Washington Law Review

Volume 45 | Number 4

6-1-1970

Administrative Law—Common Carriers—Route Certification: Regulated Competition Favored under Public Convenience and Necessity Standard—Black Ball Freight Service, Inc. v. Washington Utilities and Transportation Commission, 74 Wn. 2d 871, 447 P.2d 597 (1968)

anon

RECENT DEVELOPMENTS

ADMINISTRATIVE LAW—COMMON CARRIERS—ROUTE CERTIFICATION: REGULATED COMPETITION FAVORED UNDER PUBLIC CONVENIENCE AND NECESSITY STANDARD—*Black Ball Freight Service, Inc. v. Washington Utilities and Transportation Commission*, 74 Wn. 2d 871, 447 P.2d 597 (1968).

Plaintiff was a large, diversified land and water carrier operating throughout the Puget Sound area. Since 1962, when it absorbed the only other motor carrier providing such service, plaintiff had had the sole certification for "regular route, scheduled service" between south Kitsap County and the city of Seattle.[1] When the Washington Utilities and Transportation Commission [hereinafter cited as W.U.T.C.] granted additional "regular route, scheduled service" authority for the same area to one of the plaintiff's motor freight competitors, plaintiff filed suit to have the board's decision declared invalid. Plaintiff argued that the W.U.T.C.'s finding that "adequate" service was being given in the area precluded any additional certification, and that his high operating ratio[2] and possible loss of revenue would necessarily lead to such a deterioration of service as to require denial

1. The area was also served, however, by a variety of smaller irregular route and non-scheduled carriers.

2. Black Ball Freight Service, Inc. v. Washington Util. and Transp. Comm'n, 74 Wn. 2d 871, 881 n.3, 447 P.2d 597, 600 n.3:

> The operating ratio is the percentage of costs and expenses to total revenues received. An operating ratio of 98 per cent means that expenses and depreciation amount to 98 per cent of total revenues and that there is a net profit of only 2 per cent.

The I.C.C. has explained the utility of an operating ratio in Middle West General Increases, 48 M.C.C. 541, 552-553 (1948):

> In industries where the amount of investment is large in relation to total costs, the rate of return on investment generally has been accepted as appropriate for determining revenue needs. In such industries the risk is related more to the amount of the investment and less to costs. On the other hand, where the amount of the investment is relatively small in relation to total costs, investment is not the primary factor in determining revenue needs. . . . The owners of motor carriers can hardly be expected to look to the return on the amount of their investment as an incentive where the principal risk is attached to the substantially greater amount of expense.

Thus the special economic characteristics of the motor carrier industry demand careful scrutiny of the revenue and expense margin to guarantee sufficient revenue to meet current operating expenses. While the I.C.C. considers an operating ratio of 93 to be reasonable for motor carriers, state commissions often use higher ratios ranging from 95 to 98. C. PHILLIPS, THE ECONOMICS OF REGULATION 275 (1965).

of applicant's petition for increased authority. The Washington Supreme Court *held*: a possible loss of revenue and the existence of presently adequate service does not prevent authorization of additional competition required by present or future public convenience and necessity. *Black Ball Freight Service, Inc. v. Washington Util. and Transp. Comm'n*, 74 Wn. 2d 871, 447 P.2d 597 (1968).

The *Black Ball* decision is the Washington court's first interpretation of a 1963 amendment providing that a permit shall be issued to a common carrier only when its operations[3]

> are or will be required by the present or future public convenience and necessity, otherwise such application shall be denied.

Prior to the 1963 "public convenience and necessity" amendment, various criteria such as "sound economic conditions," "efficient service," "reasonable charges," and "public interest" had been employed by the legislature to regulate motor carrier certification.[4] Early Washington cases based on these standards had been generally protective of existing carriers' regulated monopolies,[5] and had not been explicitly overruled by such later cases as *State ex rel. Adams Transp., Inc. v. Wash. Public Service Comm'n*,[6] which upheld

3. WASH. REV. CODE § 81.80.070 (1969), *as amended by* ch. 242, [1963] Wash. Sess. Laws.

4. *See* Comment, *Standards For The Granting of Motor Carrier Operating Authority*, 38 WASH. L. REV. 465, 466-71 (1963); and D. HARPER, ECONOMIC REGULATION OF THE MOTOR TRUCKING INDUSTRY BY THE STATES, 62-66, 119-21 (1959) [hereinafter cited as HARPER], for a summary of the different statutory standards and administrative policies utilized by the Washington transportation commissions from 1920 to 1963.

5. Taylor-Edwards v. Dept. Pub. Serv., 22 Wn. 2d 565, 157 P.2d 309 (1945), and State *ex rel.* Morrison v. Dept. of Transportation, 32 Wn. 2d 580, 202 P.2d 916 (1949), were two early cases which marked Washington's transportation policy as favoring "regulated monopoly." In both decisions, the court and commission were solicitous of the existing carriers' business, refusing to authorize new competition because the existing carriers would lose revenue and customers, and because the applicant had not shown present services to be inadequate in the areas for which he applied. For a more detailed explanation of the decisions see Comment, *Standards For The Granting of Motor Carrier Operating Authority*, 38 WASH. L. REV. 465, 468-469 (1963).

6. 54 Wn. 2d 382, 340 P.2d 784 (1959) [hereinafter cited as *Adams*]. This case dealt with the transfer of an authority to carry bulk cement to another permit holder over the protests of other competitive carriers. Construing the "Declaration of Policy" in WASH. REV. CODE § 81.80.070, the *Adams* court noted that the state constitution prohibited monopolies, and that the real purpose of the act was not the protection of existing carriers from competition, but the avoidance of "unfair or destructive competitive practices." The court felt these prohibited practices would only encompass

> such competitive practices as would impair the transportation service available to the public. The fact that competition might be injurious to the respondents is of no moment unless it would have that result.

54 Wn. 2d at 385, 340 P.2d at 786.

beneficial competition. However, in *State ex rel. Bremerton Transfer & Storage v. Wash. Util. and Transp. Comm'n*,[7] a case decided in 1966 under the pre-1963 statutory language, the court noted parenthetically that the new "public convenience and necessity" standard overruled part of the *Adams* decision. The implication was that the amendment would be construed conservatively insofar as competition was concerned,[8] despite an increasingly liberal transportation policy espoused in other states, in the federal courts, and by the national executive branch.[9]

In rejecting this dictum of *Bremerton Transfer*, the *Black Ball* decision is to be applauded for its conclusions, though it is subject to criticism for its rather *jejune* reasoning. In determining the legislature's intent the court was content to recite the federal cases without

The *Adams* interpretation of "unfair or destructive competitive practices" was cited with approval in State v. Washington Pub. Serv. Comm'n, 57 Wn. 2d 32, 354 P.2d 711 (1960), and N. Pac. Transp. Co. v. Washington Util. and Transp. Comm'n, 69 Wn. 2d 472, 418 P.2d 735 (1966).

One year after *Adams*, the Washington Supreme Court again recognized the public's interest in further competition. State *ex rel.* Ry. Express v. Wash. Pub. Serv. Comm'n, 57 Wn. 2d 32, 354 P.2d 711 (1960), involved the grant of an intercity permit for the carriage of packages to United Parcel which was protested by several previously certified common carriers and sixteen short-line carriers. The appellant contended that it had a statutory right to be free from action of the Commission which granted an unfair advantage to a competitor. Reaffirming the *Adams'* interpretation of WASH. REV. CODE § 81.80.070, the court noted that competition was only unfair and destructive when it impaired the transportation services already available to the public.

In a more recent case, N. Pac. Transp. Co. v. Washington Pub. Util. and Transp. Comm'n, 69 Wn. 2d 472, 418 P.2d 735 (1966), "impairment" was established and the application denied. The latter case should not be read as indicating a retreat from the *Adams* preference for increased competition, but rather as an application of the *Adams* formula. Thus after *Adams*, and *Railway Express*, certification in Washington of common carriers closely paralleled the federal policies under "public convenience and necessity", *i.e.*, a deemphasis of the effects of new competition on existing carriers unless those carriers were thereby forced to restrict their operations.

7. 67 Wn. 2d 876, 410 P.2d 602 (1966) [hereinafter cited as *Bremerton Transfer & Storage*].

8. We also feel that the trial court was in error in ruling that the Commission's findings of fact and conclusions of law Nos. 6 and 7 were unsupported by material and substantial evidence. Under the rule in State ex rel. Adams . . . the fact that competitors may be injured is not a relevant factor in determining whether a permit will be granted. (This case has been overruled by the 1963 amendment to R.C.W. § 81.80.070, but was in effect when this case was heard.)

Bremerton Transfer & Storage, 67 Wn. 2d 876, 881, 410 P.2d 602, 605 (1966).

9. In his TRANSPORTATION SYSTEM OF OUR NATION MESSAGE FROM THE PRESIDENT TO CONGRESS, April 5, 1962, H.R. Doc. No. 384, 87th Cong. 2d sess., President John F. Kennedy deplored the obsolete and inconsistent regulatory policies inhibiting transportation growth and efficiency. Unfortunately, bills introduced by the President to "deregulate" rates on bulk commodities and to increase freer competition were killed by the opposition of the I.C.C., water carriers, large trucking concerns and adversely affected producers. *See* A. FRIEDLAENDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION 163 (1969).

analyzing them or considering other useful tools of statutory construction.

Legislative intent may be derived from a variety of sources: (1) official documentation of the legislature's purpose, (2) the language of the statute, (3) the prevalent construction of similar statutory language and (4) the nature of the problem with which the legislature was dealing. There is no official documentation of legislative purpose regarding the Washington act.[10] As for the language of the statute itself, "public convenience and necessity" is an undefined term in the Washington statute, as in the federal statutes. Hence, an evaluation of the *Black Ball* decision must rest upon an analysis of cases construing similar provisions in other jurisdictions,[11] and the economics of the motor carrier industry.

1. *Federal Authority*

Without close analysis of the opinions, the *Black Ball* court noted that federal precedent in construction of the statute would be "cogent authority,"[12] since for almost thirty years[13] federal courts and the

10. Based on conversations with legislators and commission officials actively serving at the time of the 1963 amendment's passage, this writer has concluded that much of the support for the amendment actually came from the motor carrier industry's hope that it would be construed in a way that would restrict further competition.

Another more practical reason for the adoption of a "public convenience and necessity" standard was the Second Proviso exception of 49 U.S.C. § 306(a) (1964). It provided that no federal certificate of public convenience and necessity was required for operations of interstate commerce by motor carriers operating solely within a single state, if they had already been granted a public convenience and necessity authority from that state's commission. And since Washington had not operated under such a standard from 1935 to 1963, rights granted by the Washington commissions could not be registered under the federal exemption. Crumpacker Common Carrier Application, 4 M.C.C. 264 (1938); Tooker Common Carrier Application, 12 M.C.C. 552 (1939). Consequently, state carriers were forced to make a separate showing of public convenience and necessity to the I.C.C. with commensurate additional expense and delay. The 1963 amendment thus offered the industry a more expeditious method of acquiring interstate commerce authority for intrastate hauling similar to that enjoyed by carriers in many other states.

11. *See* Chandler, *Convenience and Necessity: Motor Carrier Licensing by the Interstate Commerce Commission*, 28 OHIO ST. L. REV. 379, 389 (1967).

12. *Black Ball Freight*, 74 Wn. 2d at 874, 447 P.2d at 599 (1968).

One reason for the prevalence of state reliance on federal transportation law is the relative scarcity at the state level of a systematic compilation and digesting of local motor carrier cases. In 1968 the W.U.T.C. began to annotate its more important motor carrier cases by issuing the first of its "Transportation Reports." The *Public Utilities Reporter* also carries selected state commission transportation decisions, but its inclusion of many different types of railroad, gas and electric decisions curtails any extensive coverage of state transportation policies.

13. When the Interstate Commerce Act was amended in 1935 by the Motor Carrier

I.C.C. had been construing the federal statute[14] from which the Washington statute was adopted almost verbatim. While it was certainly correct to cite federal authority, the court should also have analyzed it for two reasons: first, to ensure that the federal precedent which it cited was good law in 1963, revealing a discernible trend recognized by the legislature; and secondly, to judge whether, under the applicable standard, the W.U.T.C. had properly acted within its administrative discretion in granting certification in this case.

In opinions beginning with *Pan American Buslines Operation*[15] in 1936, the I.C.C. had taken a rather protectionist tack which appeared to favor "regulated monopoly."[16] An application would be summarily denied if existing service was found to be "adequate."[17] The possibility of a reduction of an existing line's revenues or operations prac-

Act, Congress chose to insert the same "public convenience and necessity" standard which had been employed for similar purposes for railroads since the Transportation Act of 1920, sec. 402 (18) and (20), 41 Stat. 477-78 (1920). According to Interstate Commerce Commission v. Parker, 326 U.S. 60, 65 (1944), this use of "public convenience and necessity" for motor carriers indicated a continuation of the judicial and administrative interpretation of the language fostered under the earlier railroad regulation. Thus, while the I.C.C. had only regulated motor carriers under a "public convenience and necessity" standard for twenty-eight years before Washington adopted the phrase, the administrative and judicial history of "public convenience and necessity" was actually over forty years old.

14. 49 U.S.C. § 307 (1964).

15. 1 M.C.C. 190 (1936).

16. The question, in substance, is whether the new operation or service will serve a useful purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by the applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

Id. at 203.

Cf. Arrow Transp. Co. v. Hill, 236 Ore. 174, 387 P.2d 559, 563 (1963):

The legislative policy in this state is to regard motor carrier competition as desirable and to subject that competition to regulation only to the extent that it is necessary to do so in serving the public interest. . . . This is to be contrasted with the protection which is given existing carriers under the test of public convenience and necessity as traditionally applied. Under the latter test the existing carrier enjoys a modified form of monopoly, having the right to serve expanding needs if it can handle them adequately.

17. Chandler Trailer Convoy, Inc., 83 M.C.C. 577, 580 (1960):

We have repeatedly found that in the absence of a showing of material inadequacy in the services of available carriers, we are not warranted in authorizing the entrance of a competitive newcomer in the field. We believe this to be a salutary rule. . . .

Federal cases are collected in Hudson Transit Lines v. United States, 82 F. Supp. 153, 157 (S.D.N.Y. 1948). *See also* Consolidated Freight Ways, Inc., 79 M.C.C. 17, 25 (1959); Morgan Drive-Away, Inc., 78 M.C.C. 698, 700 (1959); L.A. Tucker Truck Lines, Inc. v. United States, 115 F. Supp. 647 (E.D. Mo. 1953); William F. Crossett, 76 M.C.C. 661, (1958); Strickland Transportation Company, Inc., 77 M.C.C. 655 (1958), *aff'd* 186 F. Supp. 777 (S.D. Tex. 1960).

State cases applying the same test are listed in HARPER, *supra* note 4, at 106-07.

tically precluded "public convenience and necessity" certification of a potential competitor; and in order to protect the resident carrier from a loss of revenue, it was often given a chance to correct deficiencies in service before a new applicant would be authorized to compete.[18]

But federal courts reviewing the I.C.C. eventually rejected regulated monopoly in favor of "regulated competition."[19] Inadequacy of service and potential loss of revenue by the existing carrier became only two of many factors that could be weighed in the consideration of public convenience and necessity. On the other hand, the I.C.C. demanded proof of inadequacy as late as 1960;[20] and rejection of such standards—a slow process reflected in numerous, and often conflicting district court decisions[21]—became apparent only in the late 1950's

18. Curtis, Inc., 92 M.C.C. 25, 32 (1961). *And see* Highway Transp. Inc., 76 M.C.C. 209, 213 (1958):

> We have consistently held that existing carriers should be afforded an opportunity to transport all of the traffic which they can handle adequately, economically, and efficiently in the territory they serve before a new carrier is permitted to enter the field.

The I.C.C. demanded that an applicant show specifically that the revenues of existing carriers would not be diminished, Greyhound Corp. Extension of Operation—Bangor, Maine, 33 M.C.C. 517 (1942), and that existing carriers be given the opportunity to transport all the traffic they could handle efficiently before additional competition would be authorized, Walter Benson, Inc., 61 M.C.C. 128 (1952); New York Central Railway Co., 61 M.C.C. 457 (1953).

State regulation under public convenience and necessity statutes was equally solicitous of existing carriers' revenues and operations. *See* HARPER, *supra* note 17, at 108-10.

19. Midwest Emery Freight System, Inc. v. United States, 293 F. Supp. 403 (N.D. Ill. 1968); Alabama Highway Express, Inc. v. United States, 278 F. Supp. 714 (N.D. Ala. 1968); United Van Lines, Inc. v. United States, 266 F. Supp. 568 (E.D. Mo. 1967); Texas Mexican Railway v. United States, 250 F. Supp. 946 (S.D. Tex. 1966); Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (E.D. Mo. 1962), *aff'd per curiam*, 374 U.S. 95 (1963); Campus Travel Inc. v. United States, 224 F. Supp. 146 (S.D.N.Y. 1963). The last four cases were cited in Black Ball Freight Service, Inc. v. Washington Util. and Transp. Comm'n, 74 Wn. 2d 871, 447 P.2d 597 (1968). *But see* Van Dyke Trucking, Inc. v. United States, 291 F. Supp. 97 (W.D. Wash. 1968). Earlier cases advocating a regulated competition approach were: Associated Transp., Inc. v. United States, 169 F. Supp. 769 (E.D. Mo. 1958); Dance Freight lines, Inc. v. United States, 149 F. Supp. 367 (E.D. Ky. 1957); Southern Kansas Greyhound Lines, Inc. v. United States, 134 F. Supp. 502 (W.D. Mo. 1955); St. Johnsbury Trucking Co. v. United States, 99 F. Supp. 977 (D. Vt. 1951); Norfolk Southern Bus Corp. v. United States, 96 F. Supp. 756 (E.D. Va. 1950); C.E. Hall & Sons, Inc. v. United States, 88 F. Supp. 596 (1950); Lang Transp. Corp. v. United States, 75 F. Supp. 915 (S.D. Calif. 1948).

20. Chandler Trailer Convoy, Inc., 83 M.C.C. 577, 580 (1960). *See also* William F. Crossett, Inc., Extension—Neville Island Pa., 76 M.C.C. 661 (1958); Strickland Transp. Co., Inc. Extension—La. Routes, 77 M.C.C. 655 (1958), *aff'd* 186 F. Supp. 777 (S.D. Tex. 1960).

21. Following the *Hudson Transit Lines* decision in 1948, a few courts held that inadequacy was definitely a prerequisite for certification in the early 1950's. Clarke v.

and early 1960's. Hence, it is possible that the legislature intended to adopt the standards embodied in the older protectionist decisions.

More probably, however, the 1963 legislature was aware of the rather clear trend of federal authority at that time favoring competition. Federal courts have held that a loss of revenue was not justification for denial of an application where the existing carrier's service was inadequate and the area was experiencing rapid economic and population growth.[22] It has also been held that a decrease in revenue and tonnage expected by the existing carriers in a given area will not preclude a "public convenience and necessity" certification when: (1) competition is presently limited, (2) there are delays in deliveries and shipments at the time of the hearing, (3) business in the area is abundant, (4) a new line will afford the public more frequent service, and (5) evidence indicates that the existing carrier will improve its services in response to new competition.[23]

In post-1963 cases the strength of the trend favoring competition has become even more apparent. Federal courts have held that the absence of a finding of inadequacy is not by itself sufficient to bar the issuance of a new certificate.[24]

> The element of inadequacy is thus not a controlling one, but is to be considered along with the other factors. . . . [I]t appears to be the more reasonable view that the narrower conceptual element of inadequacy of present service was not intended to be imposed as a straight jacket upon the process of determining the broader interests of public convenience and necessity. . . .
>
> Interstate carriers no longer necessarily get a chance to improve

United States, 101 F. Supp. 587, 591 (D.D.C. 1951); L.A. Tucker Truck Lines v. United States, 115 F. Supp. 647, 649 (E.D. Mo. 1953). And judicial sentiment favoring this approach continued into the early 1960's. *See*, Mercer, J. (dissenting), Burlington Truck Lines, Inc. v. I.C.C., 194 F. Supp. 31, 63 (S.D. Ill. 1961) and cases cited therein. A careful reading of the more recent cases cited in this dissent suggests that Judge Mercer's interpretation is strained. The federal case precedent advocating that the Commission must affirmatively make findings concerning the effect of new competition on existing carriers faded even more quickly after the renunciation of this theory in Southern Kansas Greyhound Lines v. United States, 134 F. Supp. 502, 506 (W.D. Mo. 1955). Two decisions which did follow a strict "regulated monopoly" approach in demanding an "effect" finding were Clarke v. United States, *supra*, and Luckenbach v. United States, 122 F. Supp. 824, 827 (S.D.N.Y. 1954).

22. Atlanta-New Orleans Motor Freight v. United States, 197 F. Supp. 364 (N.D. Ga. 1961).

23. Inland Motor Freight v. United States, 36 F. Supp. 885 (D. Idaho 1941).

24. Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646, 653 (D. N.H. 1964).

their services before a competitor is certified. The Supreme Court rejected the contention that there is any "invariable rule" that a commission must grant existing carriers an opportunity to remedy deficiencies in service.[25] In sum, then, the federal courts have of late shied away from inflexible rules in determining the exigencies of the public convenience and necessity.

Given the facts established in *Black Ball*, it seems certain that the federal courts would have reached the same result. The record indicated that appellant's services in previous years had been better when spurred by competition.[26] The court indicated that a reliable "one-day" delivery was needed by the businessmen of the area, and that Black Ball and the nonscheduled carriers could not always be counted on to maintain this type of daily service.[27] Moreover, the route certified was in an area capable of generating sufficient carriage to support both Black Ball and the applicant. It is clear, then, that the Washington court came to the correct result insofar as federal precedent is concerned.

2. *Economic policy*

The court should also, however, have evaluated the W.U.T.C.'s decision in light of the general economic policies underlying the requirement of a finding of convenience and necessity. Few modern authorities would deny that competition can be beneficial to the public. The rigors of competition may stimulate a carrier to give better service and, absent price regulation, lower his prices. On the other hand, destructive competition was originally a key factor in the demand for strict regulation of carriers.[28] Early abuses of the railroad monopolies spawned a turbulent era of public demand for federal regulation of all forms of transportation. But the railroad industry had economic characteristics not present in the motor carrier industry. The large, fixed costs of railroads, their "natural" monopolies over extensive areas,

25. United States v. Dixie Highway Express, Inc., 389 U.S. 409, 411 (1967); *accord*, Alabama Highway Express, Inc. v. United States, 278 F. Supp. 714 (N.D. Ala. 1968). For an excellent summary of the current weight accorded to the various factors considered in "public convenience and necessity" certification on the federal level, see TRANSPORTATION LAW INSTITUTE, 1968, OPERATING RIGHTS APPLICATIONS, PAPERS AND PROCEEDINGS 276-90 (1969).

26. *Black Ball Freight*, 74 Wn. 2d at 600, 447 P.2d at 876 (1968).

27. *Id.* at 599, n.2, 447 P.2d at 874, n.2 (1968).

28. See HARPER, *supra* note 4. *See also* note 31 *infra*.

and other economic barriers to entry combined to produce intolerable competitive practices.[29] In contrast, motor carriers have low fixed costs, no natural monopolies, and economic conditions conducive to easy entry. Consequently, the objections which have been raised against free competition in the railroad industry are inapplicable to motor carriers.[30]

Another reason frequently advanced in favor of restricted competition among scheduled carriers is that indiscriminate entry by competitors on the same route and schedules might reduce each carrier's volume so much that the total quality and frequency of service offered to the public would be substantially impaired. While this argument has some merit, its limitations should be recognized. When the total volume of freight hauled is appreciably greater than that required to sustain any one carrier, it is doubtful that additional competition would ever cause all of the carriers to restrict their services to a point

29. A long line of precedent construing the "public convenience and necessity" standard in railroad regulatory legislation existed long before the same standard was enacted for the motor carrier industry. In early motor carrier cases, then, it is understandable that courts turned to railroad cases in construing this phrase. See note 13 *supra*. However, the economic distinctions between the two industries indicate that the public interest would not be served by identical standards.

Railroads usually had a natural monopoly over intermediate points on their routes, but competed on shipments to terminal points. For example, if two railroads had lines between City A and City B, there would be competition as to shipments between those cities, but since the lines almost always took divergent routes, both railroads would have a monopoly as to shipments to or from intermediate points on their respective lines. The large investment in rails, and maintenance thereof, caused fixed costs to be extraordinarily high, and variable costs correspondingly low. Each railroad sought as large a volume of freight as possible so that the fixed costs could be covered at reasonable rates; and once there was sufficient volume to meet the fixed costs any additional freight carried was extremely profitable. The result was bitter competition for freight going between terminal points with fares often doing little more than covering variable costs. However, there was no competition over the intermediate points on the routes so fares were set unconscionably high to help defray both the fixed costs and to compensate for the low fares generated by excessive competition for shipments between terminal points. Invidious price discrimination was the consequence.

See generally, D. P. LOCKLIN, ECONOMICS OF TRANSPORTATION 129-54 (5th ed. 1960).

See also A. FRIEDLAENDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION 7-27 (1969) for a brief history of the social pressures and economic factors which led to the regulation of rail, motor and water carriers.

30. Several observers have even argued that the economic structure of the motor carrier industry is conducive to normal competition, and hence requires little or no regulation. *See e.g.*, Colof, *Private Carriage on Trial: Competition in the Motor-Transportation Industry*, 21 STAN. L. REV. 1204, 1222-26 (1969); A. FRIEDLAENDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION, 164-66 (1969); C. PHILLIPS, THE ECONOMICS OF REGULATION, 512-62 (1965); Pegrum, *The Economic Basis for Public Policy for Motor Transport*, 28 LAND ECONOMICS 244 (1952); and J. C. NELSON, NEW CONCEPTS IN TRANSPORTATION REGULATION, NATIONAL RESOURCES PLANNING BOARD, TRANSPORTATION AND NATIONAL POLICY (1942).

where the public could not secure adequate transportation. Only where the route barely sustains one scheduled carrier does it become highly probable that the entrance of a competing line will result in inadequate service by both together.

Moreover, applications for certification under these latter conditions would be few, since an entering carrier would not voluntarily undertake a predictably unprofitable venture. It is admitted that such ill-fated attempts were common during the Great Depression, causing widespread instability in the industry and giving impetus to strict federal regulation.[31] Modernly, however, there is no reason to think that the problem would recur to any great degree so long as the crucial factor—depression of the markets governing the factors of production—is not present.[32]

In conclusion, it appears that the decision of the court to interpret "public convenience and necessity" so as to promote easier entry and increased competition, rather than to continue a protectivist policy of regulated monopoly, was entirely correct. If there is any fault with the opinion, it lies in the court's failure to meet the public interest issue head on. The court's decision could, and should, have been supported by reference to the economics of the motor carrier industry and by a broader analysis of the federal experience with this standard rather than an unquestioning acceptance of the outcome of federal precedent.

31. In American Trucking Association v. United States, 344 U.S. 298, 312 (1953) the Supreme Court described the situation leading to the enactment of the Motor Carrier Act as characterized by ease of entry and hence, "overcrowded with small economic units which proved unable to satisfy the most minimal standards of safety or financial responsibility." However, this situation would seem to call for a licensing scheme requiring entrants to meet standards of safety and financial responsibility, rather than the route and rate regulation system which was enacted.

32. In a period of widespread unemployment and general absence of economic opportunity, those industries which have low capital requirements and few barriers to entry often suffer from excessive entry with consequent overcapacity and low prices. This condition stems from dislocation of the labor and capital markets. Lack of viable economic alternatives forces people to undertake marginal economic ventures whose chances of success are doubtful. Such entry should not occur to any large degree in a period of prosperity, since the existence of remunerative economic alternatives would make entry into overcrowded industries look rather unattractive by comparison.