars per year and save hundreds of millions of gallons of fuel annually. He also said the Act "will eliminate the red tape and the senseless over-regulation that have hampered the free growth and development of the American trucking industry."[7]

A. *Philosophy of the Act*

Section 2[8] of the 1980 Act states that the new law is part of a continuing effort by Congress to reduce unnecessary regulation by the federal government. The philosophy of the new law, as stated in section 3,[9] is based on the findings of Congress that the 1935 Motor Carrier Act, as amended, was outdated and needed to be revised to reflect the transportation needs and realities of the 1980's. Congress had also found that the existing regulatory structure had tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry. Further, Congress concluded that regulation had resulted in some operating inefficiencies and some anti-competitive pricing. Recognizing the problems created by the ICC's dramatic change in its interpretation of the Act relative to motor trucking since 1977, Congress also concluded that, in order to reduce the uncertainty felt by the transportation industries, the Commission should be given explicit direction for regulation of the motor trucking industry and that the ICC should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation.

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6. In 1978, the Interstate Commerce Act and certain related statutes were recodified, replacing without substantive change the former act with a five-digit numbering system.

7. *Motor Carrier Act of 1980 Signed by President Carter at the White House*, 183 Traffic World, July 7, 1980, at 66.

8. Section 2 does not refer to the Code. Section 1 is the title of the Act.

9. Section 3 does not refer to the Code.

B. *Oversight*

Section 3 of the new legislation addresses the problem of oversight by Congress which emerged during recent years. It provides that the appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of the new legislation, no less than annually for the first five years, to insure that the Act is being implemented according to Congressional intent and purpose.

The prior law contained no such provision. In the author's opinion, this provision is badly needed. There is no question that the independent transportation regulatory agencies have gotten out of the control of Congress and better oversight by Congress is needed to insure, in this case, that the ICC carries out the intent of Congress. A likely problem with the implementation of the Act of 1980 is that the Commission, as presently constituted, will go beyond what Congress intended in reforming regulation and will deregulate to an extent even greater than that provided for in the new law. Whether or not the oversight provided for in the legislation will be effective depends upon how seriously the appropriate authorizing committees view their oversight responsibilities and whether or not they will have the time and the resources with which to carry out the oversight.

IV. Entry Control—Common Carriers

A. *Issuance of Certificates*

The most important aspect of economic regulation of the motor trucking industry has always been control over entry; hence, much of the controversy surrounding regulatory reform concerned the question of entry control. Section 5 of the Act of 1980 amended the Code[10] by providing that the ICC shall issue a certificate of public convenience and necessity to a common carrier applicant if the Commission finds the applicant to be fit, willing, and able to provide the transportation and to comply with the law and the regulations of the ICC and that, on the basis of evidence presented by persons supporting the issuance of the certificate, the service proposed will serve a useful public purpose responsive to a public demand or need, unless the ICC finds that the transportation is inconsistent with the public convenience and necessity. In making this determination, the Commission shall consider and, to the extent applicable, make findings, *inter alia*, on (1) the National Transportation Policy[11] and (2) the effect of issuance of the

10. *See* 49 U.S.C. § 10922 (1979).

11. The National Transportation Policy, 49 U.S.C. § 10101 (1979), was amended by section 4 of the Act to state that it is the policy of the federal government to achieve various noble objectives in regulating motor truck transportation. These objectives are stated in general terms and it is likely that the amendment will have little impact on individual decisions of the ICC, as has been the case in the past with the National Transportation Policy.

certificate on existing carriers; however, the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

Under the old law, the ICC was free to issue a certificate of public convenience and necessity to an applicant to perform common carrier service if the applicant was fit, willing, and able to provide the transportation and conform with the law and the regulations of the Commission, and if the transportation to be provided was or would be required by the present or future public convenience and necessity. The ICC was left to interpret the latter. The important thing to note is that the old law provided that the proposed service was to be required by the present or future public convenience and necessity. The new law insists that a certificate will be issued unless the proposed service will be inconsistent with the public convenience and necessity. Whether or not a useful public need would be served was considered by the Commission under the old law as part of the public convenience and necessity test.

In addition, section 5 of the 1980 Act supplemented the existing law by providing that no motor common carrier of property may protest an application to provide common carrier service by motor vehicle unless it either: (1) possesses the authority to handle, in whole or in part, the traffic in question, is willing and able to provide the service, and has performed service within the scope of the application within the previous twelve-month period or has solicited service during such period; or (2) has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or (3) is granted leave to intervene. No motor contract carrier of property may protest an application to serve as a common carrier. In contrast, prior law made no reference to who could or could not protest a common carrier application.

These provisions are, perhaps, the heart of the new law. Not only is the role of public convenience and necessity changed, as noted above, but the ICC's decision in *Pan American Bus Lines Operation*,[12] traditionally used to interpret the meaning of public convenience and necessity, was formally discarded by Congress. The *Pan American* guidelines provided that the issues of whether existing carriers could provide the service applied for and the extent to which the existing carriers would be harmed by the new entry had to be considered. The Commission itself had already, in recent years, for the most part abandoned consideration of these factors. Whether or not existing carriers could provide the service was discarded entirely as a factor and harm to an existing carrier's *overall* operations had to be shown to carry any weight with the ICC. And the protesting existing common carrier had the burden of proving substantial injury and harm to its

12. 1 M.C.C. 190, 203 (1936).

operations such that it would be contrary to the public interest.[13] In fact, since 1977, the Commission had been approving almost all common carrier applications received. Thus, in effect, the new law provides statutory backing for what was already a fact administratively.

The provision of the 1980 Act dealing with the right to protest a common carrier application reduces the ability to protest and is consistent with recent Commission policy on the question. In November of 1978, the ICC ruled that a protesting carrier had to be participating in the traffic in question in order to protest.[14] Prior to that time, the Commission had been liberal in granting the right to protest to existing carriers, whether or not they were participating in the traffic involved.

These are drastic changes in common carrier entry control; the potential consequences are serious for regulated common carrier trucking companies. The new statute alters the process of regulating common carrier entry from a complex system involving several factors to be considered by the ICC to one in which only two factors need be considered—whether the applicant is fit, willing, and able, and whether the proposed service will serve a useful public purpose responsive to a public demand or need. And the ability of existing carriers to protest is significantly reduced.

In the aggregate, these changes, combined with those discussed below (involving partial exemptions from common carrier entry control, temporary common carrier operating authority, removal of common carrier operating restrictions, and reduced control over contract carrier entry), plus changes in the various complete exemptions from regulation not discussed here, essentially mean that the statutory barriers to entry have been significantly reduced and there is little protection of existing carriers. If, however, the ICC administers the new common carrier entry control provisions in such a way as to examine carefully the fitness and ability to serve of each applicant and the useful public purpose and public need to be served, then there will be an entry control structure that has some meaning. If, on the other hand, the Commission adopts a casual attitude about fitness and ability to serve and finds a useful public purpose and public need in *every* entry control case, then the for-hire common carrier trucking industry will be faced with what would be tantamount to free entry. The existing carriers would receive no protection from competition and the certificates of public convenience and necessity they hold would become worthless.

13. *See* Ex Parte MC-121, Policy Statement on Motor Carrier Regulation, 43 Fed. Reg. 56,978 (1978); Liberty Trucking Co. Extension—General Commodities, 131 M.C.C. 573, 575-76 (1979).

14. Ex Parte 55 (Sub-No. 26), Protest Standards in Motor Carrier Application Proceedings, 43 Fed. Reg. 50,908 (1978).

B. Partial Exemptions from Common Carrier Entry Control

Section 5 of the new law amended the Interstate Commerce Act[15] so that the fit, willing, and able test will be applied in all cases where applications for common carrier authority are filed, but the other provisions regarding entry will not be applied in the following situations: (1) transportation to any community not regularly served by a motor common carrier of property certificated by the ICC; (2) transportation service which will be a direct substitute for abandoned rail service if the community has no rail service at all; (3) transportation for the U.S. Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions; and (4) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds. In addition, owner operators[16] were given special treatment in that they must meet only the test of being fit, willing, and able provided that the transportation they propose is transportation of food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, or agricultural fertilizers, if such transportation is provided with the owner of the vehicle in such vehicle and, after issuance of the certificate, such transportation does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt under the agricultural exemption provision in the Act.

There were no partial exemptions of this kind under the old law. Carriers were either subject to the full entry control requirements or they were completely exempt from them.

The partial exemptions (fit, willing, and able being the only test) for common carrier service to communities without regulated common carrier service or where the service is a direct substitute for abandoned rail service are designed to encourage continued service to small communities under less regulation. It was claimed by the opponents of reform that small communities would not be served by motor trucking companies under less regulation. Unfortunately, by permitting almost free entry into such service, the new Act may merely mean that no carriers would want to serve because there will not be protection from competition for service that may be marginally profitable, at best.

The exemption of government traffic should result in a large quantity of service available to government agencies and increased opportunities for

15. *See* 49 U.S.C. § 10922 (1979).

16. An owner operator, or "independent trucker," is a person who owns a motor truck and operates it himself or herself and carries exempt commodities for hire and/or hires himself or herself and the vehicle to a regulated carrier to carry regulated traffic for hire under that carrier's operating authority.

entry by small and large carriers alike. The loss of traffic by currently regulated carriers could be great.

The exemption of small shipments of less than 100 pounds is designed to encourage service in a traffic area that has had service problems for a long time. The same result may occur, however, as with the partial exemptions for service to small communities discussed above. Even prior to the promulgation of this legislation, the Commission had been granting certificates to anyone applying for small shipment authority without much success, and it is difficult to imagine that anyone would apply for such restricted authority, *i.e.*, the shipments must be of less than 100 pounds and carried in a vehicle in which no one package exceeds 100 pounds.

As to owner operators, the new Act permits them to carry regulated traffic under their own names without meeting all of the usual entry control tests. This is in response, at least in part, to the problems faced by owner operators in recent years and their strikes in 1974 and 1979. The food area offers a great potential market for them and can help agricultural haulers obtain legal for-hire traffic on the back haul from processing centers to rural areas. Their unbalanced traffic problem may also be reduced through their carriage of soil conditioners and fertilizers. Confining them to an amount of traffic not greater than what they carry as exempt haulers limits the partial exemption to owner operators who haul exempt commodities (as opposed to those who work for regulated carriers). The partial exemption may prove to be a great policing and enforcement headache. In any case, the loss of revenue by regular certificated carriers could be substantial if owner operators are willing to apply for certificates and thereby subject themselves to regulation by the ICC. They may choose to pass up the opportunity.

C. Temporary Operating Authority

Section 23 of the new law added a provision[17] that permits the Commission to grant a motor common carrier of property temporary authority to provide transportation service to a place or in an area that has no motor carrier of property service capable of meeting the immediate needs of the place or area. The ICC may grant temporary authority for not more than 270 days and must take action on an application for temporary authority within ninety days after the application is filed. Emergency temporary authority for up to thirty days may be granted in such cases where there is not sufficient time to process an application. Emergency authority may be extended for an additional ninety days. The ICC must take action in emergency authority cases within fifteen days of the time of filing the application.

17. Added to 49 U.S.C. § 10928 (1979).

Prior law established a 180 day maximum on temporary authority with no provision for the extension of time and no provision for granting of emergency temporary authority, although it was often granted by the Commission.

This is another attempt to make entry control more liberal and motor carrier transportation more flexible. It is likely that temporary authority will be very easy to acquire from the Commission, although the need for it will be less since permanent authority will be relatively easy to obtain in a short period of time. By May of 1980 the Commission had already begun to permit its field offices to grant emergency temporary authority for up to thirty days under certain circumstances,[18] had indicated an interest in making temporary authority easier to obtain, and had unsuccessfully tried to eliminate notice to competing carriers before issuing emergency temporary authority.[19]

D. Removal of Operating Restrictions

The Code was amended by section 6[20] of the 1980 Act to require the Commission to eliminate within 180 days gateway restrictions[21] and circuitous route limitations imposed upon common carriers of property, and to implement procedures to process expeditiously applications of individual carriers seeking removal of operating restrictions to provide for final ICC action not later than 120 days (extendable by 90 days) after the date the application is filed with the Commission. The kinds of restrictions to be dealt with have to do with the kinds of commodities carried, service to intermediate points on a carrier's routes, one-way only authority, and territorial limitations. In deciding such cases, the ICC must consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings, and improved efficiency, and it must give special consideration to providing and maintaining service to small and rural communities and small shippers.

Operating restrictions of this kind were permitted under the old law and, in fact, the law required that the Commission was to specify the service to be rendered; however, no specific reference to their severity or removal was included.

The overparticularization of operating authority in terms of what could

18. Ex Parte MC-67 (Sub-No. 5), Temporary Authority Application Procedures, 45 Fed. Reg. 3,580 (1980).

19. *See Court Vacates ICC "Rule" on ETA Notification, Ends Case on T.I.M.E.—D.C. Grant*, 180 Traffic World, Dec. 10, 1979, at 96.

20. *See* 49 U.S.C. § 10922 (1979).

21. A gateway restriction is a requirement that service be through a certain "gateway" point and was often the result of "tacking" of operating authority, *i.e.*, adding two certificates together at a common point.

and could not be done by a regulated common carrier had long been in need of reform.[22] The ICC had begun to eliminate operating restrictions before the legislation was enacted. In late 1979, the Commission began to consider issuing "master" certificates and permits in twelve different commodity fields wherein there would be no geographic restrictions whatever, and it was in the process of granting such master certificates to carry government traffic when the Motor Carrier Act of 1980 was signed by the President. The Commission was also removing gateway restrictions from certificates. In early 1980 the ICC proposed to allow regular route common carriers to operate over the most direct routes between terminal points in their certificates.[23] However, in the 1980 Act, Congress required that *all* gateway restrictions and circuitous route limitations be eliminated within 180 days, regardless of justification for them. This appears to be a less desirable approach than permitting the ICC to decide whether or not and when such restrictions should be removed, as is being done with other kinds of operating restrictions. Moreover, the ICC may not be able to remove gateway and circuitous route restrictions except on a blanket order basis of some kind because of the large number of certificates in its files which the Commission could not physically cull within 180 days. Another possible difficulty is that the ICC may well be deluged with so many applications to remove operating restrictions that it will not be able to handle the flood of paperwork and still meet the 120 day deadline established in the Act.

V. Entry Control—Contract Carriers

A. *Contract Carrier Definition*

Section 10 of the 1980 Act amended the Interstate Commerce Act[24] by redefining contract carriage of property. A contract carrier of property is now defined as a person who provides service under continuing agreements with one or more persons (1) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or (2) designed to meet the distinct needs of each such person. Prior to this amendment, the Act defined a contract carrier in a similar fashion with the additional feature that the continuing agreements were with "a person or a limited number of persons." This provision carries forward the ICC's decision in 1978 to eliminate the "rule of eight" that had previously been adopted by the Commission as a test of how many shippers a carrier could

22. *See, e.g.*, Nupp, *Control of Entry As an Economic and Regulatory Problem*, 35 ICC Prac. J. 591 (1968).

23. Ex Parte MC-136, Direct Routes for Regular Route Movements, 45 Fed. Reg. 19,280 (1980).

24. *See* 49 U.S.C. § 10102 (1979).

serve and still retain the status of a contract, rather than a common, carrier. (See the discussion of contract carrier entry control below.) It means that there is no longer any statutory limit on the number of customers a contract carrier can have, and this could result in overexpansion of the number by some carriers and consequent difficulty for competing common carriers. The ICC may find it necessary to establish a new version of the "rule of eight."

B. Issuance of Permits

The entry control provisions of the old law relative to contract carriers were amended by section 10[25] of the Act of 1980. The new law provides that in deciding whether to approve an application of a person for a permit as a motor contract carrier of property, the ICC shall consider (1) the nature of the transportation service proposed, (2) the effect the granting of the permit could have on the protesting carriers if such grant would endanger or impair their operations to an extent contrary to the public interest, (3) the effect denying the permit would have on the carrier applying for the permit, its shippers, or both, and (4) the changing character of the requirements of those shippers. No motor carrier of property may protest an application to provide transportation as a motor contract carrier of property unless it either (1) possesses authority to handle, in whole or in part, the traffic for which authority is sought, is willing and able to provide the service, and has performed service within the scope of the application within the previous twelve-month period or has solicited such service during such period, or (2) has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic, or (3) is granted leave to intervene.

Prior legislation provided that the Commission could issue a permit to a contract carrier if the carrier were fit, willing, and able and the transportation service to be provided was or would be consistent with the public interest and the National Transportation Policy. These requirements are retained in the new Act. The old law also provided that, in deciding whether to approve an application, the ICC had to consider (1) the nature of the transportation proposed to be provided, (2) the number of shippers to be served, and (3) the effect that granting the permit would have on the transportation of carriers protesting the granting of the permit. There was no reference in the law to the extent of the effect on protesting carriers. The latter two provisions were deleted in the 1980 Act.

The entry of contract carriers will be easier under the new law. The number of shippers to be served is no longer a consideration and the effect on protesting carriers must be contrary to the public interest to warrant con-

25. *See* 49 U.S.C. § 10923 (1979).

sideration by the Commission, while the existing carrier's ability to protest is limited. As to the number of shippers, the ICC had, in 1978, already removed the "rule of eight."[26] The rule, adopted by the ICC in 1962, had provided that a contract carrier usually should serve no more than six or eight shippers unless a very specialized service was involved.[27] However, the Commission will probably be forced to deal with the question of the number of shippers anyway, unless it adopts an attitude of indifference toward maintaining a distinction between contract and common carriage.

C. *Restrictions on Operations*

The Act was amended by section 10[28] of the new legislation to prohibit the ICC from requiring a contract carrier of property to limit its operations to carriage within a particular industry or within a particular geographic area. The ICC may prescribe the person or class of persons to be served by a contract carrier of property.

Under prior law the Commission was required to prescribe various conditions and limitations under which a contract carrier of property could perform service but no specific conditions were prohibited and the Commission could prescribe the number of persons to be served.

These changes allow contract carriers of property more freedom in whom they serve and the number of persons served and will enable them to expand the scope of their operations geographically and otherwise to the detriment of competing common carriers. As has been noted, problems with the number of persons served may develop.

D. *Partial Exemptions from Entry Control*

The Code was further amended by section 10 of the new Act to provide that certain kinds of contract carrier transportation performed by an owner operator, when the owner is in the vehicle, need not be justified by showing that it will be consistent with the public interest, and the ICC need not consider the effect on protesting carriers. The applicant must, however, be fit, willing, and able. This exempt traffic includes food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, or agricultural fertilizers. The annual transportation of this partially exempt traffic (measured by tonnage) shall not exceed the

26. Ex Parte MC-119, Policy Statement Regarding the "Rule of Eight" in Contract Carrier Application, 43 Fed. Reg. 38,756 (1978).

27. Umthun Trucking Co. Extension—Phosphatic Feed Supplements, 91 M.C.C. 691 (1962).

28. *See* 49 U.S.C. § 10923 (1979).

transportation provided by the motor vehicle which is exempt under the agricultural commodity exemption in the Act. Partial exemptions of this kind for contract carriers did not exist under prior law.

Since this amendment allows owner operators to hold contract carrier permits without having met some of the usual entry control tests, it will work to the disadvantage of competing common carriers. The food area offers a potentially large market for owner operators, and all of the partially exempt traffic offers possibilities to balance their traffic. However, it may be that owner operators will forego this opportunity to carry regulated traffic because of the cost of subjecting themselves to interference by the ICC. In addition, the exemption may be difficult to police in terms of limiting it to no more traffic than that carried in exempt commodities.

E. *Conversion of Contract Carriers to Common Carriers*

The Act of 1980 in section 10 added a new provision to the Code[29] to the effect that if the Commission determines that the operations of a contract carrier of property or any part thereof do not conform to the operations of a contract carrier and instead are those of a common carrier of property, the ICC may amend or revoke the permit or part thereof to conform the operations to those of a contract carrier. The Commission may issue in place of a revoked permit or part thereof a certificate which authorizes operations as a common carrier.

The old law provided an amendment and revocation power but without specifying operation as a common carrier as a possible reason for amendment or revocation. However, such could be done under the old law.

This addition to the law is necessary in view of the fact that the ICC no longer has specific authority to prescribe the number of persons to be served by a contract carrier of property. The provision may get extensive use and present considerable legal difficulty.

VI. Dual Operation

The Interstate Commerce Act was amended by section 10[30] of the Act to permit dual operation as both a common carrier of property and a contract carrier of property. Further, a person holding both a certificate as a common carrier and a permit as a contract carrier may transport property under the certificate in the same vehicle and at the same time as property under the permit. In contrast, dual operation was prohibited under the Act of 1935 except where the ICC would find good cause consistent with the public interest to allow it.

29. *See* 49 U.S.C. § 10925 (1979).
30. *See* 49 U.S.C. § 10930 (1979).

The new provisions go beyond the Commission's 1978 decision to allow dual operation except in situations where it could be shown that there is a "realistic opportunity" for rate or service discrimination to occur.[31] Prior to that time, dual operation was prohibited by the ICC if there was a "mere possibility" that a carrier would unjustly discriminate against a customer. Dual operation was permitted usually only where the services involved were not competitive (*i.e.*, different commodities and/or routes were involved).

The possible danger here is discrimination between customers who buy basically the same service but are served by a common carrier or a contract carrier, depending upon how the carrier wants to serve them, and the carrier has the opportunity to offer different rates and services accordingly. This is made more likely by allowing activity as both kinds of carrier in the same vehicle at the same time, which is permitted under the new Act. It also presents great enforcement problems for the Commission in the area of unjust discrimination.

VII. Master Certificates and Permits

Section 5[32] of the new Act provides that with respect to common carrier applications, the ICC may not make a finding relating to public convenience and necessity which is based upon general findings developed in rulemaking proceedings. Section 10 of the new law amended the Code[33] to the effect that, with respect to applications for permits as contract carriers of property, the Commission may not make a finding relating to the public interest which is based upon general findings developed in rulemaking proceedings. The previous law made no mention of these matters.

These provisions prohibit the Commission from issuing so-called "master certificates" and "master permits," which constitute operating authority granted after the ICC has made a general finding that granting of certificates or permits to carry a given kind of traffic would not be inconsistent with the public convenience and necessity (certificates) or the public interest (permits). Individual certificates or permits would not be issued. Applicants would merely make application and they could begin operations shortly thereafter unless some unusual circumstance prevailed. The ICC, in 1980, was considering issuing master certificates and permits for nationwide authority to carriers involved in certain kinds of traffic[34] and had already done so for common carriers of government freight.[35]

31. Ex Parte 55 (Sub-No. 27), Dual Operations, 43 Fed. Reg. 14,664 (1978).
32. *See* 49 U.S.C. § 10922 (1979).
33. *See* 49 U.S.C. § 10923 (1979).
34. Ex Parte MC-135, Master Certificates and Permits, 44 Fed. Reg. 57,139 (1979).
35. Ex Parte MC-107, Transp. of Gov't Freight, 45 Fed. Reg. 3,586 (1980). When the 1980 Act was passed, the ICC said that all notices of applications for master certificates to carry govern-

The issuance of master certificates and permits was one of the reform proposals most threatening to the regulated trucking industry, and the industry fought very hard against it. The prohibition of master certificates and permits in the new law prevents almost automatic entry for large numbers of carriers and helps to keep intact at least a semblance of an entry control system.

VIII. Entry Control—Brokers

Section 17[36] of the 1980 Act provides that the ICC shall issue a license to a person to be a motor carrier broker for transportation of property (other than household goods) if the Commission finds the applicant to be fit, willing, and able to be a broker and to comply with the law and regulations of the Commission. Prior law included this limitation in addition to the requirement that the transportation for which the person is to be a broker will be consistent with the public interest and the National Transportation Policy.

Even prior to the promulgation of the Motor Carrier Act of 1980, the ICC had indicated interest in deregulating entry of brokers. This provision is consistent with the relaxation of carrier entry control contained in other provisions of the Act, and it will certainly make entry into transportation brokerage easier. This, combined with the increasing difficulty of managing and marketing motor carrier service in a less structured regulatory environment, could lead to a growth in the number and size of motor carrier brokers as more smaller carriers rely on them as a source of traffic.

IX. Small Community Service Study

Section 28[37] of the Act of 1980 requires the ICC to study motor trucking service to small communities, with emphasis on those of 5,000 or less population, and to submit findings to the President and to Congress by September 1, 1982. The study is to include an analysis of (1) the common carrier obligation to provide service, (2) whether the Commission is enforcing such obligation, (3) the extent to which motor carriers were providing such service prior to the enactment of the Act, and (4) ways to ensure maintenance of service to small communities. The Act also authorized to be appropriated for fiscal years 1981 and 1982 such sums as are necessary to pay for the study.

One of the issues in the reform controversy was the effect of reform on small communities—the anti-reformers claimed that such service would be reduced as carriers concentrated their efforts on more lucrative larger com-

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ment traffic that had been submitted to the Federal Register would be approved. Others were to be dismissed.

36. *See* 49 U.S.C. § 10924 (1979).

37. Section 28 does not reference the Code.

munities and heavy traffic routes. Studies were cited to "prove" both sides of the argument. Properly done, the study provided for in the 1980 Act should help to resolve this controversial issue and to ensure that small communities are properly served by motor carriers of property.

X. Time Limits on ICC Procedures

Section 25[38] of the new law contains several procedural reforms for non-rail cases. The more important changes are mentioned here. Where there is an oral hearing or the Commission has found the issue to be of general transportation importance, the ICC must complete all evidentiary proceedings within 180 days and issue an initial decision in writing within 270 days following institution of the proceeding. In all other proceedings, an initial decision must be issued in writing by the 180th day following institution of the proceeding. An initial decision becomes a final decision on the twentieth day after it is served on the interested parties unless an appeal is filed or the Commission stays or postpones the decision. If a timely appeal is filed, the final determination shall be made not later than the fiftieth day after the appeal is filed. If a further hearing is involved, a final decision must be made within 120 days following the date the further hearing is granted. Other changes have to do with reopening proceedings, granting rehearings, and the effective date of final decisions.

These time limits do not apply to entry control cases involving modification of restrictions on motor carrier operations, issuance of temporary authority, and formal investigations by the Commission. In these situations, the Act provides for specific time limits. Prior law did not contain time limits on entry control cases.

Time limits on ICC proceedings were needed, but the limits set forth in the 1980 Act are liberal and may not do much to speed up Commission action. What the work load of the ICC will be under reformed regulation is difficult to predict, and the time limits established in the new law may or may not be practical. Much of this will be determined by how the Commission responds to the Act of 1980. If the ICC decides to use as little of the authority that it now has as is possible, the activity of the Commission may be less than in the past and these time limits may be easily complied with.

XI. Conclusions

The Motor Carrier Act of 1980 added a number of new subject areas to the statute regulating entry into the motor trucking industry, areas that had not been previously dealt with in the law. These include provisions dealing with partial entry control exemptions, favorable treatment of owner

38. *See* 49 U.S.C. § 10322 (1979).

operators, required removal of operating restrictions, conversion of contract carriers to common carriers, prohibition of master certificates and permits, time limits on ICC decision making, and a required study of service to small communities.

In addition, the Act substantially amended provisions of the prior law on entry control, such as factors to consider in entry control of both common and contract carriers, issuance of temporary operating authority, dual operation as both a common carrier and a contract carrier, and entry of brokers. Thus, it may be concluded that the Act of 1980 significantly changed the structure of regulation of entry into the motor trucking industry.

And yet much of what Congress did in the Act of 1980 relative to entry control had already been done, at least in part, or was shortly to be done, by the ICC; hence, the Act merely endorsed what already was or was soon to be. The subject areas where this occurred include the tests for common carrier entry, the removal of operating restrictions, permitting dual operation as both a common carrier and a contract carrier, the tests for entry of brokers, making it possible for agricultural haulers to carry some regulated traffic on the back haul, removing the restrictions on the number of shippers to be served by a contract carrier, and issuance of temporary operating authority. Similar to the experience with the Civil Aeronautics Board and the airline deregulation legislation of 1977 and 1978, this was a rare case when a regulatory agency was way ahead of the legislature and led the way to substantial change in the statute. In only one important area did Congress reverse a policy that the Commission had been fostering—that of issuing master certificates and permits.

Did the Motor Carrier Act of 1980 reduce the amount of regulation of entry into the motor trucking industry? It did so in several areas. The most notable are in the factors to consider in entry control of both common carriers and contract carriers and the removal of operating restrictions. Other areas where there is less regulation are in the number of shippers served by contract carriers and in the control of entry of brokers.

At the same time, the Act of 1980 provided that the ICC will have more authority in several areas not related to entry control. These include the areas of control of transportation performed by agricultural cooperatives, financial responsibility (with DOT), rate bureau procedures, monitoring allowances for pickups when zone pricing is used by a seller, guidelines for entertainment expenses, through routes and joint rates, loading and unloading vehicles, and written contracts between shipper and carriers. In addition, the Commission is required to make several studies (loading and unloading vehicles, state regulation, service to small communities) which will add to its involvement in regulation. Consequently, it is difficult to conclude that the Commission will be less involved in the affairs of motor trucking companies in the future.

That the ICC will not have a less responsible role or an easier time of it in the future is further indicated by the administrative and enforcement obligations it has under the new law. Although a reduction in some kinds of regulation will reduce the Commission's work load, and it is expected that most Commission cases will be handled under modified procedure with hearings only in extraordinary circumstances, several features of the Act result in an additional administrative burden that will be substantial. As to entry control, these include handling the flood of applications for operating authority under the liberal entry provisions of the Act and the job of removing operating restrictions.

Several changes made in the Act of 1980 will lead to difficult policing and enforcement problems for the ICC. In connection with entry control, they include enforcing the conditions necessary to qualify for a partial exemption as to entry control (*e.g.*, transportation to replace abandoned rail service, transportation of small packages), preventing unjust discrimination by carriers holding dual operating authority as both a common carrier and a contract carrier, preventing contract carriers from becoming common carriers without the proper operating authority, and policing mixed loads to prevent exempt carriers from carrying regulated commodities they are not authorized to carry. Thus, the ICC may be as busy as ever in the future, although the character of the work will be somewhat different, and the job of regulating the motor trucking industry may be no less difficult.

A critical aspect of the Act of 1980 is how the ICC interprets its various provisions and how efficiently the Commission works. The success or failure of the Act will be largely determined by the Commission. As in any regulatory system, the persons performing the regulating are more important to its success than the law upon which the regulation is based.

As to interpretation of the Act by the ICC, although the Act of 1980 is more specific in what Congress wants done than most other transportation regulatory legislation has been, there is still room for considerable "interpretation" by the ICC. Should the Commission choose, it can interpret the new law in such a way as to produce almost total deregulation of entry, even though beyond the intention of Congress. If the oversight provision of the Act does not protect against this, the determination of the future of economic regulation of motor trucking will be left by default to the ICC.

What about oversight? Senator Howard W. Cannon (D., Nev.), in commenting on the Act at the time of its passage by Congress, was quoted as saying, "In the legislation we admonish the ICC to follow the directives of the new law faithfully—and we mean it. We [the Senate Commerce, Science, and Transportation Committee] intend to hold oversight hearings at

least once a year over the next five years."[39] The likelihood is that the ICC will try to go as far as possible to deregulate trucking and that oversight will be concerned with that kind of problem. The oversight provision of the Act may turn out to be the most important of all. But will Congress really put in the time and effort to exercise effective oversight?

The problem with oversight is that it can take considerable time and effort on the part of the legislators. And it is clear that in this day of show business politics, there are few votes and no glamour in legislative oversight, as compared with writing new legislation. Instead, oversight can be difficult and dreary work. In addition, oversight of the ICC and its interpretation of the Motor Carrier Act of 1980 is not likely to be a high priority item for Congress because motor trucking regulation, although its impact on the public can be important, does not rank with inflation, the defense budget, and other conspicuous domestic issues in terms of public, and hence Congressional, interest.

Immediately after the new law was signed by the President, the ICC took steps to carry out the provisions of the Act. The Commission sought public comment on a number of proposals for implementing the new law,[40] continued proceedings which were in line with the provisions of the Act, and discontinued its proceeding on master certificates and permits for twelve proposed specified fields of transportation.[41] These and other steps taken in the first few months following the signing of the Act indicate that the Commission will probably stretch the reduced regulation aspects of the new law to the limit in order to deregulate the motor trucking industry as much as possible. Evidence of this in the entry control area is found in the Commission's intention to use very broad descriptions of commodities and territories in operating authorities, its lack of consideration of protesting carriers in entry control cases, the large proportion of applicants that have been admitted, and its flexible rules for owner operators when attempting to qualify for authority to carry food and other items on back hauls. Congressional oversight is likely to be given a severe test by the Commission.[42]

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39. *Truck Deregulation Bill Is Passed by Congress, Sent to President*, 182 TRAFFIC WORLD, June 30, 1980, at 11.

40. *See ICC Plans at Least 25 Rulemakings as a Result of Motor Carrier Act*, 182 TRAFFIC WORLD, June 30, 1980, at 15; *ICC Moves Swiftly to Implement New Motor Carrier Act; Initiates Major Changes in Regulatory Policy*, TRANSP. TOPICS, July 7, 1980, at 1.

41. Ex Parte MC-135, Master Certificates and Permits, 44 Fed. Reg. 57,139 (1979); *see Comments Sought on ICC Proposals Implementing Motor Carrier Act*, 183 TRAFFIC WORLD, July 14, 1980, at 36.

42. President Ronald Reagan will have the opportunity to appoint several new members to the ICC. Should he choose to do so, he could slow down or stop the Commission's efforts to totally deregulate the trucking industry by appointing, with the consent of a Republican-controlled Senate, persons not committed to that goal. Or he could continue the Carter policy of appointing those who are in agreement with a philosophy of deregulation. The latter is more likely to be the case.

Some questions may be raised concerning the Act of 1980. First, how will the trucking industry react to the new law over time? If the new law is administered in such a way as to virtually eliminate meaningful entry control (and regulation of rates and the rate bureau method of establishing rates collectively), the trucking industry may decide that total free enterprise would be better than a regulatory structure that is burdensome (*e.g.*, regulating financial responsibility, security issues, accounts, and mergers) but does little to help the carriers (*i.e.*, no meaningful entry control and rate regulation). The industry may then work to have all regulation repealed.

Second, will reform of economic regulation produce the societal benefits claimed for it? Will it result in eight billion dollars in savings for consumers and save substantial amounts of energy, as was claimed? Will it improve service to the public and hold rates down? Or will it lead to poor service, rates that are too high (or too low), no energy savings, and no savings to the consumer? And will it result in less or more regulation and red tape overall?

Third, is the Motor Carrier Act of 1980 a large step toward total deregulation of the motor trucking industry? Three possible developments could lead to total deregulation. If the ICC proceeds to seek total deregulation and administers the law accordingly, and Congress does not exercise adequate oversight, virtual total deregulation may occur. Or, if the Commission adheres to the intent of Congress and the reforms in the Act actually prove to be effective in improving motor truck service and rates, without substantial damage to the trucking industry, a next logical step might be further decontrol by Congress. Finally, as noted above, the trucking industry itself might strive for total deregulation if it finds the present situation under the new law intolerable, with many disadvantages and few advantages in regulation for the carriers.

The Act of 1980 retains statutory economic regulation of the trucking industry, including entry control, although news reports and statements by government officials at the time of its passage and signing made it look as though regulation had been abolished. A good deal of statutory regulation remains and, in fact, a case could be made that a net reduction in total regulation has not been accomplished but, instead, reduction in some aspects and increases in others took place.

But the new law is a giant step toward regulatory reform. In the most important aspect of economic regulation of motor truck transportation—entry control—Congress went very far toward free enterprise, perhaps too far, and it is this part of the new law that will be the most important in determining its success or failure.

It is difficult to conceive of an effective, workable regulatory system where there is not some control over entry. How, for example, can a regulatory agency establish a level of rates that is reasonable to the public if it is

necessary to have the rate level produce adequate revenue for an excessive number of carriers? And would it be possible to effectively regulate financial responsibility, security issues, accounting systems, quality of service, non-discriminatory service, and other matters without some control over the number and quality of carriers? And would there be any point in worrying about such things as partial exemptions, numbers of shippers served by contract carriers, operating restrictions, or any other aspect of the entry control picture if the Commission admits virtually all who apply for anything anywhere any time?

If the dire predictions of open entry opponents prove accurate, the Act will be a failure, regardless of the outcome of rate regulation and other features of the Act. And the openness of entry depends in large part on the ICC.

Overall, the Motor Carrier Act of 1980 is a well written, well structured, and comprehensive law. Several problems and weaknesses[43] in the law relative to entry control have been noted above but it is, in general, a carefully drafted piece of legislation. Congress has provided what appears to be a generally workable law that, given reasonable interpretation by the ICC, can provide substantial regulatory reform without destroying the regulatory system altogether.

43. A weakness in the new law not discussed here is its lack of consideration of the intermodal consequences of the legislation, *i.e.*, its impact on other modes of transportation, particularly railroads, and to what extent it will influence economic regulation of other modes.