975

RAIL DEREGULATION: MARKET DOMINANCE, CONTRACT RATES AND EXEMPTIONS

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC GROWTH AND STABILIZATION

OF THE

JOINT ECONOMIC COMMITTEE

AND THE

SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

U.S. HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 4570

A BILL TO REFORM THE ECONOMIC REGULATION OF RAILROADS, TO IMPROVE THE QUALITY OF RAIL SERVICE IN THE UNITED STATES THROUGH FINANCIAL ASSISTANCE WHICH ENCOURAGES RAILROAD RESTRUCTURING, AND FOR OTHER PURPOSES

SEPTEMBER 27, 1979

Serial No. 96–111

(Committee on Interstate and Foreign Commerce)

Printed for the use of the Joint Economic Committee and the Committee on Interstate and Foreign Commerce

U.S. GOVERNMENT PRINTING OFFICE

59-551 O WASHINGTON : 1980

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(Created pursuant to sec. 5(a) of Public Law 304, 79th Cong.)

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RAIL DEREGULATION: MARKET DOMINANCE, CONTRACT RATES, AND EXEMPTIONS

THURSDAY, SEPTEMBER 27, 1979

CONGRESS OF THE UNITED STATES, SUBCOMMITTEE ON ECONOMIC GROWTH AND STABILIZATION, JOINT ECONOMIC COMMITTEE, AND SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE, HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,

Washington, D.C.

The subcommittees met jointly, at 9:30 a.m., pursuant to notice, in room 357, Russell Senate Office Building, Hon. George McGovern, member of the Subcommittee on Economic Growth and Stabilization, and Hon. James J. Florio, chairman, Subcommittee on Transportation and Commerce, cochairmen, presiding.[1]

Senator McGOVERN. If the committee will please come to order, we will begin our proceedings.

We are meeting this morning at a time when the United States faces the most serious railroad crisis in its history. The situation is now manifested most strongly in South Dakota and other upper plains and Western States where grain producers and many other shippers are threatened with ultimate loss of all rail service. Even as this hearing is getting under way, the Senate is preparing to debate this morning possible emergency action involving the Milwaukee Railroad.

Yesterday, the bankruptcy court which is deciding the fate of the Milwaukee Road approved an embargo of all Milwaukee service on some 6,400 miles of its system, a situation which I think is unprecedented in its dimensions. In effect, this means that all mainline service by the Milwaukee from eastern Montana all the way to the west coast, some mainline service in the Midwest, and all branch line service on some 1,000 miles of track in South Dakota where the Milwaukee is the only mainline railroad, will end as of November 1.

The ICC is preparing to issue a directed service order which would require that essential service be provided on the embargoed sections of the Milwaukee. The directed service order amounts to a temporary respite from the loss of all rail service on some embargoed sections of the Milwaukee system.

Many farmers and other shippers on those parts of the Milwaukee not covered by the directed service order may lose all rail service as of November 1. At best, partial service under the directed order of the ICC can last no longer than 8 months. During this

[1] NOTE.—See also hearings before the Subcommittee on Transportation and Commerce, House Committee on Interstate and Foreign Commerce, on H.R. 4570 held on Apr. 24, May 31, July 2, Oct. 16, 23, 25, 30, and Nov. 1, 1979.

time, efforts will continue to persuade other railroads to take over embargoed sections of the Milwaukee, but the outcome at this point is far from certain.

Communities throughout South Dakota and other Western States are now confronted with a transportation disaster. Without a railroad, they have no other viable alternative to move grin, a principal element in their economies, to distant domestic and export market points. The future of these communities will be largely determined by the success or failure of efforts made over a period of less than a year to maintain permanent rail service. It is perhaps a bitter irony that these towns and many other communities which owe their very existence to the railroads as they moved west now stand threatened by the loss of transportation which links them with the mainstream of the national and world economies on which they are so dependent.

My hometown of Mitchell, for example, was named after the president of the Milwaukee. The town is there because of the railroad.

Nowhere is this problem more pronounced than in the Midwest and Upper Plains States where the Rock Island Railroad as well as the Milwaukee, is in bankruptcy, and where other railroads are struggling for survival. Grain farmers, after again producing bumper crops, are once more unable to move their harvest to market. The strikes on the Rock Island and at grain elevators at Duluth and Superior made a perennial grain car shortage crisis even more severe. And now with the embargo of most of the Milwaukee system, that crisis may become chronic for much of this region.

Viewed on a broader scale, railroad shippers throughout much of the Nation are faced with the jarring paradox of not being able to fully utilize the most energy-efficient means of transport available during what is now an energy-short era. The question is whether the rail system as a whole will have the ability to meet the demands of our energy-short economy will increasingly place upon it in the immediate years ahead, given the rail system's lost traffic and revenue and the deterioration of a large part of its facilities.

The extent to which the rail industry succeeds in achieving its potential substantially rests on two points: freedom from no longer needed and often damaging regulatory constraints, and vigorous and imaginative development of new competitive market approaches by both railroads and railroad shippers.

I am well aware of the ongoing work to develop and enact comprehensive deregulation legislation, but at best, this will be complex and prolonged. In the meantime, there is substantive legislative and administrative policy initiatives that can and should be made to benefit the rail industry and the shipping community while continuing to move toward equitable overall deregulation. These steps, in turn, can have a direct bearing on the future formulation of a complete deregulation package.

At this point I would like to express to Chairman Florio my appreciation for the opportunity to hold this joint hearing by our two subcommittees. In this hearing we are combining the policy advisory approach of the Joint Economic Committee toward economic problems, with the mandated legislative responsibilities of the Subcommittee on Transportation and Commerce, which Congressman Florio chairs.

I look forward to a productive hearing. Just briefly, we want to know first of all how the ICC's market test criteria should be modified to provide a straightforward, practical standard that can be effectively applied to protect the legitimate interests of captive shippers; second, why the record of contract ratemaking between railroads and shippers has been so dismal when this approach holds the promise of great benefit for both railroads and their customers through agreements that can be reached without Federal intervention.

Beyond this, the question arises as to whether the widespread use of contracts could reduce or perhaps even eliminate the need for development and application of a market dominant standard if captive shippers are able to negotiate mutually agreeable service arrangements with railroads. This issue is taking on increasing importance. I am approaching the point of concluding that in economic deregulation matters, the core issue is not comprehensive deregulation per se; rather, it is the degree of economic regulatory protection that should be retained to protect captive shippers. This question can be answered by the scope with which contract ratemaking is successfully conducted by railroads and shippers.

The final issue relates to the question of what obstacles lie in the path of broadening the exemption of rate regulation of traffic in markets where adequate intermodal competition exists and what can be done to reach this objective which aims at removing the Federal regulatory presence where it is no longer needed.

I think if Congress effectively addresses these issues, we will have moved the rail industry and the shipping community a long way toward deregulation and a more secure and prosperous future.

Well, I am anxious to hear now Chairman Florio's opening statement. Both of us have a complication today with the Milwaukee emergency. Action on this subject is contemplated both on the House and Senate sides this morning, so there may have to be a brief interruption at some point, but we will go as far as we can.

Chairman Florio?

Mr. Florio. Thank you very much, Senator.

Just to amplify on the point that the Senator made, at 10:30 this morning the House Rules Committee will meet in an emergency session to consider granting a rule for legislative proposals that have come forth from my committee to deal with the Milwaukee crisis and to facilitate the restructuring of the Milwaukee. At 10:30 I will have to be at the Rules Committee for a brief period of time.

I am pleased to join with the Senator to hear from the Chairman, and from shippers with regard to the proposals for regulatory reform which have come from the ICC, and to perhaps get the shippers' reactions to those proposals. The dialog is critical to the development of fair and equitable deregulation proposals. Railroads need relief from constraints of overregulation, and shippers need efficient, reliable, and reasonably priced transportation services. Hopefully these needs are compatible.

Competition, is the answer, and where competition exists, regulatory constraints must be lifted so that railroads can compete in the marketplace. Where no competition exists, or where there is a question as to whether competition does or does not exist, shippers and the public must be protected. Deregulation, if it is to be offered in lieu of Government regulation, must facilitate competition and most assuredly should not hinder competition intermodally or intramodally.

Today we will hear from shippers as to what they have experienced under preliminary regulatory reform initiatives from the ICC. We need to go much further than the preliminary reforms, as far as I am concerned. We need to address what will happen to railroads and shippers under a deregulation proposal. We already know the disastrous results of too much regulation. Without deregulation, the public—in other words, the Government, and ultimately the taxpayers—will continue to pay the price of the existing system. We may very well be facing more bankruptcies in this industry, to the point where railroads will be eliminated as a major component of our transportation system. This is certainly undesirable.

Deregulation gives the railroads the opportunity to perform efficiently and effectively as other businesses do in the marketplace. We should, therefore, attempt to formulate a proposal that will derive the maximum benefits for the industry as well as for shippers and consumers.

Without objection, I wish to place in the record at this point the text of H.R. 4570, "Railroad Deregulation Act of 1979."

[Testimony resumes on p. 91.]

[Text of H.R. 4570 follows:]

I

96TH CONGRESS
1ST SESSION

H. R. 4570

To reform the economic regulation of railroads, to improve the quality of rail service in the United States through financial assistance which encourages railroad restructuring, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 21, 1979

Mr. STAGGERS (by request) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

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A BILL

To reform the economic regulation of railroads, to improve the quality of rail service in the United States through financial assistance which encourages railroad restructuring, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—RAILROAD DEREGULATION

SEC. 101. This title may be cited as the "Railroad Deregulation Act of 1979".

PART A—RAIL TRANSPORTATION POLICY

RAIL TRANSPORTATION POLICY

SEC. 110. (a) Chapter 101 of title 49, United States Code, is amended by inserting after section 10101 the following new section:

"§ 10101a. Rail transportation policy

"To ensure the development and maintenance of a healthy, efficient freight transportation system in the private sector, in which the various modes of transportation are subject to impartial regulation, the Interstate Commerce Commission shall consider the following as being in the public interest:

"(1) Maximum reliance on competitive market forces and on actual and potential competition among all transportation modes to provide transportation services at fair prices and to enable efficient and well-managed carriers to earn adequate profits and to attract capital.

"(2) Avoidance of undue concentrations of market power.

"(3) Reduction of regulatory barriers to entry into and exit from the industry.

"(4) Maintenance of fair wages and working conditions.

"(5) Operation of transportation facilities and equipment without detriment to the public health and safety.

"(6) Development and maintenance of a transportation system responsive to the needs of the public and of the United States, including the national defense, in which regulatory decisions are reached fairly and expeditiously.".

(b) Section 10101(a) of title 49, United States Code, is amended by striking out "To ensure" and inserting in lieu thereof "Except where policy may have an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure".

(c) The section analysis of chapter 101 of title 49, United States Code, is amended by inserting after the item relating to section 10101 the following new item:

"10101a. Rail transportation policy.".

PART B—RATEMAKING

MAXIMUM AND MINIMUM RATE REGULATION

SEC. 121. (a) Subchapter I of chapter 107 of title 49, United States Code, is amended by inserting after section 10701 the following new section:

"§ 10701a. Standards for rates and conditions of service for rail carriers

"(a) Subject to the provisions of subsections (b) and (c) of this section, a rail carrier subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish any rate and condition for transportation or other service provided by the carrier. In addition, one or more rail carriers may, by contract, agree with one or more purchasers of rail services on specified rates and conditions for specified services, and any such contract or agreement shall not be subject to the provisions of subsections (b) and (c) of this section.

"(b)(1) During the 5-year period beginning on the effective date of the Railroad Deregulation Act of 1979, any rail carrier rate that exceeds the base rate, increased by 7 percent annually, shall be subject to the provisions of paragraphs (2) through (7) of this subsection. The base rate is the rate in effect for identical or substantially similar services on the effective date of such Act, adjusted by multiplying that rate by a fraction, the numerator of which is the latest published Quarterly Implicit Price Deflator for Gross National Product compiled by the Department of Commerce, or any successor index (hereinafter the 'GNP Deflator'), and the denominator of which is the same index for the fourth quarter of 1979. The base rate for services for which there was no commodity rate in effect on the effective date of such Act and for which a rate first becomes effective after such date, and for a rate established under paragraph (6) of this subsection, shall be the published or established rate, as the case may be, adjusted by multiplying that rate by a fraction, the numerator of which is the latest published quarterly GNP Deflator and the denominator of which is the same index for the quarter preceding the quarter in which that rate becomes effective or is established.

"(2) During the 2-year period beginning on the effective date of the Railroad Deregulation Act of 1979, one or more rail carriers may put into effect a rate increase described in section 10706(a)(3)(B) of this title if the increased rate does not exceed the base rate. The base rate is the rate in effect on the effective date of such Act for services identical or substantially similar to those services affected by the increase, adjusted by multiplying that rate by a fraction, the numerator of which is the latest published quarterly GNP Deflator and the denominator of which is the same index for the quarter preceding the quarter in which such effective date occurs.

"(3) During the 5-year period beginning on the effective date of the Railroad Deregulation Act of 1979, the Commission may, subject to paragraphs (4) through (8) of this subsection, order a reduction in the amount of a rate increase which is in excess of the levels specified in paragraph (1) or (2) of this subsection, except where such increase raises the rate to a level at which it covers only the incremental cost of providing the service. A rate may be reduced only upon investigation initiated on petition of a complaining purchaser of transportation services or an organization representing a complaining purchaser. Before an investigation may be initiated, the Commission must find, based upon the verified statements of a complaining purchaser or organization representing such a purchaser and after a hearing if the Commission so orders, that such complaining purchaser or organization has demonstrated that—

"(A) the complaining purchaser will be or has been competitively damaged by imposition of the rate complained of; and

"(B) the complaining purchaser is likely to prevail on the merits in any investigation undertaken.

"(4) In any such investigation, to obtain relief the complaining purchaser or organization must prove, on the record by clear and convincing evidence, that the complaining purchaser has no reasonable alternative to transportation by the carrier that proposed the increase. The complaining purchaser shall address and the Commission shall make a specific finding with respect to each of the following:

"(A) Transportation services and associated rates offered by rail carriers other than the rail carrier that proposed the increase, by all other carriers of other modes, and by combinations of modes (including the possibility and cost of private carriage).

"(B) The existence of alternative markets for or sources of (as appropriate) such complaining purchaser's goods.

In making its determination under this paragraph, the Commission shall find that the complaining purchaser has a reasonable transportation alternative if comparable motor carriage is available at a rate not in excess of 125 percent of the rail rate at issue or if carriage by rail and water or rail and motor carrier is available at a rate not in excess of 110 percent of the rail rate at issue, or if a comparable volume of traffic from that purchaser has moved at a rate in excess of the rail rate at issue during the year prior to the effective date of the rail rate at issue.

"(5) If the Commission finds, taking into account all the factors listed, that the complaining purchaser has no reasonable transportation alternative, then the rail carrier establishing the increase shall bear the burden of proving, on the record by clear and convincing evidence, that the increase is reasonable.

"(6) If the Commission finds that the complaining purchaser has no reasonable transportation alternative and that the rate at issue is not reasonable, it may order such rate reduced, except that—

"(A) the Commission may not reduce a rate below the level required to ensure the rail carrier revenues that (i) are adequate to cover total operating expenses, including an allocable share of indirect costs and depreciation and obsolescence incurred, and (ii) when considered in the context of revenues received by the affected carrier from other sources, will yield an overall adequate return on capital; and

"(B) in no instance may the Commission—

"(i) set a rate which yields a return on the capital used to provide the service which is greater than twice the overall adequate rate of return on capital; or

"(ii) reduce a rate below the level that could be established under paragraph (1) of this subsection.

"(7) Any rate reduction ordered by the Commission shall apply only to the portion of the rate to or from the nearest interchange point at which reasonably direct service can be provided from the origin to the destination by a water carrier or two or more rail carriers that have not discussed the rate at issue, unless such interchange point is more than 50 miles from the location at which such purchaser originates or terminates traffic, in which case the reduction may be for the entire rate. In addition, any rate reduction ordered by the Commission shall apply only to the complaining purchaser. The complaining purchaser may ship at the reduced rate only as long as it ships all output subject to that rate that can practicably be moved by rail, container-on-flat-car, or trailer-on-flat-car beween the points covered by that rate via the rail carrier or carriers affected by the rate reduction.

"(8) Notwithstanding any other provision of this section, a rate that is reduced under this subsection may not be increased for 12 months after the effective date of the Commission's order reducing the rate.

"(9) A petition under this subsection may be filed by a group of similarly situated purchasers, or by an organization representing a group of similarly situated purchasers, but in any such case the showing required by paragraphs (3) and (4) of this subsection must be made for each member of the group before such member may benefit from a rate decrease.

"(c) No rail carrier shall, with the intent to eliminate a competitior, set a rate below a level that contributes to the establishing carrier's going concern value. Any rate that covers incremental cost shall be found to contribute to going concern value. If an affected competitor proves, on the record, that a rate is in violation of this section, the Commission may order such rate to be increased, but only to a level that contributes to the going concern value of the carrier.

"(d)(1) A rail carrier may establish a tariff, for any movement or group of movements, under which rates may be raised or lowered between published maximum and minimum levels, effective on publication, in response to either expected or actual fluctuations in demand for rail service. The conditions under which rates may be raised or lowered, and the maximum and minimum levels of such rates, shall be set forth clearly in the tariff.

"(2) During the 5-year period beginning on the effective date of the Railroad Deregulation Act of 1979, subsections (b) and (c) of this section shall apply to the average rate (calculated by totaling the rate in effect on each day of the period and dividing that total by the number of days in the period) actually charged under a tariff established under this subsection in any 6-month period, except that where a complaining purchaser proves that a particular rate level covered by such tariff remained in effect for more than 120 days in any 150-day period, subsections (b) and (c) of this section shall apply to that particular rate level. For purposes of this paragraph, a particular rate level shall be deemed to include rates up to 3 percent above and 3 percent below such rate level.".

(b)(1) The section heading of section 10701 of title 49, United States Code, is amended by inserting "other than for rail carriers" after "practices".

(2) The first sentence of section 10701(a) of title 49, United States Code, is amended by inserting "subchapter I (except a rail carrier), II, III, or IV of" after "under".

(3) Section 10701(b) of title 49, United States Code, is repealed.

(4) Section 10701(c) of title 49, United States Code, is amended by inserting "(except a rail carrier)" after "those subchapters".

(5) The section analysis of chapter 107 of title 49, United States Code, is amended by striking out the item relating to section 10701 and inserting in lieu thereof the following:

"10701. Standards for rates, classifications, through routes, rules, and practices other than for rail carriers.
"10701a. Standards for rates and conditions of service for rail carriers.".

(c) Section 10503(a) of title 49, United States Code, is amended by striking out paragraph (2) thereof.

INVESTIGATION OF RATES AND ORDERS SETTING RATES

SEC. 122. (a) Section 10704(a)(1) of title 49, United States Code, is amended by inserting immediately before the period at the end of the first sentence thereof the following: ", subject to the provisions of section 10701a of this title".

(b) Section 10704(e) of title 49, United States Code, is repealed.

(c) Section 10704(f) of title 49, United States Code, is amended—

(1) by inserting immediately before the period at the end of the first sentence thereof the following: ", except that with respect to a rail carrier, the Commission may begin an investigation only upon complaint"; and

(2) by striking out "title, but" and all that follows in the second sentence and inserting in lieu thereof "title.".

(d) Section 10707(a) of title 49, United States Code, is amended—

(1) in the first sentence, by striking out "on its own initiative or on complaint of an interested party" and inserting in lieu thereof "on complaint of an interested party, subject to the provisions of section 10701a where applicable"; and

(2) by inserting after the first sentence the following new sentence: "No investigation of an allegation that a rate is unreasonably high may be ordered with respect to any rate increase that becomes or is scheduled to become effective after 5 years after the effective date of the Railroad Deregulation Act of 1979.".

(e) Section 10707(b)(1) of title 49, United States Code, is amended to read as follows:

"(b)(1) The Commission must complete a proceeding under this section and make its final decision by the end of the 4th month after a complaint is filed. If the Commission does not reach a final decision within the applicable time period, the Commission may not find the rate, classification, rule, or practice to be unlawful on the basis of the allegations in the complaint or substantially similar allegations.".

(f) Section 10707(c) of title 49, United States Code, is repealed.

(g) Section 10707(d) of title 49, United States Code, is amended to read as follows:

"(d) With respect to any rate increase investigated under this section, the Commission shall require the rail carriers involved to account for all amounts received under the increase until the Commission completes the proceeding or until 4 months after a complaint is filed, whichever occurs first. The accounting must specify by whom and for whom the amounts are paid. When the Commission takes final action in favor of a complaining purchaser, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unjustified, plus interest at a rate equal to the average yield (on the date the complaint is filed) of marketable securities of the United

States Government having a duration of 120 days, and may, if the violation is found to be willful, assess the carrier all or any portion of the costs and attorneys' fees incurred by the complaining purchaser. If the Commission determines that an action under this section was initiated or continued in bad faith, it may assess the complainant all or any portion of the costs and attorneys' fees incurred by the carrier.".

(h) Section 10707(e) of title 49, United States Code, is repealed.

(i) The first sentence of section 11701(a) of title 49, United States Code, is amended by striking out "The" and inserting in lieu thereof "Except as otherwise provided, the".

(j)(1) The section heading of section 10707 of title 49, United States Code, is amended by striking out "and suspension".

(2) The item relating to section 10707 in the section analysis of chapter 107 of title 49, United States Code, is amended by striking out "and suspension".

JOINT LINE RATES AND THROUGH-ROUTES

SEC. 123. (a) Section 10705(a) of title 49, United States Code, is amended—

(1) in paragraph (1), by striking out "The Interstate Commerce" and inserting in lieu thereof "The Interstate Commerce Commission may prescribe through-routes among rail carriers and between rail

carriers and other common carriers subject to the jurisdiction of the Commission under subchapter II (except a motor common carrier of property) or subchapter III of chapter 105 of this title. In addition, except as provided in subsection (b) of this section, the";

(2) in paragraph (1), by inserting "(except a rail carrier)" after "subchapter I";

(3) by striking out the last sentence of paragraph (1);

(4) by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2); and

(5) in paragraph (2), as so redesignated, by striking out "or joint rate applicable to it" in subparagraph (B).

(b) Section 10705 of title 49, United States Code, is amended by redesignating subsections (b) through (f) as subsections (c) through (g), respectively, and inserting after subsection (a) the following new subsection:

"(b)(1) Rail carriers subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may among themselves, and with carriers of other modes, establish joint-line rates for through service on any route, and may agree on any division of revenues from such rates on such routes.

"(2) In the event carriers participating in any through route involving a rail carrier that is established by the Commission pursuant to subsection (a) of this section are unable or unwilling to agree on joint-line rates and divisions of revenues, the applicable rate for service on the through route shall be the sum of the local or proportional rates established by each participating carrier for its portion of the route, and each carrier shall receive revenues in accordance with its local or proportional rate for that portion of the route.

"(3) Unless the participating carriers agree otherwise, the originating carrier on any through route involving a rail carrier shall collect all revenues for the service and shall divide the revenues according to the local rates or the divisions established, as the case may be.

"(4) Nothing in this subsection shall be construed as requiring the cancellation of any joint-line rates or divisions of revenue in effect on the effective date of the Railroad Deregulation Act of 1979.".

(c) Section 10705(c) of title 49, United States Code, as redesignated, is amended—

(1) by inserting "subchapter II or III of" after "under" the first place it appears; and

(2) by striking out "rail or".

(d) Section 10705(e) of title 49, United States Code, as redesignated, is amended—

(1) by inserting "(1)" immediately before "When";

(2) by striking out "rail or" in the first sentence;

(3) by striking out the second sentence; and

(4) by adding at the end thereof the following new paragraph:

"(2) Unless the participating carriers agree otherwise, a joint-line rate involving rail carriers shall be increased or decreased by the absolute amount of any increase or decrease in the rate of any participating carrier for its portion of the traffic, and the entire amount of the increase or decrease shall be added to or subtracted from the share of revenues of the carrier establishing the new rate. Any participating carrier may, however, elect to cancel the joint-line rate in such event.".

(e) Section 10705(f) of title 49, United States Code, as redesignated, is amended to read as follows:

"(f) The Commission may begin a proceeding under subsection (a) or (c) of this section on its own initiative or on complaint and may take action only after a full hearing.".

(f) Section 10703(a)(2) of title 49, United States Code, is amended by striking out "and shall establish rates and classifications applicable to those routes".

RATE BUREAUS

SEC. 124. Section 10706(a) of title 49, United States Code, is amended—

(1) by adding at the end of paragraph (1) the following new subparagraph:

"(C) 'practicably participates in that movement' means—

"(i) with respect to a revision of an existing joint-line rate, that a carrier has, during the 12 months preceding the discussion, agreement, or vote, actually carried traffic under the joint-line rate at issue; or

"(ii) with respect to a joint-line rate proposed for a movement never before conducted, or for which no joint rate was previously in effect, that a carrier has agreed to carry any traffic tendered to it under the joint line rate at issue during the 12 months following the date on which the joint-line rate becomes effective.";

(2) in the first sentence of paragraph (2)(A), by inserting "publication," after "initiation,";

(3) in the second sentence of paragraph (2)(A), by striking out "section 10101" and inserting in lieu thereof "section 10101a";

(4) in paragraph (3)(A), by adding after the first sentence the following new sentence: "Such organization shall provide that all of its meetings (except those dealing with personnel or purely internal administrative matters) shall be open to the public and recorded or transcribed, that a legible copy of a transcript shall be available to the public on payment of the reasonable cost of reproduction, and that all votes and agreements shall be open, recorded, and not secret.";

(5) in paragraph (3)(A)(i), by inserting "to discuss," after "rail carrier" and by striking out "can practicably participate" and inserting in lieu thereof "practicably participates";

(6) by striking out paragraph (3)(B) and redesignating paragraph (3)(C) as paragraph (3)(B); and

(7) by adding at the end thereof the following new paragraph:

"(4) Notwithstanding any other provision of this subsection, one or more rail carriers may enter into an agreement, without obtaining prior Commission approval, that provides solely for compilation, publication, and distribution of rates in effect or to become effective. The Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the

Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) shall not apply to parties and other persons with respect to making or carrying cut such agreement. However, the Commission may, upon application or on its own initiative, investigate whether the parties to such an agreement have exceeded its scope and upon a finding that they have, issue such orders as are necessary, including an order dissolving the agreement, to assure that actions taken pursuant to the agreement are limited as provided in this paragraph.".

ANTIDISCRIMINATION

SEC. 125. (a) Section 10741 of title 49, United States Code, is amended by redesignating subsections (b), (c), and (d) as subsections (e), (f), and (g), respectively, and by striking out subsection (a) and inserting in lieu thereof the following:

"(a) No rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may discriminate in rates, directly or indirectly, between competing purchasers of like and contemporaneous transportation services under similar transportation conditions unless—

"(1) the cost of the services differs as between purchasers and the charges reflect only the difference; or

"(2) the degree of competition to provide the purchasers with transportation services differs as between the purchasers.

"(b)(1) Upon petition of a purchaser of transportation services, or of a lawful representative of a locality, port, gateway, or transit point, alleging that a rail carrier has charged different rates for like and contemporaneous services under similar transportation conditions, and that such action has resulted in competitive harm to the petitioner, or, in the case of a locality, port, gateway, or transit point, to a purchaser doing business in that locality, port, gateway, or transit point (hereinafter a 'represented purchaser'), the Commission may order an investigation of the alleged discrimination. To obtain relief—

"(A) a petitioner must prove, on the record by clear and convincing evidence, that different rates were charged, that such action has resulted in competitive harm to the petitioner or a represented purchaser, and that the injured purchaser is in competition with the favored purchaser; and

"(B) a petitioner alleging that a rail carrier has discriminated against it by failing to offer to enter into a contract for rates and services similar to that into which another purchaser has entered must prove, in addition to the proof required in subparagraph (A) of this paragraph, that the injured purchaser or represented purchaser would have been ready, willing, and able to accept substantially similar contract terms at a time essentially contemporaneous with the period during which the carrier offered the contract to the favored purchaser.

"(2) The rail carrier alleged to have violated subsection (a) of this section shall have an affirmative defense if such carrier proves the cost justification for rate differentials referred to in paragraph (1) of such subsection or the differing degrees of competition referred to in paragraph (2) of such subsection. Costs developed in accordance with the accounting system promulgated by the Commission under section 11142(b) of this title shall be accepted as proof of cost.

"(c) A rail carrier may be found to be in violation of subsection (a) of this section with respect to a rate charged for services for which a joint-line rate is in effect only if the carrier is an indispensable party to the route covered by the joint rate and if it has refused to provide the portion of the service on its route at a nondiscriminatory rate.

"(d) A rail carrier found to be in violation of subsection (a) of this section shall be required to establish nondiscriminatory rates, within the meaning of this section, for the traffic involved and to pay an injured purchaser or represented purchaser damages equal to the difference between the rate charged that purchaser and the rate charged the favored purchaser from the date the complaint was filed until the date on which the Commission issues its decision, plus interest at a rate equal to the average yield (on the date the complaint is filed) of marketable securities of the United States having a duration of 90 days. In addition, if the violation is found to be willful, the Commission may assess the carrier all or any portion of the costs and attorneys' fees incurred by the complainant. If the Commission determines that an action under this section was initiated or continued in bad faith, it may assess the complainant all or any portion of the costs and attorneys' fees incurred by the carrier.".

(b) Section 10741(e) of title 49, United States Code, as redesignated, is amended by inserting "(except a rail carrier)" after "of this title".

(c) Section 10742 of title 49, United States Code, is amended by adding at the end thereof the following new sentence: "A carrier subject to this section may require a connecting line to pay the incremental cost of providing any facilities or services required under this section.".

(d)(1) Section 10726(a)(1) of title 49, United States Code, is amended by striking out "I or".

(2) Section 10726(c) of title 49, United States Code, is repealed.

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NOTICE AND PUBLICATION

SEC. 126. (a) Section 10762(a)(1) of title 49, United States Code, is amended by inserting after the first sentence the following new sentences: "A rail carrier that has entered into a contract to provide a purchaser of rail services with specific services at specific rates shall publish and file with the Commission the essential terms of such contract, as required by the Commission. In setting the terms to be published, the Commission, to the maximum extent consistent with the purposes of this section, shall not require publication of the name or other identifying characteristics of the purchaser of rail services.".

(b) Section 10762(b) of title 49, United States Code, is amended—

(1) in the first sentence of paragraph (1), by striking out "The" and inserting in lieu thereof "Except with respect to the tariffs of a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, the";

(2) in the second sentence of paragraph (1), by inserting "(except a rail carrier)" after "subchapter I";

(3) by striking out subparagraph (B) of paragraph (1) and redesignating subparagraphs (C), (D), and (E) as subparagraphs (B), (C), and (D), respectively; and

(4) by redesignating paragraph (2) as paragraph (4) and inserting after paragraph (1) the following new paragraphs:

"(2) With respect to the tariffs of a rail carrier, the Commission may prescribe the information to be included in a published tariff, but it may not prescribe the format. In this paragraph, 'format' includes such items as typeface, spacing, type of index, and location of information in the tariff. The Commission may require the publication of origin to destination rates for any Commission established through route. If no joint line rate is in effect for such route, the published rate shall be the rate established under section 10705(b)(2) of this title.

"(3) With respect to the tariffs of a rail carrier, 'publish' means that the tariff is generally available to the public (A) while it is in effect, and (B) during the notice period set forth in subsection (c)(3) or (c)(4) of this section, as applicable, except as that notice period is modified pursuant to subsection (d) of this section.".

(c) Section 10762(c) of title 49, United States Code, is amended—

(1) in paragraph (3), by striking out "A proposed change and a new or reduced rate" in the second sentence and inserting in lieu thereof "A proposed change

or new or reduced rate of a carrier other than a rail carrier"; and

(2) by adding at the end thereof the following new paragraph:

"(4) New or changed rates of rail carriers, and tariffs described in section 10701a(d) of this title, may become effective as follows:

"(A) During the first year following the effective date of the Railroad Deregulation Act of 1979, 21 days after notice thereof is published.

"(B) During the second year following such effective date, 14 days after notice thereof is published.

"(C) During the third year following such effective date, 7 days after notice thereof is published.

"(D) During the fourth year following such effective date, and thereafter, upon publication.

Notwithstanding the foregoing provisions of this paragraph, rates described in the second sentence of section 10701a(a) of this title may become effective upon publication.".

(d) Section 10762(d)(1) of title 49, United States Code, is amended by striking out "30-day" and inserting in lieu thereof "notice".

MISCELLANEOUS RATE PROVISIONS, INCLUDING RATES ON GOVERNMENT TRAFFIC, RELEASED VALUE RATES, AND THE COMMODITIES CLAUSE

SEC. 127. (a) Section 10709 of title 49, United States Code, is repealed.

(b) Section 10711 of title 49, United States Code, is amended to read as follows:

"§ 10711. Effect of certain sections on rail rates and practices

"Sections 10701a, 10707, and 10728 of this title do not modify the application of section 10741, 10742, or 11103 of this title in determining whether a rail rate or practice complies with this subtitle.".

(c)(1) Section 10721(a) of title 49, United States Code, is amended—

(A) in paragraph (1), by striking out "(1)"; and

(B) by striking out paragraph (2).

(2) Section 10721(b) of title 49, United States Code, is amended—

(A) in the first sentence of paragraph (1), by inserting "(except a rail carrier)" after "subchapter I"; and

(B) in the first sentence of paragraph (2), by inserting "referred to in paragraph (1) of this subsection" after "carrier".

(3) Section 10721 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) Notwithstanding section 10762 of this title, a rail carrier may provide transportation services for the United States Government at a rate to be retroactively determined where the United States Government represents to such carrier that the retroactive setting of such rate is necessary to meet the needs of the national defense.

"(2) Whenever a petition is filed under section 10741(b) with respect to a rate referred to in paragraph (1) of this subsection, the petitioner must prove, in addition to the proof required in section 10741(b)(1)(A) of this title, that the petitioner or represented purchaser would have been ready, willing, and able to purchase substantially similar transportation services at a time essentially contemporaneous with the period during which the carrier provided the services to the United States Government.".

(d) Section 10727 of title 49, United States Code, is repealed.

(e) Subsection (b) of section 10728 of title 49, United States Code, is repealed, and subsection (a) of that section is amended by striking out "(a)".

(f) Section 10729 of title 49, United States Code, is amended to read as follows:

"§ 10729. Rail carriers; incentive for capital investment

"Notwithstanding any other section of this title, any rate that became effective under this section prior to the effective date of the Railroad Deregulation Act of 1979 shall remain in effect in accordance with its terms, but for no longer than 5 years from its effective date, unless the parties agree otherwise. During that period, the Commission may, however, order the rate revised to a level equal to the incremental cost of providing the transportation if the Commission finds that the level then in effect reduces the going concern value of the carrier.".

(g)(1) Chapter 107 of title 49, United States Code, is amended by adding after section 10730 the following new section:

"§ 10730a. Rates and liability based on value for rail carriers

"A rail carrier subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, by a written agreement, or by a declaration in a tariff of a limit on liability for losses.".

(2) Section 10730 of title 49, United States Code, is amended—

(A) in the section heading, by inserting "other than for rail carriers" after "value"; and

(B) in the first sentence, by inserting "(except a rail carrier)" after "subchapter I".

(3) The section analysis of chapter 103 of title 49, United States Code, is amended by striking out the item relating to section 10730 and inserting in lieu thereof the following:

"10730. Rates and liability based on value other than for rail carriers.
"10730a. Rates and liability based on value for rail carriers.".

(h) Section 10731(b)(2) of title 49, United States Code, is amended—

(1) by striking out "10701" and inserting in lieu thereof "10701a"; and

(2) by striking out "and order the rate found to be in violation of either of those sections removed from the rate structure".

(i)(1) Section 10744(a) of title 49, United States Code, is amended—

(A) in paragraph (1), by striking out "rail, motor," and inserting in lieu thereof "motor"; and

(B) in paragraph (2), by striking out ", and a reconsignor or diverter giving a rail carrier,".

(2) The first sentence of section 10744(b) of title 49, United States Code, is amended by striking out "rail or".

(3) Section 10744(c) of title 49, United States Code, is amended—

(A) by striking out paragraph (1) and redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively; and

(B) in paragraph (2), as so redesignated, by striking out "A rail or express" and inserting in lieu thereof "An express".

(j) Section 10746 of title 49, United States Code, is repealed.

(k) Section 10747 of title 49, United States Code, is amended by striking out the last two sentences thereof.

(l) Sections 10748 and 10750 of title 49, United States Code, are repealed.

(m) Subchapter V of chapter 107 of title 49, United States Code, is repealed.

(n) The items relating to sections 10709, 10727, 10746, 10748, and 10750, and subchapter V in the section analysis of chapter 107 of title 49, United States Code, are repealed.

STUDIES

SEC. 128. (a) Within 2 years after the effective date of this title, the Secretary of Transportation shall prepare and submit to the Congress a preliminary study of competition in the provision of transportation services. Specifically, the Secretary of Transportation shall address the extent to which all forms of competition are available in connection with the transportation of goods and commodities between and within all regions of the country. The study will identify factors such as types of commodities or movements that could preclude effective actual or potential competition, and determine what, if any, rail traffic is not subject to competition.

(b) Within 4 years after the effective date of this title, the Secretary of Transportation shall prepare and submit to the Congress a final study describing experience under the maximum rate regulation provisions of this title, relating that experience to the results of the earlier study, summarizing the effects of that experience on carriers of all modes and their employees, on shippers, and on consumers, and recommending any legislation necessary to provide users of the freight transportation system with the benefits of competition.

(c)(1) For the purposes of the studies authorized by subsections (a) and (b) of this section, carriers of all modes, shippers, and other persons shall, upon request of the Secretary of Transportation, provide information and data relevant to the study. Such data may include traffic flows by mode and commodity between and within specified regions, relevant costs, rates, and revenues associated with the provision of existing and alternative transportation services, and existing and alternative marketing patterns for the commodities studied.

(2) Any information or documentary material provided to the Secretary or his representatives under this section, to the extent it contains or relates to trade secrets, processes, operations, or style of work or the identity, confidential statistical data, amount, or source of any income, profits, losses, or expenditure of any person, firm, partnership, corporation, or association, shall be exempt from disclosure under section 552(b)(3) of title 5, United States Code, and no such data may be made public except as part of the projections, statistical studies, analyses and related activities required under this section (in which case identifying characteristics shall be deleted to the maximum extent possible), and as may be relevant to any administrative or judicial action or proceeding.

(d)(1) The Secretary may request from any department, agency, or instrumentality of the Federal Government such statistics, data, program reports, and other materials as he considers necessary to carry out his functions under this section, and such department, agency, or instrumentality shall cooperate with the Secretary and furnish such statistics, data, program reports, and other materials to the Secretary upon his request. Nothing in this paragraph shall be deemed to affect any provision of law limiting the authority of an agency, department, or instrumentality of the Federal Government to provide information to any other agency, department, or instrumentality of the Federal Government.

(2) The head of any department, agency, or instrumentality of the Federal Government may detail, on a reimbursable basis, any personnel of such department, agency, or instrumentality to assist in carrying out the duties of the Secretary under this section.

PART C—STRUCTURE

ENTRY

SEC. 131. (a) Section 10901 of title 49, United States Code, is amended to read as follows:

"§ 10901. Authorizing construction and operation of railroad lines

"(a) Any rail carrier or other entity, including a State or local government, a shipper, or a shipper association, but not including a carrier subject to the jurisdiction of the Commission under subchapter I (except a rail carrier), II, III, or IV of this chapter or a person affiliated with such a carrier, may—

"(1) construct and operate a new railroad line or an extension of an existing railroad line;

"(2) construct and operate a railroad line that crosses another railroad line, if—

"(A) the construction and operation does not unreasonably interfere with operation of the line crossed; and

"(B) the owner of the crossing line pays the owner of the crossed line a fair market rental or for the easement provided.

If the carriers are unable to agree on the amount or terms of payment, or operation, either party may submit the issue to the Commission for binding arbitration.

"(b) Subject to the provisions of sections 11342 and 11343 of this title, any rail carrier or other entity, including a State or local government, a shipper, or a shipper association, but not including a carrier subject to the jurisdiction of the Commission under subchapter I (except a rail carrier), II, III, or IV of this chapter or a person affiliated with such a carrier, may acquire an existing rail carrier or portion thereof and operate its railroad line.

"(c) A rail carrier providing service within a given Standard Metropolitan Statistical Area (SMSA), as defined by the Secretary of Commerce, shall provide switching service in a nondiscriminatory manner, at a charge not to exceed the fully allocated cost of providing such service, to all carriers originating or terminating traffic within that SMSA.

"(d) For purposes of this section, a person is affiliated with a carrier subject to the jurisdiction of the Commission under subchapter I (except a rail carrier), II, III, or IV of this chapter if, because of the relationship between that person and such carrier, it is reasonable to believe that the affairs of a rail carrier acting under this section will be managed in the interest of such other carrier.".

(b) Section 10902 of title 49, United States Code, and the item relating to section 10902 in the section analysis of chapter 109 of such title, are repealed.

ABANDONMENT AND DISCONTINUANCE OF SERVICE

SEC. 132. (a)(1) Section 10903(a) of title 49, United States Code, is amended by striking out the last sentence thereof.

(2) Section 10903(b) of title 49, United States Code, is amended—

(A) by amending paragraph (1)(A) to read as follows:

"(A) finds public convenience and necessity, it shall approve the application as filed; or";

(B) by redesignating paragraph (2) as paragraph (3) and by inserting after paragraph (1) the following new paragraph:

"(2) The Commission shall find that the public convenience and necessity require and permit the abandonment or discontinuance if—

"(A) no objection to the abandonment or discontinuance is timely filed under section 10904(c)(1) of this title;

"(B) the applicant carrier demonstrates that revenues attributable to the line or service, as the case may be, do not meet or exceed the full cost of operating the line or service, as defined in section 10905(a)(1) of this title; or

"(C) the Commission determines that the benefit to the applicant carrier from abandonment or discontinuance, including any benefit arising from the ability to put capital used on the line or service to other railroad use, exceeds the detriment to the objecting party and others similarly situated from loss of service, taking into account any impact the abandonment or discontinuance may have on rural and community development.".

(3) Section 10903(c) of title 49, United States Code, is amended to read as follows:

"(c) A certificate issued under this section shall be effective on the 31st day after its issuance.".

(b)(1) Section 10904(a)(2) of title 49, United States Code, is amended by striking out "and" at the end of subparagraph (A), by redesignating subparagraph (B) as subparagraph (C), and by inserting after subparagraph (A) the following new subparagraph:

"(B) a statement that the line is available for subsidy or sale in accordance with section 10905 of this title, an estimate of the subsidy and minimum purchase price required to keep the line in operation, calculated in accordance with section 10905 of this title, and the name and business address of the person who is authorized to discuss sale or subsidy terms for the carrier; and".

(2) Section 10904(b) of title 49, United States Code, is amended to read as follows:

"(b)(1) Except as provided in paragraph (2) of this subsection, if an objection to an abandonment or discontinuance is timely filed, the burden is on the person applying for the certificate to prove that the present or future public convenience and necessity require or permit such abandonment or discontinuance.

"(2) An application approved by the Secretary of Transportation as part of a plan or proposal under section 5 (a) through (d) of the Department of Transportation Act (49 U.S.C. 1654 (a) through (d)) shall be approved by the Commission unless an objecting party demonstrates, on the record, that the detriment to the objecting party and others similarly situated from the abandonment or discontinuance exceeds the transportation benefit from the plan or proposal as a whole, as determined by the Secretary of Transportation.".

(3) Section 10904(c)(1) of title 49, United States Code, is amended—

(A) by amending the first sentence to read as follows: "The Commission shall begin an investigation to assist it in determining what disposition to make of an application for a certificate of abandonment or discontinuance if an objection is filed, at least 30 days before the date proposed in the application for the abandonment or discontinuance to become effective, by a shipper or other person that has made significant use (as determined by the Commission) of the railroad line involved during the 12-month period before the filing of the application, or by a State or political subdivision of a State in which any part of the railroad line is located."; and

(B) in the last sentence, by striking out "or on the initiative of the Commission".

(4) Section 10904(c)(2) of title 49, United States Code, is amended to read as follows:

"(2)(A) If an objection to an application is not timely filed by a proper party as described in paragraph (1) of this subsection, the Commission shall approve the application and shall immediately issue a certificate under section 10903 of this title.

"(B) If an objection to an application is timely filed by a proper party as described in paragraph (1) of this subsection, the Commission shall complete its investigation and issue its decision within 120 days after the last day on which an objection to such application could have been timely filed under paragraph (1) of this subsection. If the Commission finds public convenience and necessity, or if the Commission fails to complete its investigation and issue its decision within such 120-day period, it shall approve the application and issue a certificate under section 10903 of this title.".

(c)(1) Section 10905(a) of title 49, United States Code, is amended by striking out paragraph (2), redesignating paragraph (1) as paragraph (2), and inserting before paragraph (2) the following new paragraph:

"(1) 'full cost' means the avoidable cost of providing rail freight transportation on a line, plus an adequate return on capital attributable to the line.".

(2) Section 10905(b) of title 49, United States Code, is amended—

(A) in the first sentence, by inserting "promptly" after "publish"; and

(B) by striking out everything that follows the first sentence and inserting in lieu thereof the following: "If, within 10 days after the date of such publication, the carrier has received an offer of subsidy under subsection (c) of this section or an offer to purchase under subsection (e) of this section, any certificate issued by the Commission authorizing the abandonment or discontinuance shall have no effect for the line of railroad or portion thereof covered by the offer. If an offer of subsidy or sale is made and the subsidy or sale agreement is not consummated within 100 days after the date of publication of notice under this subsection, the Commission shall issue a new certificate authorizing the abandonment or discontinuance, except that in the case of a sale the parties may agree to an extension of such 100-day period.".

(3) Section 10905 of title 49, United States Code, is amended by striking out subsection (c) and inserting in lieu thereof the following new subsections:

"(c)(1) During the 10 days following the date of publication of notice under subsection (b) of this section, any financially responsible person, including a governmental entity, may offer to pay the carrier a subsidy that covers the difference between revenues attributable to the line and the full cost of continuing service on such line. In addition, a subsidy offer may be made for a portion of the line if such portion does not connect only to a line that is the subject of an application for a certificate of abandonment or discontinuance which is pending under this subchapter. Any subsidy offer under this subsection shall be filed concurrently with the Commission.

"(2) If a subsidy offer is for less than the carrier's estimate provided in the notice issued under section 10904 of this title, the offeror shall explain the basis of the disparity. The full cost of continuing service shall be determined by the carrier and the offeror in accordance with subsection (a)(1) of this section. The carrier shall promptly make available, to all potential offerors who so request, all information that the Commission by regulation considers necessary to allow a potential offeror to calculate an adequate subsidy offer.

"(3) A subsidy offer may not be made under this subsection for a line, or a portion of a line, if the revenues attributable to such line or portion thereof meet or exceed the full cost of operating such line or portion thereof.

"(d)(1) If the carrier and the offeror cannot agree on full cost or other terms of the subsidy, either the carrier or the offeror (if he is the only offeror or he has been chosen under subsection (g) of this section) may, within 30 days after the date the offer is made, submit the dispute to the Commission for binding arbitration.

"(2) If a dispute is submitted to the Commission for arbitration under paragraph (1) of this subsection, the Commission shall render its decision within 60 days after the date of submission. Such decision shall be effective immediately upon being rendered, and shall provide for the subsidy payments to be retroactive to 30 days after the date of publication of notice under subsection (b) of this section. After the conclusion of arbitration, the offeror may withdraw his subsidy offer, in which case—

"(A) the offeror shall pay to the operator the full cost of operation of the line, as previously determined by arbitration, for any time the line was operated or is required to be operated after the 30th day following the date of publication of notice under subsection (b) of this section; and

"(B) the Commission shall issue a certificate authorizing the abandonment or discontinuance.

"(e)(1) During the 10 days following the date of publication of notice under subsection (b) of this section, a financially responsible person, including a governmental entity, who intends to continue service on the line may offer to purchase the line or any portion thereof (including, unless otherwise mutually agreed, all facilities on the line or portion thereof necessary to provide effective transportation services) for not less than the lesser of (A) the fair market value of the line or portion thereof when used to provide rail services (excluding consideration of any Federal or State subsidy), or (B) the fair market value of the line or portion thereof when used for purposes other than providing rail services. Any purchase offer under this subsection shall be filed concurrently with the Commission.

"(2) If a purchase offer is for less than the carrier's estimate provided in the notice issued under section 10904 of this title, the offer shall explain the basis of the disparity.

"(f)(1) If the carrier and the offeror cannot agree on the purchase price or other terms of the sale, either the carrier or the offeror (if he is the only offeror or he has been chosen under subsection (g) of this section) may, within 30 days after the date the offer is made, submit the dispute to the Commission for binding arbitration.

"(2) If a dispute is submitted to the Commission for arbitration under paragraph (1) of this subsection, the Commission shall render its decision within 50 days after the date of submission. Such decision shall be effective immediately upon being rendered, and shall establish a purchase price for the line or portion thereof, which shall not be less than the lesser of (A) the fair market value of the line or portion thereof when used to provide rail services (excluding consideration of any Federal or State subsidy), or (B) the fair market value of the line or portion thereof when used for purposes other than providing rail services. After the conclusion of arbitration, the offeror may withdraw his purchase offer, in which case the provisions of subsections (d)(2) (A) and (B) shall apply in the same manner as those provisions apply to the withdrawal of a subsidy offer.

"(3) Except in a case in which the purchase offer is withdrawn, the carrier shall continue service at its own expense during the arbitration period unless the carrier and the offeror agree that the offeror shall begin service during the arbitration period.

"(g) If a carrier receives more than offer of purchase or subsidy, it shall, before the 40th day following the date of publication of notice under subsection (b) of this section, choose the offeror with whom it wishes to deal and complete the sale or subsidy agreement or submit the dispute to arbitration in accordance with this section.

"(h)(1) A carrier that sells a line or a portion of a line under this section may not discontinue service on such line or portion thereof until the purchaser commences service or 30 days after the date of consummation of the sale, whichever occurs first.

"(2) A purchaser of a line or portion of line sold under this section may not—

"(A) during the 2-year period beginning on the date of the consummation of sale, transfer or seek to discontinue service on such line or portion thereof; or

"(B) during the following 3-year period, transfer such line or portion thereof to any person other than the carrier from whom it was purchased.

"(i) Any subsidy provided under this section may be discontinued on 60 days' notice to the operating carrier and the Commission. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as the agreement discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.".

(d) Section 10906 of title 49, United States Code, and the item relating to section 10906 in the section analysis of chapter 109 of such title, are repealed.

(e)(1) Section 10907(a) of title 49, United States Code, is amended by striking out "sections 10901 and 10902" and inserting in lieu thereof "section 10901".

(2) Section 10907(b) of title 49, United States Code, is amended by striking out "under sections 10901 through 10906 of this title".

(f) Section 10908 of title 49, United States Code, is amended by striking out "train or" in the section heading and each place it appears in subsection (a).

(g) Section 10909 of title 49, United States Code, is amended—

(1) by striking out "train or" each place it appears in subsections (a) and (b); and

(2) by adding at the end thereof the following new subsection:

"(d) The procedures governing abandonment, discontinuance, and changes in services provided by rail carriers subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title are exclusive and may not be modified by a State except where service is provided, without interstate through service including service via one or more connecting railroads, wholly within that State.".

(h) The item relating to section 10908 in the section analysis of chapter 109 of title 49, United States Code, is amended by striking out "train or".

MERGERS AND CONSOLIDATIONS

SEC. 133. (a) The first sentence of section 11341 of title 49, United States Code, is amended by striking out "The" and inserting in lieu thereof "Except as otherwise provided in this subchapter, the".

(b)(1) Section 11342(d) of title 49, United States Code, is amended by striking out "this section" and inserting in lieu thereof "subsections (a), (b), and (c) of this section".

(2) Section 11342 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(e)(1) Notwithstanding subsections (a) through (d) of this section, the Commission shall, upon application, approve and authorize any transaction involving two or more rail carriers that provides for the coordination of services, exchange of markets, joint use of facilities, granting of trackage rights, or transfer of less than substantially all of the rail assets of any such carrier unless, on the basis of comments received from interested parties and a hearing if the Commission so orders, the Commission finds that—

"(A) as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States; and

"(B) the anticompetitive effects of the transaction, as described in subparagraph (A) of this paragraph, outweigh the public interest in meeting significant transportation needs.

An opponent of a transaction proposed pursuant to this subsection shall have the burden of proving the anticompetitive effects of such transaction. The proponent of the transaction shall have the burden of proving that the public interest in meeting significant transportation needs outweighs such anticompetitive effects.

"(2) In making its findings under this subsection, the Commission shall accord substantial weight to any recommendation of the Secretary of Transportation pursuant to section 5 (a) through (d) of the Department of Transportation Act. Upon receipt of an application and upon the making of any finding under this section, the Commission shall publish notice thereof and shall provide a copy of such application and finding to the Secretary of Transportation.

"(3)(A) Except as provided in subparagraph (B) of this paragraph, the Commission shall issue its finding under this section within 120 days after the date an application is filed.

"(B) If the Commission determines, within 30 days after an application is filed, that the proposed transaction is of general transportation importance, the Commission shall issue its finding under this section within 365 days after the date the application is filed."

(c)(1) Section 11343(a) of title 49, United States Code, is amended—

(A) by inserting ", except a transaction involving only two or more rail carriers," after "of this title"; and

(B) by striking out paragraph (6).

(2) Section 11343(d) of title 49, United States Code, is amended by striking out "(d)(1)" and inserting in lieu thereof "(d)" and by striking out paragraph (2).

(3) Section 11343 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) The approval and authorization of the Commission is not required for any merger, acquisition of control, transfer of all or substantially all of a rail carrier's railroad assets to another rail carrier or to a company that controls or is controlled by a rail carrier, or any corporate consolidation involving one or more rail carriers or companies that control or are controlled by rail carriers. However, no such transaction shall become effective unless the Commission certifies that the transaction is in compliance with the provisions concerning employee protection arrangements contained in section 11347 of this title. Such transactions shall be subject to the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a). No service may be abandoned or discontinued in connection with a transaction under this section except in accordance with the procedures specified in subchapter I of chapter 109 of this title.".

(d)(1) Section 11344(a) of title 49, United States Code, is amended—

(A) in the first sentence, by striking out "section 11343" and inserting in lieu thereof "section 11343(a)"; and

(B) in the last sentence, by inserting "unless such transaction involves only two or more rail carriers or" after "transaction".

(2) Section 11344(b) of title 49, United States Code, is amended by striking out paragraph (2) and redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively.

(3) Section 11344(c) of title 49, United States Code, is amended by striking out the last sentence thereof.

(e) Sections 11345 and 11346 of title 49, United States Code, and the items relating to sections 11345 and 11346 in the chapter analysis of chapter 113 of such title, are repealed.

(f) Section 11347 of title 49, United States Code, is amended to read as follows:

"§ 11347. Employee protective arrangements in transactions involving rail carriers

"(a) Employee protective arrangements in transactions under this subchapter involving a rail carrier or carriers shall be certified by the Commission as fair and equitable in the circumstances of each transaction. No such arrangement shall be certified unless it contains levels of protection for the interest of employees who will be affected thereby at least as protective of those interests as those provided under this section before February 5, 1976, and under section 565(b) of title 45, including the issuance to affected employees of 90-day notices of intended changes and the negotiation and execution of implementing agreements prior to the effectuation of changes resulting from the transaction that will affect employees.

"(b) If an implementing agreement is not executed within 60 days prior to the date the transaction is proposed to be effective, either party to the dispute may submit the issue for final and binding arbitration. The decision on any such arbitration shall be rendered no later than 5 days prior to the date the transaction is proposed to be effective, unless the parties otherwise agree. The arbitration decision shall not result in affected employees receiving levels of protection less than those provided under this section before February 5, 1976, and under section 565(b) of title 45, shall be final and binding on the parties thereto, and shall become part of the labor protective arrangement certified by the Commission."

(g) Section 11348(a) of title 49, United States Code, is amended by striking out "sections 11344 and 11345" and inserting in lieu thereof "section 11344" and by striking out "11711,".

(h) Section 11350 of title 49, United States Code, and the item relating to section 11350 in the section analysis of chapter 113 of such title, are repealed.

(i) Section 11912 of title 49, United States Code, is amended by striking out "11345, 11346,".

RAIL SECURITIES SUBJECT TO THE SECURITIES LAWS OF THE UNITED STATES

SEC. 134. (a)(1) Section 11301(a)(1) of title 49, United States Code, is amended to read as follows:

"(1) 'carrier' means—

"(A) a motor carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title;

"(B) a corporation organized to provide transportation as a carrier subject to the jurisdiction of the Commission under that subchapter; and

"(C) a corporation authorized by the Commission to acquire control of at least one motor carrier subject to its jurisdiction under that subchapter.".

(2) Section 11301 of title 49, United States Code, is amended by adding at the end thereof the following new subsections:

"(g) This section does not apply when the total value of capital stock (or principal amount of other securities to be issued) and the value of capital stock and principal amount of other securities then outstanding is not more than $1,000,000, or to notes of a maturity of not more than 2 years that aggregate not more than $200,000. Notes that, with other outstanding notes of a maturity of not more than 2 years, aggregate that amount may be issued without regard to the percentage limitations applicable under subsection (b)(2) of this section. The value of capital stock having no par value is the fair market value on the date of issue of that stock, and the value of capital stock that has a par value is the fair market value on the date of issue or the par value, whichever is greater.

"(h) This section does not apply to the United States Government, a State, or an instrumentality or political subdivision of the United States Government or a State.".

(3)(A) The section heading of section 11301 of title 49, United States Code, is amended by striking out "certain carriers" and inserting in lieu thereof "motor carriers".

(B) The item relating to section 11301 in the section analysis of chapter 113 of title 49, United States Code, is amended by striking out "certain carriers" and inserting in lieu thereof "motor carriers".

(4) Section 11302 of title 49, United States Code, and the item relating to section 11302 in the section analysis of chapter 113 of title 49, are repealed.

(5) Section 11911(a) of title 49, United States Code, is amended by striking out "or of a person to which that section is made applicable by section 11302(a) of this title".

PART D—OPERATIONS

CAR SERVICE

SEC. 141. (a) Section 11121 of title 49, United States Code, is amended to read as follows:

"§ 11121. Criteria, compensation, and practice

"(a)(1) Rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall establish and publish an agreement that sets and provides an enforcement mechanism for uniform, industrywide rules covering safe and adequate car service and related practices, demurrage rates, and charges for a rail carrier's use of rolling stock owned by another rail carrier and other equipment used in rail transportation. Rules with respect to demurrage rates provided for in such agreement shall be designed to fulfill the national needs relating to (A) freight car use and distribution, and (B) maintenance of an adequate supply of freight cars to be available for the transportation of property.

"(2) An agreement established under this section shall be submitted to the Commission for approval, and the Commission shall approve such agreement if it is limited to those items described in paragraph (1) of this subsection and contains the procedural provisions required by this subsection. If such agreement is approved, the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) shall not apply to parties and other persons with respect to making or carrying out such agreement. All discussions, agreements, and voting of the carriers with respect to the collective establishment of such rules, practices, and rates shall be open to the public, not secret, and recorded or transcribed, and a legible copy of a transcript shall be available to the public on payment of the reasonable cost of reproduction.

"(3) The Commission may, on its own initiative or on petition, investigate whether the parties to an agreement approved under this subsection have exceeded its scope and upon a finding that they have, issue such orders as are necessary to assure that actions taken pursuant to the agreement are limited as provided in this subsection.

"(b) If the rail carriers cannot, within 18 months after the date of enactment of the Railroad Deregulation Act of

1979, reach an agreement under subsection (a) of this section on any or all car service, car hire, demurrage, or related practices, any rail carrier may submit the dispute to the Commission for binding arbitration. The Commission shall render its decision within 90 days after the date of submission.

"(c) The establishment of an industrywide agreement shall not preclude a rail carrier from negotiating different terms with one or more other rail carriers jointly involved in providing rail services or with an individual purchaser of rail services. If an agreement between such carriers or between a carrier and purchaser cannot be reached, the relevant uniform industrywide rates and provisions established pursuant to subsections (a) and (b) of this section shall apply.

"(d) Rail carriers may not agree among themselves with respect to the terms of compensation for use of cars owned by an entity other than a rail carrier. Each rail carrier shall be free to enter into an agreement with any such car owning entity covering all terms and conditions affecting such compensation.".

(b) Section 11122 of title 49, United States Code, is repealed.

(c)(1) The section heading of section 11123 of title 49, United States Code, is amended to read as follows:

"§ 11123. Transportation emergencies requiring immediate action to provide adequate rail service".

(2) Section 11123(a) of title 49, United States Code, is amended—

(A) by inserting "(1)" immediately before "When" and by redesignating paragraphs (1), (2), (3), and (4) as subparagraphs (A), (B), (C), and (D), respectively;

(B) by striking out "Interstate Commerce Commission considers" and inserting in lieu thereof "President of the United States finds";

(C) by striking out "Commission may" and inserting in lieu thereof "Secretary of Transportation may";

(D) by striking out "and" at the end of subparagraph (C), as redesignated;

(E) by striking out the period at the end of subparagraph (D), as redesignated, and inserting in lieu thereof "; and" and by adding after such subparagraph the following new subparagraph:

"(E) when traffic cannot be transported by the rail carrier to which it is offered in a manner that serves the public, require the handling, routing, and movement of that traffic by another rail carrier to promote commerce and service to the public, on terms of compensation the carriers establish between themselves, subject to subsection (b)(2) of this section."; and

(F) by adding at the end thereof the following new paragraph:

"(2) The Secretary of Transportation may also take any action described in paragraph (1) of this subsection upon a written certification by the Secretary of Defense that such action is necessary to meet the needs of the national defense.".

(3) Section 11123(b) of title 49, United States Code, is amended to read as follows:

"(b)(1) Except as provided in paragraph (2) of this subsection, the Secretary of Transportation may act under this section without regard to subchapter II of chapter 5 of title 5.

"(2) When the carriers do not agree on terms of compensation under subsection (a)(1)(B) of this section or on terms for joint or common use of terminals under subsection (a)(1)(C) of this section, the Secretary of Transportation may establish in a later proceeding terms of compensation the Secretary finds to be reasonable.

"(3) The Secretary of Transportation shall compensate a rail carrier for any costs (including an adequate return on capital used) incurred by it in complying with orders issued pursuant to subsection (a) of this section, to the extent such costs are not otherwise recovered. The Secretary shall issue regulations establishing procedures to be followed for the payment of compensation under this paragraph. There are authorized to be appropriated such sums as may be necessary to provide compensation under this paragraph.".

(4) Section 11123 of title 49, United States Code, is further amended by adding at the end thereof the following new subsection:

"(c)(1) Action of the Secretary of Transportation under subsection (a)(1)(E) of this section may not remain in effect for more than 60 days. However, the Secretary may extend that period for an additional designated period of not more than 180 days if cause exists.

"(2) The Secretary may not take action that would—

"(A) cause a directed carrier to operate in violation of section 421 of title 45; or

"(B) impair substantially the ability of a directed carrier to serve its own patrons adequately, or to meet its outstanding common carrier obligations.

"(3) A directed carrier is not responsible, because of the direction of the Secretary, for the debts of the other carrier.

"(4) A directed carrier shall hire the employees of the other carrier, to the extent that they previously provided that transportation for the other carrier, and assume the existing employment obligations and practices of the other carrier for those employees, including agreements governing rate of pay, rules and working conditions, and employee protective conditions for the period during which the action of the Secretary is effective.".

(d) Sections 11124, 11125, and 11126 of title 49, United States Code, are repealed.

(e) Section 11128(a)(1) of title 49, United States Code, is amended—

(1) by striking out "Interstate Commerce Commission" and inserting in lieu thereof "Secretary of Transportation"; and

(2) by striking out "Commission shall" and inserting in lieu thereof "Secretary shall".

(f)(1) The items relating to sections 11122, 11124, 11125, and 11126 in the section analysis of chapter 111 of title 49, United States Code, are repealed.

(2) The item relating to section 11121 in such section analysis is amended to read as follows:

"11121. Criteria, compensation, and practice.".

(3) The item relating to section 11123 in such section analysis is amended to read as follows:

"11123. Transportation emergencies requiring immediate action to provide adequate rail service.".

(g) Section 11901(e) of title 49, United States Code, is amended—

(1) in paragraph (1), by striking out "(1)" and by striking out "11124, 11125,"; and

(2) by striking out paragraph (2).

(h) Section 402 of the Act entitled "An Act to amend section 5 of the Department of Transportation Act, relating to rail service assistance, and for other purposes", approved November 8, 1978 (Public Law 95–607; 92 Stat. 3067), is repealed.

COMMON CARRIER OBLIGATION

SEC. 142. Section 11101(a) of title 49, United States Code, is amended by inserting after the first sentence the following new sentences: "In this subsection, 'reasonable request' means, with respect to a rail carrier, a request for service at a rate not found unlawful under section 10701a of this title. A rail carrier cannot be found to have violated this section solely because (1) it provides different frequencies or qualities of service at different prices or under different transportation conditions, (2) it offers to contract to provide services to a prospective purchaser under certain circumstances but does not offer to provide services to another prospective purchaser under significantly different circumstances, or (3) it fails to provide prompt service during periods of peak demand where such failure is due to prior commitment of equipment.".

Part E—Accounts and Reports

DEFINITIONS

Sec. 151. (a) Section 10102 of title 49, United States Code, is amended—

(1) by redesignating paragraphs (1) through (9) as paragraphs (2) through (10), respectively, and by redesignating paragraphs (10) through (28) as paragraphs (12) through (30), respectively;

(2) by inserting before paragraph (2), as redesignated, the following new paragraph:

"(1) 'adequate return on capital' means—

"(A) in all cases other than a proceeding under section 10704(a)(2) of this title—

"(i) a return on debt capital equal to (I) the actual percentage cost of the debt associated with the capital assets employed by a railroad in providing a specific service or movement, or in a case in which such cost cannot be calculated, the mean embedded percentage cost of debt of the railroad, multiplied by (II) a fraction, the numerator of which is the debt associated with the capital assets employed in providing such service or movement, and the denominator of which is the debt and equity capital associated with the capital assets employed in providing such service or movement; plus

"(ii)(I) a return on equity capital associated with capital assets employed by the railroad in providing a specific service or movement that is adequate to attract and retain new equity capital, multiplied by (II) a fraction, the numerator of which is the equity capital associated with the capital assets employed by such railroad in providing such service or movement and the denominator of which is the debt and equity capital associated with the capital assets employed in providing such service or movement;

"(B) in a proceeding under section 10704(a)(2) of this title—

"(i) a return on debt capital equal to (I) the mean embedded percentage cost of debt of the railroad, multiplied by (II) a fraction, the numerator of which is the debt associated with all capital assets of the railroad and the denominator of which is the debt and equity capital associated with all capital assets of the railroad; plus "(ii)(I) a return on equity capital associated with the capital assets of the railroad that is adequate to attract and retain new equity capital, multiplied by (II) a fraction, the numerator of which is the equity capital associated with all capital assets of such railroad and the denominator of which is the debt and equity capital associated with all capital assets of such railroad.

For purposes of this paragraph, to attract and retain new equity capital, the rate of return must be at least equal to the rate of return an investor could earn on equity securities of other firms that have comparable capital structure and that engage in activities of comparable risk."; and

(3) by inserting after paragraph (10), as redesignated, the following new paragraph:

"(11) 'incremental cost' means that amount by which a rail carrier's costs (including the cost of assets) change as a result of a change in the quantity of a specific service or movement provided. For purposes of this paragraph, a service or movement is one provided under specified conditions and circumstances, between specified origins and destinations or at a specified location or locations. For a service or movement not expected to continue beyond the life of the existing assets that are used to provide that service or movement and that will not be used in other service, the cost of those existing assets shall not be included in the computation of incremental cost of that service or movement, except to the extent of their salvage values.".

(b) Section 10704(a)(2) of title 49, United States Code, is amended by striking out "a reasonable and economic profit or return (or both)" and inserting in lieu thereof "an adequate return".

(c) Within 4 years after the effective date of this title, the Interstate Commerce Commission shall revise all reporting requirements affecting rail carriers subject to the jurisdiction of the Commission under subchapter I of chapter 105 of title 49, United States Code, to require the minimum amount of information necessary for the Commission to properly perform its duties under subtitle IV of such title.

FINANCIAL AND COST ACCOUNTING SYSTEMS

SEC. 152. (a) Section 11142(a) of title 49, United States Code, is amended by striking out "cost and revenue" and inserting in lieu thereof "financial".

(b) Section 11142(b) of title 49, United States Code, is amended by redesignating paragraphs (2) and (3) as paragraphs (4) and (5), respectively, and by striking out paragraph (1) and inserting in lieu thereof the following new paragraphs:

"(b)(1) In this subsection—

"(A) 'cost center' means each activity, segment of line, asset, yard, shop, station, or geographic location large enough to provide accounting data sufficiently discrete to allow the costing system to yield data on specific services and lines.

"(B) 'direct costs' means those costs that can be attributed to a specific cost center without resort to arbitrary allocation.

"(2) Not later than 1 year after the date of enactment of the Railroad Deregulation Act of 1979, the Commission shall prescribe, for rail carriers providing transportation subject to this subchapter I of chapter 105 of this title, a Uniform Cost Accounting and Reporting System, which shall be separate from the financial accounting system described in subsection (a) of this section. Such system shall identify and define, for each cost center—

"(A) operating and nonoperating revenues;

"(B) direct costs, including labor, materials, and direct overhead; and

"(C) indirect costs.

"(3) The Commission shall require carriers to collect and retain data on an individual cost center basis, and shall by regulation establish levels of aggregations of cost centers that shall be used in providing data for public reports.".

PART F—COMMISSION ORGANIZATION

ARBITRATION PANELS

SEC. 161. (a) Chapter 103 of title 49, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER VI—ARBITRATION PANELS

"§ 10391. Scope of functions

"Wherever in this title provision is made for arbitration by the Interstate Commerce Commission, such arbitration shall be conducted in accordance with this subchapter. It shall be assumed in all arbitration that the public interest lies in completing the proceeding by reaching an expeditious agreement within the time stated in each specific arbitration authorization and in conformity with the standards set forth in that specific arbitration authorization.

"§ 10392. Establishment of panels

"(a) A party authorized to submit a matter to the Commission for arbitration shall do so by filing with the Commission, in a form established by the Commission, a notice of request for arbitration. Such notice shall include names of a Commissioner and an alternate chosen by the submitting party to serve on the arbitration panel. The notice shall simultaneously be served on all other parties to the proposed agreement.

"(b) Within 5 days after the notice is served, the party to the proposed agreement (other than the submitting party) shall file with the Commission, in a form established by the Commission, a response to the notice. Such response shall include designation of a second Commissioner and an alternate to serve on the arbitration panel. Where there are more than two parties to the proposed agreement, all parties (other than the submitting party) together shall, within 10 days after the notice is served, respond and designate in accordance with this subsection.

"(c) Within 5 days after the response is served, the 2 designated Commissioners shall designate a third person, who may be a Commissioner, to serve on the panel.

"(d) If a designated or alternate Commissioner is unable to serve, all parties shall be immediately notified and the party that had designated such Commissioner shall, within 5 days after such notification, designate another Commissioner to serve.

"(e) The Commission may grant such extensions of time as are necessary in any arbitration proceeding under this subchapter, except that (1) no such extension may be granted with respect to arbitration conducted pursuant to section 10905 of this title, and (2) in all cases a decision shall be rendered no later than 1 year after the date on which the matter was submitted for arbitration.

"§ 10393. Arbitration procedures; precedent; appeal

"(a) The Commission shall establish procedures for arbitration under this subchapter, including procedures requiring that—

"(1) arbitration proceedings shall be open only to the panel and its staff, the parties and their representatives, and witnesses and their representatives; and

"(2) the decision rendered shall consist of the agreement reached and supporting rationale, and shall be available to the public.

"(b) An arbitration decision shall not be considered a decision of the Commission and shall not be considered precedent for future Commission or arbitration proceedings.

"(c) An arbitration decision shall be appealable to the United States district court for the district in which any party to the arbitration resides or does business. Implementation of an arbitration decision may not be stayed or enjoined pending judicial review except where the petitioner alleges and proves that there has been corruption, fraud, or undue means in the arbitration process. The findings and decision of the arbitration panel shall be presumed correct and may be set aside, in whole or in part, or remanded to the panel, only if—

"(1) the decision does not conform to the substantive requirements of the section of this title under which the arbitration was authorized;

"(2) the proceedings were not in substantial conformity with this subchapter and regulations promulgated by the Commission under this subchapter; or

"(3) the decision was procured by corruption, fraud, or undue means or there was evident partiality or corruption on the part of the arbitration panel or any member thereof.

"§ 10394. Compensation; conflict of interest

"(a) The Commission may designate one or more employees appointed under section 3105 of title 5 to advise and assist the arbitration panels established under this subchapter.

"(b) The members of a panel and any employees designated to assist them under subsection (a) of this section may administer oaths, subpena witnesses and the production of records, and take depositions under section 10321 of this title related to matters for which the panel was established.

"(c) When carrying out their duties under this subchapter, panel members shall receive an allowance for travel and subsistence expenses as the Commission shall provide. In addition, each member of an arbitration panel who is not a Commissioner or other employee of the United States Government shall receive a per diem compensation in an amount not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–18 of the General Schedule.

"(d) A member of an arbitration panel may not have a pecuniary interest in, hold an official relation to, or own securities of, a party to the arbitration.".

(b) The chapter analysis of chapter 103 of title 49, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER VI—ARBITRATION PANELS

"10391. Scope of functions.
"10392. Establishment of panels.
"10393. Arbitration procedures; precedent; appeal.
"10394. Compensation; conflict of interest.".

PART G—FEDERAL-STATE RELATIONS

STATE AUTHORITY

SEC. 171. (a) The first sentence of section 11501(a)(1) of title 49, United States Code, is amended by striking out "shall" and inserting in lieu thereof "shall, to the extent authorized under section 10701a or 10741 of this title,".

(b) The first sentence of section 11501(b)(2) of title 49, United States Code, is amended by striking out "shall" and inserting in lieu thereof "shall, to the extent authorized under sections 10701a or 10741 of this title,".

(c) Section 11501 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) No State or political subdivision thereof and no interstate agency or other agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law—

"(1) that relates to rates, charges, routes, classifications, rules, practices, services (including abandonments or discontinuances of service), or financial structure of a rail carrier; and

"(2)(A) that applies to transportation described in section 10501(a)(2) of this title, or (B) that constitutes an unreasonable discrimination against or imposes an unreasonable burden on interstate commerce.".

PART H—MISCELLANEOUS PROVISIONS

EFFECTIVE DATES

SEC. 181. (a) Except as otherwise provided in this section, the provisions of this title shall take effect 6 months after the date of enactment of this title.

(b) The amendments made by section 124(6) and section 127(c)(2) of this title shall take effect 2 years after the date of enactment of this title.

(c) The amendments made by section 133 of this title shall take effect on the date of enactment of this title.

ANTI-INJUNCTION PROVISION

SEC. 182. Nothing in this title shall be construed to confer on any court the power to grant injunctive relief with respect to any regulatory matter dealt with in part B of this title.

SAVINGS PROVISION

SEC. 183. (a) Any judicial or administrative case or proceeding commenced prior to the effective date of this title under subtitle IV of title 49, United States Code (other than subchapter III of chapter 113 thereof), or under regulations promulgated pursuant to such subtitle, shall be conducted and determined under such subtitle or regulations as if this title had not been enacted, and the rights of parties in connection with any such case or proceeding shall continue to be governed by the law applicable to such case or proceeding as if this title had not been enacted.

(b) Any judicial or administrative case or proceeding commenced prior to June 21, 1979, under subchapter III of chapter 113 of title 49, United States Code, or under regulations promulgated pursuant to such subchapter, shall be conducted and determined under such subchapter or regulations as if this title had not been enacted, and the rights of parties in connection with any such case or proceeding shall continue to be governed by the law applicable to such case or proceeding as if this title had not been enacted.

AMENDMENTS RELATING TO BANKRUPTCIES

SEC. 184. (a) The second sentence of section 1170(b) of title 11, United States Code, is amended to read as follows:

"The Commission shall report its action on the application to the court 120 days after the date the application is filed.".

(b) Section 1170(c) of title 11, United States Code, is amended by striking out "or the expiration of the time fixed under subsection (b) of this section, whichever occurs first,".

TITLE II—RAIL RESTRUCTURING ASSISTANCE

SHORT TITLE

SEC. 201. This title may be cited as the "Rail Restructuring Assistance Act of 1979".

FINDINGS AND PURPOSE

SEC. 202. (a) The Congress finds that—

(1) the national interest requires a rail transportation system in the private sector which is capable of moving the Nation's freight safely and efficiently; and

(2) the railroad industry faces significant capital needs which it must meet through a reduction in excess facilities and through improvements in asset and manpower utilization.

(b) It is declared to be the purpose of the Congress in this title to foster a safe and efficient rail transportation system by providing transitional financial assistance which facilitates—

(1) restructuring of railroad facilities and related projects that emphasize higher density operations and the elimination of uneconomic plant; and

(2) improved asset and manpower utilization.

RESTRUCTURING ASSISTANCE

SEC. 203. Title V of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 821 et seq.) is amended by adding at the end thereof the following new sections:

"RESTRUCTURING ASSISTANCE

"SEC. 518. (a) GENERAL.—The Secretary is authorized to provide financial assistance, through repayable credits constituting a debt or equity financing, to any class I railroad (as determined by the Commission in accordance with section 11145(a) of title 49, United States Code) other than the Consolidated Rail Corporation, or to any subsidiary of such a class I railroad, to pay any share of the cost of restructuring its facilities, including related labor protection costs, and acquiring securities pursuant to a restructuring. The Secretary shall make debt or equity financial assistance available under this section only if the Secretary determines that—

"(1) the assistance will result in significant railroad restructuring and such restructuring would not be likely to be achieved unless such assistance is provided; and

"(2)(A) the railroad has agreed to restructuring under a plan submitted in accordance with subsection (h) of this section; or

"(B) the assistance will be used to fund a project approved by the Secretary under section 5 (a)–(d) of the Department of Transportation Act (49 U.S.C. 1654 (a)–(d)), and the railroad shows that such project will result in significant restructuring.

"(b) FINANCIAL ASSISTANCE.—The Secretary shall provide financial assistance under this section by purchasing a fixed debt obligation issued by a railroad, or where the Secretary determines that an equity financing is essential to a restructuring, the Secretary may provide financial assistance under this section by purchasing Senior Preferred Stock. The Secretary may purchase a fixed debt obligation issued as a trustee certificate by the trustee of a railroad in reorganization under chapter 11 of title 11 of the United States Code or under section 77 of the Bankruptcy Act. The Secretary shall purchase a trustee certificate only if the Secretary finds that the restructuring is necessary for the establishment of a self-sustaining railroad.

"(c) CHARACTERISTICS OF FIXED DEBT OBLIGATIONS.—A fixed debt obligation which the Secretary purchases under this section shall provide that on the 5th anniversary of the date of original issuance, interest (at three-fourths of the rate established by the Secretary of the Treasury as of the most practicable date immediately preceding execution of a financing agreement, taking into account the current average yield on outstanding marketable securities of the United States having comparable maturities) shall begin to accrue. Beginning on the 6th anniversary of the date of original issuance, accrued interest and principal shall be payable annually in equal aggregate installments such that on a date not later than the 20th anniversary of the date of original issuance, the principal and all accrued interest shall have been repaid. Consistent with subsection (f) of this section, the Secretary may require a railroad or a subsidiary receiving assistance under this section to convey to the Secretary a security position which accords the Secretary a lien and priority of payment which are subordinate to those of the railroad's or subsidiary's present and prospective secured creditors (and any claims having a priority of payment senior to secured creditors) but are first in time and right to those of all present and prospective unsecured creditors.

"(d) Exchanges.—Where the Secretary makes a determination under subsection (b) of this section, the Secretary may, in purchasing trustee certificates or at any time thereafter, agree with the trustee of a railroad in reorganization under chapter 11 of title 11 of the United States Code or under section 77 of the Bankruptcy Act to exchange trustee certificates for Senior Preferred Stock issued in connection with a plan of reorganization approved by the reorganization court.

"(e) CHARACTERISTICS OF SENIOR PREFERRED STOCK.—Senior Preferred Stock purchased by the Secretary under this section shall be an equity security issued by a railroad or its subsidiary. Each share of Senior Preferred Stock shall—

"(1) in accordance with laws of the issuer's State of incorporation governing dividends on and redemption of preferred stock—

"(A) be subject to redemption at par commencing no later than the 6th anniversary of the date of original issuance and ending not later than the 20th anniversary of the date of original issuance in amounts which will aggregate the initial par value of the share and return the aggregate of dividends cumulated and due;

"(B) have dividends payable annually (at one-half the rate established by the Secretary of the Treasury as of the most practicable date immediately preceding execution of a financing agreement, taking into account the current average yield on outstanding marketable securities of the United States having comparable maturities) beginning on the 6th anniversary of the date of original issuance and computed on the average outstanding par amount of the share for the 12 months preceding each payment; and

"(C) have dividend and redemption declarations and payments which are cumulative and not subject to the discretion of the issuer's board of directors or shareholders;

"(2) be optionally redeemable by the issuer, and upon any optional redemption, shall return the outstanding par value plus the aggregate of dividends cumulated and due (pro rata for any part of a year after the 5th anniversary of the date of original issuance) as of the date of an optional redemption;

"(3) be nonvoting and have an initial par value of $10,000;

"(4) be senior in right with respect to dividend and redemption payments and in case of any liquidation or dissolution of the issuer only to all of the issuing corporation's equity securities whenever issued; and

"(5) be issued by the corporation (A) that owns all of the facilities to be rehabilitated or improved, or (B) that will, at the completion of an acquisition, own all of the facilities acquired in whole or in part with assistance provided under this section and that has a capitalization at the time of issuance which consists solely of equity.

"(f) TERMS AND CONDITIONS.—Before providing any financial assistance under this section, the Secretary shall require the railroad or the subsidiary receiving assistance to agree to such terms and conditions as are sufficient, in the Secretary's judgment, to assure that—

"(1) significant restructuring will occur;

"(2) all financial assistance provided under this section will be used as prescribed by the Secretary; and

"(3) that there is a reasonable likelihood that such financial assistance will be repaid.

"(g) DEFAULT.—Whenever a railroad or a subsidiary receiving assistance under this section defaults on any provision of a financing agreement or a security purchased pursuant to this section, the Secretary may (but is not required to) appoint from time to time two members to the board of directors of the railroad or the subsidiary (or both), at the Secretary's option, who shall serve until the financial assistance has been repaid in full or for a lesser period as determined by the Secretary. The Secretary may also exercise all remedies in law or equity and may request the Attorney General of the United States to commence a civil action for damages, specific performance, or any other available remedy in any appropriate court.

"(h) RESTRUCTURING PLANS.—Each railroad or subsidiary which applies for assistance under subsection (a)(2)(A) of this section shall submit a restructuring plan that—

"(1) has been approved by the railroad's board of directors;

"(2) demonstrates the railroad's or the subsidiary's ability to repay the financial assistance; and

"(3) identifies specific coordinations, consolidations, or other restructuring actions which the railroad or the subsidiary proposes to undertake.

The Secretary shall establish regulations governing the scope, content, and format of the restructuring plan.

"EMPLOYMENT EFFECTIVENESS IMPROVEMENT ASSISTANCE

"SEC. 519. (a) GENERAL.—The Secretary is authorized under such terms and conditions as the Secretary shall prescribe to provide financial assistance to any class I railroad other than the Consolidated Rail Corporation to cover up to 100 per centum of the railroad's payments to any eligible employee or former employee to whom the railroad is obligated to make payments under a labor-management agreement which results in a significant change in railroad operating practices or work rules and which the Secretary determines will significantly improve manpower effectiveness. In making such determination, the Secretary shall consider the relationship of the railroad's labor costs to its revenues and any evidence of efficiency gains that the railroad and labor organizations may demonstrate.

"(b) FINANCIAL ASSISTANCE.—The Secretary shall make financial assistance available under this section by purchasing a fixed debt obligation, including a trustee certificate, which shall be unsecured but otherwise have the terms and conditions of fixed debt obligations under section 518(c) of this title.

"(c) TERMS AND CONDITIONS.—Before providing any financial assistance under this section, the Secretary shall require the railroad receiving assistance to agree to such terms and conditions as are sufficient in the Secretary's judgment to assure that the railroad has, through a long-term change in operating practices or work rules, improved its manpower effectiveness.

"(d) DEFAULT.—Whenever a railroad receiving assistance under this section defaults on any provision of a financing agreement or security purchased pursuant to this section, the Secretary may exercise all remedies in law or equity and may request the Attorney General of the United States to commence a civil action for damages, specific performance, or any other available remedy in any appropriate court.

"AUTHORIZATION

"SEC. 520. There is authorized to be appropriated to the Secretary for purposes of providing financial assistance under sections 518 and 519 for fiscal years 1980 through 1984, without fiscal year limitation, such sums as are necessary, not to exceed $1,475,000,000, of which no more than $275,000,000 in the aggregate shall be used for the payment of related labor protection costs under section 518 and for providing assistance under section 519. Sums appropriated under this section are authorized to remain available until expended.".

TECHNICAL AMENDMENTS

SEC. 204. (a) Section 501 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 821) is amended—

(1) by redesignating paragraphs (2) through (7) as paragraphs (4) through (9), respectively, and by inserting after paragraph (1) the following new paragraphs:

"(2) 'consolidation' means the combination of separate rail facilities into fewer facilities and the abandonment of excess facilities, except that such term does not include the combination by a single railroad of multiple tracks into fewer tracks where the tracks do not constitute separate physical and operating lines of railroad;

"(3) 'coordination' means the combination of rail freight traffic flows through the use of joint facilities arrangements or internally that results in a reduction of service on at least one facility and includes arrangements for joint use of tracks or other facilities and the acquisition or sale of assets;";

(2) by amending subparagraph (5)(E), as redesignated, to read as follows;

"(E) shop or repair facilities or any other property used or to be used directly in rail freight transportation services or for originating, terminating, improving, and expediting the movement of freight by rail;"

(3) in paragraph (8), as redesignated, by inserting "trustee certificate," after "note," and by inserting ", or to facilitate a restructuring" after "improvement"; and

(4) by striking out "and" at the end of paragraph (8), as redesignated, by striking out the period at the end of paragraph (9), as redesignated, and inserting in lieu a semicolon, and by adding at the end thereof the following new paragraphs:

"(10) 'restructuring' means any activity (including consolidations, coordinations, mergers, and abandonments) which (A) involves rehabilitation or improvement of any facility or its transfer, (B) improves the long-term profitability of any railroad or railroads, and (C) results in the enhancement of the national rail freight system through the achievement of higher average traffic densities and improved asset utilization; and

"(11) 'subsidiary' means any corporation in an unbroken chain of corporations beginning with a class I railroad, if each corporation other than the last corporation in the chain owns voting securities possessing more than 50 percent of the total combined voting power in one of the other corporations in the chain.".

(b) Section 510 of such Act (45 U.S.C. 830) is amended—

(1) by inserting ", obligations, or Senior Preferred Stock" after "shares"; and

(2) by inserting "to the Federal Government" after "railroads".

(c) Section 511(i) of such Act (45 U.S.C. 831(i)) is amended—

(1) by amending paragraph (1)(A) to read as follows:

"(A) will not make any discretionary dividend payments except as provided for in the Secretary's agreement to guarantee its obligation; and"; and

(2) by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2).

Mr. FLORIO. I look forward to the witnesses' testimony today, and at this point would welcome the Chairman, Mr. O'Neal. I think it would be appropriate that we hear from them.

Mr. O'NEAL. Thank you.

Senator McGOVERN. Mr. O'Neal, I want to join in welcoming you to the committee this morning.

STATEMENTS OF HON. A. DANIEL O'NEAL, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, ACCOMPANIED BY HANFORD O'HARA, LEGISLATIVE COUNSEL; JAMES V. SPRINGROSE, VICE PRESIDENT FOR TRANSPORTATION, CARGILL CO.; JOHN NORTON, DIRECTOR OF TRANSPORTATION AND DISTRIBUTION, DU PONT CO.; E. MORGAN MASSEY, PRESIDENT, A. T. MASSEY COAL CO., ALSO ON BEHALF OF THE BOARD OF DIRECTORS, NATIONAL COAL ASSOCIATION; LAURENCE J. STERN, MANAGER OF TRANSPORTATION, SUNKIST GROWERS; AND MICHAEL LEVIN, VICE PRESIDENT FOR TRANSPORTATION, WESTERN GROWERS ASSOCIATION

Mr. O'NEAL. Thank you.

I have a much longer, prepared statement I would like to submit for the record [see p. 94], and a summary statement that I will try to run through in just a few moments.

With me on my left is Hanford O'Hara, who is our legislative counsel.

We, of course, are participating in the effort that you have expressed toward finding the proper mix of regulation in the marketplace for producing a sound railroad transportation system. The ICC today is working under the latest directive from the Congress which took the form of the 4-R Act in 1976, and we have taken a number of actions pursuant to that act. We are currently reassessing some of the initial steps that were taken. For example, we are looking at such issues as to how to make market dominance more workable than it seems to be. We are looking at the issue of through routes and joint rates. We are looking at general increases and what adjustments ought to be made in that area, if any, and we are also very much involved in the contract rate area.

Insofar as legislative changes are concerned, we feel that much of what needs to be done can be done administratively. However, we do have some legislative ideas which we are proposing at this time. We don't claim these to be as comprehensive, perhaps, as they should be, but they represent where we come out at this point of our review of rail regulation.

I will run through some of the policy initiatives and then spend a little time on some of the legislative proposals.

In the market dominance area, we have been aware, of course, of the complaints by the railroads that the process has been too cumbersome, and that there have been restrictions on their ability to use the flexibility available in the 4-R Act because of the Commission's rules on market dominance. So we had a study done last year, the results of which were made available this spring, and using that study, we are now proposing some changes to the market dominance test.

Essentially what we are looking at is presuming that there is competition where revenue is 140 percent or less of variable costs.

Essentially that would mean if rate adjustment falls into that area, the Commission is very likely not going to suspend or investigate the rate unless there is an awfully good showing by a shipper protestant that there is market dominance by the carrier.

Above that level, between 140 and 180 percent, the protestant would still have the burden of showing a lack of effective competition. Over 180 percent of variable costs, the burden would shift to the carrier to establish the presence of effective competition.

We are also considering the possibility of a 7-percent zone of reasonableness where there would be a guarantee of no suspension.

The purpose of this is to give a signal to both sides, shippers and carriers, that if a rate falls within a certain level, what action they can expect from the Commission and what they can anticipate in terms of that rate going into effect.

We have been concerned for some time about the heavy reliance of railroads on general rate increases to raise their revenues. Indeed, in the last several years, 98 percent of the railroads' revenues have come from this approach. We think it is self-defeating for the railroads, that it has tended to move the railroads away from where they should be, and where they should be is in pricing selectively and using pricing as part of their marketing strategy so they can be more competitive.

On through routes and joint rates, this is an issue which the Commission had hoped we would have a little longer period to evaluate ideas about how this question can be addressed. There is little question, I think, that the fact that railroads are required to maintain joint rates imposes a limitation on their capacity to price flexibly in that before they can make a change in a rate they have to obtain a concurrence where a joint rate is involved. They have to obtain a concurrence from the other railroad that is involved. And since 70 percent of rail traffic is interlined, that does impose a restraint on the railroads in their price flexibility.

Recently ConRail in particular has come in and made some proposals which have caused the Commission to confront this issue directly and, while we hoped to have a little time to look at it theoretically, we must now look at an actual situation, in fact, several. ConRail has in effect proposed surcharges on certain traffic that that railroad claims is moving at noncompensatory levels, below variable costs, and thus far the Commission has allowed those rates to go into effect.

We are currently reviewing the proposals. We are cognizant of the issue here—that we are looking at a balance between ratemaking freedom versus the need to maintain an integrated rail system. And frankly at this point I don't have the answer to where that balance is. But this is a very important issue which we are looking at right now.

Another issue of concern is demand-sensitive rates and why the railroads haven't used them. Apparently there is a problem in the notice requirements. We are looking at changing that.

With regard to contract rates, again, we are aware of the concerns of the railroads and shippers about the use of contract rates. We are currently trying to develop some guidelines. There are some problems in using contract rates. Many small shippers are quite concerned that with contract rates being made available, that they may be squeezed out of using rail service. Contract rates can be anticompetitive, and again, the question is how do we strike a balance? How do we strike a balance between what we think is a good idea, contract rates, where they apply, and the obligation of railroads to meet their common carrier obligation. There is a question as to whether, if you have contracts, we should make them available on the same terms to other shippers, and how that would work. So there is some work that needs to be done in that area.

There are some other things that the Commission currently has underway. We have a uniform system of accounts in effect for the railroads. Adjustments are being made to make it work better. We are also starting up a cost center accounting and reporting system. We are making some adjustments in the line abandonment process to make it work better, we hope. One of our concerns is that recently the courts have forbidden the Commission from reopening a line abandonment case after 6 months, even if the railroads had refused to negotiate in good faith. Our concern is that the leverage is lost and that perhaps a subsidy negotiation, a negotiation between local communities or shippers and the railroad, might not take place if there isn't some leverage to force the parties to deal in good faith. We are afraid that the courts have eliminated that incentive.

We are considering now proposing exempting from the statute—and this would, of course, have to come in the form of legislation—the requirement that railroads apply to the ICC before they can construct new lines. We want to make sure that that is really a necessary regulatory concern at this stage of railroad development.

The Commission has also been very active in using the general exemption authority. I guess we will have more testimony from the shippers on that later. The Commission did exempt fresh fruits and vegetables in June. We are considering other agricultural products, ground crops in particular. We are also looking at exempting TOFC and COFC traffic. There are some other areas, but these are the primary ones we are focusing on at the present time.

Turning now to the legislative area, again, I want to say that we are not here proposing a comprehensive package, and I don't want to pretend that it is anything like that. We do have some specific ideas that we think should have some congressional attention.

In the abandonment area, just a fairly minor thing but it does involve eliminating some what we think is unnecessary delay. In the long haul and short haul provisions of the statute, we feel this area probably ought to be repealed in its entirety. We see no necessity for it today with the competition being provided to the railroads for short haul transportation.

We are also proposing an exemption from securities issuance for small railroad carriers. We don't think those requirements need to be imposed on small railroads. We are also suggesting that there be an expansion of the rail exemption authority. The operative language in the statute right now gives the Commission the power to exempt railroad traffic from regulation where it is of limited scope. We feel that innovation in the rail area should not be limited to limited scope. It is important to recognize here that the public is protected if the Commission does take action to exempt commodities from regulation. There are the various safeguards in the

Administrative Procedures Act, in the Interstate Commerce Act, and of course, there is judicial review of whatever action is taken. In addition, there is always the possibility and the power for the Commission to make a change in the exemption if we feel that a mistake has been made or if someone comes in and complains and makes a good case that the adjustment was not proper.

That ends the summary of the statement. I would be pleased to try to answer any questions that you might have.

[Testimony resumes on p. 136.]

[Chairman O'Neal's prepared statement and attachment follow:]

STATEMENT OF
A. DANIEL O'NEAL, CHAIRMAN
INTERSTATE COMMERCE COMMISSION
BEFORE A JOINT SESSION OF THE SUBCOMMITTEE ON ECONOMIC GROWTH AND STABILIZATION OF THE JOINT ECONOMIC COMMITTEE AND THE SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON RAILROAD REGULATION

September 27, 1979

Mr. Chairman, Members of the Subcommittees:

I. OVERVIEW

I appreciate the opportunity to appear before you today to present the views of the Interstate Commerce Commission on issues relating to rail regulation.

After nearly a hundred years of railroad regulation, we are once again at one of those critical points in the continuing debate; namely, what is the proper mix of regulation and the marketplace to achieve the best results for the Nation's railroad system? For many years--from the beginning of regulation in 1887 to the passage of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act)--the answer generally was more regulation. Through a series of laws enacted over those years, Congress gave to the Commission greater and greater regulatory responsibility over the railroads' fortunes, including such facets of operations as rates, service, entry and exit, and mergers and consolidations.

The 4R Act represented a significant shift in approach, since Congress concluded that the improvement of the railroads' fortunes appeared to depend on less regulation rather than more. The broad aim of that legislation, as expressed by Congress in its declaration of policy, was to restore, maintain, and revitalize an efficient railway system under private enterprise. Although this Act is still relatively new, the continuing debate over its effectiveness is one of the reasons why we are again discussing these issues today.

This debate has focused largely on whether there is a need to continue maximum rate regulation. It is the view of some that this regulation is not necessary, because competitive forces will operate to keep all rail rates at a reasonable level. The Commission does not endorse this view, although we do believe that competitive forces do play a greater role in determining rail rate levels than they have in the past. To this end we are adopting numerous initiatives which will lessen our regulation in certain areas, and have already removed it entirely in one area. Some of these initiatives will be discussed shortly.

Other important issues which are part of the debate include through routes and joint rates, general increases, and contract rates. Considerable thought and ingenuity have been given to those matters by people representing a broad spectrum of interests. The Commission is continuing to reassess its position on all of those areas, and in some has issued policy statements. We recognize, as others do, that regulatory changes are needed.

Of course, the inquiry into the Nation's railroads' problems must be comprehensive, taking into account the way in which various regulatory reform initiatives affect each other, and further, taking into account the relationship between regulatory reform efforts and other initiatives, such as financial assistance. It should also reflect the fact that the railroad "problem" varies widely among the situation in the Northeast, the situation in the Midwest, and the circumstances surrounding the lines in the other sections of the country.

In addition, any initiatives in the railroad area must take into account not only the interests of the railroads but also the interests of rail users, and should come only after all affected have had an opportunity to express their views on the subject. That includes not only the shipping public, but also the public at large. It is not simply a question of what is fair, although fairness in the marketplace is important. More fundamentally, it is a question of the economic viability and progress of large sectors of the economy. Railroad rates and practices substantially affect numerous producing and manufacturing concerns, large and small, who depend heavily on railroad transportation, at reasonable rates and service levels, to calculate their own economic prospects. Among these are producers and users of such basic commodities as food and fuel, whose collective economic fortunes substantially affect the economy of the entire Nation. Any program which purports to aid the railroads at the expense of these other important elements of the economy could cause severe problems overall. Moreover, such a program probably would be ineffective since the railroads' long-term fortunes depend upon the economic viability of rail users.

How the Congress addresses these issues will be influenced by what it wants from the Nation's railroad system and how it views that system. In summary, should the railroads be viewed solely as private enterprise? Or is the rail system also an instrument of national policy, to be used to secure social as well as economic ends? And if so, who should pay for the achievement of these purposes?

With these general thoughts in mind, I will now turn to a more detailed examination of our own recent railroad policy initiatives. In some instances we have combined recommendations for legislation with our discussion of our own policy initiatives. Where we have done so, it represents our best judgment that statutory changes are necessary to fulfill regulatory goals. Where we have not done so, it means either that we believe sound policies can be carried out under existing law, or that policies are still actively being worked out and the need for legislation, if any, cannot yet be determined with certainty.

II. RAILROAD POLICY INITIATIVES BY THE COMMISSION

A. MARKET DOMINANCE

In the 4R Act the Congress told the Commission to continue regulating where competition was inadequate to prevent monopoly pricing, to give the railroad freedom to price their services in competitive markets, and to devise a test to distinguish between the two situations.

We devised that test, by defining the concept of "market dominance." That action has produced a lively controversy. We feel that we drew that line in a reasonable way, but we believe the question of where the line should be drawn is a fair one and will benefit from increased discussion. We are well along in the process of reviewing our definition of market dominance in light of our experience under the 4R Act. We recognize that the presumptions we established for determining market dominance have created some problems, especially since they are viewed as overly complex by some parties.

We will soon propose a more simplified threshold test for determining our jurisdiction. On September 6 we announced that we are going to reopen Ex Parte No. 320, the rulemaking proceeding in which we established the current market dominance standards. As indicated in a recent press release (copy attached), a notice of proposed rulemaking in this matter is currently being drafted and will be released very soon.

The notice of proposed rulemaking will discuss the following elements which the Commission will propose to include in its revised standards and procedures for market dominance:

- A cost range for rates of 100% to 140% of variable cost within which the Commission will not suspend or investigate.
- A cost range for rates greater than 140% of variable cost and not exceeding 180% of variable cost within which any protesting party must establish the absence of effective competition.
- A requirement that the railroad proposing a rate in excess of 180% of variable cost establish the presence of effective competition.

Variable costs would be determined on a Rail Form A basis and the Commission's 1977 "Burden Study"[1/] would be available to interested parties to assist them in determining which cost range applied to particular movements.

1/ Using the One Percent Waybill as the primary data base, a revenue contribution study for 1977 has been developed through a contract for the Commission by A. T. Kearney, Inc. This study is referred to as the "Burden Study". While the waybill contains revenue data for each movement, variable and fully-allocated costs had to be estimated. Rail Form A costs were utilized to calculate variable and fully-allocated costs by type of cars, net loads, and varying lengths of haul for each ICC cost territory. These costs were estimated using both regional averages and individual carrier data. Details on the costing methodology will be included in the market dominance notice of proposed rulemaking.

It is contemplated that costs developed by the Burden Study would be accepted as prima facie evidence (subject to rebuttal by more accurate cost data) to make these procedures administratively feasible for small shippers.

The proposed standards will also provide specific guidelines to assist interested parties in determining the presence or absence of effective competition. These will identify such transportation characteristics as: long-haul bulk movements lacking water competition, oversized or overweight movements, hazardous materials that cannot be shipped by other modes, and other factors indicating that the shipper lacks practical alternatives to rail transportation. The three existing rebuttable presumptions contained in the present regulations would be cancelled. Nothing in this proposal would affect the Commission's ability to investigate discrimination, poor service or inefficient management.

In addition, the Commission has announced it will propose to establish a zone of reasonableness (ZOR) for all rates to permit a 7 percent per calendar year adjustment, up or down, from the base rate. Rates adopted within the zone would not be suspended or investigated, but a formal complaint could be filed later.

At the Commission's conference held July 17, 1979, there was considerable discussion as to the applicability of the market dominance test to rates within the zone of reasonableness. At present there is a fairly clear consensus among the members that the market dominance test should not apply to rates within the zone of reasonableness as long as the rate falls below 180 percent of variable cost--above which market dominance would be presumed.

The proposed rulemaking does not make a preliminary judgment as to whether rates within the zone of reasonableness, but exceeding the upper limit for a presumption of market dominance (e.g., 180 percent of variable cost), should also be exempted.

The ZOR concept is being considered because it was felt that limited rate flexibility is necessary to meet individual market situations.[2/] One of the options the Commission is considering is a zone of reasonableness which would not preclude the railroads from filing for general rate increases in order to recoup their inflation created costs.

It is recognized that heavier reliance on rate to variable cost ratios may increase the number of cost-based protests. On the other hand, acceptance of the costs developed in the Kearney report as <u>prima facie</u> evidence, and the use of the 7 percent zone, should mitigate this problem to some extent. In addition, as mentioned, the NPR will contain specific evidentiary guidelines to be addressed by

2/ Vice Chairman Stafford is generally opposed to carrier rate flexibility because, much more often than not, it means higher rates for shippers who have no forum to which they can appeal.

the parties in establishing the presence or absence of market dominance.

We believe the above program represents a logical and internally consistent approach. It is being proposed because it appears to offer the following advantages:

1. Meets the economic and equity considerations contained in the 4R Act.

2. Provides both shippers and carriers with a sense of certainty regarding Commission decisions on market dominance.

3. Is consistent with other aspects of regulatory reform.

4. Provides carriers with limited rate flexibility without an unduly complex administrative process.

B. GENERAL RATE INCREASES

In an era of inflation and rapid changes in economic conditions, general rate increases have been justified by the railroads for the most part as across the board revenue increases to offset rapid escalations in wages, fuel expenses, and other outlays. However, an almost exclusive use of general increases as a means of additional revenue generation has resulted in severe compromises in the ability of individual railroads to respond in a timely fashion to changes in individual railroad costs and demands for service.

The special ratemaking provisions of the 4R Act are designed to achieve a better balance between needed short-term funds for both financially sound and marginal railroads and needed modifications of the tariff structure consistent with the efficient long-term provision of rail service in the public interest. They offer a wider opportunity for competitive pricing through individual, independent initiatives. We believe, therefore, that the intent and policies of the 4R Act ratemaking provisions necessitate de-emphasizing the role of the general increase in railroad ratemaking.

The Commission generally does not favor general rate increases due to their adverse impact on the railroad rate structure and their insensitivity to market condition and demand considerations.[3/] On the other hand, the Commission recognizes the railroad industry's need to offset inflation created cost increases. We would like to reduce or eliminate the general rate increase and induce the railroad industry to make greater use of the 4R Act ratemaking provisions. The newly proposed market dominance standards are intended to re-enforce selective ratemaking initiatives. As the carriers gain experience with selective rate actions, we will consider de-emphasizing the use of general rate increases by limiting their applicability or reducing the proportion of costs which can be recovered through the use of general increases.

3/ Vice Chairman Stafford does not support elimination of general increases. He believes they are the only practical means of recouping inflationary costs without imposing an unfair burden on captive shippers.

Commissioners Trantum and Alexis believe that general rate increases should be quickly eliminated.

While Commissioner Clapp believes it is desirable to reduce the level of reliance which railroads currently place on the general rate increase approach by encouraging other means of obtaining income such as selective increases, he thinks that at the present time its elimination would be unwise.

We should mention that some interest has been expressed in the use of inflation cost indices as a possible alternative to general rate increases. The use of such indices--to recover at least a portion of actual or prospective inflation created cost increases--has both positive and negative aspects.

The use of such an instrument would eliminate most of the documentation which must accompany general rate increase requests. It could also eliminate some of the time lag present in the current system. Some parties have argued that if the Commission were to forecast annual inflationary cost increases, announce them in October or November and allow increases up to that level any time after January 1 of the following year, the railroads would benefit from an immediate increase in cash flow through the elimination of lags.

However, it appears that such increases could leave the carriers in an unchanged financial condition in the absence of any significant productivity and efficiency gains. Also, such an approach would not encourage selective rate activity and the corresponding rationalization of the rate structure. For these reasons, we have thus far not supported the use of an inflation cost index, preferring to proceed with revised market dominance regulations (as well as other ratemaking regulatory revisions) which are designed to encourage selective rate activity in competitive markets. However, we are not ruling out such indices, and we intend to reevaluate in the future the possibility of using them to offset inflation created cost increases in captive markets. For example, one approach would be to allow indexed increases in rates up to a point somewhat below anticipated or experienced cost increases. This would force the railroads to improve their efficiency and productivity, and thereby improve their financial condition. Such an approach would also not be inflationary.

While we have not studied the relative merits of various types of indices, the "charge-out price and wage index" published by the AAR appears to be one good candidate.

C. <u>THROUGH ROUTES AND JOINT RATES</u>

The Commission is currently analyzing the joint-rate and through-route issue. As we have noted repeatedly, we believe that rate flexibility and rate innovation are the keys to the solution of the rail problem. In this regard it is important to note that 70 percent of rail traffic is interlined between at least two carriers, chiefly under joint rates. In order to make a rate change in such a situation, the carriers traditionally needed to obtain the approval of the interlining carriers (or, if the proposed cancellation is protested, the Commission's approval) to cancel the joint rates. These factors can have the effect of deterring carriers from making rate changes which they feel to be necessary to cover their own segment of a through movement.

We believe that the inhibition of joint rates on the use of ratemaking flexibility is an important issue which warrants attention now. The Commission, several months ago, prevented interlining carriers from cancelling a tariff in the Michigan Northern[3/] case. But more recently, in the Ann Arbor[4/] case, the Commission allowed Conrail to cancel a joint rate with the Ann Arbor Railroad, subject to our investigation, which is now in progress. In addition, we have authorized a number of surcharges which have allowed carriers to increase their revenue on their portion of interline movements.

There are, of course, serious questions which must be explored in considering this issue. The ability of one carrier to raise rates on interline traffic may divert the traffic, thus affecting the revenue of the interlining carrier. In the Michigan Northern case, just the opposite was true; the carrier refused to join a general rate increase, and other carriers tried to coerce it by cancelling their joint rates. It is also possible that originating carriers could take actions which might undermine the financial structure of connecting lines with whom they compete for other traffic. For example, assume an originating carrier has two optional routings for a shipment to a given destination, one of which is more direct and uses a connecting

3/ I&S 9179, Cancellation of Intermediate Routing, Michigan Northern Railway, served August 29, 1978; Commissioner Gresham vigorously opposed the majority's decision in this case.

4/ No. 37093, Joint Rates via the Ann Arbor Railroad System, December 1978. A decision on this proceeding will be made on October 15.

carrier, while the other is more circuitous but is solely on the carrier's own lines and thus produces higher revenue for that carrier. Currently, the originating carrier would be required to establish through routes and joint rates via the more direct route. If through routes were not required, the carrier could effectively close off the direct route as a serious rail alternative. That would harm the carrier's natural connecting carriers, and an inefficient and wasteful circuitous route might be promoted.

The Commission can police such abuses under its existing authority to suspend the local rates which would be established in lieu of the joint rate, if the interlining carrier protests that the new local rates would be discriminatory, predatory or unreasonably high. Perhaps one way to solve the need of the carriers for the freedom to price their services over their own lines in interline movements would be to establish a zone of reasonableness whereby interlining carriers would be given freedom to establish local rates--or surcharges on joint rates--within a certain percentage of the existing joint rate. This zone could be enlarged over a period of time, except as to the issue of discrimination, where the Commission would retain jurisdiction. The increased use of exemptions for particular commodity groups is another device that might be used to modify gradually the existing through route and joint rate structure.

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Whether or not either of these approaches is adopted, the point to be noted is that the joint rate question presents a clear issue of the need to give carriers ratemaking freedom versus the need to maintain an integrated transportation network. Some modification of the existing restrictions in this area seems warranted, and the Commission will carefully evaluate and take prompt action on the petition of any carrier to establish innovative practices involving interline movements. We have instructed our Office of Policy and Analysis to look into the joint rate situation and recommend to the Commission possible initiatives we could take. However, the recent filing of surcharge requests, which I will discuss next, has somewhat forced the issue.

Surcharges have been sought by particular rail carriers on particular types of traffic. This represents a device designed to redress revenue shortfalls. We are requesting that basic cost and revenue information be submitted at the time a surcharge tariff is filed. This will enable the Commission's staff to monitor closely the effect of any approved surcharges.

The Commission's recent actions to allow publication of surcharges on single and joint line rates is based on two special considerations. Most of these surcharges were permitted in situations where the rail carrier submitted evidence indicating that the revenue it was earning was insufficient to cover its costs although the overall joint rate was compensatory. The 4R Act requires the Commission to permit rate increases in those cases where the current rate diminishes the carrier's going concern value.

The second consideration where we permitted the use of a surcharge was when it was used as a peak or demand-sensitive rate to reflect an equipment shortage. The Rock Island surcharge on hopper cars represents an example of this situation.

D. DEMAND SENSITIVE RATES

In Ex Parte No. 324 the Commission established regulations implementing the 4R Act's demand sensitive rates provisions. These regulations require that carriers file 30 days prior to implementing a seasonal rate. The Commission established that requirement in anticipation that any changes in traditional notice requirements would have a disruptive effect on shippers. It was felt that if peak pricing was to be used as a means of shifting demand, 30 days would be required for shippers to adjust their demand.

The procedures established in the Commission's regulation for implementing seasonal rates have been criticized by the railroad industry as being overly restrictive. The industry's criticisms have focused on two principal areas: notice and reporting requirements.

The carriers have argued that the 30 day notification requirement severely limits the usefulness of this provision. In particular, they maintain that the uncertainty affecting the supply and demand for equipment used in unstable markets requires that rate changes be implemented with little or no notice. They feel that the ability to change rates in response to prevailing demand and supply conditions is fundamental if railroads are to achieve economical use of equipment as well as optimize their investment requirements.

In recognition of carrier needs for more flexibility, it was indicated in Ex Parte No. 324 that special permission for publishing seasonal or peak rates on short notice could be sought. Such short notice, when granted, increases a rail carrier's ability to propose rates which most closely reflect prevailing market conditions. However, it does not remove the uncertainty of whether the proposed rate will be suspended or investigated. Short notice only reduces the time shippers (or other carriers) have to protest a rate; it does not address the rate's propriety. Any proposed rate change under Ex Parte No. 324 is potentially subject to protest, suspension, and/or investigation. To further encourage experimentation, the Commission has, as a matter of policy, severely limited the use of its power to suspend or investigate rate proposals under this provision. Thus, the probability of successfully implementing a seasonal rate on short notice is good; yet, it appears that carriers are still unwilling to rely on this informal policy as a basis for altering their ratemaking strategies.

The reporting and data requirements contained in Ex Parte No. 324 allegedly represent a second source of discouragement to rail carriers contemplating the use of a seasonal or peak rate. When a proposed peak rate is ordered investigated by the Commission, the railroad respondents must be prepared to submit detailed cost data to support the proposed rate. The railroad must be able to show how its costs rise as a consequence of the demand peak and how costs would be affected by the smoothing of traffic induced by the peak-load rate. In addition, the regulations call for a carrier to forecast the profitability of the affected traffic on the basis of both the peak and off-peak rates. Although the Commission has repeatedly stated that these requirements are only indicative in nature and that alternative information would be acceptable, carriers continue to express concern over the difficulty and cost of collecting and maintaining data which would satisfy the intent of the regulation.

The regulations also require carriers to file annual reports identifying all seasonal, regional or peak period rates published, the total mileage hauled, tonnage carried, and revenues derived, as well as the comparable data from the previous year. Similar reports must also be filed within 45 days following the last day of any effective seasonal or peak-period rates.

As a means of encouraging carriers to use this important ratemaking provision the Commission is contemplating making the regulations more flexible and eliminating unessential reporting requirements. Several alternatives for reducing notice requirements and aiding implementation are being studied. Among these are:

1. Simply shorten the notice requirement or provide blanket special permission if certain threshold conditions triggers are met.

2. Permit carriers to publish maximum and minimum rates in the form of a flexible tariff and to vary rates within these bounds on short notice.

3. Establish a surcharge for seasonal commodities which the carrier can apply to rates on short notice.

4. Totally or partially exempting seasonal commodities.

These alternatives are not mutually exclusive. Consequently, the Commission may permit carriers to file demand sensitive rates under the alternative which best meets their needs with the more sophisticated approaches probably yielding higher revenues. Reporting and data requirements could then be established which match the sophistication of the demand sensitive pricing program being undertaken. Programs which permit carriers to change substantially peak and off-peak rates would require more documentation than those which provide more limited flexibility. Steps have already been taken to review possible options for making the use of seasonal ratemaking more attractive for grain and grain products. These options are currently being examined.

E. CONTRACT RATES

The Commission has recently taken the position that rail contract rates are not unlawful, and it has encouraged their use in appropriate circumstances. This position was taken in Ex Parte No. 358-F, Change of Policy, Railroad Contract Rates. This change of policy represents a firm commitment by the Commission to support the railroad industry's use of contract rates. We believe that contracts are useful in numerous ratemaking situations and provide benefits to both shippers and carriers.

Now that contract rates have been recognized as legal we are turning our attention to the question of where and in what form these rates are acceptable in practice--i.e., guidelines on their application. In spite of our anticipation of interest in contract rates by rail carriers when Ex Parte No. 358-F was issued, only two contracts have been filed to date. In deciding this matter, we deliberately did not commit ourselves to specific positions on the numerous related issues raised by the parties. Instead it was felt that policy should be permitted to evolve on a case-by-case basis. We believed that the adoption of explicit rates in the absence of actual experience or concrete rate proposals could stifle the flexibility and innovations which the policy seeks to promote.

However, in the interest of promoting greater use of contract rates, the Commission is reevaluating its views on developing additional guidelines. While the case-by-case approach has generally been useful in the traditional areas of ratemaking, additional policy clarification in this complex and controversial area may be necessary. The principal areas we are reviewing deal with discrimination and the relationship between the contract obligation and the common carrier obligation.

Of all the issues which must be resolved by the Commission, the issue of discrimination may be one of the most difficult. Opportunities for discriminating through the use of contract rates are bountiful. Great care must be exercised to prevent carriers from using contractual arrangments as a means of discriminating among similarly situated shippers. On the other hand, an overly restrictive approach to this problem could have a chilling effect on the use of contracts.

Of equal importance is the need to establish a clearer relationship between the traditional common carrier obligation and any contractual arrangements which may be established.

In addressing this very sensitive area, we stated in Ex Parte No. 358-F:

> It is important to note that a carrier will not be relieved of it's common carrier obligations upon entering into a contract rate. This is an important responsibility imposed upon regulated carriers by the Interstate Commerce Act and it cannot be ignored or contracted away. The railroads must be sure that their contracts will not conflict with their duties as common carriers.

While we did not intend this language to mean that rail carriers must give common carriage traffic preference over contract traffic, we believe that further clarification or modification of this point may be in order.

Although our experience with contract rates is limited, thus far, we have identified a few problem areas. For example, escalator clauses often used in connection with contract-like rates may present a problem. The problem is that price indices used as a basis for an escalator clause (such as the AAR wage and material price index), when applied automatically, can eventually produce a distorted charge relative to the actual impact of inflation on unit costs.[5/]

5/ Commissioner Trantum would have deleted this paragraph and the following paragraph.

Further, any long-term commitment has the natural disadvantage of reduced flexibility. A shipper entering into a long-term commitment to ship only by rail cannot respond to unforeseen opportunities to use cheaper alternative modes. This is a risk that shippers entering into such agreements must weigh. The disadvantage to society is that carriers of alternate modes may face an inelastic demand for their service. As a result, when such carriers charge low rates reflecting their relative cost efficiencies, they are not rewarded with the traffic increase they could otherwise expect and hence may be inadequately motivated to enter the market.

On the other hand, to the extent that contract rates represent an opportunity for greater competition among carriers, society can benefit through the approximation of rates to costs and the consequent tendency of traffic to be allocated more efficiently among modes.

E. ACCOUNTING AND REPORTING REVISIONS

As mandated by section 307 of the 4R Act, the Commission revised the Uniform System of Accounts (USOA) for railroads. In the revision, we adopted a matrix for railroads to report their operating expenses. This matrix classifies expenses by both their nature (such as labor costs, material costs and overhead) and by major functions for which the expenses are incurred. Under the old system, labor, material and overhead costs were lumped together in the same expense accounts relating to certain railroad operating functions. Other expense accounts showed only one type of cost, such as superintendents' salaries, which belong to various functions. By categorizing expenses according to their nature and their functions, we can improve our cost analysis. First, arbitrary allocation of costs to functions can be reduced; and second, we can better determine how each type of cost varies with the volume of traffic services. During the revision, we also updated financial accounting procedures to make them conform to generally accepted accounting principles. The Commission is in the process of letting a contract to an independent accounting firm to evaluate the changes to the USOA and make recommendations for further change.

The Commission is now deciding whether to institute a rulemaking proceeding to consider adopting a cost center accounting and reporting system for Class I railroads. The proposed system would require Class I railroads to accumulate certain cost and statistical data at a more detailed level than under the current Uniform System of Accounts for Railroads. Railroad cost data would be recorded by cost centers particularized as to line segments, terminal switching districts, equipment types, and specific specialized services. Cost data collected by such cost center designations would then be aggregated into certain other categories for reporting purposes. In most cases, routine reporting requirements would not be as specific as the level of accounting. This proposal would provide more relevant and valid cost data for regulatory purposes while protecting the confidentiality of specific proprietary information.

G. ABANDONMENTS

The Commission believes that it would be desirable to simplify abandonment procedures and to place greater emphasis on economic costs and financial profitability in evaluating abandonment proposals.

We believe that the criteria which the Commission applies to abandonments could be more clearly defined. This could be beneficial to carriers, shippers and the Commission alike. Further definition of those criteria must proceed carefully, however, in order to preserve the necessary flexibility while at the same time permit applicants and potential protestants to determine more readily their chances of success. Thus, we would be very cautious in suggesting specific statutory standards although we recognize that some further definition may be desirable, and will gladly work with Congress to develop such standards.

The use of rebuttable presumptions would be a possible means to develop specific criteria in deciding abandonments, while leaving the Commission the discretion to approve or disapprove an application. The most obvious and potentially useful presumption would permit abandonment where the line is not profitable. The burden would then fall on the parties opposing the abandonment to show that (1) the line is not losing money, or (2) there is some overriding reason not to permit abandonment.

In another area of concern with respect to abandonments, the Commission discussed the subject of alternatives to abandonment at an open conference on Tuesday, September 18, 1979. A number of the members noted that they would be receptive to pricing innovations by the railroads designed to make service profitable on currently unprofitable lines. The Commission has recently given carriers the freedom to propose surcharges on traffic, a tool which could be used to increase revenue on individual carrier's portions of interline traffic. We expect to release a policy statement on this subject sometime next month.

An area in which the Commission has encountered some problems involves the six-month subsidy negotiation period which can follow the issuance of a certificate of abandonment. Under section 10905 of title 49 U.S.C., the Commission is required to postpone the issuance of a certificate if a responsible offer of financial assistance has been made to continue the service or to purchase the line. The six-month period was intended to enable the subsidizing entity to enter into an agreement with the rail carrier to continue service or to purchase the rail line.

However, last year, a Federal appellate court held that the present statutory language does not allow the ICC to reopen an abandonment proceeding after the six-month negotiation period, even where a railroad has refused to negotiate in good faith with potential subsidizers. It is our concern that this "loophole" may result in the loss of some rail service which might have otherwise been continued under a subsidy arrangement if the parties had had the proper incentive to complete their negotiations.

The Commission is considering several different approaches to solving this problem. If, after a more complete analysis, we should believe that legislation is needed, we will make appropriate recommendations to Congress.

An issue related to abandonments is the construction of new railroad lines. The Commission is considering a staff proposal that would exempt from our jurisdiction the construction of new railroad or trackage rights agreements which do not constitute major market extensions. Although the term "market extension" is not presently defined, it could be defined as a transaction involving competitive effects similar to a major consolidation case.

As this issue is further resolved by the Commission, we will propose legislation as appropriate.

H. GENERAL EXEMPTION AUTHORITY

Earlier this year, at the request of a petitioner, the Commission made the first use of its rail general exemption authority (49 U.S.C. section 10505) by exempting fresh fruits and vegetables from regulation by the Commission. The exemption, first made effective on May 28, 1979 has been used profitably by a number of railroads during this past summer. By coincidence, the independents' truck strike in early summer allowed the railroads an opportunity to haul a large volume of available fresh fruit and vegetable traffic. While rates have been higher than previously, generally rail movements are now competitive with truck transportation. In fact, rail service has expanded dramatically and it appears that many shippers have continued to use the railroads even after the end of the truck strike. As we continue to monitor the results of the exemption, we are encouraged by the innovative and market-responsive actions taken by the railroads involved.

At this time the Commission is taking several additional actions in regard to the general exemption authority. In Ex Parte No. 346 (Sub-No. 2) we are considering extending an exemption to other non-processed agricultural commodities by including ground crops (peanuts, potatoes) and fishery products. We expect to consider a draft decision on this matter in the near future.

In Ex Parte No. 230 (Sub-No. 5) the Commission is considering whether to initiate a rulemaking to exempt rail transportation of TOFC/COFC from Commission regulation either in whole or in part.

In another area, an independent contractor has submitted a report to the Commission recommending that about 40 different commodity groupings be exempt from regulation. Commission staff is now studying these recommendations with special emphasis on the interrelationships between market dominance and the need for specific commodity exemptions.

I. RESTRICTIONS AGAINST INTERMODAL OWNERSHIP

The issue has arisen as to whether existing restrictions against ownership of one mode of transportation by another should be removed. We will be considering this matter in upcoming deliberations and will make recommendations to Congress as soon as possible.

III. LEGISLATIVE PROPOSALS

Our discussion thus far has focused on administrative initiatives designed to bring about reforms in the regulation of railroads. We would like now to turn to actions which we believe Congress might take to further the same end.

Before discussing specific measures, however, I would offer the following general thoughts on legislation in this area. First of all, they do not form a comprehensive railroad regulatory package. Rather, they are proposals which logically follow from the stage of policy development, in each area of concern, necessary to support a legislative recommendation. As has been previously noted, several important areas are currently under consideration where we do not believe that recommendations for legislation can be supported at this time, inasmuch as the preferred course of action is not yet entirely clear. In those instances we would expect to have further recommendations later on.

There are also instances where we do not recommend legislation because we are satisfied that existing law gives the Commission sufficient flexibility to work out administrative solutions, and where administrative solutions seem preferable because further changes might be required. An example of the latter situation is market dominance, where we are already moving toward changes in the present regulations, and where the complexity of the situation could require still further changes. Another example would be contract rates, where several problems have emerged as a result of the first policy change in this area.

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A. ABANDONMENT EFFECTIVE DATES--SECTION 10903(C)

1. Amendment

Section 10903(c) of title 49, United States Code, is amended to read as follows:

> "(c) Except as provided in sections 10905 and 10906 of this title, an abandonment or discontinuance approved under section 10904(c), may take effect under the certificate on the 30th day after the issuance of the certificate."

2. Evaluation and Justification

This amendment would make the effective date for all rail abandonments 30 days after issuance of a certificate. Present law permits an effective date of 30 days if the certificate of abandonment is issued without an investigation and after 120 days if the certificate is issued after an investigation. The 120 day time period was originally provided in order to offer affected shippers a transitional period in which to make other transportation arrangements or to complete existing contracts.

However, experience leads us to believe that a 120 day adjustment period is not necessary. Shippers have been afforded sufficient time for planning and adjustment during the time taken by the Commission to process the application, consider and dispose of administrative appeals, publish the findings in the Federal Register, and to await offers of financial assistance.

B. LONG-HAUL AND SHORT-HAUL--SECTION 10726

1. Amendment

Section 10726 of title 49, United States Code, is stricken in its entirety.

2. Explanation and Justification

This amendment would allow for greater price flexibility in rail rates. The long-haul and short-haul clause was originally enacted as an absolute bar to charging higher rates for movements between two intermediate points than movements between the two end points. Relief from this provision has been routinely granted in the form of exemptions in recognition of (1) the presence of generally pervasive competition at most intermediate points and (2) the fact that volume movements between major producing and consuming areas generally have lower costs.

The granting of these exemptions enables rail carriers to take advantage of lower unit costs for volume movers and to more effectively meet intermodal competition between end points. The repeal of section 10726 would achieve the same benefits without the administrative expense attendant to a petition for exemption. We feel that any residual problems of discrimination could be handled under the more general prohibitions against discrimination of section 10741.

C. EXEMPT SECURITIES ISSUANCES BY SMALL RAIL CARRIERS--SECTION 11301

1. Amendment

Section 11301 of title 49, United States Code, is amended by adding a new subsection (g) to read as follows:

"(g) This section does not apply when the total value of capital stock (or principal amount of other securities to be issued) and the value of capital stock and principal amount of other securities then outstanding is not more that $5,000,000, or to notes of a maturity of not more that 2 years that aggregate not more than $1,000,000. Notes that, with other outstanding notes of a maturity of not more than 2 years, aggregate that amount may be issued without regard to the percentage limitations applicable under subsection (b)(2) of this title. The value of capital stock having no par value is the fair market value on the date of issue of that stock, and the value of capital stock that has a par value is the fair market value on the date of issue or the par value, whichever is greater."

2. Evaluation and Justification

This amendment would effectively exempt from Commission jurisdiction securities issued by small rail carriers. We do not feel that carriers with outstanding securities not exceeding $5,000,000 and with short term notes not exceeding $1,000,000 should be required to comply with Commission securities regulations. The burden on small carriers would seem to outweigh the public interest in meeting our filing requirements because the overall impact of these smaller transactions is minimal, and regulation by other federal and state agencies is likely to protect the securities purchaser.

This statutory exemption would be in keeping with the securities exemption granted motor carriers under section 11302.

D. RAIL EXEMPTION AUTHORITY--SECTION 10505

1. Amendment

Amend section 10505(a) of title 49, United States Code, by deleting the words beginning with "because" and ending with "service", and the comma following the word "service".

2. Evaluation and Justification

The proposed legislation would amend Chapter 105 of Title 49 to broaden the Commission's authority to exempt rail carriers or their services from regulation, in whole or in part, when continued regulation is deemed not to be in the public interest. The proposed bill is similar to a proposal submitted to Congress in June of this year, which would have expanded Commission authority to exempt non-rail carriers from unnecessary regulation. Essentially, the proposal would eliminate the requirement that the transaction or service in question be of "limited scope".

Currently, the Commission is going through a period of considerable reassessment and critical decisionmaking aimed at improving regulation and making it more responsive to the needs of the public. Those efforts have resulted in a variety of changes in its policies and procedures. Some of the changes involve steps to increase competition and strengthen the impact of market forces. We believe that the Commission should have expanded discretion to remove unnecessary regulatory restraints in order to enable carriers to improve their efficiency, compete more effectively, and be more responsive to the demands of the marketplace.

The proposed exemption authority would assist the Commission in achieving these goals by providing the Commission with greater flexibility for developing innovative programs designed to meet the changing needs of our National transportation system. The Commission is presently making use of its general exemption authority, which we consider broad enough, even with the "limited scope" language to encompass a range of administrative reform of rail regulation. However, we do not believe that the "limited scope" qualification is necessary or any longer desirable.

For one thing, we do not believe that regulatory innovation should cease at the point where the matter is no longer one of "limited scope". There are bound to be measures which may be of substantial scope but where fixed legislative changes are not as desirable as more flexible administrative changes. The purpose of the exemption authority is to allow experimentation, where the ultimate preferred course is not clear but action seems warranted. It is possible--in fact, even contemplated--that such changes may bring about further changes or retractions--a process ideally suited to the administrative environment. We do not believe that the limitation in the present statute allows optimum use of this approach.

It should also be noted that the public is protected from any undesirable consequences of such regulatory experiments by the safeguards which are built into the exemption authority process. Under this proposal, as under present law, the Commission is authorized to exercise its exemption authority only after opportunity is given for a proceeding in which interested parties may present their views. Applications for exemption are subject to the requirements of the Administrative Procedure Act. Further, regulation can be simply and directly restored if the exemptions prove to be contrary to the public interest. This proposal would assist the Commission in committing its resources more efficiently to those areas where regulation is necessary, and in eliminating the burdens of unnecessary regulation.

In conclusion, we believe that the expanded exemption authority could be used to reduce further the workload that now faces the Commission by reducing unnecessary regulation, and by enabling the Commission to develop innovative methods for carrying out those regulatory programs which are necessary. Further, we believe that this use of the exemption authority would complement the original intent of Congress in enacting the rail exemption authority, as it would enable the Commission to better commit its limited resources in areas where they are needed, and would help return discretion to rail management in those areas where the marketplace is able to regulate most effectively.

CONCLUSION

This concludes my prepared testimony. I will be glad to try to answer any questions you may have at this time.

ATTACHMENT

interstate commerce commission
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FOR RELEASE:
September 6, 1979

(202) 275-7252
LESSER

ICC TO REOPEN PROCEEDING ON MARKET DOMINANCE

The ICC today announced that it will reopen a 1976 rulemaking proceeding in which the Commission set standards and procedures for determining when a railroad possesses a monopoly--"market dominance"--over certain freight shipments.

The reopening, late this month, comes after extensive review which included internal staff analyses, deliberations by the Commission, and a contract study by an outside consulting firm.

Market dominance and its interpretation by the Commission under the 4R Act (Railroad Revitalization and Regulatory Reform Act of 1976) has been one of the more controversial issues between railroads and the ICC. It is fundamental to the question of how railroads set their rates.

The decision to reopen the market dominance proceeding reflects a commitment by the Commission when the original rules were put into effect two years ago to look again at the complex rail issue on the basis of subsequent experience and analysis.

ICC

319-79

A fact sheet explaining the market dominance proceeding is attached.

Fact Sheet

The notice of proposed rulemaking to reopen Ex Parte 320 will discuss the following elements which the Commission will propose to include in its revised standards and procedures for market dominance:

- A cost range for rates of 100% to 140% of variable cost within which the Commission will not suspend or investigate.
- A cost range for rates greater than 140% of variable cost and not exceeding 180% of variable cost within which any protesting party must establish the absence of effective competition.
- A requirement that the railroad proposing a rate in excess of 180% of variable cost establish the presence of effective competition.

Variable costs would be determined on a Rail Form A basis and the Commission's 1977 Burden Study would be available to interested parties to assist them in determining which cost range applied to particular movements.

The proposed standards will also provide specific guidelines to assist the parties in determining the presence or absence of effective competition. These will include such transportation characteristics as: long haul bulk movements lacking water competition, oversized or overweight movements, hazardous materials that cannot be shipped by other modes and other factors indicating that the shipper lacks practical alternatives to rail transportation. The three existing rebuttable presumptions contained in the present regulations would be canceled.

The standards and procedures would be linked to two closely related concepts, a zone of reasonableness (ZOR) within which rate changes would be neither suspended nor investigated, and a program to exempt commodity groups that are subject to inter and intramodal competition.

The Commission is exploring two forms of the zone of reasonableness within which rate changes would not be suspended or investigated. The first alternative would permit changes of not more than 7% a year upward or downward changes to the variable cost level for all rates. The second alternative would apply the same zone only to those rates equal to or less than 180% of variable cost.

Shippers and other interested parties would remain free to file complaints on the reasonableness of rates falling within either of these zones of reasonableness or rates falling within the 100% to 140% of variable cost range. In complaint actions, the complaining party has the burden of proving that the challenged rate is unjust or unreasonable.

The program of exemptions will not be a part of the revised standards and procedures themselves. The program is an essential component of the Commission's continuing efforts to identify rail traffic that is sufficiently competitive that regulation can be completely or partially eliminated. Exempting such traffic from regulation will remove any necessity for rail carriers to prove that such traffic is subject to effective competition.

The integrated approach to market dominance described above is intended to reflect more accurately the Commission's commitment to rate flexibility for rail carriers while assuring continued protection for the captive shipper. The Commission expects to issue a notice of proposed rulemaking before the end of September that will more fully explain the rationale of proposed standards and procedures summarized in this release.

Specific Examples of How the Proposed Rules Would Work.

In order to clarify the proposed procedures, several illustrations are provided below:

Example 1

Rate Action:	Rate raised from 120 percent to 130 percent of variable costs.
Protests:	At suspension level, protestant is effectively limited to challenging cost data submitted in any advance rail justification and showing rate exceeds 140 percent of variable costs. If unable to show this, the rate goes into effect.
Shipper recourse:	Complaint procedures (Section 11707) after rate is effective.

Example 2

Rate Action:	Rate raised from 120 percent to 141 percent of variable cost.

Protest: Rate exceeds 140 percent of variable cost and increases exceeds the 7 percent ZOR. Protestant has burden of proof on issue of market dominance. Protestant must, as a minimum, address guidelines established by the Commission. Carrier can rebut shipper's evidence. Commission makes determination on facts presented and will consider suspension on investigation only if shipper establishes the presence of market dominance.

Example 3A

Rate Action: Rate increased from 191 to 201 percent of variable cost. The increase is 5.2 percent of total pervious rate.

Protest: Since increase falls within the ZOR (7 percent), Commission will not suspend or investigate.

Shipper recourse: Complaint procedure.

Example 3B

Rate Action: Same as 3A above.

Protest: Assume that the ZOR does not apply to rates in excess of 180% of variable cost. The shipper must present data to show that the rate exceeds 180 percent. The carrier may rebut by establishing the absence of market dominance.

Example 4

Rate Action: Rate increased from 175 to 190 percent. The rate increase is 10 percent of the previous base rate.

Protest: At the suspension level, once the rate to costs ratios are established, the carrier again bears the burden of showing that there is effective competition under guidelines established by the Commission. If it does not carry that burden, suspension and/or investigation is possible but not mandatory.

Example 5

Rate Action:	Initial rate established at 150 percent of variable cost.
Protest:	The 7 percent zone would not apply to initial rates. Since the rate falls at 150 percent of variable cost; the protestant would have to prove market dominance exists as rate is within the 140-180 percent of variable cost range.

Senator McGOVERN. Thank you very much, Chairman O'Neal.

I think the way we will proceed this morning is ask the panel to come forward, and if you could stand by, Mr. O'Neal, maybe we can question you after we have heard from the panel.

Mr. O'NEAL. Fine.

Senator McGOVERN. Members of the panel in the order in which they will be heard, if they will come forward now, are Mr. James Springrose, vice president for transportation of the Cargill Co.; Mr. John Norton, the director of transportation and distribution of the Du Pont Co.; Mr. E. Morgan Massey, president of the A. T. Massey Coal Co.; Laurence J. Stern, manager of transportation, Sunkist Growers; and Michael Levin, vice president for transportation of the Western Growers Association.

Gentlemen, in view of the considerable number of distinguished witnesses this morning, we are going to ask that you confine your opening statement to about 10 minutes, but rest assured that your entire prepared statement will be entered in the hearing record.

I might point out that Mr. Curtis, corporate director of transportation service for Georgia Pacific will be unable to appear as scheduled at our hearing. The vacancy caused by his absence will be filled by Michael Levin, vice president for transportation of the Western Growers Association of California. Mr. Levin, as I understand it, does not have a prepared statement but will participate in the hearing during the question and answer periods.

Mr. Springrose, if you are ready to proceed, we will be happy to hear from you.

STATEMENT OF JAMES V. SPRINGROSE

Mr. SPRINGROSE. Thank you, Senator, and good morning, gentlemen.

I would like to express my appreciation to the Joint Economic Committee for this opportunity to respond to your inquiry into transportation circumstances so vital to the commerce of the United States. The issues you have undertaken are especially important to agriculture for the efficient domestic and worldwide distribution of grain and other foodstuffs.

We have prepared a statement for your review and consideration which explains a proposal whose legislative implementation could provide the rallying point for polarized positions, railroad rate-making freedom and protection from abuse of captive shippers. We have been asked by the committee staff to respond specifically to the issue of the captive shipper. I believe our statement [see p. 139] does that, and I will elaborate as time permits.

First, however, I would like to respond to five additional questions posed in your invitation letter dated September 18, 1979. The initial question deals with possible changes in the ICC market dominance criteria. We have observed over recent months that market dominance and captive shipper essentially mean the same thing to those who react to this issue.

Since our statement concentrates on this question, further elaboration is not needed for the moment. I should emphasize, however, that our proposal eliminates the need for complex criteria or definitions of either phrase because the issue is rendered moot at the shipper's discretion and control.

The second question, characteristics which determine modal choices vary depending upon the demand in the marketplace for grain or most other goods shipped by Cargill. In times of shortage of freight-carrying capacity, service is the first requirement; price is secondary. For example, the inability of the inland waterway system to accommodate increasing demands because of the bottleneck and locks and dam 26 has caused greater emphasis on rail movements, notwithstanding higher rate levels. Conversely, when demand is soft and carrying capacity is readily available, comparative price becomes the major determining factor in modal selection.

Third, assuming readily available carrying capacity, the service criteria we seek is consistency. We are not so interested in speed as predictability of elapsed time between origin and destination. Transportation is only one component of the logistical planning required for the efficient distribution of our products. Speed of movement does not hamper our logistics if it is consistently provided. Therefore we can accommodate speed of movement when it is important to considerations which deal with improved productivity of transportation resources.

Fourth, the cost of transporting grain and other bulk commodities represents a high percentage, sometimes as high as 50 percent, of the value of the delivered goods.

Fifth, our bargaining power with principal modes of transportation is more limited than most people realize. Size does not provide proportionate clout. Our experience suggests that when we have developed sound programs which provide recognizable benefits for our carriers, we are usually successful. When the benefits are singularly toward ourselves, we generally fail.

I would be glad to elaborate on each of these items in response to your further inquiry.

In the allotted time still remaining, I will expand on our view of regulatory protection for the captive shipper.

As we have said in our statement, defining "captive shipper" has been perplexing and elusive. The criteria established by the Interstate Commerce Commission at the direction of the 4R Act sought to deal with the issue in terms of maximum rate levels. As our statement describes, we believe it is a service issue.

My experience with the public hearings and elsewhere in connection with work on the Rural Transportation Advisory Task Force supports this view. In addition, much of my work at Cargill deals with transportation innovations in both price and service which are justified by market competition and/or transportation competition. The results confirm my belief that railroad management will respond with rate reductions when it can be shown that they have priced segments of our mutual business interest out of the market competitive circumstance.

The major consideration they insist upon in these negotiations is that the recaptured tonnage renders them a profit for the service they perform. We do not consider this unreasonable or abusive.

These factors aside, the captive shipper issue dies with the birth of legitimate contract carriage by railroad. We believe the legitimacy of contract carriage by railroad can only be obtained through an act of Congress. It will also require these provisions against discrimination be brought forward from the present Interstate Commerce Act. I must caution here that bringing restraints forward from the present law should be held to an absolute minimum lest we wind up calling it a rose by another name.

As our statement describes, the shipper voluntarily becomes captive at his own election by entering into a contract for carriage. The terms of the contract would not only protect him from rate abuse, but also guarantee the service he needs to reach his market outlet.

By way of holding provisions of the present law to a minimum, I would consider the following to be adequate for rail contract carriage. First, the antipreference, prejudice provisions; second, the antidiscrimination; third, the commodities clause; fourth, minimum rate restrictions; finally, that contracts be filed with the Commission as public records available for public review.

Other components of the present law which should be left to the discretion of the contracting parties would include rate levels, service characteristics, car costs and car supply, liability, volume, joint routes and divisions of revenue between connecting carriers, if any.

Finally, I believe a growing consensus has developed among shippers, railroads and governmental bodies that there is merit to this approach because the transportation circumstances of 1979 justifies some movement away from common carrier regulatory postures of 1887. I would urge, however, that we stop short of total deregulation.

Thank you.

[Testimony resumes on p. 156.]

[Mr. Springrose's prepared statement follows:]

An Approach to Resolving the Impasse Currently Threatening Sound Rail Transportation Regulatory Reform

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We will begin these comments with the briefest of reviews of the events in the recent past, legislative or otherwise, which have lead to the present impasse in formulating a rational policy for the transportation of grain by rail which would effectively remove all unnecessary regulation (what we might call the excesses of regulation) and preserve only that minimum, but critically necessary, regulatory overview that contributes to and advances positive national objectives.

The debate among the extremists advocating total de-regulation, on the one hand, and total regulation, on the other hand, of all modes, each as totally opposite means of achieving equality of treatment for rail carriers, was always leavened by the many compromisers who saw the fallacy in these simplistic extremes and proposed accordingly. From the Eisenhower era through the Kennedy transportation message of 1962 to the early 1970's, in spite of increasing predictions of railroad disaster, all these contending views simply produced a stand-off, fatal preservation of the status quo and the inaction which finally produced the disasters of the Penn Central bankruptcy and those other carrier failures in the northeast.

Those dramatic railroad failures finally broke the legislative log jam and produced, among other things, the 4R Act. At its heart this legislation contained an intelligent attempt by the more rational comprisers to give the rail carriers the rate making freedom they craved, as a panacea to their problems, while preserving adequate protection for shippers against abuse of rail carrier monopoly power.

The framers of the 4R Act recognized that the sticking place in making progress towards a system of rail rates determined by the market, and the forces of competition, had been the fear that the captive shipper would be abused by his rail carrier imposing increasingly higher rates, not justified by the cost of serving that shipper, and utilized to solve the carrier's revenue problems and to cross subsidize rates on non-captive traffic.

The 4R Act sought a practical means to identify the captive shipper and create, especially for him, a means of recourse to protect against such abuse while freeing the balance of the system from the stultifying effects of needless regulation.

The principle of identifying the captive shipper and preserving limited regulation to protect him from carrier abuse is, of course, theoretically sound. The 4R Act concept of "market dominance" was a well-intentioned attempt to achieve this praiseworthy goal.

What is tragically clear today is that this well intentioned compromise solution has failed and has produced no amelioration of the problem it was designed to curb.

Why has it failed?

What the subsequent history of this concept has probably established is that the problem of developing any simple methods to isolate out, for regulatory purposes, the traffic that is subject to rail market dominance, or the truly captive, individual shipper, is close to insoluable. This view would certainly appear to be supported by the weighty studies carried out for the Commission in 1979. The Commission, with its development of rebuttable presumptions, has struggled manfully to render this complex determination simple, quick and manageable. In embarking on this necessary attempt it encountered massive criticism. It is currently embarking on a fresh attempt while new (and probably already failed) legislation, prepared by others, seeks once again to redefine the captive shipper. The fact is the problem is too complex for easy solutions readily accessible to the shippers most in need of this protection who will usually be, although not exclusively, smaller shippers without alternative plants, markets and sources, who therefore tend to lack rate bargaining power.

Unfortunately unless cheap and simple methods of demonstrating market dominance, or rail captivity, are available we submit regulation, or rate protection, dependent on these concepts, will end up tending to protect shippers who probably need the protection least -- namely the larger ones with the resources to litigate such complex issues and the more needy shippers are deterred. Moreover we are dubious of the validity of any simple method of determining rail captivity, at least in a business as fluid and complex as the grain business. Markets, and prices at markets, may determine what mode a grain shipper is captive to, in that shipper's subjective judgment, on any particular day. Nothing that has emerged recently by way of studies, or other theories, would suggest that the problem will be rendered simpler in the future.

It is our conclusion that, unfortunately, this approach is bankrupt and that further pursuit of it by way of further redefinitions, or lists of more ingenious rebuttable presumptions, will only win time for further deterioration and postpone, perhaps fatally, action beneficial to rail carriers and those who depend on them.

In the area of agriculture, with which we are here primarily concerned, it would appear that many others have reached this same conclusion. We would caution very forcibly against a trend, born out of frustration and superficially logical, that we see generated by this failure of the 4R Act approach which has caused a flirtation with the notion that the remaining workable option is total deregulation of grain. The reasoning goes like this. There were originally three possible approaches to this problem -- (1) total regulation of all modes (totally discredited today); (2) the compromise solution typified at its best, and most subtle, in the 4R market dominant theory -- (now an established failure after three years); and (3) total de-regulation (as yet untried except in a limited area -- fresh produce -- where it appears to be developing some success). This reasoning has led to proposals, such as that of DOT in its Ex Parte 270 submission, for total deregulation of grain transportation. Contributing to this apparent logic is the fact that for many years both the rail carriers' competing modes have enjoyed an exemption from regulation when transporting grain and the grain business has had no apparent problem in coexisting with that degree of deregulation.

Before going further we would like to comment on why we do not believe total deregulation of rail transportation of grain is in the public interest.

In this discussion we will set aside the obvious problem of the true rail captive shipper under total deregulation. Let there be no mistake, there are such unfortunates and under total deregulation their sole protection would lie with their rail carriers' intelligent, selfish interest in keeping them competitive to their markets. It is self defeating for a rail carrier to price its customers out of business for that does nothing for its revenue position. Against this notion of intelligent self-interest by rail carriers we must note the fact that desperate carriers, virtually in their death agony, will grasp for revenue without any restraint whatever when they are furnished with no other alternative to enable them to earn assured income with which to function. We have set aside this problem of the captive shipper because we do not think it has, in the past, lacked, or will now lack, spokesmen. Instead we would like to focus on an aspect of total deregulation of rail grain which we have rarely seen articulated and which we believe is important.

The need of the grain trade that we would like to articulate is the need of the grain merchant for a predictable, or reasonably measurable, future transportation cost structure. Such a structure exists today although there is some fear that it is being undermined by short notice, arbitrary rail rate increases being imposed as, and under the procedures designed to accommodate, demand sensitive pricing. There is little doubt that it would cease to exist entirely under total rate deregulation and, as we shall seek to illustrate, this, in the final analysis, is the fatal flaw for the grain trade, and the public interest, in the concept of total deregulation of grain transportation.

Why is such an ability critical to the grain merchant and why will its absence have an impact on the public interest far beyond the narrow interest of the grain merchant?

The answer has to do with the concept of forward pricing which is at the heart of, and has much to do with, the genius and success of the current U.S. agricultural economy.

Perhaps the most important hallmark of the market price system which the U.S. agricultural economy has enjoyed, and by which it has prospered, is the ability, because of the price reference and price insurance functions of the futures markets, to contract for grain as much as 18 months into the future. This deferred term marketability has allowed producers to make planting decisions, processors to cover anticipated needs and merchandisers to provide a market for both, not only in nearby shipment periods but in every ensuing month of the crop year, and even into the following crop year. Critical to the furnishing of this crucial marketing service has been the merchant's ability to rely upon a fairly measurable future transportation cost structure.

A major threat to this vital function of forward pricing and the present system of grain marketing, with its many benefits and obvious record of success, is posed by any system of rail freight pricing that changes on short notice in response to surges in demand for rail transportation (the situation that would obtain, of course, under deregulation). We can almost hear the sceptics saying "but that's exactly what happens with truck and barge transportation". We will respond to that thought in a moment when we have concluded our comments on the need for predictability.

The point we would now like to make most forcibily is that the potential for damage to the grain marketing system of short notice, arbitrary, and unpredictable increases in transportation costs is enormous. In the face of them, or the threat of them, the country elevator is inhibited from bidding for grain, and from selling grain in positions other than the very nearby, without taking undue price protection to cover the potential economic risk of an arbitrary railroad rate increase. The seeking of such undue price protection simply means the risk taker has to insist on a greater margin to cover his risks. The result is the farmer receives less for his grain and the buyer, at destination, pays more because of unpredictable, and unhedgable, risks of uncertain transportation costs. The ultimate result will be a tragic constriction in the forward marketing mechanism which has made such a positive contribution to our agricultural economy, our capacity to increase agricultural exports profitably and all the many ensuing benefits from that national success story.

The situation which obtains in grain marketing currently is a good example of the beneficial effects of the use of the forward marketing mechanism. Today there is probably a record amount of grain "on the books" for 1979-80 - that is bought and sold. Strong prices have encouraged the farmer to sell a lot of his expected production for delivery in forward positions; suspect foreign crop production has brought buyers into the U.S. market in record numbers and volumes. Merchants, from the country elevator right through to the exporter, have bought grain, and resold it, and what needs to be noted and emphasized, for present purposes, is that they did so in reliance upon an expectation of a rational, predictable railroad transportation pricing policy. Within that concept, and within the contemplation of all parties, is the susceptibility of such rates to reasonable cost escalation characteristic of the times but what is not within contemplation, and what presents a fearful risk to the whole marketing system, is the sudden imposition of increases based on the arbitrary, and unilateral, judgment of individual rail carriers, or the rail industry in general, as to the current, and probable, demand for their services. Such increases are made at the expense of every forward purchase and sale already made in reliance on the existing rate structure. Such price behavior by individual carriers, not influenced or restrained by anything resembling true free market or competitive forces, because of the nature of the rail mode, as we shall illustrate, is a serious threat to the forward pricing mechanism so vital to the marketing system.

We promised earlier to respond to the issue of the difference between a railcarrier reacting to an increased demand for its services, by being free to raise its prices, and a barge or truck line so reacting.

The fact is that there are valid distinctions to be drawn between these transportation modes which distinctions permit the present, sophisticated, grain marketing system to co-exist with, and to take into account, this market influenced behavior of truck and barge prices in a manner it is unable to do with short notice, arbitrarily announced increases by rail carriers.

What are these distinctions?

First of all the barge lines and trucks do operate in a true free market which, by definition, means price changes cannot be made unilaterally and arbitrarily by the seller for the reason that, in such a market, competitive forces exist to bring prices into line. Buyers and sellers have available to them alternatives which allow them to resist arbitrary price setting and permit them to pay only what the market ultimately dictates. Barges and trucks (unlike rail carriers) operate and compete with one another along common transportation arteries. If one such carrier raises its price the potential buyer of that service can, and does, turn to others to satisfy his needs. Only if the general marketplace establishes the increase as the market value of the service, as a result of the free interplay of demand and supply, will the shipper be obliged to pay the proposed increase. Such a price structure, while not fully predictable in the sense of one based on regulated published tariffs, is a rational system responding rationally to market forces, some quite predictable, some not quite so predictable but, in any event, in a manner well understood by the merchant.

Another distinction is that, if he wishes, the merchant can contract over long contractual periods with either barge or trucks for his future transportation needs, an option that, heretofore, has not been available with the rail carrier.

Finally, as a result of the free interplay of market forces in barge transportation, there is a daily quoted market in barge freight for all relevant shipment positions on which the merchant can base his bids and offers.

The foregoing reasons explain why the grain marketing system can co-exist with demand-sensitive pricing by barges and trucks. Why is the situation different with rail carriers?

Unfortunately, in the case of rail carriers, immediate competitive market forces which would bring prices into line do not exist. Such forces as do exist, such as intermodal or market competition, tend to operate over too great a time span to have a bearing on the current market. Many grain elevators and plants tend to be on a single railroad line and often do not have economically priced alternative modes of transportation. Moreover buyers of railroad freight have not, up to this time, had the option of contracting for their freight needs in advance. Nor is there in existence a visible market price reference system on which future purchase and sale prices can be based.

In sum there is no effective way for the grain merchant to price the uncertainty of future railroad rate action if such pricing is to be allowed to respond arbitrarily, and on short notice, to correctly, or incorrectly, perceived rail transportation demand peaks and valleys as it would under total deregulation.

Since we believe the grain trade and the public interest will suffer adversely from the loss of predictability inherent in total deregulation we would now like to move on to examine a new approach to the basic problem which, of necessity, must preserve this element of predictability while seeking to deal with all other elements.

A New Approach

What the foregoing history has demonstrated is that new thinking must be applied to the analysis of the apparently incompatible problem of protecting the rail captive shipper while granting to rail carriers the degree of rate making freedom they need for ultimate survival.

A starting point is to reexamine a number of propositions that have played a role in the design of previous attempted solutions. This reexamination must be done with some boldness and willingness to innovate and experiment in recognition of the fact that the present dangerous impasse cannot be allowed to continue in the name of protecting the captive shippers whose plight will certainly not be improved by the ultimate demise of the mode they are captive to.

A basic question is whether the problem is, in fact, as significant as has been suggested. How many truly captive shippers are there under today's conditions, when all competitive alternatives are considered, as well as the bargaining power of many shippers vis-a-vis their carriers? The study commissioned by the ICC had this to say:

> "The precise extent of market dominant traffic is difficult to determine. If all forms of transportation alternatives are considered together with long term adjustments by shippers, very little (under 5%) of the traffic would be considered market dominant. However, short term effects and the limited effectiveness of intramodal competition indicate that 10% to 15% of the rail traffic appears to be market dominant and a substantial portion was found to be of a mixed competitive nature."

A next question is whether it is necessarily a fact that those shippers who are in a truly captive category will, in fact, be abused by their carriers or will intelligent self-interest of the carrier, rather than regulation, govern the carrier's conduct by a recognition that the shipper must be kept competitive in its market or the carrier loses all revenue finally.

In that connection it is possible that, in today's climate, such abuse of captive shippers (cleary a self-defeating proposition, in the long-term, for the carrier) will occur only because the carrier is in desperate revenue straits and is furnished with no realistic alternative that would be beneficial to both shipper and carrier. In other words is it not probable that carriers would act with restraint, in the area of potential abuse of captive shippers, if more immediate, practical and realistic revenue raising measures were available to carrier management?

This leads to the key question which lies at the heart of this new approach -- namely is it possible that much current analysis of the situation of the captive shipper is outdated in that his major concern may not be maximum rate levels (kept in reasonable check by the carrier's interest in keeping its customer competitive in the market place) but getting service from his sole source of transportation (rail) when rail equipment is in short supply and must be shared equally with non-rail captive shippers?

Our answer to this question is a resounding and emphatic "yes".

To this conclusion we add another crucial element, access to contract rates, which the Commission has recently furnished, in its policy pronouncement legalizing and encouraging the use of contract rates, as a means of solving many of the mutual problems of carrier and shipper.

These are the two concepts -- the reanalysis of the captive shipper's dilemma as really being a service problem and the availability of contract rates to rail transportation -- which, at this time, seem to come together inexorably, logically and quite fatefully, to contribute to the solution of the problem of finding a simple means of identifying and protecting the captive shipper.

Here follows the proposal and the underlying analysis.

We will begin with a reanalysis of the captive shipper's dilemma as a service problem rather than a maximum rate problem. This theory assumes that maximum rate levels will be determined by transportation competition, market competition, shipper bargaining power or a combination of these factors and that a major consideration in minimizing carrier abuse of the shipper is the carrier's self interest in maintaining its customer competitive in his market place. We recognize the complexity of this situation and that desperate carriers, short sighted carriers and carriers in complex situations might still abuse shippers. We believe, however, the possibility of this abuse on a limited amount of traffic cannot be allowed to outweigh the dangers of inaction in this area.

We would also point out that even today, under existing maximum rate regulation, the victim of such abuse, especially if he is a smaller shipper without great resources, is not too well served in his quest for protection by resorting to ICC litigation or Court litigation. Such a shipper might well be better served by having available to him the option of negotiating with his carrier the type of contract rates we are about to discuss.

Is it taking too optimistic a view to assume that such a shipper would get a reasonably fair shake from his carrier in such circumstances? We do not believe so. The value to a carrier of any shipper offering guaranteed business to the carrier in the form of commitment to a contract rate should not be underestimated. All kinds of advantages accrue to the rail carrier when he has predictable demands for service which, for the most part, the system has heretofore denied to him. The carrier, in such circumstances, can plan, invest and borrow far more easily and thus perform, and meet the shippers' demands for service, far more efficiently. Whatever their critics might say of them we believe rail carrier managers are reasonable and intelligent businessmen who would much rather serve their captive shippers well and make a reasonable, and predictable, profit doing it than, self-defeatingly, bleed them to death.

Let us, however, revert to our reanalysis of the captive shipper situation. If we are correct that there are factors at work, other than maximum rate regulation, which normally keep the captive shipper's rates at a level which keep him competitive in the market he seeks to reach, then his major concern becomes his ability to obtain adequate service from his carrier to enable him to reach that market, particularly in times of equipment shortage for, unlike his more fortunate non-captive competitor, he has, by definition, no practicable alternative mode by which to reach his market. It avails him nothing to have lower rates to his market if he cannot use them for lack of available service. Such a shipper might gladly pay a higher rate for guaranteed service for, without service, he is out of business.

Now we need to note that since captive shippers tend to pay higher rates than non-captive shippers, whose rates have been influenced downwards by the pressure of competition from alternative modes, nothing would be more economically natural, in times of equipment shortage, than for rail carrier management to give the captives priority for service since their rates, being higher, will produce a better return for the carrier. If this practice were permissible the captive shipper, who pays a higher rate than his more fortunate non-captive competitor, and is therefore somewhat disadvantaged in periods of non-shortage of carrier equipment, would get a compensating advantage, in return for his higher rate level, for, in times of equipment shortage, he would get priority for the rail transportation without which he is out of business, and his non-captive competitors would be left to utilize their alternative modes and to share the residual rail car supply remaining after the captives were serviced. This practice would amount to a captive shipper being able to qualify itself for a guaranteed car supply, year round, in return for paying a negotiated rate. Now which shippers would most readily seek this arrangement? -- the answer is probably only truly captive rail shippers because non-captive shippers will believe they can do better over the year by "playing the field" and using alternative modes when these are most economical (in agriculture it should be noted these modes are substantially exempt and their rate levels fluctuate with supply and demand).

In such a system there would be a certain logic as well as equity.

What prevents this solution from operating today now that the Commission has given its blessing to contract rates? The answer is the application of the common carrier car service obligation which admonishes, in effect, equal treatment of all shippers from a service viewpoint. This is the basis for the Commission's emergency car service orders in times of equipment shortage. The underlying concept is a rationing or allocation of the available resources. This need to free contract rates from the tyranny of the common carrier car service obligation, if contract rates are to achieve their true potential, has clearly been foreseen by ICC Chairman O'Neal.

Chairman O'Neal in his testimony before the Surface Transportation Subcommittee of the Senate Committee on Commerce, Science and Transportation on May 22, 1979 mentioned the need to establish broad policy guidelines to "clarify the policy stated in Ex Parte 358-F to state that contract rate agreements will not be disrupted by enforcement of common carrier obligations outside the scope of a particular contract e.g. car service orders".

We believe it critically necessary, on this vital issue, that the matter not be left to administrative interpretation by the Commission but that there be bold, clear legislation which establishes the respectability of rail contract rates beyond all doubt and insulates the equipment requirements of contract rates from the vagaries of the car supply situation, the tyranny of the common carrier car service obligation and the Commission's car service orders.

For contract rates to be efficacious for the present proposal they must take precedence over the common carrier service obligation. There are sound reasons why they should, in today's prevailing circumstances, and in the light of historical developments, as we shall illustrate. What needs to be noted here is that this is critically needed by both parties to the contract. To each the real benefits flow from certainty as opposed to chaos and unpredictibility. Both can plan, merchandise, borrow and invest with confidence. The boon that this would be to rail carriers in particular cannot possibly be overestimated. It is greatly to the Commission's credit that it has recently recognized the enormous potential of contract rates to make a beneficial contribution to rail rate making at this juncture. Because some aspects of rail regulation have remained frozen in time since 1887 we have saddled rail executives with burdens that most managers could not tolerate. They must make and justify investments without any assurance that the plant or equipment in question can be used for the service for which it is acquired. Few other managers go before their financial committees or bankers under such a handicap.

Would it be appropriate or fair to modify this rule in today's transportation circumstances?

In considering this question what needs to be noted is that the common carrier car service obligation came into being at a time when all shippers were captives, and there were virtually no alternative modes, and it has remained unchanged since that time. Clearly, however, it has always been interpreted to call for equality of treatment between shippers equally circumstanced, e.g. single car shippers versus unit train shippers. Therefore no fundamental principle would be breached in an interpretation that called for equal treatment within the two classes of captive (or contract) and non-captive shippers but not necessarily equal treatment between the two classes. Differences of treatment between these two differently circumstanced classes of shipper would not necessarily be "undue" -- the magic word under the Act.

We would again mention that this change should be by legislation. The problem with going forward on the basis of Commission policy interpretations is the element of uncertainty that would remain -- policy can change, such interpretations can be challenged and, perhaps, blocked. If shippers and carriers are to make significant investments, and modify their operations, in reliance on the many certainties, which constitute the main value and utility of contract rates, the availability of the contracted service must be invulnerable. If it is not the necessary investments simply will not get made and little will change.

We can now conclude that a carefully drawn modification to the law of the common carrier service obligation would be appropriate to enable rail carrier management to give service priority to captive shippers.

We began this paper by virtually throwing up our hands at the impracticability of developing any simple rules or presumptions for identifying the true captive shipper or truly market dominant traffic. Have we ended up here against the same brick wall? Is it necessary for us to be able to identify true captive shippers to ascertain those entitled to service priority as captive shippers?

Fortunately we believe the answer is "no". The concept of contract rates (a concept whose time the Commission has indicated has come) now furnishes a pragmatic solution to this problem. We have asked the question "which shippers would most readily accept a negotiated rail rate in return for guaranteed service?" The answer was that captive shippers would be the most probable takers. If contract rates were permitted to produce exactly this result of guaranteed service then the logical customers for them would be the captive shippers. Would a test be needed to determine the degree of "captiveness" to see which shippers were entitled to such "new concept" contract rates? No -- because by merely entering into a contract committing a stated volume of traffic, for a stated period, to the rail carrier a shipper would be rendering the issue moot because, for the duration of such a contract, that shipper would be a voluntary, if not an involuntary, captive. As we have said such an arrangement would be most attractive to true captive shippers but would be equally available to others who might see advantages to their operations in utilizing contract rates.

Thus no small advantage to this approach is that no further complex efforts to define captive shipper or market dominance will be needed.

If, then, we get rid of the need to modify the law to identify, by complex rules, the captive shipper, what modifications would still be needed to law, or practice, to make this pragmatic approach work?

In examining this question it is perhaps wise to pause for a moment to place in perspective what we are actually proposing to do, conceptually, to the traditional methods of furnishing rail transportation and to note the situation that has historically obtained, with regard to the other modes, and the furnishing of transportation in the dual role of a contract and a common carrier.

Railroad contract rates are not provided for in the Interstate Commerce Act nor are they prohibited. They are simply not mentioned. The body of legal precedent that, until the Commission's Ex Parte 358 pronouncement, has inhibited railroad use of contract rates has evolved from ICC decisions applying the provisions of the Act applicable to rates in general.

Under old Part II of the Act, dealing with motor carriers, contract and common carriage are distinguished, and each authorized, but dual operations are prohibited except with specific Commission approval. The effect of this prohibition, however, is much diluted in the transportation of grain because it is exempt from regulation.

Under old Part III of the Act, dealing with water carriers, there are similar provisions and prohibition on dual operations but, once again, the dry bulk exemption, which virtually exempts water transportation of grain from regulation, much dilutes the impact of the prohibition against dual operations.

The modifications now needed in the case of rail carriers consist, in effect, of the authorizing of dual operations, as both common carrier and contract carrier, and a clarification of the conditions, and shipper protections, which will apply to each form of transportation

We believe the required amendments will be comparatively simple.

For any rail transportation being performed for a shipper other than under a written contract all the provisions of the Act will continue to apply and the carrier will continue to function as a common carrier.

The modifications will then provide for the use of contract rates, negotiated between carrier and shipper, and indicate which provisions of the Act will continue to govern such contracts to insure equality of treatment of shippers by carriers. We believe the Commission should continue to have minimum reasonable rate jurisdiction over such rates to prevent predatory rate making and the provisions designed to protect competitors against preference and prejudice should continue to apply, the underlying principle there, of course, being that any shipper similarly situated should be entitled to a similar contract. In order to make these provisions efficacious provision would be made for the filing of all contracts with the Commission and for the furnishing, as a service performed by the Commission (preferably for a fee), of relevant information on executed contracts to shippers and interested parties. Since this information retrieval system will be new it should be carefully designed, from the outset, to make maximum use of computer technology and to be a model of efficiency. What should be noted is that while this system would perform the same notice function as the tariff filing system, which furnishes information solely on available rates, it also is a source, for the first time, of much more meaningful statistics. Particularly as the use of contract rates increases it will show actual volumes of grain that are committed to be moved. This could prove very valuable in terms of planning for the rail industry in general.

What should also be noted is that this information retrieval system, properly designed, would meet the problem of the grain trade's need for a predictable, or reasonably measurable, future transportation cost structure sufficient to preserve the benefits of forward pricing earlier discussed.

A critical new and separate provision, of course, would be the modification to the common carrier car service obligation that would enable priority for equipment to be lawfully given, in times of equipment shortages, to shippers who had rendered themselves indisputably captive by entering into contract rates.

With this provision it is obvious we are dealing with a crucial public interest question -- what would be an appropriate modification to the common carrier service obligation in the face of today's competitive conditions as contrasted with those of 1887?

The answer could range from the boldest, which would be the granting of full priority on cars to contract shippers for the movement of their contracted minimum volume in times of car shortage, on the one hand, to an experimental approach on the other, analogous to that used with unit trains, of earmarking a stated percentage of a carrier's fleet as eligible for contract rates with the balance of the fleet available for, and subject to the rules of common carrier service. We would suggest that boldness here would not be inappropriate when we note that the current dialogue has contemplated total deregulation of rail rates (phased over time) as one means of saving the railroads. We recognize, however, that there will be a temptation to be tentative here and select the conservative approach. We would urge against it because it seems inevitable that any arbitrary allocation will tend to create discrimination between the "ins" and the "outs". Probably the wisest course is that the balance for each carrier fleet, between contract cars and common carrier cars, should be allowed to develop naturally based on shipper needs.

We believe that the concept here advanced, like anything new, will create problems, particularly in the early stages, when the mix between common carrier shippers, contract shippers and the equipment to serve both classes fairly may be far from established.

We do not believe any of these problems should be beyond the ingenuity of man to solve. Probably a phased in approach may commend itself with control vested in the Commission to insure an orderly transition, with minimum hardship, from an all common carrier system to the ultimate dual system.

We believe the basic proposal is sound and could lead to a rejuvenation of the railroad system with rail carriers returned to prosperity, able to tailor their services to individual shipper needs, to maximize the inherent advantages of rail service, and to furnish a quality of service, even special service, for which shippers would be delighted to pay. Cargill and the Illinois Central Railroad had such a vision in 1968 of a Rent-A-Train with a guaranteed minimum average train speed of 25 miles per hour, loaded or empty. It was then an idea whose time had not yet come. Are there such trains in the future, operating on high speed tracks, with guaranteed speeds, or delivery schedules, or functioning in whatever manner, or with whatever characteristics, that a willing shipping public is willing to pay? Contract rates could make it so. It is a consummation devoutly to be wished.

Quite simply the existence of these "new concept" contract rates would divide shippers into two categories -- a classification that would more truly reflect the realities of today as contrasted with 1887. The two classes would be involuntary or voluntary captive shippers, who choose contract rates, and common carrier oriented shippers who chose to retain the option of playing the field among a variety of modes including rail. The appropriate 1887 car service rule was equal treatment of all shippers in time of car shortage because, at that time, all shippers had the same competitive circumstances in that, for all practical purposes, there were no alternative modes and all were captive shippers. A 1979 updating of that principle of equality among shippers similarly circumstanced would logically seem to call for a more flexible solution along the lines discussed.

Up to this point we have tended to discuss this proposal primarily in the context of the captive shipper and rate regulation of maximum rates and a pragmatic solution to that particular thorny problem.

What should not be lost sight of is that contract rates (properly conceived and supervised) can make significant contributions to achieving many goals which the Congress has encouraged, in the 4R Act and elsewhere, but which goals have remained frustratingly elusive. Examples are:

1. Seasonal rates -- the levelling of peaks and valleys;

2. Improved car utilization;

3. Closer cost and service relationship;

4. Service tailored to shipper's needs;

5. Capital incentive rates and goals;

6. Encourage shipper innovations to take advantage of rail strengths;

7. Rail emphasis on service as a strength rather than a weakness;

8. Greater equality in agriculture between modes -- competitors contract for long term movements.

9. Last, but far from least, the element that has been already mentioned and simply cannot, in today's perilous situation, be overemphasized -- namely the enhanced planning ability which is conferred on rail carrier management.

This is not an exhaustive list.

It should also be noted that in recent times the rail carriers' main success story, when in competition with other modes, has been in bulk movements in unit trains with tariffs that come close to being essentially contract rates containing, as they do, an incentive to ship a stated volume rather than a contractual obligation to do so.

We would like to conclude with a quotation from the recent study done for the ICC by the Kearney Management Consultants. To us this independent observation suggests that in tackling today's rail carrier problems a solution that tinkers with, or modifies, the historic common carrier concepts, as we are frank to admit, this one does, is not all bad. Now note Kearney at page II-4 of its April 10, 1979 study, thus:

> "There has been a shift in the railroad's competitive advantage over the last 30 years. Increasing labor costs have made terminal and classification functions relatively more expensive. As a result, single car movements and very short movements are increasingly not cost competitive with motor carriers. The railroad's strength appears to lie in the realm of high volume, long haul traffic where the regularity and size of the movements permits such labor saving innovations as high capacity specialized cars, unit train operation, and special run-through services. In such movements, the railroad becomes an integral part of the materials handling system for a set of closely interrelated processing/distribution functions.
>
> The close coordination between auto parts, train schedules and automobile assembly plant operations is a prime example of this. As this trend progresses, the railroads may become less well equipped to handle a random flow of general purpose cars, moving in relatively unpredictable patterns, and requiring repetitive switching and classification. <u>This trend raises a serious question whether the traditional concept of rail common carriage is economically feasible in the current environment</u>."

<u>Conclusion</u>

To our certain knowledge our country has been struggling with transportation reform since before the Kennedy transportation message and, in particular, with the search for a means to reconcile rail rate making freedom

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with the plight of the captive rail shipper. Such has been the intractible nature of this problem that failure to resolve it has been the ultimate rallying point of every vested interest, over the intervening years, who opposed transportation reform other than under its own prescription. As a result, the railroads have continued to wither.

To all parties genuinely interested in moving forward from a status quo that all agree threatens the national welfare we commend these thoughts.

Senator McGOVERN. Thank you very much, Mr. Springrose, for your testimony.

We will move on now to Mr. Norton.

STATEMENT OF JOHN NORTON

Mr. NORTON. Thank you, Mr. Chairman, and thank you for the opportunity to be heard today.

In response to your invitation to testify this morning, we have filed our written statement which I request be included in the record [see p. 159].

I would like to take this opportunity to summarize our statement which strongly endorses the concept of transportation contracts between shippers and railroads. We believe this to be one of the most important objectives of needed rail regulatory reform.

A second key objective, equally as important as contracts, is increased rail-to-rail competition within the existing rail network. Mr. Florio has already declared competition as a key, and we strongly support this statement. I will touch on both objectives, contracts and competition in my remarks, starting with responses to questions about contracts raised in your letter of September 18.

You asked about our experience with contracts and problems which we have encountered. Du Pont has extensive experience in moving goods by contract carriage. Over one-third of Du Pont's tonnage is now moved by contracts with transportation companies, these being executed primarily for bulk shipments with marine and pipeline carriers. Although we are engaged in negotiations with several railroads and hope these will lead to contracts, none have yet been finalized. I know this slow progress has disappointed Chairman O'Neal, as it does us, but there are valid reasons for the snail-like progress.

One is the type of contract Du Pont is interested in. We are interested in going much beyond rates and quantities. Most of our rail shipments are in tank or hopper cars we own or lease. We are therefore keenly interested in transit times since any delay in transit time adds to the burden of transportation equipment we must bear. Many of the commodities we ship present some hazard to the public or the environment if not properly contained. We therefore want to specify precisely the safety considerations in the contracts.

Most of our rail shipments are destined for further manufacturing and go to manufacturers who desire to keep minimum inventories. Precision of delivery, which we would like to specify in contracts, is therefore important.

And lastly, there is a tremendous diversity in our rail shipments, with each different chemical compound requiring individual attention in loading, unloading, packaging or equipment specifications. This complexity is not helped by the lack of familiarity rail executives have with this new way of doing business, and with uncertainties both shippers and railroads have as to what can and cannot be agreed to and what standing the contract might have when railroad resources are overtaxed. I will get into these problems more fully in answering other questions.

You asked about significant benefits and liabilities shippers might expect with contracts. I see shippers of all types as having benefits in two primary ways: First, from assured dependability of service; and second, by being able to address specific problems, including safety, which are peculiar to individual commodities. Railroads cannot at present be compensated for producing better or safer service on individual shipments, nor can shippers be compensated when inadequate rail service causes increased costs or lost sales opportunity. These problems can be addressed in contracts with benefits to both shippers and carriers.

The shippers will benefit in two primary ways: First, the opportunity contracts give to increased market share, or to hold on to valuable existing traffic; and second, operating economies which will flow to railroads as a result of advanced knowledge of their workload.

You asked about obstacles that inhibit shippers and railroads from making contracts. I have already touched on three: complexity of some operations, lack of familiarity with this new way of doing business, and several uncertainties about the scope and duration of the new policy decision. Time and effort will cure some of these problems, but the uncertainty should be removed through legislative action.

There is another obstacle which will bother certain shippers. This is the question of confidentiality. We in Du Pont have serious concerns about filing for public notice the full text of any rail contract we enter into. Contracts of the type we seek and have with other carriers of necessity contain important trade information. As much as we favor contracts, we would forego them rather than to reveal confidential market data to our competitors. We do not object to filing summary data with the ICC for their information and to aid them in adequately protecting the public interest.

You asked about incentives large and small shippers can offer to encourage railroads to participate in contracts. I don't foresee shippers having many problems in interesting railroads in entering into contracts once the railroads become more familiar with executing contracts, and the status, scope and duration of contracts are firmly established in law. The railroads won't need separate incentives from shippers once they see the advantages contracts provide in increasing market share and reducing costs.

On the other hand, certain rail carriers who feel they have particular moves captive to the rail system and to their particular railroads will need incentives to consider contracts. Merely authorizing contracts will not be enough in these cases, and in this respect I disagree with my friend Mr. Springrose. This is a reason for opening up the competition among railroads a point I will get to later.

You asked if shippers need to be protected from possible discriminatory aspects of contracts. I believe the answer is yes, but I do not anticipate that the railroads will intentionally withhold contracts or discriminate in executing them. They have too many incentives in the other direction. Therefore I believe legislation should address the question of how to insure equal access to contracts by all types and sizes of shippers.

One obvious step is to facilitate contract negotiations between rail carriers and shipper groups such as cooperatives, shipper associations, and freight forwarders. This system works well in Europe and should work well here.

Finally, you asked to what extent common carrier obligations need be retained. In Du Pont, we expect contracts will become the basis for 50 percent or more of our rail tonnage, covering the high volume, repetitive moves, and this may be a pattern for other shippers. However, we still will have many spot shipments by rail and other shipments for which contracts are not appropriate. We will then continue to need a rail system responsive to common carrier obligations. We believe both systems can exist in harmony without discrimination to either class of shipper if contract obligations and common carrier obligations have equal standing.

I have said earlier that achievement of increased rail-to-rail competition within the existing rail network is as important as contract, and I would like to justify that statement. Although there is an abundance of rail trackage in the United States, an overabundance in some areas, shippers often have to run an economic blockage to make use of the full range of rail services of those carriers willing to carry his freight. This economic blockade is maintained by originating and delivering rail carriers through their denial of reasonable joint rates over through routes which are disadvantageous to them. This denial is sanctioned in the act under section 10705. As a result, shippers are placed in a dilemma. If safety, transit time or car supply via the only established joint-rate route is inadequate, and if all the rail alternatives are rated as combinations, the economic penalty may be so large as to drive the shipper to an alternative mode, often never to return.

I have an example of this market dominance by railroad rate strategy. However, I see my 10 minutes are almost up, and I would prefer to use this time to encourage this committee and other involved congressional committees to seriously consider the importance of intermodal ownership as a further means of helping solve not only some of the problems of rail carriers, but many problems of the shipping public and other modes. Except for plan 2 piggyback, I know of no substantial offering of through intermodal freight services by any transportation company. The benefits of intermodal operations, and there are many, can be obtained under present law only by the shipper or his agent dealing with the individual modes separately and then linking the modes together by his own effort. The various transportation resources could be much better utilized if multimodal transportation companies with single profit incentive were permitted.

Thank you for this opportunity to make this statement.

[Testimony resumes on p. 165.]

[Mr. Norton's prepared statement follows:]

TESTIMONY OF JOHN H. NORTON,
DIRECTOR OF TRANSPORTATION & DISTRIBUTION,
E. I. DU PONT DE NEMOURS AND COMPANY
BEFORE THE SUBCOMMITTEE ON
ECONOMIC GROWTH AND STABILIZATION
OF THE JOINT ECONOMIC COMMITTEE AND
THE SUBCOMMITTEE ON TRANSPORTATION
AND COMMERCE OF THE HOUSE
INTERSTATE AND FOREIGN COMMERCE COMMITTEE
SEPTEMBER 27, 1979

My name is John Norton, and I am Director of Transportation & Distribution for E. I. du Pont de Nemours and Company, a diversified chemical company headquartered in Wilmington, Delaware.

Du Pont appreciates this Committee's invitation to express our views on this very important topic of deregulating the Nation's rail industry. The Du Pont Company recognizes the need for a revitalized private sector rail system capable of generating revenues sufficient to meet rail capital requirements. Du Pont, therefore, supports efforts to remove burdensome overregulation of the railroad industry which restricts the setting of rail freight rates in the competitive marketplace. Du Pont particularly favors the expanded use of contracts which include performance standards to enhance the safety and overall productivity of rail transportation.

I intend to direct my remarks this morning to this question of the ability of railroads and shippers to enter into contracts for service. We view this as an extremely important part of the entire deregulation program. The ability to contract for service will help the shipper who is captive to the rails to ensure an acceptable level of service. I will address the balance of benefits and problems that we see in initiating rail service contracts.

The current system of railroad regulation reflects a series of uncoordinated actions intended to remedy specific problems encountered during the past 100 years. The result is an inconsistent hodgepodge which no longer recognizes the economic condition of the railroads, the nature of intermodal competition, or the needs of shippers and consumers. Although much was accomplished by the 4-R Act -- the first comprehensive attempt in many years to reexamine the needs and assumptions underlying economic regulation -- much more is needed now if the railroads are to survive as private entities.

We applaud current initiatives by the Department of Transportation, the Interstate Commerce Commission, and the Congress aimed at substantial deregulation of the railroads. Among the most meaningful proposals are those that will permit contracts between shippers and carriers.

Advantages of Contracts

Service contracts between railroads and shippers will be no panacea for the plight of the railroads. However, long-term agreements will assure the railroads of certain revenues over an extended period of time. They can also be helpful in raising badly needed capital for the carriers, while offering a certain degree of rate stability for shippers as the current rate regulation by the ICC is further curtailed.

Du Pont moves substantial amounts of commodities under annual volume tariffs. We generally are satisfied with the level of these rates which should be similarly protected under specific contracts.

But beyond these obvious economic considerations we see great opportunities to enhance safety and service. As an example, contracts will permit the shippers and carriers to agree upon operating conditions such as how and where in-transit inspections are conducted, where rail cars will be positioned in the train, when the car will be moved, speed, train length, pick-up and delivery times, transit times, etc. Services which add to cost will be recognized and agreed upon; we are willing to pay the added cost for the particular type of service that we need. In short, we see economic, safety, and service incentives for shippers to enter into these contracts; more predictability of service requirements and revenue should be attractive to the railroads.

Transportation contracts are not a novelty with Du Pont or the chemical industry. They are commonplace in the less regulated modes. For example, unregulated water shipments account for 25 percent of all freight tonnage moving to or from our plants. This mode has the freedom to enter into contracts which allows the shipper and carrier to specify and agree on steps to improve safety and productivity, as well as other essential conditions of service.

For example, a typical contract with a marine tower addresses such issues as maximum safe wind conditions for operation, safe berths for loading and unloading, use of explosion proof lanterns, and prohibitions against smoking or carrying matches. Operating parameters which affect productivity are also addressed -- such as fuel consumption, speed, communications, and loading or unloading schedules.

I believe that this unregulated mode is more in tune with today's transportation needs because carriers' ability to enter into contracts has allowed them to meet shipper needs for safety and productivity.

The Need for Legislative Action

It has been nearly a year now since the Interstate Commerce Commission ruled that contracts represented a permissible arrangement between shipper and rail carrier. It is discouraging to note that despite our efforts, and we suppose those of our shipper colleagues, we know of no significant contracts between shippers and railroads.

We, of course, probably do not have all the answers to why there has been this lack of results. However, our dealings with the railroads during the past year have shown us several areas of concern. First, we believe that there is a genuine reluctance on behalf of railroads to rely heavily on the "policy statement" of the ICC, an agency which has been rapidly changing many broad policy directions in recent months. We believe that this perceived weakness in the current administrative authority to enter into contracts can be remedied by the sureness of legislative mandate.

Second, railroads have been under the yoke of regulation for nearly 100 years. Although the change in the railroads' approach to marketing their services may come slowly, the railroads will be less inhibited to respond to shippers' suggestions for service agreements in a less regulated environment.

Third, the ICC policy statement requires that contracts between rail carriers and shippers be made public information--contrary to the entire thrust of other private business dealings. Valuable proprietary and marketing information could be gleaned from contract publication -- which we oppose. We and our competitors do not publish our labor or materials contracts, or transportation contracts for unregulated modes. Requiring publication of rail contracts will be a serious impediment in many cases to their successful negotiation. Minimum filings should provide the Commission with information sufficient to protect shippers from discrimination.

If we are really committed to utilize the forces of the marketplace, to promote and strengthen competition, we should be prepared to truly let the marketplace operate. Shippers should be completely free to negotiate for services from the railroads, as they currently do for any other service.

Contracts and the Common Carrier Obligation

We recognize that concerns have been expressed that the creation of contract rail service may produce unwanted discriminatory effects on shippers who do not have contracts with carriers. We support the retention of the common carrier obligation to protect shippers who, for whatever reason, do not contract with the railroads. We believe that as long as the common carrier obligation does not interfere with the right of parties to contract, it should be retained. We believe that both systems can live together. The railroads are, we believe, capable of exercising these dual duties, balancing their responsibilities under contracts and the common carrier obligation.

Conclusion

Of course, this issue of contracts for rail service should not be examined in a vacuum. This innovative concept must be considered along with other vital elements of a deregulation program, such as freedom of entry. For example, competitive pursuit of contracts by two or more carriers will lead to more tailoring of services to shippers' needs and imaginative approaches to increased productivity that will eventually enhance the carriers' profits.

In summary, Du Pont supports enlightened efforts to remove the heavy hand of restrictive regulation from the railroad industry. Among the proposals that can benefit shippers and carriers are those that provide for contracts. Contracts which recognize individual circumstances and needs can help enhance rail safety and productivity. We need the Nation's railroads. We think they need a change in present law. Thank you for this opportunity to express our views.

Senator McGovern. Thank you very much for your statement, Mr. Norton, and we will move on now to Mr. Massey.

STATEMENT OF E. MORGAN MASSEY

Mr. Massey. Thank you, Senator McGovern and Chairman Florio.

I am president of A. T. Massey Coal Co., which is the coal division of St. Joe Minerals Corp., and I am also here representing the board of directors of the National Coal Association. Our company produces about 12 million tons a year which puts us in about the top 10 producers in the United States, and I think we are the No. 2 exporter in the United States. But still, all that adds up to only 2 percent of the U.S. coal production. It is an awfully big industry, and it represents the largest portion of the railroad traffic in this country.

I appreciate the opportunity to express my company's views and those of the coal industry on regulatory protection of captive shippers, contract ratemaking and some other rail regulation issues.

Mr. Chairman, I assume that my formal statement will be entered into the hearing record [see p. 169].

Senator McGovern. Yes. All of the prepared statements will be printed as though read.

Mr. Massey. The position of the coal industry on proposed regulatory changes encompassed within the provisions of Senate bill 796, which is the proposed Railroad Deregulation Act of 1979, was presented in testimony by National Coal Association president, Carl Bagge, on June the 6 before the Surface Transportation Subcommittee of the Senate Committee on Commerce, Science and Transportation.

Mr. Chairman, I respectfully request that a copy of NCA's June 6 statement be included in the hearing record [see p. 181] inasmuch as it presents information which is directly relevant to the issues now under consideration by your subcommittees.

In my formal statement I would like to focus on three subject areas.

First, I will review the issue of rail market dominance involving coal shippers who are captive to rail transportation. These captive shippers require protection against unreasonable rates, inadequate service and many other conditions now regulated under the Interstate Commerce Act.

Next I would like to discuss the views of the coal industry on contract ratemaking as a technique to achieve rail carrier pricing flexibility appropriate to the transportation performance and services furnished.

Finally, if time permits, I will summarize the views of the coal industry on ratemaking and on nonratemaking issues that are associated with rail deregulation.

Rail market dominance over coal shipments is a fundamental issue which must be addressed in considering rail deregulation 65 percent of the Nation's annual coal production moves by rail for most or all of the distance from the mines to the users. A recent NCA coal transportation study shows that an overwhelming portion of the coal shipped by rail nationwide is captive to the railroads. On all coal tonnages shipped by rail, the study found that 85 percent had no practical alternative to rail transport.

Again, Mr. Chairman, I would respectfully request that this study be inserted in the record.

Senator McGOVERN. Without objection, that will be printed [see p. 202].

Mr. MASSEY. From 1969 to 1978, rail rates for coal traffic have increased 128 percent, or more than 14 percent per year on a national scale. In 1978 and 1979, even more severe selective coal rate increases have been allowed, giving rise to serious concerns by the coal industry that rapid acceleration in rail rates may cause unacceptable increases in the delivered price of coal and thereby interfere with the national effort to increase the use of coal, reduce the dependence on imported oil, and preserve natural gas supplies for higher and better uses. Rapidly increasing rates will also mean higher energy costs for electric utilities and industrial users and higher costs for goods and services to the American public. Also, slower growth in coal use will reduce the potential rail carrier revenues from coal traffic.

A case in point is the recent ICC decision which authorized coal rate increases of 38 percent for the Louisville & Nashville Railroad. This was approved under two consolidated proceedings before the ICC. One increased rates on L. & N. originated coal traffic by 22 percent and another increased L. & N. coal rates on shipments in the South by 13 percent which, due to compounding, produces a combined increase of 38 percent.

This 38-percent rate increase will permit the rail carrier's revenue on coal traffic to become 169 percent of the variable cost for providing such transportation services according to the ICC Chairman's testimony on September 24 before the Surface Transportation Subcommittee of the Senate Committee on Commerce, Science, and Transportation. The coal industry views the recent trend of major coal rate increases with considerable alarm.

While coal traffic contributes its fair share to rail carrier revenues, the ICC should certainly assure that coal is not treated unfairly in the ratemaking process because it constitutes rail market dominant traffic. Further, it should be the duty of the ICC to assure that coal is capable of being routinely delivered to customers at a price that is not inflated by unreasonable rail rates which would discourage its use.

Coal is the leading commodity transported by rail. Since 1975, coal has represented 20 percent of the total carloadings of rail freight across the Nation each year. Coal traffic also constitutes a primary revenue reserve source for several major rail carriers. Through the years, rail carriers have participated in developing evolutionary coal ratemaking structures starting from single car rates and moving into multiple car, annual volume, trainload, and unit train rates during recent years in order to tailor coal rates to the needs of particular coal shippers, both producers and customers.

However, there seems to be some uncertainty among rail carriers regarding contract ratemaking as a step toward moving foward with achieving rail services pricing flexibility commensurate with specified coal traffic service requirements. The concern about possible violations of a common carrier's obligation under the Interstate Commerce Act to hold out reasonable, nondiscriminatory rates and services should have been effectively removed through a favorable decision involving contract ratemaking issued by the ICC a year ago.

The coal industry supports the concept of contract ratemaking and recommends that the Government clearly adopt a policy that contract ratemaking is a lawful transaction between a shipper and a rail carrier, and that such transactions should be under the purview of the ICC from the standpoint of, No. 1, applying procedures for facilitating contracts by shippers and/or rail carriers desiring to pursue contract ratemaking negotiations with other parties; and two, determining that rail carrier services are reasonable and sufficient for shippers whose freight traffic is not involved in contract ratemaking transactions with rail carriers.

This would allow private carriers and shippers to engage in conventional business practices while insuring that Government involvement is held to a level required to protect legitimate public and private interests. It also would provide for the orderly reduction of Government participation in the ratemaking process. Thus, the ICC's efforts in the ratemaking area can be held to a minimal level.

The coal industry supports the inclusion of an enabling provision in the Interstate Commerce Act which would explicitly allow contract rate agreements as a method of increasing rail services pricing flexibility and of providing a businesslike technique for carriers and shippers to mutually agree on, one, acceptable rates; two, service requirements; three, dedication of carrier and shipper-owned rail equipment; and four, adjustment in rates or other compensation for use of shipper-owned rail equipment.

It remains essential that an independent agency, the ICC, continue having jurisdiction over resolution of discriminatory practices that could result from the many aspects of rail carrier and shipper interactions, including the impact of contract rate agreements on the availability of rail carrier services to all shippers.

I am not aware of any contract ratemaking agreements currently in force in the coal industry. This probably results from several factors: One, concern of rail carriers regarding possible violation of common carrier obligations; two, reluctance to become bound by long-term agreements that would place limits on rail rates; three, apprehension of rail carriers with respect to meeting specifications for rail services; and four, opposition to penalties that may be incurred for nonperformance, whereas no such conditions are presently encountered.

Benefits associated with contract ratemaking are: One, contract ratemaking agreements are attractive inducements to investors to provide equity capital. Two, a sense of permanency is established and permits coal users to plan for orderly coal purchases. Three, some cost control is furnished inasmuch as rail rates would be bound over the length of the contract. And four, investments by shippers and carriers in specific rail equipment are protected with respect to cost recovery. Some liability could ensue to the coal shipper who cannot supply or consume coal on a timely basis and is still required to meet contractual commitments for rail services.

Obstacles inhibiting shippers and carriers from successfully negotiating contract ratemaking agreements appear to consist essentially of uncertainties in resorting to new approaches for acquiring rail services and perhaps a reluctance to commit to specific service levels under the deteriorating trackage conditions. Shippers can offer rail carriers significant incentives for participation in contract ratemaking through the furnishing of shipper-owned rail equipment needed to expedite movement of coal traffic and resultant rail carrier revenues.

Mr. Chairman, I will be glad to answer any questions at this time, or written responses subsequent to this hearing.

[Testimony resumes on p. 256.]

[Mr. Massey's prepared statement and attachments follow:]

STATEMENT BY E. MORGAN MASSEY ON RAIL DEREGULATION BEFORE THE SUBCOMMITTEE ON ECONOMIC GROWTH AND STABILIZATION OF THE JOINT ECONOMIC COMMITTEE OF CONGRESS AND THE SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, PRESENTED ON SEPTEMBER 27, 1979.

Mr. Chairman and Members of the Subcommittees:

My name is E. Morgan Massey. I am President of A. T. Massey Coal Company, Incorporated, the Coal Division of St. Joe Minerals Corporation, and a member of the Board of Directors of the National Coal Association. A. T. Massey Coal Company produces approximately 12 million tons of metallurgical and steam coal annually. We have coal mining operations in Kentucky, Virginia, West Virginia, and other states. In addition to supplying coal to various markets in the United States, we are engaged in exporting coal to foreign customers using East Coast and Gulf Ports through our subsidiary, Massey Coal Export Corporation.

I appreciate this opportunity to express my company's views and those of the coal industry on rail deregulation issues under consideration at this hearing. My statements on regulatory protection of captive shippers, contract rate-making, and other rail regulatory issues reflect the position of the coal industry adopted in consideration of legislative proposals introduced in the Congress earlier this year in the form of S.796, the proposed Railroad Deregulation Act of 1979.

The position of the coal industry on proposed regulatory changes encompassed within the provisions of S.796 was presented in testimony by NCA President Carl E. Bagge on June 6, before the Surface Transportation Subcommittee of the Senate

Committee on Commerce, Science, and Transportation. Mr. Chairman, I respectfully request that a copy of NCA's June 6 statement be included in the hearing record inasmuch as it presents information which is directly relevant to the issues now under consideration by your Subcommittees.

In my formal statement today, I will focus on three subject areas:

- First, I will review the issue of rail market dominance involving coal shippers who are captive to rail transportation. These captive shippers require protection against unreasonable rates, inadequate service, and many other conditions now regulated under the Interstate Commerce Act.

- Next, I will discuss the views of the coal industry on contract ratemaking as a technique to achieve rail carrier pricing flexibility appropriate to the transportation performance and services furnished.

- Finally, I will summarize the views of the coal industry on ratemaking and on non-ratemaking issues that are associated with rail deregulation.

Rail Market Dominance Over Coal Shippers

Rail market dominance over coal shipments is a fundamental issue which must be addressed in considering rail deregulation. About 65 percent of the Nation's annual coal production moves by rail for most, or all, of the distance from mines to users. This represents about 481 million tons of the 740 million tons of coal production estimated for 1979 by the National Coal Association. Assuming coal production of 887 million tons in 1983 (NCA forecast) and continuation of the 65 percent rail share, rail carriers would be expected to transport about 100 million additional tons of coal per year by 1983, or a total of about 580 million tons.

Moreover, an NCA coal transportation study[1/] shows that an overwhelming portion of the coal shipped by rail nationwide is captive to railroads. Of all coal tonnages shipped by rail in 1977, the NCA study found that 85 percent had no practical alternative to rail transport. Mr. Chairman, at this point, I respectfully request that this study be inserted in the record of these hearings.

Based on this study, coal is clearly a market dominant commodity. As such, we believe that the concept of maximum rate regulation should be continued and not be terminated.

The ICC should continue to have jurisdiction over coal shipments by rail carriers under existing provisions of the Interstate Commerce Act dealing with market dominance and the protection of captive shippers, including the powers to set maximum rates, to suspend rates, and to determine the reasonableness of general rate increases. However, our recommendation should not be construed as an endorsement of recent ICC decisions which have sustained significant increases in rail rates for transporting coal.

From 1969 to 1978, these rates have increased 128 percent, or more than 14 percent per year, on a national scale. In 1978 and 1979, even more severe selective rate increases have been allowed, giving rise to serious concern by the coal industry that rapid acceleration in rail rates may cause unacceptable increases in the delivered price of coal and thereby

1/ "Captive Coal Shipments by Rail," NCA, May 1979.

interfere with the national effort to increase the use of coal, reduce dependence on imported oil, and preserve natural gas supplies for higher and better uses. Rapidly increasing rates will also mean higher energy costs for electric utilities and industrial users and higher costs for goods and services to the American public. Also, slower growth in coal use will reduce the potential rail carrier revenues from coal traffic.

A case in point is the recent ICC decision which authorized coal rate increases of 38 percent for the Louisville and Nashville Railroad. This was approved under two consolidated proceedings before the ICC. One increased rates on L & N, originated coal traffic by 22 percent and another increased L & N's coal rates on shipments in the South by 13 percent which, due to compounding, produces a combined increase of approximately 38 percent.

This 38 percent rate increase will permit the rail carrier's revenue on coal traffic to become 169 percent of the variable cost for providing such transportation services according to the ICC Chairman's testimony on September 24, before the Surface Transportation Subcommittee of the Senate Committee on Commerce, Science, and Transportation.

In other recent cases, the ICC has approved coal rate increases which reflect ratios of revenue to variable costs ranging from 170 percent[2/] to 203 percent.[3/] The coal industry

2/ Docket No. 36970, Annual Volume Rates on Coal--Wyoming to Flint Creek, Arkansas, served May 25, 1979.

3/ Docket No. 36936, Incentive Rates on Coal--Hayden, Colorado to Kings Mill, Texas, served January 17, 1979.

views this recent trend of major coal rate increases with considerable alarm.4/

While coal traffic contributes its fair share to rail carrier revenues, the ICC should assure that coal is not treated unfairly in the ratemaking process because it constitutes rail market dominant traffic. Further, it should be the duty of the ICC to assure that coal is capable of being routinely delivered to customers at a price that is not inflated by unreasonable rail rates which would discourage its use.

Contract Ratemaking for Coal Traffic Moved by Rail Carriers

Coal is the leading commodity transported by rail. Since 1975, coal has represented about 20 percent of the total carloadings of rail freight across the Nation each year. Coal traffic also constitutes a primary revenue source for several major rail carriers. For instance, in 1978, according to rail industry statistics, 60.6 percent of Norfolk and Western's originated freight tonnage was coal. This figure was 57.6 percent for the Chessie System, 43.5 percent for the Burlington Northern, 30.5 percent for the Family Lines (SCL/L & N) System, 27.8 percent for the Southern Railway, and 23.1 percent for Conrail.

These carriers, among others, should have a major interest

4/ In I & S No. 9199, Unit Train Rates on Coal--Burlington Northern, Inc., served July 13, 1979, the ICC approved rates which reflect 171 and 180 percent revenue to variable cost ratios for coal movements from the west to locations in Iowa; and Docket No. 46180, San Antonio City Public Service Board v. Burlington Northern, Inc., decided May 23, 1979, supported a new coal rate which reflected a 176 percent revenue to variable cost ratio.

in seeking greater use of coal. Such rail carriers probably can be expected to pursue advanced approaches for marketing of rail services to move coal. Through the years, these carriers have participated in developing evolutionary coal ratemaking structures starting from single car rates and moving into multiple car, annual volume, trainload, and unit train rates during recent years in order to tailor coal rates to the needs of particular coal shippers, both producers and customers.

However, there appears to be some uncertainty among rail carriers regarding contract ratemaking as a step towards moving forward with achieving rail services pricing flexibility commensurate with specified coal traffic service requirements. The concern about possible violations of a common carrier's obligation under the Interstate Commerce Act to hold out reasonable, non-discriminatory rates and services should have been effectively removed through a favorable decision involving contract ratemaking issued by ICC a year ago.

A 1973 study,[5/] sponsored by the U. S. Department of Transportation, furnished conclusive findings and recommendations in support of contract ratemaking. This study recommended that the Interstate Commerce Act be amended "to establish the policy that contract rates do not constitute an unfair or destructive competitive practice within the meaning of National Transportation Policy." The study report also recommends that

5/ "Study to Identify and Analyze Existing Impediments to the Use of Railroad Contract Rates in the United States," Federal Railroad Administration, USDOT, prepared by R. L. Banks and Associates, Inc., May 1973.

"rate and service contracts be subject to the provisions of the Act."

The coal industry supports the concept of contract ratemaking and recommends that the government clearly adopt a policy that contract ratemaking is a lawful transaction between a shipper and a rail carrier and that such transactions should be under the purview of the ICC from the standpoint of: (1) applying procedures for facilitating contacts by shippers and/or rail carriers desiring to pursue contract ratemaking negotiations with other parties; and (2) determining that rail carrier services are reasonable and sufficient for shippers whose freight traffic is not involved in contract ratemaking transactions with rail carriers.

This would allow private carriers and shippers to engage in conventional business practices while ensuring that government involvement is held to a level required to protect legitimate public and private interests. It also would provide for the orderly reduction of government participation in the ratemaking process.

Thus, the ICC's efforts in the ratemaking area can be held to a minimal level. Now, the ICC's procedures for investigating a rail rate involve the use of four evaluation criteria which frequently result in lengthy, complex proceedings. The criteria consist of first comparing the rate with other rates for comparable shipments; then examining the rate in relationship to the cost of providing the service; next assessing the economic effects of the rate on communities; and, finally, determining the adequacy of the carrier's revenue to cover operating, depreciation, and captial costs and furnish sufficient return-on-investment for retaining and attracting equity captial that is justified and needed.

While these evaluation criteria have certain merits, they tend to move towards a stronger emphasis on carrier revenue adequacy and away from shipper protection. This is critical because such rate investigations apply only to freight that is rail market dominant, such as coal traffic. Moreover, ICC procedures neglect a fundamental consideration in evaluating the efficacy of a rail rate--the level of service and performance to be provided by the rail carrier in return for the rate incurred by the shipper.

For these reasons, the coal industry supports the inclusion of an enabling provision in the Interstate Commerce Act which would explicitly allow contract rate agreements as a method of increasing rail services pricing flexibility and of providing a businesslike technique for carriers and shippers to mutually agree on: (1) acceptable rates; (2) service requirements; (3) dedication of carrier and shipper-owned rail equipment; and (4) adjustments in rates or other compensation for use of shipper-owned rail equipment.

The common carrier obligation of the railroads would not be violated *per se* by contract rate agreements between shippers and carriers under an extant decision by the Interstate Commerce Commission. It remains essential that an independent agency, the ICC, continue having jurisdiction over resolution of discriminatory practices that could result from the many aspects of rail carrier and shipper interactions, including the impact of contract rate agreements on the availability of rail carrier services to all shippers.

In themselves, contract rate agreements are not specifically directed towards protection of captive shippers. Such protection in the ratemaking process is a function which should fall within the powers of the ICC. The key element underscoring the value of contract rate agreements from the shippers' perspective is that freight rates should be directly related to rail performance and services to be provided.

A concerted effort to expand contract ratemaking across the rail carrier and shipper community is an important first step in moving towards a goal of allowing railroads to gain more pricing flexibility while protecting the captive shipper. It should be noted that the coal industry also considers other reductions in rail regulations as critical for improving the economic health of the rail carrier industry. For instance, the facilitation of mergers and acquisitions of control and of abandonment of unprofitable services, among other measures, to achieve cost reductions in the delivery of rail carrier services would be constructive.

I am not aware of any contract ratemaking agreements currently in force. This probably results from several factors: (1) concern of rail carriers regarding possible violation of common carrier obligations; (2) reluctance to become bound by long term agreements that would place limits on rail rates; (3) apprehension of rail carriers with respect to meeting specifications for rail services; and (4) opposition to penalties that may be incurred for non-performance, whereas no such conditions are presently encountered.

Benefits associated with contract ratemaking are: (1) contract ratemaking agreements are attractive inducements to investors for providing equity capital; (2) a sense of permanency is established and permits coal users to plan for orderly coal purchases; (3) some cost control is furnished inasmuch as rail rates would be bound over the length of the contract; and (4) investments by shippers and carriers in specific rail equipment are protected with respect to cost recovery. Some liability could ensue to the coal shipper who can not supply or consume coal on a timely basis and is still required to meet contractual commitments for rail services.

Obstacles inhibiting shippers and carriers from successfully negotiating contract ratemaking agreements appear to consist essentially of uncertainties in resorting to new approaches for acquiring rail services and reluctance to commit to specific service levels under deteriorating trackage conditions. Shippers can offer rail carriers significant incentives for participation in contract ratemaking through the furnishing of shipper-owned rail equipment needed to expedite movement of coal traffic and resultant rail carrier revenues.

Summary of Views on Ratemaking and Non-Ratemaking Issues Related to Rail Deregulation

In the time remaining, Mr. Chairman, I will identify briefly the views of the coal industry on several ratemaking and non-ratemaking issues related to rail deregulation. Coal shippers, as captive rail transportation users, strongly believe that an independent agency, the Interstate Commerce Commission, should retain general jurisdiction over rail carrier regulation. The ICC is needed to protect captive shippers who must rely on rail services and who have no practical transportation alternative for the delivery of their commodities to users. This basic view pertains to securing prompt and effective recourse with respect to either unreasonable rates or inadequate services encountered by rail shippers.[6/]

In the ratemaking area. the coal industry recommends that:

- Contract rates should be explicitly authorized.
- ICC should continue to have powers to set maximum rates, to suspend rates, and to determine the reasonableness of general rate increases.
- ICC should have powers to set both single and joint line rates.
- Antitrust immunity should be retained for ratemaking by rate bureaus.
- Reduced rates for government traffic should be eliminated.

In non-ratemaking areas, the coal industry recommends that:

- ICC jurisdiction should be retained and ICC decisions should be expedited with respect to rail mergers and acquisitions of control.
- Rail abandonment procedures should be simplified and time required for discontinuing unprofitable rail services should be reduced.
- Open entry for providing rail services should be authorized.

6/ Additional support for these views is provided in NCA's June 6, 1979 Statement provided earlier and in NCA's analysis of the rail deregulation issue dated May 23, 1979, provided for the record.

- Actions on routine car service matters should be the direct responsibility of the rail carrier industry.

- The "commodities clause" should be retained.

- Rail carrier accounting and reporting requirements should be upgraded to furnish commodity-specific and route-specific cost center data.

Mr. Chairman, I will be glad to answer any questions at this time or in written responses subsequent to this hearing.

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NATIONAL COAL ASSOCIATION

STATEMENT BY

CARL E. BAGGE
President
National Coal Association

Mr. Chairman and Members of the Subcommittee:

My name is Carl E. Bagge. I am President of the National Coal Association (NCA), which represents major coal producing and sales companies of the Nation as well as many other organizations concerned with the production, transportation and use of coal.

I appreciate this opportunity to present views of the coal industry on the proposed legislation you are considering, "The Railroad Deregulation Act of 1979," S. 796. In my formal statement today, I plan to deal with four principal matters:

- First, I will review the importance of the railroads in transporting the coal produced in the U.S.
- Second, I will comment on the "captive" nature of much of the coal transported by rail -- that is, the absence of adequate competition among rail carriers and other transport modes for shipping coal.
- Third, I will summarize the important impact that railroads, rail service and rail rates can have on the nation's use of coal, where the coal is produced and used, the costs of coal and the cost to consumers of products and services dependent upon coal.
- Finally, I will give the coal industry's general views on rail deregulation and specific recommendations for dealing with twelve major issues raised by S. 796, with the rationale for those recommendations.

I. Importance of Railroads in Transporting U.S. Coal

Mr. Chairman, I particularly welcome the opportunity to present our views today on rail deregulation because of the importance of railroads in transporting coal produced in the United States -- both for consumption in the U.S. and for export.

A. Railroads will be carrying about 465 million tons of coal in 1979 (65% of production) and about 700 million tons by 1985.

Coal production in the U.S. this year will be in the neighborhood of 715 million tons. About 65% of this coal -- or roughly 465 million tons -- will be moved by rail for all or part of the distance from coal mines to the place where the coal is used.

Coal could be making a larger contribution to the nation's energy needs and favorable trade balance since the nation has plentiful coal reserves and more than adequate productive capacity. The demand for coal has been held down particularly by government policies and actions which have increased the cost of producing, transporting, and using coal and, in some cases, made coal use difficult or impossible.

If coal fired plants now planned are permitted to go ahead, we expect coal demand and production to grow by 5 to 7% per year from now through 1985 -- reaching and probably exceeding 1 billion tons by 1985. Coal producers and users will be looking to railroads to move about 700 million tons of this coal in 1985.

Thus, it is quite clear why the coal industry has a strong interest in actions which will affect the availability of adequate rail service and cost of that service.

B. There is no practicable alternative to rail transportation of coal in many situations.

There is no practicable alternative to rail transportation of coal in many cases. This dependence is directly related to the bulk nature and large quantities of coal that must be shipped. Water transport is economic but is limited by the availability of navigable waterways. Truck transport is generally viable for relatively short distances if adequate roads are available. Slurry pipelines are widely believed to be practicable for moving coal but only one such pipeline is now operational. Mine-mouth plants, capable of generating electricity at the location of a coal mine, are already being used in some cases and more are being constructed but this approach will not reduce substantially the need for rail transport of coal in the future.

Several other factors limit the flexibility of coal shippers to switch from one mode of transport to another. Because of wide variability in characteristics of coal, the specifications for plants burning coal are generally matched with the coal that will be used over the lifetime of the plant. Long term contracts (15 to 30 years) are commonly used to provide coal needed for plants, particularly in the case of electric utilities. In addition, substantial investments are often made for transportation equipment(e.g., rail cars) and loading and unloading facilities which make it costly for coal shippers to switch to another transport mode.

II. The Extent to Which Coal Shipments by Rail are "Captive."

The Administration's railroad deregulation proposal is based heavily on the assumption that competition among carriers and modes of transportation is adequate to permit reliance on competition to assure adequacy of service and reasonableness of rates. Because of this, the extent to which coal shipments by rail are "captive" is an overriding issue.

A. <u>NCA Conducted a Survey to obtain data on the magnitude of the "Captive shipper" problem for coal.</u>

Since relatively little hard data on "captivity" were available, the National Coal Association (NCA) conducted a survey of coal producers to develop estimates on the extent of the captive problem and potential effects on captive shippers. I am providing for the record a copy of the NCA report on this survey.

Briefly, the data covered by the survey are for 1977 since that was the latest normal 12-month period for which data are available. (1978 coal shipments were interrupted by coal and rail strikes.) For purposes of this survey, NCA defined "captivity" to exist when two conditions are present:

. A single rail carrier represents the only present transportation alternative for the entire shipment, or a substantial share of the route, for the shipment in question; and

. The "next best" future transportation alternative (other rail carrier, motor or water carrier) is one which would cause injury to the shipper's competitive position if forced to adopt that alternative.

Information from the survey covers 291 million tons of coal or 42% of 1977 production. This includes 193 million tons shipped by rail (or 66% of the 291 million tons reported in the survey). The survey covers shipments for utilities, steel makers, industrial users and export.

B. <u>The Survey shows that 85% of the coal shipped by rail was considered "captive."</u>

The full report on the survey, which has been provided for the record, summarizes the data for all of the rail shipments reported and also presents a breakdown of this data for the Appalachian, Central and Western regions of the U.S.

The Survey shows that 85% of the coal shipped by rail in 1977 was considered to be transported under "captive" conditions. In those cases where the coal shipper believed there was a "next best" transportation alternative available, estimated costs would have been almost three times the 1977 average cost of using rail transport.

III. Proposals for railroad deregulation have important implications for the cost of coal, and the extent to which coal is used, where it is used, and where it is produced.

Because coal shippers must rely heavily on rail transportation, any changes resulting from deregulation which affect availability or quality of service or coal hauling rates can have a major impact on coal producers and users. In fact, changes in any of these factors can determine:

. The extent to which U.S. coal is used, particularly in relation to other fuels with which it must compete;

. Where it is used; and

. Where it is produced.

Because of the importance of rail deregulation, the coal industry has reviewed the Administration's proposal and analyzed its implications carefully. I am also providing for the record a detailed staff analysis of rail deregulation proposals and views which I believe will be useful to the Committee and your staff.

Several implications deserve special attention.

A. Deregulation would affect the cost of transporting coal.

Some coal shippers have experienced problems in rail transport service resulting in disrupted production and higher costs. Proponents of deregulation point out that provisions dealing with such matters as abandonments, mergers and consolidations and car service regulations are intended to reduce the drain on rail revenues from unprofitable lines, permit increased efficiency of operations, and permit improved maintenance and use of equipment. If these results were to occur, they could benefit coal shippers having ready access to rail transport.

Rail freight costs are often a significant share of the delivered price of coal. The share varies widely depending upon such factors as distance, value of coal, and alternative transportation modes available.

Rail transport rates for coal have been increasing rapidly. For example, Bureau of Labor Statistics (BLS) data show that rates increased an average of 14.2% per year or a total of 128% from 1969 to 1978. Other data show that, from 1974 to 1977, rail revenues have grown from $4.71 to $6.48 per ton of coal shipped, which is an increase of 37.5% over the three year period. As this Committee has been told by others, additional large increases in rates for hauling coal are pending before the ICC.

It is not possible to predict future rate changes that might occur under the Administration's proposal. However, if S. 796 had been in effect from 1972 to 1978 and railroads annually increased rates by the maximum allowed (7% plus inflation), rates would have increased by 97.4%, compared to the 65.3% that did occur. If inflation continues at the current rate of 10% and railroads annually increase rates by the maximum of 7% additionally for the next five years, rates could increase by 119% without any shipper recourse through the ICC, if S. 796 were adopted in its present form.

3. <u>The amount of coal that is produced and used in the U.S. or exported will depend heavily on increases in the cost of producing, transporting and using coal.</u>

While coal has the advantage of security of supply compared to oil and natural gas, the price advantages of coal have not been adequate to result in a substantial increase in industrial use of coal or in rapid replacement of existing oil and gas-fired utility and industrial capacity. Costs of producing and using coal are important factors in decisions to use coal but transportation costs are also an important factor.

Exports of U.S. coal have declined significantly, from 65.7 million tons in 1975 to 39.8 million tons in 1978 -- for a loss in coal's contribution to a favorable balance of payments of more than $1 billion per year. The increasing costs of producing and transporting coal are undoubtedly a significant factor in reducing the nation's ability to compete in world coal markets with accompanying adverse effects on our balance of payments position.

In addition, imports of coke and steam coal have been increasing. Imports of steam coal particularly from South Africa and Australia for use on the Gulf Coast, have grown from 940 thousand tons in 1975 to 3 million tons in 1978. Again, higher costs of producing and transporting U.S. coal are cited by users as the reason for these imports.

IV. <u>NCA Views on Rail Deregulation and Recommendations on the major issues raised by S. 796, the proposed "Railroad Deregulation Act of 1979.</u>

NCA generally favors the elimination of unnecessary government economic regulation when competition is adequate to assure adequate service and reasonable prices. NCA also recognizes that some railroads are experiencing severe financial difficulties and low rates of return on investment. These considerations are reflected in the views I am presenting today on behalf of the coal industry.

A. <u>NCA has general concerns about protection for captive shippers, protection against discriminatory rates, absence of obligation for providing better service, and the nature of future regulation.</u>

The NCA's general concerns about the provisions of S. 796 are that:

1. There is a lack of clear-cut definition for non-competitive transportation user (captive shipper) situations which can be met practically only through rail transport services, a prevalent condition encountered in coal marketing.
2. Effective and timely recourse for resolution of adversary cases involving rail carriers is not made available over the long-term for captive shippers.
3. Discriminatory rail carrier pricing could result in disruptions of coal markets without suitable recourse.
4. No obligations are included for improved services to be provided to shippers by rail carriers as rates change.
5. Automatic, total deregulation would occur after five years unless other legislative initiatives were taken to deal with any serious problems that may be encountered during this period.

These concerns lead to two key questions:

1. Should the independent authority and administrative powers of the Interstate Commerce Commission be substantially reduced as proposed in S.796?
2. Should rate deregulation be enacted, especially with respect to captive shippers.

B. <u>NCA has Specific Recommendations for dealing with 12 major issues raised by S. 796.</u>

To deal with the above concerns and questions and with other matters raised by S. 796, NCA makes the following specific recommendations for the reasons indicated.

1. <u>ICC Should Retain Substantial Jurisdiction Over Rail Transport Regulation.</u>

NCA concludes that, contrary to the provisions of S.796, some form of rail regulation should continue, and that such regulation should not be left in the hands of anti-trust laws. The retention of the Interstate Commerce Commission as the independent agency having jurisdiction over rail transport regulation and responsible for continued protection of shippers and users of rail transport against discriminatory practices is suggested.

S.796 would substantively reduce the present authority and the existing powers of the ICC provided under the Interstate Commerce Act. It presumes that effective competition exists for the provision of surface transportation services, i.e., rail, highway, waterway, and pipeline systems, and therefore shippers have access to both intramodal and intermodal options for transport of commodities between various origins and destinations. Under this assumption, competitive market forces would adequately counter potential inequities in relation to prevailing maximum rates, predatory pricing, and discriminatory practices. S.796, therefore, assumes that reasonable, practical alternatives usually exist for a shipper that fails to reach agreement with a carrier on rates and services. Accordingly, the ICC's role in the initiation of ratemaking procedures and investigations, ratesetting orders and suspensions, establishment of joint line rates, antidiscrimination proceedings, and other regulatory actions would be curtailed.

NCA does not agree with the fundamental assumption underlying the key provisions of S.796 with regard to the presumed existence of effective competition. Many coal producers and customers are, in fact, non-competitive transportation users. Substantial coal tonnages shipped from a large number of mines are subject to captive shipper situations in which rail carriage is the only practical transport mode and a single rail company is the only available originating carrier for a high percentage of the coal shipped from the mine. In addition, S.796 is based, in part, on the view that surface transportation systems are mature operations with widespread, ready access for all shippers. Not only is ready access to waterways and to acceptable line-haul highway transport systems often not available to coal shippers, coal slurry pipelines which could be used for alternative surface transportation in some areas are not yet in place. Thus, NCA finds it to be imperative that coal shippers continue to have a source of regular and timely recourse through an independent agency, the ICC, for assurance that rail carriers provide adequate service at reasonable rates for moving coal.

2. ICC Should Continue to Have Powers to Prescribe Maximum Rates, to Determine Reasonableness of General Rate Increases, and to Suspend Rates

NCA favors retention within the Interstate Commerce Commission of the powers to prescribe maximum rates, to determine reasonableness of general rate increases, and to suspend a rate pending determination of its lawfulness. This is required in order to furnish effective recourse for transportation users and assure that transportation rates, rules and practices are reasonable and are not unduly discriminatory.

S.796 contemplates complete deregulation of rates after a 5 year transition period and would remove rail carriers from the general ratemaking provisions of the Interstate Commerce Act. It would provide that any rail carrier can set its rate for services at market-determined levels. During the 5 year transition period rates may be raised by no more than 7 percent per year, above an adjustment factor for inflation, measured in constant 1980 dollars. General rate increases would be allowed during only the first 2 years of the transition period. S.796 further eliminates the ICC's power to suspend rates. Rate investigations by the ICC could only be initiated upon complaint during the transition period and no ICC rate investigations could be launched after the 5 year period. NCA strongly opposes the phasing out of maximum rate regulation and the repeal of the ICC's power to suspend rates and ultimately to be denied the authority to perform rate investigations upon complaint.

The captive shipper situation encountered in the coal industry is considered by NCA to call for continued rate regulation to ensure protection against unreasonable rate increases that could be attempted in view of the lack of practical and effective alternatives for transporting coal.

NCA recognizes that quality of service should be related to the capability of generating adequate revenue for operations and for system maintenance and improvement, with a suitable return on investment included. However, it sees no assurances that service provided will be commensurate with rates set by rail carriers or that coal will not be called upon to carry an unduly disproportionate share of rail carrier costs by virtue of its captive status and reliance on effective rail service. Therefore, NCA concludes that rate regulation is necessary and the ICC should continue to have jurisdiction over rates.

3. ICC Should Continue to Have Power to Set Single and Joint Line Rates and Establish Through Routes

NCA favors retention within the Interstate Commerce Commission of the power to set joint line rates. S.796 confirms the ICC's power to establish through routes involving rail carriers but would repeal its power to set joint line rates.

NCA holds the viewpoint that eliminating the ICC's power to set a joint line rate for service on a route that involves 2 or more carriers could present a problem when a certain carrier would not be willing, on its own volition, to reach an agreement with other carriers on rates for such combined service involving multi-carrier routes, especially where the unwilling carrier can also offer other single carrier service between the same points.

Furthermore, without the ICC's power to set joint line rates, it is likely that in some instances the combined rates on through routes would be substantially higher inasmuch as the individual rail carriers involved may simply resort to the sum of local rates set by each carrier for its portion of the route.

4. Antitrust Immunity Should be Retained for Rate Bureaus

NCA concludes that, inasmuch as rate bureaus provide an effective catalyst for interaction among rail carriers and users of rail transportation, the bureaus should retain anti-trust immunity for the purposes of discussing agency and/or individual line tariffs under collective ratemaking procedures.

S.796 would remove, after 2 years, the ICC's authority to grant anti-trust immunity on rate bureau agreements that provide for general rate increases or decreases or broad tariff changes. The bill would permit a group of carriers to agree, without ICC approval but with immunity from the anti-trust laws, on dissemination of rate information, but not to engage in discussions on the establishment of both joint line and single line rates. NCA's view is counter to S.796 and favors retention of anti-trust immunity for discussions of both joint line and single line rates.

NCA takes the position that unique conditions under which rail carrier services are offered make rate bureaus an essential forum for interaction among rail carriers and shippers in the ratemaking process. Rail carriage of commodities differs from highway transportation inasmuch as trackage is fixed and not readily expansible and is owned by individual railroad companies. Therefore, the combined usage of such fixed, not readily expansible, privately owned and maintained trackage by several rail carriers in order to provide effective line haul, local and regional rail transport calls for a convenient and direct avenue for reaching agreements on rail tariffs as provided by the rate bureaus.

5. Retain the "Commodities Clause" of the Interstate Commerce Act

NCA opposes the elimination of the commodities clause which prohibits carriage by a rail carrier of commodities produced by the carrier in that it exposes the coal industry to possible loss of markets through discrimination in rates and/or service. S.796 would eliminate the commodities clause.

NCA recognizes that in some instances the restriction imposed on companies having ownership of coal lands and/or other rights to coal reserves from both mining the coal and transporting the coal to customers is being circumvented by engaging separate companies to mine coal on lands owned by rail carriers. Nevertheless, in the commodities clause, NCA sees a measure of potential control in assuring that rail rates and services furnished coal shippers are not discriminatory where on the one hand a company would be both a producer and a carrier of coal and on the other hand would also serve other competing coal producers who are not rail service providers.

6. Contract Rates Should be Explicitly Authorized

NCA favors enactment of a provision to allow establishment of contract rates which permit the dedication of rail carrier rolling stock to specific movements under contracts between rail carriers and coal shippers. S.796 expressly allows such contract rates to be established.

NCA concludes that the enactment of a provision which expressly allows contract rates affords both an opportunity for coal shippers to specify levels of service from selected rail carriers and a means of increasing the available fleet of rail carrier rolling stock because investors and financial institutions would be more willing to provide funds for purchases of equipment based on long-term commitments for use of such equipment.

7. The ICC Should be Removed from Initiating Certain Car Service Actions But Authority Should be Retained for Others

NCA favors removal of the Interstate Commerce Commission from the initiation of car service actions involving distribution of rail cars across the rail carrier industry, and would place decisions on such matters directly within the rail carrier industry. Emergency powers regarding car service should be retained within the jurisdiction of the Interstate Commerce Commission along with the responsibility for ensuring that rail cars owned by a certain rail carrier and handled by other carriers during interline movements are returned to the owning carrier promptly in serviceable condition. The present regulations regarding distribution of coal cars among coal mines served by rail carriers should remain in force.

S.796 would place the matter of car service directly within the rail carrier industry except in emergencies in which car service powers would be placed in the hands of the Department of Transportation. NCA agrees with the removal of the ICC from the initiation of car service actions; however, it disagrees with placing decisions on car service matters in the Department of Transportation under declared emergencies. NCA would place such emergency powers within the jurisdiction of the ICC.

Presently, decisions on car service are generally made directly within the AAR and are subject to approval of the ICC. NCA concludes that the AAR is a viable avenue for rational allocations of rail carrier rolling stock across the rail industry. However, the ICC, in the role of the independent agency having jurisdiction over rail transport regulation, should be the point at which car service decisions would be exercised under emergency conditions rather than the Department of Transportation. Likewise, the ICC should maintain responsibility for coming to the aid of carriers and shippers when rail car capacity is limited by inefficiency in returning rolling stock used in interline movements to the owning rail carriers.

8. <u>Abandonment Criteria Should be Simplified and Time Requirements Reduced</u>

NCA concludes that, through the Interstate Commerce Commission, shipper protection should be retained in abandonment proceedings. NCA supports modifications of criteria for findings in support of abandonment and in time limits with a view toward simplifying and expediting justifiable abandonment proceedings. NCA generally supports abandonment of unprofitable rail lines as a proper private enterprise approach toward the attainment of cost reductions with the stipulation that adequate recourse must remain for shippers or receivers who would sustain substantial injury and constitute non-competitive transportation users.

S.796 would simplify the abandonment process and would reduce the time limits on approving an abandonment to 30 days after the application is filed unless objections are forthcoming. If an objection is encountered, an investigation must start within 60 days of the filing date for the abandonment application and must be completed within a 90 day period. Thus, the likelihood of extremely long proceedings in abandonment transactions would be reduced through the imposition of reasonable timeframes for acting on abandonment petitions.

NCA recognizes that abandonment could create serious problems if such proceedings are carried out indiscriminately. It nonetheless holds the view that where substantial tonnages of coal are moved by rail, it is unlikely that abandonment proceedings would be initiated since coal transportation is generally a primary source of revenue for rail carriers. However, the Committee also notes the necessity for reasonable advance notification on formal applications for abandonment; therefore, if situations are encountered which are adverse to coal shippers, an investigation proceeding can be undertaken before the transaction is completed.

9. ICC Jurisdiction Should be Retained Over Mergers and Consolidations and Decisions Expedited.

NCA favors policies that would expedite decisions on rail carrier mergers and lesser consolidations of carrier services. S.796 would remove the ICC's jurisdiction over mergers involving two or more rail carriers and would require that such transactions be scrutinized under laws applicable to transactions involving monopolistic practices and antitrust matters. However, the ICC would retain jurisdiction over lesser restructuring than a merger, e.g., consolidation transactions that could include coordination of services, joint use of trackage, and exchange of markets. S.796 purportedly seeks to reduce any inordinate amount of time involved in rail merger cases by removing ICC jurisdiction and resorting to anti-trust laws for control of rail carrier merger transactions.

Further, while the bill leaves rail consolidation cases within the jurisdiction of the ICC, it places time limits of 120 days on such transactions if they are local in scope and 365 days if regional or national in significance. NCA favors the provisions of S.796 regarding consolidations; however, it favors ICC jurisdiction over rail carrier mergers in lieu of shifting such transactions to the purview of anti-trust laws.

NCA realizes that some rail carrier merger and consolidation transactions have not been handled on a timely basis in past years. The setting of time limits for ICC decisions on rail carrier consolidations appears to furnish substantial opportunities for improving proceedings in such cases. NCA does not have confidence that placing rail carrier mergers under anti-trust laws would permit such transactions to be consummated on a timely basis and therefore favors retention of ICC jurisdiction over mergers as well as consolidations.

10. Open Entry to Provide Rail Carrier Service Should be Authorized Except for Regulated Carriers of Another Mode

NCA favors allowing open rail carrier entry to anyone except a regulated carrier of another mode recognizing that this constitutes a potentially strong approach toward increasing rail carrier services and competition. This conforms with S.796.

NCA concludes that the provision of open entry for new rail carriers, by construction or acquisition, appropriately allows organizations other than regulated carriers of another transport mode to furnish rail carrier services thus enabling a degree of expansion in the intramodal competition among carriers and providing additional options for shippers that are captive to the rail transport mode.

11. Eliminate Provision of the ICC Act Providing for Transport of Government Traffic Without Charge or at Reduced Rates

NCA holds the view that the provision of current law which allows carriers to transport government traffic without charge or at reduced rates should be eliminated. This concurs with S.796.

NCA concludes that rail carriers should receive balanced revenues from both government and non-government traffic to fully reflect the costs of services provided to all rail transport users.

12. Improved Rail Carrier Cost Accounting Methods Should be Required

NCA favors the adoption of improved cost accounting methods that take into account specific cost centers in conformity with modern accounting principles, enabling accurate determination of the reasonableness of rates and other findings governed by the need for cost specificity. S.796 would require rail carriers to adapt to a new cost accounting system which would furnish accurate information on the cost of providing specific services, not simply information on the carrier's overall financial condition.

NCA concurs in the view that it is not possible to fairly evaluate rates for specific services, soundness of abandonment applications, and other financially-based items involved in decisions on matters of equity and reasonableness before ICC, shippers, and carriers unless cost center oriented accounting systems are used to generate specific data.

V. Views of Other Coal Industry Groups.

I have been asked by officials of the Kentucky Coal Association and the Coal Exporters Association to report to you that these associations have adopted the substance of the positions and recommendations reflected in this statement.

* * *

I would be pleased to answer questions or provide additional information if you wish.

STUDY

OF

CAPTIVE COAL SHIPMENTS BY RAIL

FOR 1977

TABLE OF CONTENTS

National Coal Association
May, 1979

EXECUTIVE SUMMARY

- Coal producers have historically depended on the railroads to transport most of their products from mine to markets. In many cases, rail transport is the only available form of transportation. Projected increases in coal production and use will increase this dependence.
- The "captive shipper" issue is the single most important among the many issues raised by proposed rail deregulation legislation.
- The survey conducted by NCA in May 1979 revealed that nearly 85 percent of the coal produced in the U.S. and shipped by rail was captive.
- The survey pointed out that the captive shipper problem existed in every coal producing region, market, and movement.
- Coal shipments to electric utilities, the largest consumer for coal, were found 83 percent captive to rail.
- Interstate movement, representing nearly 75 percent of coal surveyed, was 87 percent captive. Approximately 89 percent of the unit train shipment was captive.
- The western coal producing states were found most vulnerable to captivity. Restricted access to highways and waterways and shipment of large quantities over long distances are all contributing factors to western coal being 98 percent captive to rail.
- The transportation alternative to rail transport of coal would cost the coal shippers approximately 3 times or 300 percent of the 1977 average rail cost.

BACKGROUND

In 1977, about 691 million tons of coal were produced in the U.S., and production is expected to be about 715 million tons in 1979. Two-thirds of this coal production is transported by rail. Projections made by the Department of Energy indicate that a total of 990 million to 1,188 million tons of coal will be produced in 1985. With the expected increase in production, railroads will probably be called upon to haul 50 percent more coal than at present and more than double their current western traffic.

Since coal shippers are heavily dependent upon rail transportation, there has been considerable interest in proposals for railroad deregulation. Any changes resulting from deregulation which affect coal hauling rates or availability or quality of service can have a major impact on coal producers and users.

Among the issues raised by proposed deregulation legislation, the "captive shipper" situation has emerged as the single most important issue. Reasons are:

- There are no alternative modes of shipment and no alternative carriers for a large share of the coal now being produced and used.
- "Captive shippers" would face potentially large rate increases.
- The shipper would bear the burden of proof as to "captivity" and injury for higher rates and the higher rates would remain in effect while relief was sought.

The Administration's legislative proposal (S. 796) presumes the existence of competition for a shipper's business.

NCA SURVEY

Relatively little data has been assembled on the extent of coal shipper captivity. In an effort to improve the quality of data on this issue, NCA conducted a survey designed to develop estimates of the extent and potential effects of the "captivity" problem.

- The Approach:

Data covered in the survey are for 1977 since that was the latest 12-month relatively "normal" period for which data are available. The 1978 coal shipments were interrupted by the prolonged coal strike during the first quarter and again by the rail strike during the latter part of the year. Coal transportation patterns may have been affected during that period for the same reason.

Information collected in the survey focused on coal shipments by rail. Data were broken down by states, markets, and types of movements. Captive portions of the rail shipments for the same categories were also collected.

If captive conditions existed during the time period in question, companies were asked to supply average rail cost and the estimated additional cost that would be required for switching from existing rail carriers to the next best alternative.

- Definition of Captivity:

There is little agreement as to the exact definition of "captive." For purposes of the survey, NCA developed a definition which would (a) be accepted as objective and (b) include what NCA regards as the core of the captivity problem -- the possible injury to the unprotected shipper. We recognize that the definition is somewhat arbitrary. The definition of 'captivity' is based on the two key elements:

(1) the element of market control of the carrier over the shipper, as measured by the 'single rail carrier' criterion; and

(2) the kind of transportation alternatives available to the shipper or the mine. For example, we feel that captivity exists when the transportation alternatives are so costly that adopting them would cause serious injury to the competitive position of the shipper.

Therefore, we have defined captivity to exist when both of the following conditions are present:

(1) a single rail carrier represents the only present transportation alternative for the entire shipment, or a substantial share of the route, for the shipment in question; and

(2) the "next best" future transportation alternative (other rail carrier, motor or water carrier) is one which would cause injury to the shipper's competitive position if forced to adopt that alternative.

. Discussion of Survey Findings:

A total of 43 companies responded to the survey. These companies, which reported coal production in 17 states, produced a total of 291 million tons in 1977. This is about 42 percent of 1977 total U.S. production. According to the NCA survey, two-thirds of the tonnage, or 193 million tons, were shipped by rail. Captivity conditions were found to exist in a high degree. Nearly 85 percent of the coal shipments by rail were captive. Summary data on rail shipments of coal from the survey are shown below.

Type of Market	Percent Captive	
. Utility	83.30%	
. Steel	85.83	
. Industrial	75.05	
. Exports	93.19	
Total	84.60%	
		Percent of Total Rail Shipments
Unit Train:	89.22%	40.55%
Interstate movements:	87.37	74.60
Intrastate movements:	69.10	25.40

Average Rail Cost: $ 6.27 per to[n]
Average Alternative Cost (next best): $ 18.69 per to[n]
Alternative reported available (including higher cost alternative) - 40.71% of total tonnage.

A. The shipment of coal is greatly dependent on captive rail transport

- Approximately 291 million tons of coal production were reported to the survey, representing 42 percent of 1977 total U.S. production.
- Two-thirds of the reported tonnage or 193 million tons was shipped by rail.
- Nearly 85 percent of the coal produced in the U.S. and shipped by rail was captive.
- The average length of haul for rail shipments of coal was 247 miles.

- The next best transportation alternative, to which 41 percent of all respondents gave an answer, would cost coal shippers almost 300 percent of the 1977 average rail cost.

B. Captive shipper problems generally are serious in all types of coal markets

- Electric utilities, which received 71 percent of rail shipments in 1977, were 83 percent captive.

- Coal shipments to steel plants, which accounted for nearly 13 percent of total rail shipments of coal, were 86 percent captive.

- Approximately 75 percent of coal shipments by rail for industrial use was captive.

- The export market, which accounted for 10 percent of rail shipments in 1977, was shown to have the highest percent captivity in all market types -- 93 percent captive.

C. The magnitude of captivity varied among coal producing regions

1. Western Region - Includes coal producing states west of the Mississippi River.

- Approximately 50 million tons of coal produced in the Western Region was reported to the survey, representing 7.2 percent of 1977 total U.S. production.

- Sixty percent of the reported tonnage or 30 million tons of coal was shipped by rail.

- More than 98 percent of the coal produced in the Western Region and shipped by rail was captive.

- The average length of haul for rail shipments of coal in this region was 311 miles.

- The next best transportation alternative would cost coal shippers in the Western Region 230.6 percent of the 1977 average rail cost.

2. Central Region - Includes Illinois, Indiana, and West Kentucky.

- Approximately 94 million tons of coal produced in the Central Region was reported, representing 13.6 percent of 1977 total U.S. production.
- Nearly 62 percent of the reported tonnage or 58 million tons of coal was shipped by rail.
- About 58 percent of the coal produced in the Central Region and shipped by rail was captive.
- The average length haul for rail shipments of coal in this region was 134 miles.
- The next best transportation alternative would cost coal shippers in the Central Region 260.9 percent of the 1977 average rail cost.

3. Appalachian Region - Includes all other states not covered in the 2 above mentioned regions.

- A total of 147 million tons of coal produced in the Appalachian Region was reported, representing 21.3 percent of 1977 total U.S. production.
- Nearly 72 percent of the reported tonnage or 105 million tons of coal was shipped by rail.
- More than 95 percent of the coal produced in the Appalachian Region and shipped by rail was captive.
- The average length of haul for rail shipments of coal in this region was 291 miles.
- The next best transportation alternative would cost coal shippers in the Appalachian Region 336.9 percent of the 1977 average rail cost.

D. A high degree of captivity was found for all types of rail movements

- Approximately 41 percent of coal shipments by rail was moved by unit trains in 1977. Of the total unit train movements, 89 percent was considered captive.

- Interstate movements accounted for nearly 75 percent of total rail tonnages, and more than 87 percent of the interstate tonnage was found captive.

- Intrastate movements, which represented 25 percent of the rail shipments, were 69 percent captive.

- About one-fourth of the coal moved by rail was carried in privately owned cars (owned by shippers or customers); more than 75 percent of that was reported captive.

Detailed data for the U.S. and all three regions covered by the survey are presented in the Appendix.

CONCLUSION

The survey revealed that the captive shipper problem existed in practically every coal producing region, market and movement. Coal producers depend heavily on the railroads to get their products to the utility, steel, and industrial consumers.

In many cases, rail transport is the only available method for transporting coal to its markets. In western states, for example, coal must be shipped in large quantities over long distances before reaching its final destination.

The survey shows that there is very little or no competition for the movement of coal. Transportation costs already constitute a major portion of the delivered price of coal. Higher rail rates due to rail deregulation would lead to even higher cost of coal to the utility, steel mill and industrial coal user and to our customers overseas. Higher rail rates would eventually be reflected in higher costs of electricity and other consumer products and would make U.S. coals even less competitive in the world market.

APPENDIX 1.

"CAPTIVE" COAL SHIPMENTS BY RAIL IN 1977

AREA	U. S. TOTAL
NO OF MINES	386
TOTAL 1977 PROD (1000)	290,995
% OF REPORTED TOTAL PROD	100.00
% OF 1977 U. S. PROD	42.09

		TONS (1000)	% CAPTIVE	AVG HAUL MILES
RAIL SHIPMENTS BY MARKET	UTILITY	137,312	83.30	
	STEEL	24,487	85.83	
	INDUSTRIAL	12,154	75.05	
	EXPORTS	19,321	93.19	
	TOTAL	193,277	84.60	247
RAIL SHIPMENTS BY TYPE	UNIT TRAIN	78,382	89.22	347
		CARS* (1000)	% CAPTIVE	
	PRIVATE CARS	519	75.53	
	RAIL CARS	2,192	87.61	
		% TONS	% CAPTIVE	
	INTERSTATE	74.60	87.37	308
	INTRASTATE	25.40	69.10	70
RAIL COST & ALTERNATIVES		% REPORTED**	$/TON	
	AVG COST (RAIL)	37.43	6.27	
	AVG COST (AL'TIVE)	32.99	18.69	
	ALTERNATIVES			
	TOTAL REPORTED	40.71		
	TRUCK ONLY	37.56		
	TRUCK/BARGE	2.61		
	TRUCK/RAIL	0.54		

* Number of carloads
** Percent of total sample (in terms of tons) reporting "cost" and "alternative" data

APPENDIX 2.

AREA	WESTERN U. S.	
NO OF MINES	26	
TOTAL 1977 PROD (1000)	49,857	
% OF REPORTED TOTAL PROD	17.13	
% OF 1977 U.S. PROD	7.21	

		TONS (1000)	% CAPTIVE	AVG HAUL MILES
RAIL SHIPMENTS BY MARKET				
	UTILITY	28,682	98.06	
	STEEL	396	100.00	
	INDUSTRIAL	1,024	100.00	
	EXPORTS	0	0.00	
	TOTAL	30,071	98.15	311
RAIL SHIPMENTS BY TYPE				
	UNIT TRAIN	9,210	93.81	912
		CARS (1000)	% CAPTIVE	
	PRIVATE CARS	172	96.61	
	RAIL CARS	332	95.88	
		% TONS	% CAPTIVE	
	INTERSTATE	81.97	92.85	373
	INTRASTATE	18.03	95.60	36
RAIL COST & ALTERNATIVES		% REPORTED	$/TON	
	AVG COST (RAIL)	31.88	8.13	
	AVG COST (AL'TIVE)	19.74	18.75	
	ALTERNATIVES			
	TOTAL REPORTED	33.55		
	TRUCK ONLY	33.55		
	TRUCK/BARGE	0.00		
	TRUCK/RAIL	0.00		

AREA	CENTRAL U. S.
NO OF MINES	77
TOTAL 1977 PROD (1000)	93,993
% OF REPORTED TOTAL PROD	32.30
% OF 1977 U. S. PROD	13.60

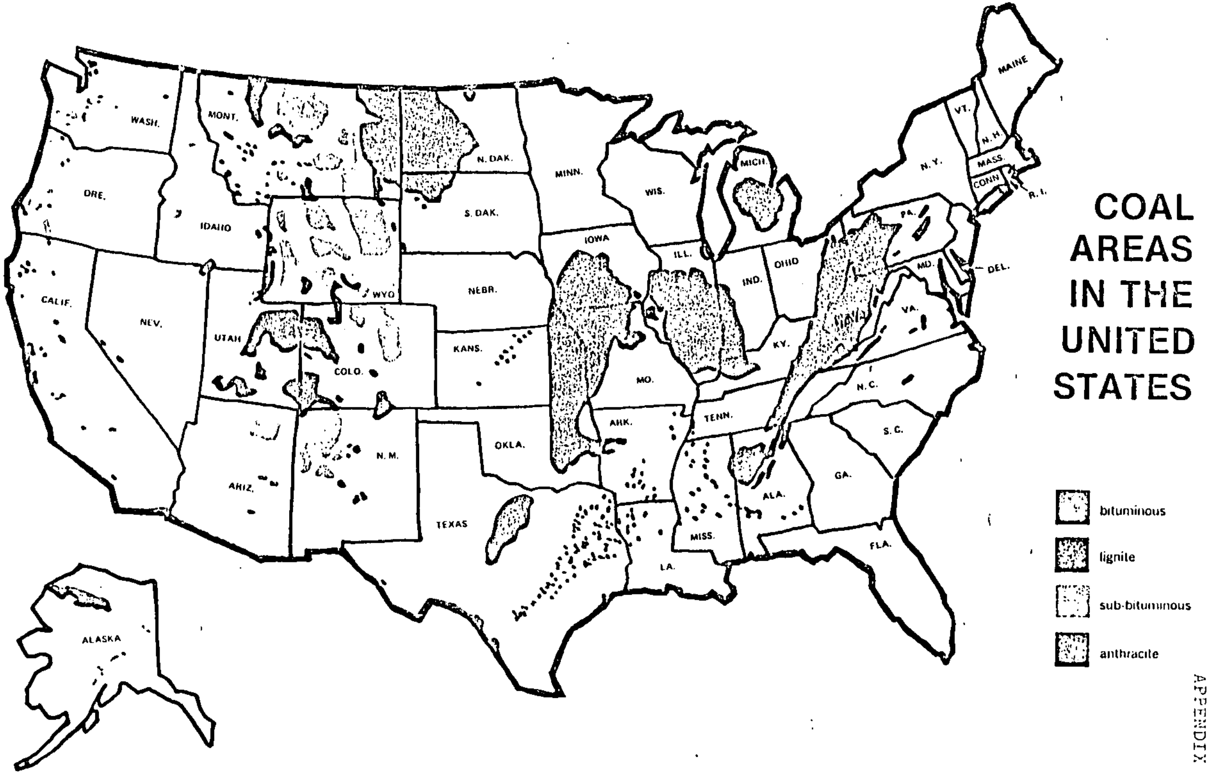
		TONS (1000)	% CAPTIVE	AVG HAUL MILES
RAIL SHIPMENTS BY MARKET	UTILITY	52,828	59.62	
	STEEL	930	3.87	
	INDUSTRIAL	3,984	47.16	
	EXPORTS	0	0.00	
	TOTAL	57,805	57.86	134
RAIL SHIPMENTS BY TYPE	UNIT TRAIN	22,821	89.22	217
		CARS (1000)	% CAPTIVE	
	PRIVATE CARS	224	75.53	
	RAIL CARS	575	87.61	
		% TONS	% CAPTIVE	
	INTERSTATE	55.70	87.37	197
	INTRASTATE	44.30	69.10	55
RAIL COST & ALTERNATIVES		% REPORTED	$/TON	
	AVG COST (RAIL)	39.12	3.76	
	AVG COST (AL'TIVE)	39.12	9.81	
	ALTERNATIVES			
	TOTAL REPORTED	42.62		
	TRUCK ONLY	39.33		
	TRUCK/BARGE	3.29		
	TRUCK/RAIL	0.00		

APPENDIX 4

AREA	APPALACHIA
NO OF MINES	283
TOTAL 1977 PROD (1000)	147,145
% OF REPORTED TOTAL PROD	50.57
% OF 1977 U.S. PROD	21.28

		TONS (1000)	% CAPTIVE	AVG HAUL MILES
RAIL SHIPMENTS BY MARKET	UTILITY	55,742	98.09	
	STEEL	23,251	88.92	
	INDUSTRIAL	7,086	87.52	
	EXPORTS	19,321	93.19	
	TOTAL	105,401	95.40	291
RAIL SHIPMENTS BY TYPE	UNIT TRAIN	46,351	92.58	299
		CARS (1000)	% CAPTIVE	
	PRIVATE CARS	123	91.86	
	RAIL CARS	1,285	95.36	
		% TONS	% CAPTIVE	
	INTERSTATE	82.86	90.84	330
	INTRASTATE	17.14	97.35	101
RAIL COST & ALTERNATIVES		% REPORTED	$/TON	
	AVG COST (RAIL)	38.08	7.24	
	AVG COST (AL'TIVE)	33.40	24.39	
	ALTERNATIVES			
	TOTAL REPORTED	41.71		
	TRUCK ONLY	37.74		
	TRUCK/BARGE	2.98		
	TRUCK/RAIL	0.99		

COAL AREAS IN THE UNITED STATES



APPENDIX 5

NATIONAL COAL ASSOCIATION

FINAL FINAL

STAFF ANALYSIS

RAILROAD DEREGULATION

Implications and Alternatives for Coal Producers and Users

A Review and analysis of:

. The Carter Administration's legislative proposal.
. The principal views of the AAR, ICC and NITL
. The rationale for deregulation proposals.
. The relationship of coal and the railroads
. The implications of deregulation for coal producers and users.
. The national interest implications of deregulation.
. The specific major issues raised by rail deregulation proposals.
. The alternative proposals and issues not addressed by current proposals.

May 23, 1979
(Final)

May 23, 1979 (Final)*

RAILROAD DEREGULATION

Implications and Alternatives for Coal Producers and Users

- Contents -

*Updated to include latest data from NCA survey of "Captive Coal Shipment" (See page 13 and Appendix D)

(more)

APPENDICES

RAILROAD DEREGULATION

Implications and Alternatives for Coal Producers and Users

The Carter Administration's legislative proposal to "deregulate" railroads was submitted to the Congress on March 23, 1979. It has been introduced (S. 796 in Senate) and hearings are underway.

Because of the potentially significant implications of changes in rail regulation for coal producers and coal users, this paper has been prepared to summarize briefly:

- .The Administration's legislative proposals.
- .The views of AAR, ICC and National Industrial Traffic League
- .The rationale for the proposals and views.
- .The importance of rail transport of coal.
- .The general implications of changes in rail service and rates for coal production and markets.
- .The major specific issues raised by the legislative proposals.
- .The alternative proposals and issues not yet addressed by the legislation.

I. CARTER ADMINISTRATION'S MARCH 23, 1979, LEGISLATIVE PROPOSAL.

A. Tabular Summary and Comparison With Current Law

The Carter Administration proposal (S. 796) is summarized in tabular form and included as Appendix A to this paper. That table describes very briefly:

- .Provisions of each section of the bill.
- .Practical meaning of the provision.
- .Change from current law.
- .What is believed to be AAR's current position on the provision.

B. Narrative Summary of Principal Features

In summary, the principal change in rail regulation that would result from S. 796 are:

1. Rate Regulation: Railroads would have flexibility to charge rates within a zone of reasonableness of 7 percent per year in 1980 dollars, based on guidelines set by the Council on Wage & Price Stability. Rate changes within the zone would be deregulated while changes outside the zone would continue to be regulated by the ICC. Rates above the zone would be subjected to a three step procedure which involves "competition" and "reasonableness". Rates below the zone would be subjected to a "predatory" pricing test. General rate increases would be allowed for two years.

2. Rate Bureaus: Rate Bureaus would continue except that single line rates could no longer be discussed or voted on by participating carriers, anti-trust immunity would end. Furthermore, all meetings and activities would be open to the public.

3. Rate Discrimination: Current anti-discrimination provisions would be rewritten to prohibit a railroad from discriminating between shippers, localities, ports, gateways, and other types of traffic unless it can be justified by differing competitive and/or cost circumstances related to providing the service. Furthermore, sections containing the "long-haul short-haul", "predatory pricing against water carriers" and "commodities" clauses all would be repealed.

4. Mergers and Acquisitions: Mergers would be subject to anti-trust laws, however, lenient standards could be applied facilitating end-to-end rail mergers and mergers involving failing companies. Various forms of control agreements like market swaps, track agreements and consolidations would be reviewed by the ICC under an expedited procedure using cost/benefit analyses. A labor protection clause would be retained.

5. Abandonments: The provisions retain the basic ICC requirements for "public convenience & necessity" (PC&N) for abandonment, etc., but under revised PC&N criteria and shorter time period. If objection, ICC must find PC&N or cost-benefit of line in 90 days.

II. PRINCIPAL VIEWS OF AAR, ICC AND NITL

A. Proposals from the Association of American Railroads (AAR) differ from those of the Administration in several respects.

While an AAR-proposed bill has not been introduced, the AAR has developed a package of specific proposals for changes in regulation. (The table included as Appendix A summarizes the AAR positions with respect to Administration proposals.)

1. Comparison on major points.

Briefly, as compared to the Administration's proposals, AAR:

.Wants freedom to set rates within a 20% zone.
.Opposes 2-year limit on general rate increases.
.Supports 5-year transition to ending of rate regulation.
.Favors contract rates.
.Favors S.796 provisions limiting ICC rate powers.
.Opposes removing ICC from joint-line and through route rates.
.Opposes changes in rate bureaus.
.Favors S.796 provisions providing more freedom to discriminate in rates when costs or competitive conditions differ.
.Wants ability to change rates without notice, rather than waiting 30 days.
.Wants clear authority for intermodal ownership.

.Wants faster agandonment proceedings.
.Favors continued ICC jurisdiction over mergers and consolidations but with revised competitive standard.
.Favors S.796 provision to remove ICC from car service.

2. AAR's Summary of Its Proposal

As stated by AAR, deregulation should have the following features:

a. Rate Regulation

.Permit publication of rates without notice, remove power of suspension on shipper protest, limit the shipper's remedy to a complaint action in which he bears the burden of proof, and remove the ICC's jurisdiction to hear a complaint unless the complainant showed both a lack of effective competition and that the rate increase or decrease exceeded 20 percent.
.Permit establishment of rates by contract without review by the ICC but require filing of contract with an appropriate government agency.
.Eliminate ICC authority to prescribe reasonable classifications, rules and practices.
.Eliminate requirements for port equalization and preferences to recyclables.
.Eliminate requirement for joint rates and connections with water carriers.
.Repeal long- and short-haul provision and limit application of the discrimination sections to cases in which there is lack of effective competition for the movement at issue.
.Extend rate bureau immunity to intrastate ratemaking which affects interstate commerce.

b. Restructuring

.Liberalize the merger criteria and speed up merger process in ICC proceedings.
.Eliminate requirement for ICC approval of abandonments and discontinuances of service on 120 days' notice.
.Permit unrestricted intermodal ownership.

c. State Regulation

.Preempt state law in all areas affecting rail carriers.

d. Car Service and Compensation

.Eliminate ICC jurisdiction over car service and compensation matters.

e. Financial and Administrative Constraints

.Remove ICC jurisdiction over the issuance of securities (already covered by SEC regulation), prescription of cost accounting systems, and railroad holding companies that are not carriers, and repeal Section 10 of the Clayton Act dealing with interlocking officers and directors.

F. Sunset

.Eliminate existing regulatory structure by 1985, replacing it with a new, limited regulatory regime.

B. ICC supports some and disagrees with other features of the Administration's proposal.

The Chairman and Commissioners of the ICC submitted their views on the Administration's proposals on April 24, 1979, in a detailed statement. In addition, ICC Chairman O'Neal gave a short oral statement. (The ICC has also been reexamining its views on rail regulation in the form of a paper, "Rail Regulatory Issues and Options Paper," and a conference held on February 27, 1979.) On April 24th, Chairman O'Neal expressed agreement with the Administration's objectives of making railroads more competitive, more innovative and healthier financially, and indicated support for a number of changes in S. 796 (e.g., phasing out of general rate increases where there is competition; restrictions on anti-trust immunity). However, he expressed doubts that the legislation would achieve the ends sought, indicating that other problems contributing to the railroads' situation included (a) government subsidies for other modes; and (b) problems of management and labor not utilizing rail labor to take advantage of technological changes.

He disagreed with the Administration's proposals with respect to:

1. Maximum Rate Regulation. "With respect to maximum rates, ...the provisions of the bill, if enacted, would enable railroads to price services freely where there is no competition, and in a way which could seriously harm users of rail service."

2. Mergers and Consolidations. He contended that railroads have been treated differently from other business because "rail transportation has been viewed as a matter of special public importance...affected with the public interest..." He questioned "...whether restructuring of the rail system should be tested by the antitrust laws alone" (which would be the result of S.796, if enacted).

C. National Industrial Traffic League (NITL).

The National Industrial Traffic League (which includes many coal producers as members) opposes major aspects of rate deregulation and supports abandonment and car service proposals. NITL has adopted positions on major rail regulatory reform issues. NITL's summary of its position is included at Appendix B. Briefly, positions on the most important issues are:

1. Rates. There should be no zone of reasonableness within which railroads could raise or lower rates without interference. Shippers should always have the right to protest rates.

2. Rate Bureaus. Antitrust exemption should be continued for rate bureaus to meet and set rates, but with modifications in the rules governing the bureaus' operations.

3. Contract rates. Supports contract rates as long as they do not interfere with the common carrier obligation.

4. Car service. Supports turning over car service and compensation authority to the rail industry.

5. Rail Abandonment. Supports abandonment of uneconomic lines; but with 240 days notice.

6. Motor carrier entry. Endorses liberalized motor carrier entry.

III. RATIONALE FOR DEREGULATION PROPOSALS

A. Carter Administration's Rationale and Justification

While not necessarily stated fully and explicitly in this way, the principal elements of the Administration's rationale and justification for its legislative proposal seem to be:

1. System Inefficiencies Preserved by Regulation. Current ICC regulation results in:

.Unnecessary costs and excess capacity. For example, two-thirds of rail traffic is carried on one fifth of the railroads' 193,500 route miles. Undesirable obstacles or delays in abandonment of unprofitable lines and in consolidations and mergers prevents steps needed to reduce the cost of maintaining track and operating trains and facilities.
.Inflexible rate making which results in (a) rates that are not competitive with carriers of other modes and (b) maximum rates which do not provide adequate rate of return on investment. Measures should be taken to permit pricing that takes into account service demand, elimination of below-cost pricing and attracting new capital, including increased shipper ownership of equipment.
.Car service and compensation rules that contribute to inefficient operations.
.Lack of innovation. Current ICC regulations often inhibit new ideas and thereby discourage novel approaches and innovation.

2. Deteriorating Financial Condition of Railroads. Railroads require large amounts of capital to maintain, replace and improve track, equipment and facilities. But, low rate of return has led to inability to attract new equity capital and new debt requires high interest rates.

The Administration cites an industry's rate of return on investment of 0.24% for the 12-month period ending in June 1978. Rates for various railroads are as follows:

Railroad	Rate of Return on Net Investment Before Taxes	After Taxes
.Conrail	deficit	deficit
.Chesapeake & Ohio	deficit	deficit
.Baltimore & Ohio	4.16%	2.81%
.Norfolk & Western	6.56%	7.19%
.Louisville & Nashville	3.14%	3.48%
.Seaboard Coast Line	6.80%	4.66%
.Southern System	8.03%	7.61%
.Illinois Central Gulf	.37%	.40%
.Burlington-Northern	2.63%	1.70%
.Chicago & North Western	deficit	deficit
.Denver & Rio Grande	7.57%	7.14%
.Missouri Pacific	8.95%	7.13%
.Union Pacific	7.52%	8.09%
Summary		
.U. S. Total	1.13%	.24%
.East	deficit	deficit
.South	5.19%	4.49%
.West	3.34%	2.73%

(Source: AAR)

3. Outlook is for massive government subsidies or nationalization. The Federal government is already spending $1 billion annually (most to Conrail) to preserve the rail freight system. In addition, three railroads are in reorganization and several others face financial difficulties. The Federal government could be forced to spend at least $20 billion to perpetuate an inefficient system, with nationalization a possibility.

4. Failure of "4-R" Act. The Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R" Act) was expected to lead to substantial improvements in railroad conditions and service, but results did not live up to expectations. The ICC is blamed for not allowing railroads sufficient flexibility even when market conditions make ICC protection unnecessary.

B. Railroads' Rationale and Justification for Proposals and Positions.

The various railroads are not necessarily in full agreement on all aspects of deregulation. However, the proposal and position outlined in II.A., above, has been endorsed by the AAR.

The rationale for its deregulation proposals presented by AAR includes:

1. Inequity among modes. Competing transportation modes enjoy less regulation and greater government subsidies. Public funding is used for waterway and highway construction, operations and maintenance, providing barge transport and motor carriers an unfair economic advantage compared to railroads which are generally expected to absorb the full cost of obtaining and maintaining rights-of-way.

2. Need for Improved Financial Conditions. Deregulation is needed to permit competing with other modes, attract needed capital, improve rate of return on investment and improve service.

3. Steps to achieve objectives. AAR supports its proposals with the following points:

   a. Rate flexibility is essential for the rail industry to restore fairness among modes already enjoying this freedom and to provide railroads with the pricing flexibility to compete more effectively.

   b. Car service freedom would limit ICC role to emergency situations or remove it altogether and return the authority to distribute cars and determine compensation levels to the rail industry.

   c. Abandonments of uneconomic lines must be allowed expeditiously. Where workable subsidies can be found lines will remain in service, if this is not the case, unreasonable government restrictions and delays should be eliminated as unnecessary and costly roadblocks.

   d. The general rate increase mechanism is essential to the rail industry to recoup cost increases especially during these double-digit inflationary times. Any elimination of general rate increases should be avoided.

   e. Rate bureaus should continue to enjoy antitrust immunity for interstate, as well as intrastate, rate making. The unique nature and conditions under which rail service is offered, make rate bureaus an essential ingredient.

   f. Mergers should be allowed to take place according to proper business judgement to bring about needed rationalization of excess plant. ICC should retain authority but under a revised competitive standard.

IV. COAL AND RAILROADS

A. Importance of rail transportation to Coal Producers and Users.

1. Coal Shippers are already heavily dependent upon rail transportation and projected increases in coal production and use will increase dependence.

U.S. production was 688 tons in 1977 and is projected by NCA to be about 715 million tons in 1979. Depending upon assumptions made about supply and demand, the Department of Energy (DOE) estimates that production of coal in 1985 is expected to range from 990 million to 1,188 million tons. Thus, DOE's 1985 projections for coal production and use are in the range of:

. 44 to 73% above 1977 levels, and
. 38 to 66% above expected 1979 levels.

As a result of expected increases in production, railroads probably will be called upon to haul 50% more coal nationally than at present and more than double their current Western traffic.

Table 1 on Page 9 shows DOE's estimate made in mid-1978 which compares 1977 coal production by geographic region and coal consumption by using sector with projections for 1985 -- according to various supply and demand assumptions. This table illustrates some significant shifts in traditional patterns of geographic patterns of production. For example, using the medium coal production and consumption forecasts, the increases in production levels from 1977 to 1985 for selected regions would be approximately as follows:

. Total Appalachia - Up 13% from 390 to 439 million tons.

. Midwest - up 53%, from 133 to 204 million tons.

. Total Northern Great Plains - up more than 280% from 86 to 328 million tons.

. Southwest - up 21%, from 23 to 28 million tons.

. Rocky Mountain - up about 100%, from 21 to 44 million tons.

. Gulf - up more than 200%, from 17 to 58 million tons.

TABLE 1

ESTIMATED REGIONAL COAL PRODUCTION AND CONSUMPTION FORECASTS

(millions of tons)

		1985			1990		
PRODUCTION	1977*	Low	Medium	High	Low	Medium	High
Northern Appalachia	173.0	228.6	[illegible]	[illegible]	194.0	[illegible]	[illegible]
Central Appalachia	195.5	196.3	235.2	209.7	138.4	236.2	[illegible]
Southern Appalachia	[illegible]	21.4	22.4	21.4	13.3	13.3	13.3
Total	[illegible]	426.3	423.6	434.3	[illegible]	443.3	474.7
Midwest	132.7	132.7	184.4	[illegible]	254.2	212.1	327.2
Total	[illegible]	[illegible]	184.4	[illegible]	[illegible]	[illegible]	[illegible]
E. Northern Great Plains	12.5	[illegible]	21.3	25.2	22.4	[illegible]	38.4
W. Northern Great Plains	73.9	[illegible]	305.5	349.9	257.7	529.0	762.7
Total	86.4	243.7	[illegible]	374.2	281.5	[illegible]	[illegible]
Central West	13.7	9.9	13.6	10.3	9.5	[illegible]	9.5
Gulf	16.3	57.7	57.7	57.7	52.3	79.5	134.1
Rocky Mountains	23.7	33.3	42.2	44.6	42.7	[illegible]	53.1
Southwest	22.7	25.3	28.3	28.5	39.0	65.0	79.3
Northwest	5.3	5.5	4.4	4.4	7.0	7.7	3.7
Total	[illegible]	[illegible]	144.3	146.1	[illegible]	[illegible]	[illegible]
TOTAL	687.7	[illegible]	1,116.1	1,138.2	1,114.4	[illegible]	[illegible]
CONSUMPTION		Low	Medium	High	Low	Medium	High
Electric Utility	477	597.4	739.5	816.1	772.9	1,007.1	1,275.7
Industrial	60	139.1	158.7	150.1	[illegible]	179.4	[illegible]
Metallurgical	77	96.1	96.2	96.2	120.3	120.0	[illegible]
Residential/Commercial	7	1.5	1.5	1.5	3.7	3.7	3.7
Synthetics	—	11.1	22.5	41.3	25.3	56.2	[illegible]
Exports	54	77.5	73.7	73.5	75.1	77.1	77.1
Total	675	984.7	1,122.1	1,185.3	[illegible]	[illegible]	[illegible]

Source: Dept. of Energy, Federal Coal Leasing and 1985 and 1990 Regional Coal Production Requirements, June 1978.

All modes of transportation are expected to increase the amount of coal carried but most of the burden of increased coal traffic will go to railroads. In 1977, approximately 430 million tons or 65% of all coal was moved by rail for part (usually most) of the distance from mines to users.

By 1985, railroads are likely to be called upon to move more than 700 million tons of coal.

The highest requirements for increased rail service would come from the Western and Midwestern coal producers during the next 6 to 7 years. In addition to the greater increases in production, the average length of the haul of coal probably will increase.1/ (However, it should be noted that

1/ The DOT Carload Waybill Statistics show that the average length of haul for coal rail traffic nationwide has increased 40% between 1972 and 1976, from 283 to 395 miles respectively. By way of comparison, the average haul for all traffic over the same period increased by only 13% from 417 to 476 miles respectively.

railroads and shippers in these areas have been increasing their investments in equipment in recent years and may be better able to handle growing coal traffic than railroads in other areas.)

2. Rail transport is the only available transport mode in many cases.

The reasons why coal is heavily dependent on rail transport, while well recognized by coal producers, transporters and users, are often not understood within government or by others not having first hand knowledge of coal. In discussions with government officials and others, it may be necessary to point out that rail transport is the only practicable mode in many cases because of the bulk nature and large quantities which affects both feasibility and economics. More specifically:

. Water movement is often cheaper and is used when navigable waterways are available.

. Truck transport is generally feasible and economic only for short distances (not more than about 100 miles) due often to necessary size and weight limitations.

. Slurry pipelines are widely believed to be practicable and economic but only one such pipeline is now available which connects one mine and one powerplant in Arizona. Other pipelines have been proposed but are held up, at least in part, by the need to cross rights-of-way of competing modes.

. Mine mouth plants, converting coal to electricity at the mine, are feasible and economic in some situations and, if so, are being used when necessary permits for their construction and use can be obtained.

It may be necessary to explain also that changes among modes often are not practicable because (1) coal-fired plants are constructed to use coal with particular characteristics, making it very costly or impossible to switch to coal from another mine; (2) coal is normally sold under long term contracts; and (3) Coal shippers often have substantial investments in loading, unloading and storage facilities which accommodate only one mode and, if it is rail, may have substantial investments in privately owned cars and locomotives.

3. Coal is an important share of the traffic and revenue for some railroads.

As shown by the table on the next page, coal is an important share of the freight originated by several railroads. Also, revenue from coal originated or handled by these railroads is an important share of total revenue.

As shown below, in 1977 coal accounted for 30% of all revenue freight originated by Class I railroads. Revenue from coal accounted for 16% of all freight revenue received by Class I railroads in 1977. Some railroads have indicated that they are looking to coal as a major source for expanding future revenue.

TABLE 2

1977 Railroad	Revenue Freight: Coal Originated (million tons)	Revenue Freight: All Commodities (million tons)	Revenue Freight: Coal as % of all Commod.	Freight Revenue*: Coal ($ million)	Freight Revenue*: All Commodities ($ million)	Freight Revenue*: Coal as % of all Commod.
.Norfolk & Western	62.5	97.7	64%	430	1,117	38%
.Louisville & Nashville	60.0	93.0	64	225	762	30
.Burlington Northern	50.5	121.7	42	354	1,658	21
.Chesapeake & Ohio	45.5	64.7	70	252	612	43
.Conrail	40.3	143.4	28	338	2,705	12
.Southern	27.3	97.9	28	155	1,125	14
.Baltimore & Ohio	25.6	51.7	49	216	764	28
.Illinois Central Gulf	19.4	65.6	30	69	652	10
.Union Pacific	16.1	64.0	25	131	1,283	10
.Missouri Pacific	12.3	69.5	18	52	306	5
.Western Maryland	6.5	10.5	62	25	66	40
.Milwaukee	4.9	25.5	19	25	431	6
.St. Louis-San Francisco	4.2	20.6	20	24	347	7
.Bessemer & Lake Erie	4.0	9.3	43	27	38	70
.Chicago & North Western	2.9	36.5	8	43	505	8
.Pittsburgh & Lake Erie	2.4	9.3	26	16	62	26
.Atch., Topeka & Santa Fe	2.3	60.7	4	23	1,335	2
.Rock Island	1.1	25.2	4	11	357	3
.Seaboard Coast Line	**	59.3	-	52	806	6
Totals for above	388.3	1,157.6	33%	$2,477	$15,760	15%
Totals for all Class I Railroads	412.3	1,393.1	30%	$2,677	$19,359	14%

*Includes revenues from bridge and terminating traffic as well as originated traffic.
**Seventeen thousand tons.

V. THE IMPLICATIONS OF DEREGULATION FOR COAL PRODUCERS AND USERS.

Because coal shippers are heavily dependent upon rail transportation, any changes resulting from deregulation which affect availability or quality of service or coal hauling rates can have a major impact on coal producers and users. In fact, changes in any of these factors can determine:

- The extent to which coal is used, particularly in relation to other fuels with which it must compete.
- Where it is used.
- Where it is produced.

The impact cannot be predicted with any certainty but the potential implications can be outlined.

A. <u>Deregulation will affect cost of transporting coal but the exact magnitude cannot be predicted with certainty</u>.

The real cost of transporting coal by rail depends on both quality of service and the actual rates.

1. <u>Quality of Service</u>. Some coal producers and users have experienced service problems resulting in disrupted production and higher costs.

   Proponents of deregulation point out that provisions dealing with such matters as abandonments, mergers and consolidations, and car service regulations are intended to reduce the drain on rail revenues for unprofitable lines, permit increased efficiency of operations, and permit improved maintenance and equipment.

   If this result were to occur, it could benefit coal shippers that continue to have access to rail transport.

2. <u>Rail Transport Rates</u>.

   a. <u>Importance of rail freight costs as a share of delivered price of coal</u>. The share of the delivered price of coal made up by rail transport charges varies widely depending upon such factors as distance, value of coal, alternative transportation modes available, etc. Little summary data is available publicly to show the relative importance of rail transport costs, but the brief table on the next page provides some information and shows the wide variations.

   b. <u>Past Rate Increases</u>. According to Bureau of Labor Statistics (BLS) freight rate index data, the nation-wide increase in coal freight rates averaged 14.2% per year (current, not constant, dollars) or 123% from 1969 to 1978.

      For comparison purposes, total freight rates increased 12.6% per year or 113% from 1969 to 1978. The Producer Price Index (formerly Wholesale Price Index) rose 10.3% per year or 97% over the same period. The details are shown in the table at the bottom of the next page.

      In theory at least, the increases in freight rates that have occurred are due to cost increases as determined by the ICC and have not allowed any increase over and above costs of "inflation."

TABLE 3

Limited Data Showing Costs of Coal and the Cost of Transporting it by Rail to Utility Users

Utility, Plant & Location	Source of Coal	Approx. Distance (miles)	Coal Price per ton FOB mine	Rail Transport Cost Per Ton	Delivered Coal Price per ton	Rail Trp cost as % of Deliv. Price
Appalachian Region	(Data for January 1979 Sales)					
Appalachian Power Co.						
-Clinch River (Va.)	Russell Cty, Va.	5	$38.49	.72	$39.21	1.8%
-John Amos, (W.Va.)	Boone Cty. W.Va.	120	$22.59	$2.89	$25.48	11.3%
-Glen Lyn (Va.)	Russell Cty, Va.	101	$28.54	3.73	$32.27	11.6%
-Philip Sporn (W.Va.)	Perry Cty. Ky.	120	$25.81	5.55	$31.36	17.7%
West	(Estimates for early 1978)					
-Pueblo, Colo.	Gillette, Wyoming	575	$ 6.50*	4.55	$11.05	41.2%
-Kansas City, Missouri	"	737	$ 6.50*	4.84	$11.34	42.7%
-San Antonio, Texas	"	1644	$ 6.50*	11.94	$18.44	64.8%
-Amarillo, Texas	"	940	$ 6.50*	7.49	$13.99	53.5%
-Houston, Texas	"	1700	$ 6.50*	15.60	$22.10	70.6%

*Estimated price for 8,000 Btu coal on long term contract sale.

Sources: Appalachian Region - Coal Week, published by McGraw-Hill
West - Paper by Carroll J. Seaman, "Coal Slurry Pipelines Electric Utility Considerations, March 1978.

TABLE 4

Comparison of Coal and Total Freight with Producer Price Index
(1969 = 100)

	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	Avg.% Per.Yr.
Coal	100.0	108.6	122.9	123.3	132.3	154.8	177.5	199.6	211.6	223.2	14.2%
Total Freight	100.0	108.3	122.4	126.1	129.3	149.7	169.4	186.5	199.1	211.1	12.5%
Producer Price Index	100.0	103.7	107.0	111.3	125.5	150.3	164.2	171.3	182.3	196.5	10.3%

c. Future Rate Changes. It is not possible to predict future rate changes that might occur under the various rail deregulation proposals other than to note that the Administration's bill would permit railroads to set rates within a zone of 7% per year above or below the rate prevailing on the previous January 1st -- not counting the allowance for inflation.

If S. 796 had been in effect for the period from 1972 to 1978, and railroads increased rates by the maximum allowed (7% plus inflation), rates would have increased by 97.4%, compared to the 65.3% increase that did occur.

If inflation continues at the current rate of 10% and railroads increase rates by the maximum of 7% additional for the next five years, rates could increase by 119% without any shipper recourse through the ICC.

B. The amount of coal that is produced and used in the U.S. or exported will depend heavily on the extent of increases in the cost of producing, transporting and using coal.

1. Relative Competitiveness of Coal. At the present time, coal is demand limited and increases in demand are expected to grow at about 5 - 7% from now until 1985 (over a 1977 base of about 690 million tons).

While coal has the advantage of security of supply compared to oil and natural gas, the price advantages have not been adequate to result in a substantial increase in industrial use of coal or in rapid replacement of existing oil and gas-fired capacity. In the case of potential industrial users, a substantial economic advantage for coal apparently is necessary to offset the greater capital costs, pollution control costs and other difficulties in using coal rather than oil or natural gas.

As shown in the graph included as Appendix C, the nationwide delivered price of coal, measured on a $ per million btu basis, has been less than oil for years and has been less than natural gas since mid-1975. However, these comparisons do not take into account the higher capital and pollution control costs associated with using coal.

Exports of U.S. coal have also declined significantly, from 65.7 million tons in 1975 to 39.8 million tons in 1978. The increasing costs of producing and transporting coal are undoubtedly a significant factor in reducing the nation's ability to compete in world coal markets.

In addition, imports of coke and steam coal have been increasing. Imports of steam coal have grown from 940 thousand tons in 1975 to 3 million tons in 1978, particularly for utility and industrial users on the Gulf Coast from South Africa and Australia. Again, higher costs of producing and transporting U.S. coal are cited by users as the reason for these imports.

2. Factors Contributing to the Increased Cost of Coal. As indicated in section IV. A. above, the costs of transporting coal by rail have increased sharply and additional increases are now pending before the ICC.

   However, transportation is but one factor contributing to the increased costs of coal. Costs of producing coal have increased sharply particularly due to the cost of meeting governmental requirements such as the Surface Mining Control and Reclamation Act of 1977. Other factors include declining productivity and higher labor costs.

   Furthermore, costs of using coal have increased substantially, due primarily to increasing costs of meeting requirements established under the Clean Air Act.

   The costs of competing fuels are also increasing but the increasing costs of producing, transporting and using coal have been great enough to provide a substantial deterrent to rapid increases in demand for U.S. coal here and abroad.

3. Competition Among Coal Producers and Coal Producing Areas. Currently there is about 100 million tons of excess productive capacity in the U.S. (i.e., 800+ million tons of demonstrated productive capacity, compared to expected 1979 demand of 704 million tons for use in the U.S. and for exports). More productive capacity could be added.

   This situation has contributed to unemployment in the coal fields and sharp competition among coal producers and coal producing regions.

   Particularly because of this situation, increases in costs of producing, transporting and using coal which affect one coal producer or region more than others will have an important impact in the geographic location of future coal production.

VI. NATIONAL INTEREST IMPLICATIONS OF DEREGULATION

In addition to the implications of deregulation for coal producers and users, there are implications for coal which could affect the broader national interest. Specifically, the impact of deregulation on the costs of transporting coal will affect:

- Rate of inflation.
- Consumer prices.
- Extent to which coal will replace imported oil and reduce or increase our excessive dependence on foreign oil which has an affect on:
  - Balance of payments and dollar and job outflow.
  - Vulnerability to economic and social disruption from an interruption in foreign energy supplies.
  - Freedom of action in international affairs.

VII. DISCUSSION OF SPECIFIC MAJOR ISSUES RAISED BY RAIL DEREGULATION LEGISLATIVE PROPOSALS.

Discussions of rail deregulation proposals that have been held thus far raise a number of issues that are of interest to coal producers and users. This part of the paper lists those issues, describes them very briefly and presents the major arguments that have been stated for favoring one side of the issue or the other.

A. The "Captive Shipper" Problem.

1. Why "captivity" is a major issue.

The "captive shipper" issue has emerged as the single most important issue raised by proposed deregulation legislation because:

- There are no alternative modes of shipment and no alternative carriers for a large share of the coal now being produced and used.
- "Captive shippers" would face potentially large rate increases (7% plus inflation over the next five years; no specified limit thereafter) before there was any recourse to the ICC.
- The shipper would bear the burden of proof as to "captivity" and injury for higher rates and the higher rates would remain in effect while relief was sought.

The Administration(S. 796) and AAR proposals presume the existance of competition for a shippers business.

2. What is a "Captive Shipper"?

There is considerable disagreement as to the correct definition of a "captive shipper" situation. In general, the broader one defines a "market" (particularly the geographic area and time period), the narrower the possibility of being considered "captive." Among the concepts that have been advanced during discussions of rail deregulation -- ranging from narrow to broad -- are the following:

a. One Carrier Concept. A coal shipper would be considered captive if his mine is served by only one rail carrier, with no reasonable alternatives.

b. One Carrier from Origin to Destination. The shipper is served by one carrier from origin to destination with no reasonable alternatives.

c. One Carrier with "Injury." The shipper is served by one carrier (as in a., above) and would suffer "injury" if the shipper were forced to seek the next best alternative.

d. Market Dominance Concept. This concept was introduced by the "4-R" Act and served as the ICC test for determining whether a shipper was suffering from excessive railroad market control. The test included three conditions:

- Market share condition. Market dominance was assumed to exist if a rail carrier carried more than 70% of the traffic in a market.

- Variable cost condition. A carrier was market dominant if his rates on the traffic in question were in excess of 160% of variable cost.

- Substantial investment condition. If a shipper shows that a substantial share of his total investment is in rail-related equipment and facilities, the shipper is considered the object of market dominance.

e. Potential alternatives concept. This approach considers the existence of "captivity" to be a temporary situation mainly attributable to relatively inflexible capital constraints. In the long run, necessary adjustments could be made to develop transportation alternatives. Further, this concept assumes that the existence of effective competition (absence of captivity) should go beyond a particular shipper or area and be evaluated in terms of both the demand for transportation and the demand for the commodity.

f. Expanded potential alternatives concept. Some Administration officials have suggested that "captivity" should be considered on a much broader basis -- extending to products resulting from use of the commodity. For example, in the case of coal used to generate electricity, the existence of "captivity" should take into account such matters as (i) use of alternative fuels, including peak load generating capacity in lieu of base load, and (ii) capability to wheel electric power among utility systems.

3. To What extent are coal shippers captive?

Relatively little data has been assembled on the extent of coal shipper captivity, but two studies should be noted.

a. ICC Report. One study was done for the ICC in 1976 in connection with market dominance requirements of the "4-R" Act, and the findings were submitted to Congress on October 5, 1977 ("Impact of the 4-R Act -- Railroad Ratemaking Provisions").

In part, this study indicated that 46.4% of coal shipments were "market dominant" as defined in paragraph 2.d. above. While the overall study seems fundamentally sound, this estimate probably is understated for several reasons including:

- The data base used was for 1972 and the coal-transportation structure has changed significantly since that time, particularly with the increase in western coal production.
- Costing procedures did not take into account unit train shipments, thus probably overstating the amount of coal moving at "noncompensatory rates."
- Coal shippers may not have transportation alternatives even when carriers do not have a 70% or greater market share.

b. Recent NCA Study. In an effort to improve the quality of data on this issue, NCA recently conducted a survey designed to develop estimates of the extent and potential effects of the "captivity" problem.

For purposes of this survey, NCA defined "captivity" to include two elements:

- A single rail carrier represents the only present transportation alternative for the entire shipment, or a substantial share of the route, for the shipment in question.
- The "next best" future transportation alternative (other rail carrier, motor or water carrier) is one which would cause injury to the shipper's competitive position, if forced to adopt that alternative.

Data covered in the survey are for 1977 since that was the latest 12-month "normal" period for which data may be available. (1978 coal shipments were interrupted by coal and rail strikes.).

Information from the survey covers 291 million tons of coal. This equals 42.1 of total U.S. production. This includes 193 million tons shipped by rail or 66.1% of the coal that moved by rail in 1977.

The data from the survey are summarized in the table below. Detailed data for the U.S., Eastern and Western districts as well as individual states covered by the survey are presented in Appendix D.

Type of market:	% Captive	% of total
. Utility	[illegible]	
. Steel	85.83%	
. Industrial	73.05%	
. Exports	93.19%	
Total	84.60%	
Unit Train:	89.22%	[illegible]
Interstate movements:	87.37%	74.60%
Intrastate movements:	69.10%	25.40%

Average Rail Cost: $ 6.27 per ton
Average alternative Cost (next best): $ 12.59 per ton
Alternative reported available (including higher cost alternative) - [illegible] of total tonnage.

* An earlier version of this table contained preliminary and less complete data from the NCA survey.

B. <u>Flexibility for Railroads to set Maximum Rates</u>

1. <u>Proposal (Secs. 102, 103, 104 of S. 796)*</u>:

.During next five years railroads would be allowed to raise rail rates of up to 7% per year (not counting inflation) without government interference.
.If a carrier sets a rate higher than the 7% zone, the dispute is settled as follows:

1st-shipper must prove that he is captive (has no reasonable transport alternative and possible damage--"reasonable" would be 120% of existing transport cost if truck is alternative, 110% if barge is alternative). If shipper can prove above conditions,
2nd-carrier must prove that rate is reasonable (justified on the basis of cost). If not,
3rd-ICC sets rate.

2. <u>Arguments in Favor of proposals for rate flexibility</u>:

.Enables railroads to be more competitive particularly against trucking.
.Permits improved service and financial viability.
.Restores fairness among modes, by giving railroads similar rate freedom, enjoyed by most of its competitors.
.Reduces ICC involvement and thereby reduces unnecessary governmental regulations and controls.
.Introduces a limit on rate flexibility and 5-year period of adjustment to minimize adverse impacts which may have come about through immediate and total rate freedom.

3. <u>Arguments Opposed to the Proposals</u>:

.In many cases, there is no alternative to rail transport for coal.
Whenever competitive forces are absent or ineffective, shippers have no signficant protection against inadequate service or higher rates within the zone. The "zone" provides insufficient protection to the captive shipper.
.If deregulation (or reduced regulation) of railroads were to result in higher rates without improved service to offset higher costs, the coal shipments in question would be less competitive with other fuels, other producing regions and other coal producers.
.Since the ICC's role would be reduced, a considerably higher financial and legal burden is placed upon the coal shipper, especially the small shipper.
.Captive coal shippers might end up bearing a greater than proportional share of the cost of improved financial viability for carriers.

*Proposals are described in more detail in Appendix A or in Part I of the paper.

.The proposal does not tie higher rates and improved performance.
.There are no assurances that railroads will "plow-back" higher coal earnings into better coal facilities and equipment.

C. Rate Bureaus

1. Proposal (Sec. 105 of S. 796)*:

.Proposes to remove ICC authority to grant anti-trust immunity on rate agreements.
.Discussion of single-line rates would be prohibited.
.Bureau meetings should be open to the public.

2. Arguments in Favor of Proposal:

.Would eliminate some of the anti-competitive effects of a rate making practices of the bureaus, and place them under anti-trust laws.
.Retains the critical services provided by rate bureaus such as publication of tariffs, etc.

3. Arguments Opposed to Proposal:

.The railroad industry relies heavily on accurate information and cooperation of virtually thousands or rates. Rate bureaus serve a useful purpose in setting and publishing these rates.
.Railroads should not be treated like other businesses because of the nature of the service they offer, and its close linkage with issues of public welfare.

D. Rate Discrimination:

1. Proposal (Sec. 106 of S. 796)*:

.Narrows the type of "discrimination" in rates or service that is prohibited. Differences would be permitted if justified by differences in carrier's cost or competitive conditions.

2. Arguments in Favor of Proposal:

.Removes some of the provisions such as the long-haul/short-haul clauses, etc., which the ICC has often used in ways that were contrary to development of an efficient transportation system.
.Gives railroads greater rate setting freedom to adopt more innovative marketing techniques.

3. Arguments Opposed to Proposal:

.Gives railroads considerable control over regional shippers and markets.
.Gives railroads greater rate and service control over various shippers.

*Proposals are described in more detail in Appendix A or in Part I of the paper.

D. Contract Rates

1. Proposal (Sec. 102 of S. 796)*:

.Allows railroads to engage in contracts with shippers for rail services.

2. Arguments in Favor of Proposal:

.Provides, at least for large shippers, an attractive and more reasonable means for securing improved service and potentially at lower rates, because of the reduced financial risk to the carrier.

3. Arguments Opposed to Proposal:

.May have the effect of 'tying' coal shippers to a fixed mode or carrier for an extended period of time. Unless specified in the contract, these conditions alone do not seem to constitute the proper incentive to improve service.
.While potentially attractive for some coal shippers, these rates could present the possibility of discriminatory effects, particularly in spot markets for small shippers. (Small shippers have a lower capability to participate in long term contracts and thus may suffer disproportionately; e.g., when adequate equipment isn't available for contract and spot shippers).

F. Notice of Rate Changes

1. Proposal (Sec. 107 of S. 796)*:

.Instead of the 30 days notice required presently, the proposal would phase in a decreasing notice period for rates.

2. Arguments in Favor of Proposal:

.Railroads need the flexibility to change and publish rates quickly to compete more effectively and respond to changing demand conditions.

3. Arguments Opposed to Proposal:

.Shippers require complete and reliable pricing information for normal business planning and to assure themselves that carriers are not engaging in illegal discrimination.

G. Abandonments

1. Proposal (Sec. 121 of S. 796)*:

.The provisions retain the basic ICC requirements for "public convenience & necessity" (PC&N) for abandonment etc., but under revised PC&N criteria and shorter time period. If objection, ICC must find PC&N or Cost-benefit of line in 90 days.

*Proposals are described in more detail in Appendix A or in Part I of the paper.

2. Arguments in Favor of Proposal:

.Permits rail carriers to abandon uneconomic branch-lines in a shorter time period, thus improving cost-effectiveness.
.Gives public sufficient means to protect its market by way of the "subsidy" option, but limits carrier's losses.
.Prevents stalemate between subsidies and carrier through arbitration.

3. Arguments Opposed to Proposal:

.Those concerned about potential abandonments believe the proposal makes abandonment possible for carrier without sufficient warning.
.Railroads indicate proposal does not make it possible for carrier to abandon lines expeditiously and retains unreasonable government restrictions and costly delays.

H. Mergers and Acquisitions

1. Proposal Meaning (Sec. 122 of S. 796):

.All special standards and procedures relating to mergers and consolidations will be eliminated and placed under anti-trust laws. Eliminate ICC from rail-rail mergers.

2. Arguments in Favor of Proposal:

.Provides incentive for rail companies to merge and improve overall rail system efficiency and financial position.

3. Arguments Opposed to Proposal:

.Mergers, particularly those referred to as parallel (merging railroads cover essentially the same area) may reduce competition, and increase the railroads' market power.

I. General Rate Increases

1. Proposal Meaning (Sec. 102 of S. 796):

.Railroads would be allowed to use general rate increases as a way to recoup inflationary effects on costs, but only for two years.

2. Arguments in Favor of Proposal:

.Provides a transition period during which rail industry has an effective instrument to recoup inflationary effects quickly and efficiently.

3. Arguments Opposed to Proposal:

.General rate increases represent collective rate making schemes and are thereby in danger of being anti-competitive.
.Simple automatic increases in rates to cover increases in costs are disincentives to cost savings and efficiency.

J. Commodities Clause Elimination

1. Proposal (Sec. 108 of S. 796):

.Would allow railroads to haul their own coal or other goods they own rather than having to set up another corporate entity, leasing, etc.

2. Arguments in Favor of Proposal:

.Railroads control considerable amounts of coal, particularly in the West, and this coal should be readily available in the market.

3. Arguments Opposed to Proposal:

.Some believe proposal could jeopardize railroad common carrier obligations, by enabling railroads to favor own shipments over those by other coal shippers in terms of rates and service. Railroads could thereby affect the competitive position of coal producers.
.Others believe the proposal would have no real impact since railroads can set up separate entities or lease their coal reserves for production.
.Railroads appear to prefer the status quo.

K. Private Car Ownership and Compensation

1. The Issues:

This matter is not raised directly by the deregulation proposals but is of interest and concern to some coal shippers. Current issues include:

.To what extent is private ownership of rolling stock necessary to help assure adequate and reasonable service in moving coal by rail?
.What are the advantages and disadvantages to a shipper of private ownership of rolling stock?
.Are current arrangements for compensating private owners and lessees of rolling stock adequate and reasonable?

2. Shippers' Position and Concerns:

A number of coal shippers, experiencing inadequate service and expecting increased need for rail transport of coal have invested or are considering investments in privately owned or leased rolling stock. Their concerns include:

.Available information suggests that some railroads' plans and commitments for additional investments may not be adequate to meet expected needs.
.When shippers buy or lease cars:
 -They lack control over the rolling stock which must travel over railroad controlled systems.
 -Compensation from railroads for privately owned or leased cars is less than that paid to other railroads for similar equipment.

3. Railroads' Position and Concerns:

.Compensation levels for privately owned or leased cars adequately reflect economic value and are adequately dealt with in tariffs covering the shipments involved.
.Railroads' investments are adequate as long as demand for rail transport of coal is relatively stable over time.
.Railroads need to retain control over rolling stock travelling on their system.
.Issue should be addressed on an individual shipper to carrier basis or resolved in ICC forum of ExParte No. 334, Sub 1.

L. Investments in Nonrail Activities

1. The Issue:

This issue is not addressed in the deregulation proposals, but some shippers have contended that some railroads have diverted revenues from rail operations to non-rail investments rather than use those resources to improve maintenance, equipment and overall service.

2. Shippers' Position:

.Cross-subsidization and investment in non-rail activities occurs at the expense of coal shippers.
.Some shippers believe that there should be some means to encourage or require plowback of revenues to improve service.

3. Railroads' Position:

.Railroads have argued that they must have the right to diversity (as do most industries) and have pointed out that low income from rail operations and low return on investment have forced the diversion of financial resources away from rail operations.
.Cross-subsidization can not be avoided by the railroad industry, in fact, it is a technique heavily relied upon to maximize total earnings.

M. Residual Regulatory Framework

1. The Issue:

.Some coal producers have expressed concern regarding the uncertainty over which governmental agencies would be responsible for administering the residual regulatory framework, after deregulation occurred.

2. Reasons for Concern:

.Although the ICC would retain most of the residual, rate bureaus, merger and long-term matters of discrimination could be placed under Dept. of Justice and/or the Federal Trade Commission. These issues are important to the coal industry and shippers, and their interpretation will depend on which agency has authority.

3. Counter arguments:

   .The issue of residual regulatory authority is relatively unimportant to the actual effects of the legislation. Focusing on "what is left" distracts from the major issues of deregulation.
   .It is almost impossible to assess how rules and regulations will be interpreted in the future by a "new" agency.
   .DOT would be charged with assessing the impact of the deregulation actions and this issue could be addressed when facts are available.

VIII. ALTERNATIVES NOT ADDRESSED BY CURRENT LEGISLATIVE PROPOSALS

Several potential actions which relate to improved rail transport services have not been addressed in the current legislative proposals (in addition to the matters discussed in paragraphs K, L and M on the two previous pages). These potential actions include:

A. Mandatory Trackage Rights -- To the extent that these rights extensions contribute to better performance and greater competition among railroads, they might reduce the captive shipper problem, at least in the short run. However, there exist several difficulties with this approach:

   .Mandatory trackage rights present operational problems for the railroad owning the track involved and agreements are difficult to work out.
   .The problem of cost sharing (i.e., how to apportion "common" costs among the users of the right-of-way) is a serious obstacle.

B. Acquisitions and Construction -- Construction of a few miles of line may, in some cases, generate new sources of rail competition. Several port areas seem to provide such opportunities. Such a step might also lead to intermodal ownership, which is welcomed by many shippers and railroads due to potential efficiencies.

C. Coal Slurry Pipelines -- Coal slurry pipelines have the potential to provide efficient and economical coal transportation. If available, slurry pipelines could contribute to competition that would help achieve the objectives of deregulation proposals. Construction of coal slurry pipelines normally requires crossing of the rights-of-way of competing transportation modes. This can result in protracted and expensive litigation to secure a right-of-way for the pipeline. This unnecessary cost and delay could be avoided by legislation granting the federal power of eminent domain for slurry pipelines, thus allowing this transportation mode to compete on its own merits with other modes.

D. Incentives to Improve Service Quality

Current rail deregulation proposals count on competition to provide the incentive for improved service and reasonable rates. The proposals do not deal with the need to improve service in situations where effective competition is absent. This is a major weakness in the proposal and action should be taken promptly to deal with it.

APPENDIX A

S. 796 SECTION	SUMMARY OF PRINCIPAL FEATURES OF S. 796 AFFECTING COAL	PRACTICAL MEANING OF PROVISION	DIFFERENCES FROM CURRENT LAW	AAR POSITION	
101	National Transportation Policy: Restates ICC's responsibility to serve the public interest; encourages free and fair competition.	Shifts emphasis of regulation from that of protection to a more competitive approach.	Current policy emphasizes protection of the various modes from one another.	Generally in favor.	
102*	Maximum & Minimum Rate Regulation: 1. Removes all carriers from the general ratemaking statutes as administered by ICC; allows carriers to set rates at "market" determined levels	1. During next five years rail rates are allowed to rise or fall up to 7% per year (not counting inflation) without gov't interference. If RR set rate higher or lower than real 7% per year, it is settled as follows: .1st, shipper must prove no alternative and damage. If he does, .2nd, RR must prove rate is reasonable. If not, .3rd-ICC sets rate.	1. ICC has control over rates via the 4-R Act "market-dominance" provisions. If ICC determines rate is "market dominant" (and does in most cases), ICC has rate control.	1. Wants freedom to set rates within a 20% zone. -Feels rate flexibility is essential for RR to restore fairness among modes -Provide RR with pricing flexibility to compete more effectively.	
	2. Allows general rate increases for two years only.	2. For next 2 years, RR could use general rate increase mechanism to recoup costs of inflation (in addition to 7%). After 2 years, entire increase subject to 1, above.	2. Presently RR are allowed to use general rate increases.	2. Strongly opposed to 2 year limit; AAR wants it to continue permanently.	
	3. Sets a five-year transition period.	3. After 5 years there would be no rate regulation at all.	3. Rate regulation continues indefinitely.	3. Generally in favor.	
	4. Permits the use of contract rates.	4. Allows RR to enter into contracts specifying service and rates.	4. Until very recently ICC considered contract rates anti-competitive.	4. Favors contract rates.	

*These sections are particularly important to coal.

S. 796 SECTION	SUMMARY OF PRINCIPAL FEATURES OF S. 796 AFFECTING COAL	PRACTICAL MEANING OF PROVISION	DIFFERENCES FROM CURRENT LAW	AAR POSITION
103*	<u>Investigation of Rates and Orders Setting Rates:</u> -Restricts ICC rate setting powers. -Requires rate investigations only upon complaint, and prohibits ICC from starting own investigations. -Repeals ICC powers to suspend a rate.	Sharply limits ICC powers to investigate and set rates. Action only in response to complaints.	Presently the ICC has power to determine "just and reasonable" rates, decide rate discrimination & adequate revenue levels. ICC has power to suspend rates and launch its own investigations	Prefers that the ICC powers in these areas be reduced. <u>Favors S.796 provisions.</u>
104*	<u>Joint-Line and Through Routes</u> (2 or more carriers for a shipment): -Eliminates ICC power to set joint-line rates. -Repeals restrictions on through routes. -Removes ICC power to decide share of total rate going to each carrier ("division")	The assumption behind this section is that it is no longer necessary to continue to require joint-line rates. On any route a rate could be calculated by adding the rates of each carrier along the route.	ICC now has the authority to designate through routes, require joint-rates on them, and thereby get into "divisions." Divisions have tended to favor non-Eastern (long-haul) carriers.	Opposes the elimination of ICC authority to require joint rates. <u>Opposes S. 796 provisions</u>.
105*	<u>Rate Bureaus:</u> -Sets limits on a carrier's right to participate in discussion, and voting on joint line rates. -Removes all authority to consider single-line rates. -Disallows ICC from granting anti-trust immunity.	-Proposes to remove ICC authority to grant anti-trust immunity on rate agreements. -Discussion of single-line rates would be prohibited. - Bureau meetings should be open to the public	Presently rate bureaus are granted anti-trust immunity as started under "Reed-Bulwinkle" but somewhat restricted under the 1976 4-R Act.	Favors continuing anti-trust exemption for both general increases and joint-line rates. <u>Opposes S. 796 provisions</u>.
106*	<u>Antidiscrimination:</u> -Carriers are prohibited from discriminating between competing shippers ("purchasers") unless cost and/or competitive differences exist.	Narrows the type of "discrimination" in rates or service that is prohibited. Differences would be permitted if justified by differences in carrier's cost or competitive conditions.	Presently, discrimination in rates and service are prohibited - for a commodity - among different origins with same destination; -different routes ("long-haul/short-haul").	Favors the increased freedom in rate setting. <u>Favors S. 796 provisions</u>.

*These sections are particularly important to coal.

S. 796 SECTION	SUMMARY OF PRINCIPAL FEATURES OF S. 796 AFFECTING COAL	PRACTICAL MEANING OF PROVISION	DIFFERENCES FROM CURRENT LAW	AAR POSITION	
107*	Notice and Publications: -Requires that essential terms of contract rates and services be published and filed with the ICC. -Phases in a decreasing notice period for rates.	-Terms of contracts would be made public -Shorter notice of changes in rates	-No history on contracts (which were not permitted) until recently. -RR are required to give 30 day notice of rate changes.	-Not opposed to making contracts public. -Wants repeal of the 30 day notice and allow rate changes without notice. S.796 does not go far enough.	
108*	Miscellaneous Rate Provisions: -Deletes provisions allowing government traffic to travel at reduced rates.	-Repeals discount rates on gov't traffic	-U.S. government traffic travels at reduced rates ("Sec. 22")	No official position (would probably favor higher rates)	
	-Eliminates the commodities clause.	-Would allow RR to haul their own coal, or other goods they own rather than having to set up another corporate entity, leasing, etc.	-The commodities clause prohibits RR from hauling their own commodities.	No official position (Some RR people have expressed preferences for status quo).	
109	Studies: -Requires the Secretary of DOT to submit status report on competition for first 2 years. -Requires DOT to prepare study on maximum rate provisions.	Several studies and reports are required to monitor the progress of the Act.	No studies are currently under way.	No official position.	
120*	Entry: -Amends the RR entry provisions to allow free entry to all, except regulated carriers of another mode.	ICC approval would no longer be required for a carrier to enter or exit from a particular market, (except for carriers of other modes subject to ICC regulation). -Does not address issue of intermodal ownership.	Entry into and exit from the rail industry is determined by ICC on the basis of a "public convenience & necessity" finding.	No official position (RR would prefer that new law address the important issue of intermodal ownership)	

*These sections are particularly important to coal.

S. 796 SECTION	SUMMARY OF PRINCIPAL FEATURES OF S. 796 AFFECTING COAL	PRACTICAL MEANING OF PROVISION	DIFFERENCES FROM CURRENT LAW	AAR POSITION	
121*	Abandonments: -Rail line abandonments are granted, if there is no objection in 30 days. -ICC must complete abandonment investigations in 90 days. -Alters the system under which a line can be kept in operation through subsidies. -Provides conditions for subsidies.	The provisions retain the basic ICC requirements for "public convenience & necessity" (PC&N) for abandonment etc., but under revised PC&N criteria and shorter time period. If objection, ICC must find PC&N or Cost-benefit of line in 90 days.	Under current regulations the ICC must determine PC&N, but without substantial time constraint, before abandonment can occur.	Abandonments of uneconomic lines must be allowed expeditiously, and unreasonable delays eliminated. S.796 contains unnecessarily strict standards. Opposes S.796 provisions.	
122*	Mergers and Consolidations: -All special standards and procedures relating to mergers and consolidations will be eliminated and placed under anti-trust laws, except for certain labor protection provisions. -Eliminates ICC from rail-rail mergers.	In this area the bill places railroads under the same anti-trust rules as other businesses. ICC role in mergers is significantly reduced.	Currently ICC has power to approve mergers & consolidations. Anti-trust immunity for	Mergers and consolidations are needed but ICC should retain control--under revised competitive standard. Opposed to S. 796 provisions.	
130	Rail Carriers Securities Laws: -Repeals ICC's authority to approve various securities, and deletes ICC control over RR's financial structure.	The section repeals ICC authority over RR securities, leaving their regulation to the security laws of the U.S.	Currently the regulatory authority over RR securities is split between the SEC and ICC.	Favors repeal of ICC authority in this area. Favors S. 796 provisions	
140*	Car Service (car availability, demurrage, per diem charges): -Repeals ICC authority over car service.	Leaves car service decisions to RR to work out with Shippers without ICC involvement	Presently the ICC sets rules for car allocation and, if necessary determines per diem & demurrage charges.	Limit ICC role to emergency situations, and return all authority to the Industry. Favors S. 796 provisions	

*These sections are particularly important to coal.

A - 4

S. 796 SECTION	SUMMARY OF PRINCIPAL FEATURES OF S. 796 AFFECTING COAL	PRACTICAL MEANING OF PROVISION	DIFFERENCES FROM CURRENT LAW	AAR POSITION	
141	Common Carrier Obligation: -Carriers will remain under common carrier obligation.	RR can not refuse service, but allows price and service variations	Service variations (e.g., preferred treatment for contract shippers) are not allowed.	No official position	
150	Accounting Definitions: -Defines "return on capital", "incremental" cost, etc. -Gives ICC 4 years to define information needs.	Defines various cost and capital concepts, and gives ICC time to study data needs.	Presently cost data are based on firm-wide concepts, instead of cost-of-service concepts.	No official position	
151	Financial and Cost Accounting Systems: -Requires ICC to develop new cost accounting system within one year.	Defines various cost and capital criteria, and gives ICC a year to develop system.	The current ICC system is more a financial accounting system than a cost accounting system No provision for arbitration.	ICC's ability to prescribe cost accounting systems would be repealed.	
160	Arbitration Panels: -This section sets the procedure by which the ICC establishes an arbitration panel.	Although overall the ICC role is minimized, at times arbitration may be needed (e.g., in abandonments).	No provision for arbitration.	No official position.	
170	State Authority: -Preserves the existing Federal state relationship and prohibits states from imposing new regulations.	Since S. 796 attempts to limit ICC's role, this section prevents the states from filling the "vacuum."	ICC has full jurisdiction over all shipments traveling in interstate commerce.	Favors complete Federal preemption of state laws affecting interstate rail operations.	

*These sections are particularly important to coal.

S. 796 SECTION	SUMMARY OF PRINCIPAL FEATURES OF S. 796 AFFECTING COAL	PRACTICAL MEANING OF PROVISION	DIFFERENCES FROM CURRENT LAW	AAR POSITION	
180-184	Effective Date and Conforming Amendments: -Sets the date for most sections of the Act as Jan. 1, 1980. -Provides that after the 5-year period, enforcement of anti-discrimination and minimum rates would be transferred to the Justice Department.	After five year period: total deregulation of the rail industry would take place. DOJ would administer anti-discrimination and minimum rates, as the only remnants.	The ICC is currently responsible for economic regulation of railroads.	Generally favors elimination of the remainder of ICC structure by 1985, and replaced by new federal system that will allow RR to operate in "market" environment.	

*These sections are particularly important to coal.

APPENDIX B

NATIONAL INDUSTRIAL TRAFFIC LEAGUES' SUMMARY OF ITS POSITION ON RAILROAD DEREGULATION

WASHINGTON—At a recent special membership meeting of The National Industrial Traffic League, members voted their approval of substantial motor carrier and rail regulatory reform. The April 25-26 meeting in St. Louis, Missouri, was convened to consider the legislative proposals for deregulation of the transportation industry proposed by the Administration and various carrier groups. League members vowed to work to insure that shippers' needs are recognized in any upcoming legislation affecting the transportation industry.

NITL adopted definitive positions on the major transportation issues, ranging from the rate bureaus' antitrust exemption through liberalized motor carrier entry and rail abandonment procedures. The League's new policies aim to establish a transportation system which is capable of maintaining its own economic vitality while effectively serving the public need.

Motor Carrier Entry - The League voted to endorse liberalized motor carrier entry procedures. NITL's position provides that any applicant should be granted the authority by the ICC to enter the trucking business once they have passed the fitness test and have demonstrated a need for their service by providing "shipper support" for their authority. Issuance of authority should not be restricted solely because of its adverse effect on existing motor carriers.

Rate Bureaus - The NITL also voted to continue its support of the antitrust exemption to meet and set rates granted to the rail and motor carrier rate bureaus, with modifications in the rules governing the bureaus' operations. The League's proposals for change in the rate bureau system include allowing single line rates to be docketed and fully discussed by any rate bureau, but voted on only by the carriers which can participate; prohibiting rate bureau employees from proposing rate dockets; and equalizing the rules governing rail and motor carrier bureaus wherever practicable.

Rail Abandonment - Recognizing the need to rationalize the nation's rail network, League members voted to allow abandonment of rail lines showing continuing financial loss, with 240 days' notice given to affected shippers and communities.

Intercorporate Hauling - The League voted to support intercorporate hauling for compensation between a parent corporation and 51% or more owned subsidiaries. This would allow corporations with their own truck fleets to charge their subsidiaries for transportation services that they perform for them, a practice which is currently prohibited by the ICC.

Rail Contract Rates - Demonstrating their continuing support of innovative ratemaking techniques, NITL members proposed that the ICC should allow railroads to offer shippers contract rates if these contracts do not interfere with the railroads' common carrier obligation.

Car Service - The League voted to support the ICC's recent proposal to turn over car service authority to railroad management. This move would allow the railroads themselves to control the routing and distribution of cars, a factor which should lead to improved rail service.

Market Dominance - The League voted to continue its support of the ICC's market dominance rules. Further, the membership endorsed a continuing review of the concept of market dominance to insure that the ICC's regulations provide the equivalent of effective competition for the protection of the shipping public.

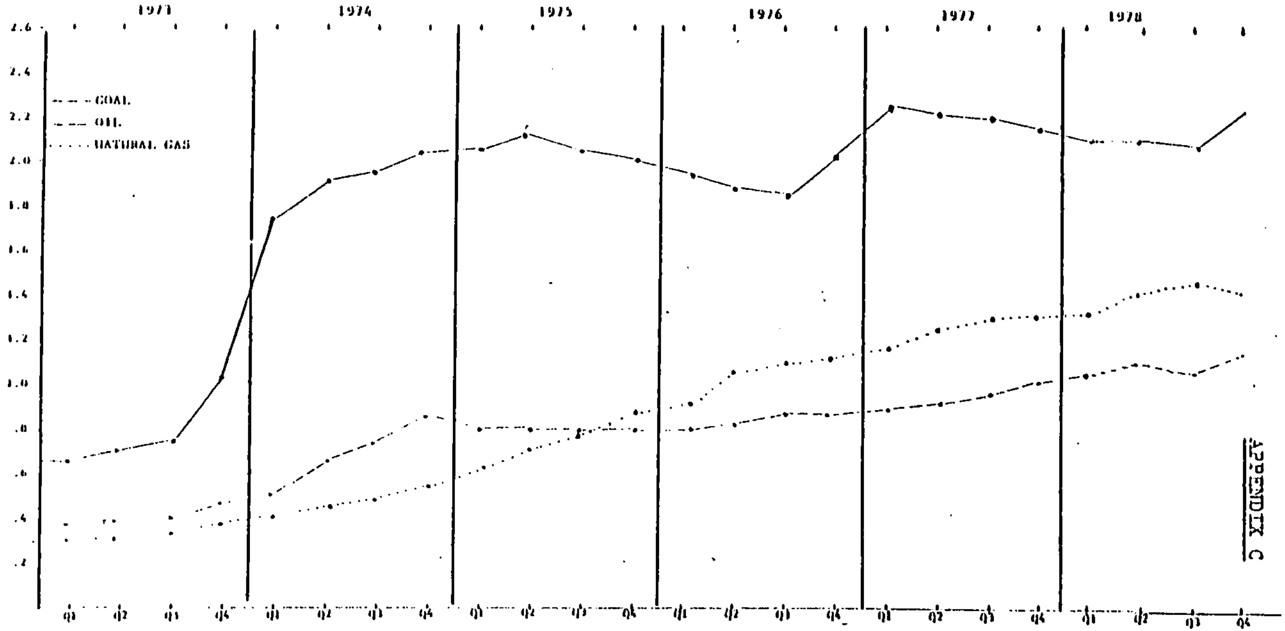
No-Suspend Zones - League members reaffirmed their opposition to the establishment of no-suspend zones for carriers, which would enable them to raise or lower rates within a certain percentage without the danger of suspension or investigation by the ICC. The League believes shippers should always have the right to protest rates.

The League plans to take legislative action on the positions endorsed at the special membership meeting shortly.

APPENDIX C

C-1

COMPARISON OF DELIVERED PRICES FOR COAL, OIL AND NATURAL GAS USED BY UTILITIES
In $ per million btu's - From 1973 to 1978 (Nationwide averages)



	1973 Q1	Q2	Q3	Q4	1974 Q1	Q2	Q3	Q4	1975 Q1	Q2	Q3	Q4	1976 Q1	Q2	Q3	Q4	1977 Q1	Q2	Q3	Q4	1978 Q1	Q2	Q3	Q4
Coal	.384	.396	.401	.417	.566	.664	.765	.857	.809	.811	.817	.810	.817	.841	.864	.857	.882	.918	.962	1.023	1.067	1.112	1.105	1.152
Oil	.678	.706	.774	1.043	1.789	1.903	1.960	2.014	2.018	2.048	2.010	2.006	1.970	1.930	1.925	2.059	2.252	2.246	2.206	2.199	2.140	2.144	2.091	2.240
Gas	.310	.316	.340	.357	.400	.453	.510	.539	.632	.711	.790	.850	.913	1.011	1.074	1.114	1.187	1.275	1.351	1.356	1.364	1.446	1.487	1.427

APPENDIX D

"CAPTIVE" COAL SHIPMENTS BY RAIL IN 1977

Summary of findings from a Survey Conducted in May 1979 to determine the extent to which coal shipped by rail 1977 should by considered "Captive"

AREA	U. S. TOTAL
NO OF MINES	336
TOTAL 1977 PROD (1000)	290,995
% OF REPORTED TOTAL PROD	100.00
% OF 1977 U. S. PROD	42.89

		TONS (1000)	% CAPTIVE	AVG HAUL MILES
RAIL SHIPMENTS BY MARKET	UTILITY	137,312	82.28	
	STEEL	24,487	85.83	
	INDUSTRIAL	12,154	75.05	
	EXPORTS	19,324	93.19	
	TOTAL	193,277	84.60	347
RAIL SHIPMENTS BY TYPE	UNIT TRAIN	78,382	83.22	347
		CARS* (1000)	% CAPTIVE	
	PRIVATE CARS	513	73.52	
	RAIL CARS	2,192	87.51	
		% TONS	% CAPTIVE	
	INTERSTATE	74.60	87.27	388
	INTRASTATE	25.40	69.10	70
RAIL COST & ALTERNATIVES		% REPORTED**	$/TON	
	AVG COST (RAIL)	37.43	6.27	
	AVG COST (ALT'TIVE)	32.39	10.43	
	ALTERNATIVES			
	TOTAL REPORTED	40.71		
	TRUCK ONLY	37.56		
	TRUCK/BARGE	2.61		
	TRUCK/RAIL	0.54		

*Number of carloads

**Percent of total sample(in terms of tons) reporting "cost" and "alternative" data

AREA	EASTERN U.S.
NO OF MINES	268
TOTAL 1977 PROD (1000)	241,133
% OF REPORTED TOTAL PROD	82.87
% OF 1977 U.S. PROD	34.83

		TONS (1000)	% CAPTIVE	AVG HAUL MILES
RAIL SHIPMENTS BY MARKET	UTILITY	108,523	73.49	
	STEEL	24,131	85.53	
	INDUSTRIAL	11,070	72.61	
	EXPORTS	19,321	92.13	
	TOTAL	152,206	82.10	225
RAIL SHIPMENTS BY TYPE	UNIT TRAIN	69,172	87.79	272
		CARS (1000)	% CAPTIVE	
	PRIVATE CARS	247	52.33	
	RAIL CARS	1,860	85.77	
		% TONS	% CAPTIVE	
	INTERSTATE	73.24	84.77	294
	INTRASTATE	26.76	66.50	74
RAIL COST & ALTERNATIVES		% REPORTED	$/TON	
	AVG COST (RAIL)	33.45	5.99	
	AVG COST (ALT'TIVE)	35.42	11.49	
	ALTERNATIVES			
	TOTAL REPORTED	42.03		
	TRUCK ONLY	38.30		
	TRUCK/BARGE	3.09		
	TRUCK/RAIL	0.64		

AREA	WESTERN U. S.
NO OF MINES	25
TOTAL 1977 PROD (1000)	49,857
% OF REPORTED TOTAL PROD	17.13
% OF 1977 U. S. PROD	7.21

		TONS (1000)	% CAPTIVE	AVG HAUL MILES
RAIL SHIPMENTS BY MARKET				
	UTILITY	23,632	98.06	
	STEEL	305	100.00	
	INDUSTRIAL	1,034	100.00	
	EXPORTS	0	0.00	
	TOTAL	24,971	98.15	311
RAIL SHIPMENTS BY TYPE				
	UNIT TRAIN	8,210	83.22	912
		CARS (1000)	% CAPTIVE	
	PRIVATE CARS	172	75.52	
	RAIL CARS	332	87.51	
		% TONS	% CAPTIVE	
	INTERSTATE	81.97	87.27	373
	INTRASTATE	18.03	93.10	36
RAIL COST & ALTERNATIVES		% REPORTED	$/TON	
	AVG COST (RAIL)	31.88	8.12	
	AVG COST (AL'TIVE)	15.74	18.73	
	ALTERNATIVES			
	TOTAL REPORTED	32.55		
	TRUCK ONLY	32.55		
	TRUCK/BARGE	0.00		
	TRUCK/RAIL	0.00		

DEFINITION OF "CAPTIVE" USED IN THE NCA SURVEY:

"Definition of 'Captivity': To define captivity is not an easy task since most definitions leave considerable room for subjective interpretation. Virtually everyone has a different concept of captivity ranging from the elaborate ICC definition of 'market dominance' to the concept of the 'single carrier.' We have tried to develop a definition which would (a) be accepted in Congress and elsewhere as objective and (2) include the core of the captivity problem -- the possible injury to the unprotected shipper. We recognize that the definition is somewhat arbitrary. The definition of 'captivity' is based on the two key elements:

(1) the element of market control of the carrier over the shipper, as measured by the 'single rail carrier' criterion; and

(2) the kind of transportation alternatives available to the shipper or the mine. For example, we feel that captivity exists when the transportation alternatives are so costly that adopting them would cause serious injury to the competitive position of the shipper.

"Therefore we have defined captivity to exist when both conditions are present:

(1) a single rail carrier represents the only present transportation alternative for the entire shipment, or a substantial share of the route, for the shipment in question; and

(2) the 'next best' future transportation alternative (other rail carrier, motor or water carrier) is one which would cause injury to the shipper's competitive position if forced to adopt that alternative."

Senator McGOVERN. Thank you very much, Mr. Massey.
Mr. Stern, we will move on to you now.

STATEMENT OF LAURENCE J. STERN

Mr. STERN. Thank you.

Mr. Chairman, thank you for the opportunity to appear before you on the subject of deregulation of perishables. As I believe you are aware, the rail transportation of fresh fruits and vegetables has been exempt from regulation by the Interstate Commerce Commission since May 28, 1979, so I suppose I am a unique witness in the sense that I am speaking here not from a theoretical position but as one who has actually operated my portion of our business under rail deregulation for 4 months, almost to the day, I might add.

I would like to summarize the highlights, if they may be called so, of our experience during the first 4 months of deregulation.

First, I must say that we have been rather disappointed with the deregulation experiment thus far. We believe there has not been the kind of good faith negotiations which normally take place between businessmen in a truly competitive environment. We at Sunkist are only party to one contract, a common document signed by all shippers located on the Southern Pacific. That contract was offered to us essentially on a take-it-or-leave-it basis with the proviso that if we did not sign the contract, we would not be offered any cars or service.

I would like at this point to just establish one set of ground rules concerning my testimony. Sunkist only ships perishables from packinghouses located on the Southern Pacific and Santa Fe Railroads. Our experience is limited to those carriers plus their connections in the East and in Canada.

The immediate impact of deregulation was a steep and sudden jump in the price of rail transportation. Deregulation unfortunately coincided with the exempt motor carriers strike, and the Southern Pacific increased its rate by 47 percent in less than 1 month. The Santa Fe also increased its rates, but not as much, the maximum being 23 percent.

There has been generally, and is now, a substantial differential in the price of rail transportation in California and Arizona, depending on which origin line is involved. This has produced a negative effect on the perishable industry. We believe it is patently unfair to penalize a shipper simply because he has the misfortune to be located on the Southern Pacific which has often charged as much as 50 cents per carton of citrus more for transportation to the same destination than the Santa Fe. We do not advocate exemption from the antitrust laws for the railroads to permit collective pricing. We do, however, point out that this is one of the inherent disadvantages of applying deregulation to shippers which have single line service. They are, we believe, in a very real sense, captive shippers. Thus, we have a fundamental problem when deregulation is applied to single line shippers.

The nature of the perishable industry is such that prompt, reliable service is an absolute necessity. Carriers of perishables, whether they be truck or rail, must take responsibility for prompt delivery. The railroads have refused thus far to accept such responsibility. The contract we are a party to, and the other rules that we have to operate under thus far, have declined to specify any particular delivery date, and provide, moreover, that they will only be responsible when guaranteed schedules are published. The catch is that no such schedules have been published, and thus we have no effective standard for prompt delivery service.

The railroads have also thus far refused under deregulation to accept traditional responsibility for the safety of cargoes in transit. This is another important aspect of transportation of perishables. The contracts we have been offered attempt to avoid the traditional concepts of common carrier liability. Because of the failure to accept responsibility for loss and damage and prompt delivery, I believe a feeling of distrust has developed on the part of shippers and receivers of perishables. Although rail rates have declined significantly in the last month so that they are, in fact, now substantially below prevailing exempt truck rates, our business has not gone back to the railroads in any significant quantity and the majority of shippers still continue to route perishable traffic via exempt motor carriers.

We are happy that the committee is concerned about common carrier obligations under deregulation. It is also of great concern to us. During the early stages of deregulation, the Santa Fe Railroad refused to serve the Pacific Northwest. They accomplished this by simply failing to quote on any traffic to cities such as Portland, Seattle, Vancouver, and Calgary. Thus, our packinghouses located on the Santa Fe had no rail transportation to their customers located in those areas. Although the Santa Fe has now resumed such service, this is an example of what we believe can happen under deregulation. We do not think that the Commission ever in fact intended that de facto abandonment occur under its deregulation order. However, it appears to us that the railroads believe deregulation gives them this option. It is easy to see the chaos that could result in the distribution of perishables if the railroads suddenly and arbitrarily decide to cut off service to particular areas throughout the country or to an individual shipper or receiver.

The committee asked us to consider what would be an appropriate criteria for exemption. Earlier in my summary I mentioned the difficulties deregulation has caused to shippers located on a single railroad line. We believe there is no true competition here. Thus, one criterion for deregulation ought to be the existence of two or more railroad lines serving a particular shipper.

Second, there are differences in perishable traffic. Some traffic is peculiarly adaptable to rail transportation. Citrus happens to be one of those commodities. It is heavy loading, normally in excess of 100,000 pounds, moves regularly throughout the year, and moves generally long distances. Economically this traffic should move in significant volume by rail, and until recent years in fact it has. Thus, in an economic sense, traffic of this nature has some of the elements of dependence on rail transportation. On the other hand, some perishable traffic moves in small volume, is light loading, and moves at relatively sporadic intervals. It is not as adaptable to rail transportation and we believe it should be immediately deregulated in its entirety.

Thus, a second criterion for deregulation is transportation characteristics which minimize economic dependence on rail transportation.

In summary, we must advise this committee that deregulation has been a disappointment thus far. We thought it could work and should work. However, unless there is a drastic change of attitude on the part of the railroads, we are rapidly coming to the unfortunate conclusion that some sort of legislative or administrative orders placing regulatory controls should be reenacted or promulgated. The deregulation experiment simply is not producing the results anticipated as of this date.

That concludes my summary statement. Thank you for the opportunity to address this committee.

[Testimony resumes on p. 279.]

[Mr. Stern's prepared statement and attachments follow:]

STATEMENT OF LAURENCE J. STERN, TRANSPORTATION MANAGER OF SUNKIST GROWERS, INC.

Mr. Chairman and members of the House Transportation Subcommittee and the Joint Economic Committee, my name is Laurence J. Stern, and I am manager of transportation of Sunkist Growers. I am pleased to have the opportunity to testify before you on a topic which is of vital importance to the perishable industry as a whole, and to Sunkist Growers in particular--rail transportation of perishable commodities.

First, a word about Sunkist and the fresh fruit and vegetable industry. Sunkist is an agricultural marketing cooperative, one of the oldest in the Nation. It markets fresh citrus fruit and products on behalf of its 7,500 grower-members who are located in California and Arizona. While products are an important adjunct to our business, fresh fruit remains the most important part of our business today. We are, therefore, one of the largest shippers of perishable commodities in the world. Some idea of the volume of our shipments is shown in the attached Exhibit 1. This Exhibit shows two things. First, it shows the volume of fresh citrus we must move in domestic transportation during the course of a normal shipping season and, second, it shows the variations in supply which are largely dictated by weather conditions over which no one has any control. Exhibit 2 shows the principal cities which, over the past few years have received significant quantities of rail deliveries. Nearly all of these points are in the East. Consequently, when we are talking about rail transportation of citrus fruit for Sunkist, we are talking about a large but variable volume of traffic which moves long distances to destinations principally east of the Mississippi River.

Perishable commodities by their nature require prompt and expeditious handling. Obviously, for the short-haul movement the flexibility and speed of motor carrier transport makes it the most desirable form of transportation and the motor carriers have taken over most of our business west of the Mississippi River. This is in part due to the inherent service advantage of motor carriers and in part to the lack of interest on the part of the rail carriers in this market. We have, however, thought that the railroad industry was interested in our business to the long-haul destinations in the populous areas in the East and in the South where the railroads can fully utilize the economies of rail transportation.

Two important requirements must be kept in mind when we are talking about distribution systems applicable to perishable fruit. First, not only do we need prompt service but it must also be reliable service. Perishables must be marketed promptly on arrival at destination or they deteriorate in quality and even spoil before they reach the consumer. Since deregulation the railroads have refused to recognize standards of transit performance. Only if schedules are promulgated will they accept responsibility for transit delay. However, since deregulation, no schedules have been published. Thus, it is important that regular schedules be published and that actual delivery times correspond closely to the schedules. Only in this manner can terminal market operators and chain store receivers schedule the arrival and sale of produce in an efficient manner. The second important aspect about produce shipment is the acceptance of responsibility for loss and damage. Produce is peculiarly susceptible to damage during transit, to losses arising out of delays in delivery, and to theft when cars are broken into while awaiting delivery at the railroad yard. It is important that some one accept responsibility for such losses and damage, otherwise businessmen are reluctant to risk large investments in produce shipments. These are two important features which are peculiar to the perishable industry. Obviously the price of transportation is important as it is in all industries, but service and responsibility are also of such importance that price often becomes secondary.

1. Experience Under Deregulation

A. Rate Levels Under Deregulation

Exhibit 3 attached hereto shows the rate levels to New York City charged by our two principal origin carriers since May 28, 1979, compared with the corresponding exempt truck rate. Note that the Southern Pacific rate increase during the independent truck strike was as much as 47% while the Santa Fe raised their rates by 23%. Now that the peak shipping season has passed and truck supplies are more plentiful, the truck costs are now back to where they started on May 28. The Santa Fe is substantially below May 28 prices and the Southern Pacific is about 7% higher than the pre-deregulation level.

Undoubtedly railroad officials would contend that this is an illustration of the success of deregulation. When demand increases, they have flexibility to increase their rates to take advantage of shortages of transportation equipment. When the peak shipping season passes, the railroads are free to reduce their charges to the point where they will make their service attractive to shippers in competition with truck transportation. But the system is not working thus far. In spite of rate flexibility, the railroads do not appear to be picking up any more business. See Exhibit 4. In short, based on our experience, deregulation is not bringing any of the perishable business back to the railroads, and it may even have fallen off a little.

In addition, there is a distinctly negative effect of rate making under deregulation. This is the considerable difference which exists between the prices charged by the Southern Pacific and Santa Fe from and to the same origin destination combinations. In the case of Sunkist the obvious result of these pricing discrepancies is that our packinghouses fortunate enough to be located on the Santa Fe have enjoyed more than their normal share of business. Approximately 33% of our packinghouses are located on the Santa Fe; and these packinghouses normally ship 32% to 34% of our citrus rail traffic year-in and year-out. However, since May 28 the Santa Fe origin packinghouses have handled 46% of our rail traffic. See Exhibit 5. We believe that this increase in share of market is attributable largely to customer requests for fruit loading on the Santa Fe. Railroad pricing appears to have created a disturbing new competitive element in our industry, with shippers finding that they are gaining or losing business for reasons entirely apart from the quality, price, or availability of their produce. I might also mention the reactions that are beginning to occur with respect to these extreme pricing differentials. Only last week, one of our large packinghouses in the San Joaquin Valley opened discussions with the Santa Fe concerning installation of a track connection so that they would no longer have to ship by Southern Pacific.

I recognize that antitrust laws prevent collective rate making on exempt commodities. I am also aware that the railroads want deregulation and exemption from antitrust laws, and I am emphatically against that. The possibilities for predatory pricing practices in such a situation are obvious. What I am in favor of is true competition. Where a shipper is served only by one railroad, i.e., the Southern Pacific-- there is not true competition. The shipper gets rail service by the Southern Pacific or nothing. In those situations we have the elements of a captive shipper and there must be some protection offerred. Not everyone can build additional rail tracks to reach another line. The expense would often be prohibitive. The trade-off would be to allow other railroads to use the tracks of the single carrier serving our packinghouse or to give us regulatory protection.

B. Scheduling, Service And Responsibility

When the deregulation experiment was begun, the railroads in the West made a number of public pronouncements that they were going after the perishable business and bring a substantial portion of it back to the railroads. Under regulation, railroad service had deteriorated until it was virtually worthless and yet the price for transportation continued to increase. We, as well as other shippers, thought that under a deregulated environment we would be able to arrive at flexible and fair business arrangements through a process of good faith negotiations on both sides. The railroads indicated that they were anxious to recapture a substantial share of our business, and as you can see from our volume available for transportation, we certainly wanted the rails back in the perishable business.

However, to date, fair, innovative negotiation has not happened. At the time deregulation took place, the carriers had no plan for handling rail business in perishable transportation. Even after a 30-day delay, we were confronted with ambiguous one-sided contracts which were presented to us on a take it or leave it basis. Unfortunately the effective date of deregulation coincided with the heaviest part of the perishable shipping season and, with the emergency fuel shortage, a strike of the independent truckers. If we wanted to move our fruit, we needed rail transportation and so we were forced into accepting railroad contracts which did not and still do not meet our needs, and which created distrust among shippers and receivers because of their legal ramifications. As a result, when trucks became available the business went back to the trucks even though the rail carriers reduced their prices significantly.

My Exhibit 4 shows that from November, 1977, through July of 1978 rail service accounted for nearly 30% of interstate shipments. In a comparable period, November, 1978, through July of 1979--including the first two months of deregulation--rail shipments declined to 22.6%.

There is no enthusiasm now for rail service even though the rates have declined, in some cases, below the regulated level last May. The keys to this industry are still being ignored by the railroads. After four months of deregulation, there is still no responsibility for prompt delivery.

Loss and damage is another problem as pointed out previously. We have revised our loading techniques in recent years so we can now load 100,000 pounds of citrus in a single car. About $50,000 may thus be tied up in one carload of fruit. Who has responsiblity if the fruit arrives damaged? Heretofore, we have had the protection of common carrier liability imposed by the Interstate Commerce Act which permitted us to file claims against the originating or destination carriers and enforce the claims without the necessity of proving on what line the damage occurred. Moreover, we had the protection of common carrier liability where our burden of proof was reduced to simply proving the goods were delivered in good condition and received in bad condition. None of these things seem to apply now. At least the railroads have attempted to deny all liability except for damage on their own lines and then only when due to fire, derailment, malfunctioning of the refrigerator unit or an act of negligence. Thus, the railroads have attempted to absolve themselves of responsibility to a greater extent than the exempt truckers. It is pretty hard to convince any one to use rail service under these conditions. We have tried to tell the railroads that they must accept some responsibility for prompt delivery and for loss and damage; otherwise, their service is not worth very much. Unfortunately, the railroads have not heard us yet.

C. Joint Rates And Through Routes

This problem seems to have been solved, at least temporarily, by the railroad industry. Nearly all of our shipments originate on one railroad and terminate on another line. Sometimes there are three or more carriers involved in the routing and sometimes only two. But only in rare instances does the shipment originate and terminate on the same line. There was some concern at first that the carriers would refuse to enter into any interchange agreements with each other and that we would have to negotiate separate contracts with each carrier involved in the routing. This has not happened. In our experience the origin carrier usually attempts to negotiate a complete rail service and has undertaken to enter into agreements with its connections.

In some respects, however, we anticipate future problems. In our business, it is sometimes necessary to ship fresh fruit which has not yet been sold. This fruit is normally placed on a car consigned to a destination such as Chicago or North Platte, Nebraska, which are points where destination changes can be conveniently made. Prior to arrival, if the car is sold we will issue what is known as a diversion and reconsignment order which will consign the car to the buyer's terminal. Consequently, before deregulation, tariffs provided for a certain number of diversion and reconsignment orders which would be carried out regardless on whose line the car was located. Now, the origin line will not take responsibility for diversion and reconsignment when the car is off its line. So far we have had no difficulties, but this represents another uncertainty which, again, reduces the desirability of rail transportation.

2. Effect On Intermodal Competition

As pointed out above, intermodal competition has not increased as a result of deregulation. Our experience shows that some carriers have actually improved their service to certain destinations in the East, particularly the Santa Fe which is doing a generally good job of handling our shipments. They are also charging less now than the regulated rate in May. The Southern Pacific, while not performing as well as the Santa Fe, has, nevertheless, improved its service from some origins in the West to certain destinations in the East. However, service continues to deteriorate from origins in Southern California and Arizona to the same destinations.

With reductions in price and improvement in service, we would expect traffic to move back to the rails. The fact that this has not happened--except during the truck strike--shows that something is lacking. The key is that there is no confidence that the railroad service improvement will continue and the railroads are unwilling to accept responsibility for delays or for loss and damage. This is why I said at the beginning of my statement that the requirements of service and responsibility are so great in this industry that, in some cases, price becomes secondary. In spite of substantially higher prices on trucks, most of our business continues to move by trucks.

3. Common Carrier Obligations

This is an area which may be of great importance in the future. Under deregulation, the rail carriers do not believe they have any obligations to the public. We had one instance where the Santa Fe refused to handle any shipments to destinations in the Pacific Northwest. The 33% of our packing-houses served solely by the Santa Fe suddenly found that they could not reach their customers in such cities as Portland, Seattle, Vancouver and Calgary by rail. Despite repeated requests for rates and service to the Pacific Northwest, the Santa Fe declined--claiming that such traffic was marginally profitable and that under deregulation they were no longer bound by any common carrier obligation to provide service to any area. We could find no record in the Ex Parte 346 proceeding indicating that the Commission had addressed that specific point. It seems to us that the freedom of the railroad to abandon service at will--whether to a specific shipper or receiver or to an entire geographical area--is a question that must be debated and answered in a manner very soon or it too will become a basis for continued economic hardship and possible litigation in the years to come.

It seems to be generally conceded now that we are entering a period of chronic fuel shortages. It also is conceded that, at least for long-haul transportation, rail service is about four times as energy efficient as motor carrier service. If the rail carriers decide to shrink their service area for perishables to only a few high density movements, then our distribution system will be more heavily dependent on motor carriers which are most vulnerable to fuel shortages and rapid increases in fuel prices. This, of course, is contrary to the purpose of deregulation which, as we understood it at least, was designed to get more traffic back on the railroads. Up until now, this has not happened, and we are left with an uneasy feeling that deregulation may be an excuse for the railroads to eliminate some of their traffic, cut their costs and maximize their profits. It may also provide a basis for de facto abandonment of facilities and communities without any prescribed procedures simply by refusing to provide service or refusal to quote rates. Certainly this was never intended by the Commission's order in Ex Parte 346.

4. Criteria For Determining Exemption Status

The Committee's last question related to what standards ought to be applied in determining whether commodities qualified for administrative exemption. This is a difficult issue. We thought perishable commodities, which predominantly moved by motor carrier, would be a logical class of commodities on which to try deregulation because shippers had largely left the railroads anyway. Now that deregulation has occurred, we begin to recognize that, at least with citrus fruits, it would be uneconomic to put the entire volume into motor carriers, particularly to the long-haul destinations east of the Mississippi River.

Citrus is a little different from most perishable commodities in that it is capable of heavy loading, moves regularly throughout the year, and moves long distances from the West Coast to the East Coast. Most transportation experts agree that heavy loading, non-seasonal, long-haul traffic is peculiarly adaptable to rail transportation and is able to take advantage of the inherent economies of rail transportation. Based on their performance thus far, we would hate to leave it up to the railroads to make a determination of how much, if any, of our traffic they want to haul, where they want to haul it, and at what price they are willing to haul it. It must be remembered that this traffic is business on which the railroads can and do make a substantial profit while still underselling the motor carriers. To some extent, I believe the same arguments hold true for such perishable commodities as potatoes, onions, carrots and perhaps lettuce. This is the kind of traffic which logically could be handled in significant volume by the railroads and I have some question whether such traffic should be completely deregulated.

Moreover, as pointed out before, areas or packinghouses solely dependent on one carrier are deprived of competition with other rail carriers and should be entitled to protection by regulation which either would tend to curtail predatory pricing practices or insure access to other lines. There is traffic in the perishable industry which is unable to take advantage of the economies inherent in rail transportation. These include commodities which generally move short distances to widely scattered destinations and in small volume. Such commodities are much more adaptable to motor carrier transportation than to rail transportation. Moreover, there are commodities which, by their very nature, are unable to load heavily. Thus, they cannot take full advantage of the equipment furnished. It is very difficult for the railroad industry to make money on such commodities and yet, under certain circumstances, they may provide better utilization of equipment and prevent an otherwise empty return.

Consequently, commodities which are light loading, or short-haul commodities which move in small volume served by two or more carriers, would seem more logical candidates for exemption, administratively, than those commodities which can and should be handled in rail service and are captive to a single railroad.

To sum it up, we have been disappointed with the first four months under deregulation. We are aware of some improvement of service but we do not attribute that benefit solely to deregulation. We question whether deregulation will prove beneficial in getting the railroads back into the perishable business, but we do see how it could result in discriminatory competitive practices which would be detrimental to our food distribution system.

EXHIBIT 1

SUNKIST GROWERS, INC.
INTERSTATE SHIPMENTS OF FRESH CITRUS
BY TRUCK AND RAIL
-IN STANDARD CARTONS-

SEASON	CARTONS BY RAIL	%	CARTONS BY TRUCK	%	TOTAL
1973-1974	21,970,500	53.0%	19,483,500	47.0%	41,454,000
1974-1975	21,202,500	44.0%	27,038,500	56.0%	48,241,000
1975-1976	18,616,000	42.1%	25,629,500	57.9%	44,245,500
1976-1977	19,050,000	42.2%	26,039,500	57.8%	45,089,500
1977-1978	11,082,000	29.8%	26,097,500	70.2%	37,179,500
1978-1979 YEAR-TO-DATE	5,615,500	22.6%	19,276,500	77.4%	24,892,000
TOTAL	97,536,500	40.5%	143,565,000	59.5%	241,101,500

NOTE 1: Sunkist season is from November-October. 1978-1979 year-to-date figures are fore November 1978-July 1979.

SOURCE: SUNKIST GROWERS, INC.
REPORTS NO. TR601 AND TR504

RS: 9/24/79

EXHIBIT 2

SUNKIST GROWERS, INC.
TEN LARGEST RAIL MARKETS FOR
INTERSTATE SHIPMENTS OF FRESH CITRUS
NOVEMBER 1973-JULY 1979

MARKET AREA	CARTONS BY RAIL	%	CARTONS BY TRUCK	%	TOTAL
New York	25,707,500	84.0%	4,897,000	16.0%	30,604,500
Montreal	15,036,500	96.7%	520,500	3.3%	15,557,000
Boston	12,026,000	87.2%	1,767,000	12.8%	13,793,000
Toronto	10,256,500	88.0%	1,403,000	12.0%	11,659,500
Philadelphia	6,935,000	70.3%	2,923,000	29.7%	9,858,000
Detroit	4,637,500	62.8%	2,747,500	37.2%	7,385,000
Chicago	4,312,000	50.4%	4,245,500	49.6%	8,557,500
Pittsburgh	3,085,000	60.3%	2,027,500	39.7%	5,112,500
Saint John	2,865,500	94.9%	153,000	5.1%	3,018,500
Hartford	2,204,500	75.3%	722,500	24.7%	2,927,000

SOURCE: SUNKIST GROWERS, INC.
REPORTS NO. TR601 AND TR504

RS: 9/24/79

EXHIBIT 3

COMPARISON OF TRANSPORTATION COSTS FOR SHIPMENTS
OF FRESH CITRUS TO NEW YORK UNDER DEREGULATION
- IN DOLLARS PER CARTON -
(See Notes)

REGULATED RAIL RATE AS OF MAY 27, 1979: $1.78 PER CARTON = INDEX 100

SHIPMENT DATE	SOUTHERN PACIFIC	INDEX	SANTA FE	INDEX	TRUCK
May 29	$1.81	102	$1.78	100	$2.70
May 30	1.81	102	1.66	93	2.70
June 4	1.81	102	1.68	94	2.70
June 6	1.90	107	1.68	94	2.80
June 9	1.99	112	1.68	94	2.80
June 12	2.08	117	1.70	96	2.90
June 15	2.17	122	1.74	98	3.00
June 19	2.26	127	1.94	109	3.10
June 21	2.35	132	1.94	109	3.40
June 22	2.44	137	1.95	110	3.60
June 23	2.44	137	1.99	112	3.60
June 26	2.53	142	2.03	114	3.70
June 27	2.62	147	2.11	119	3.80
July 3	2.62	147	2.19	123	3.80
July 5	2.35	132	2.19	123	3.40
July 7	2.17	122	2.19	123	3.00
July 10	2.17	122	2.09	117	2.80
July 13	2.17	122	2.09	117	3.00
July 18	2.26	127	2.09	117	3.00
July 20	2.35	132	2.09	117	3.00
July 21	2.26	127	2.09	117	3.00
July 24	2.17	122	2.01	113	3.00
July 26	2.26	127	1.64	92	3.00
July 27	2.26	127	1.60	90	3.00
July 28	2.17	122	1.54	87	3.00
July 31	2.08	117	1.52	85	3.00
August 1	1.99	112	1.52	85	3.00
August 2	1.90	107	1.52	85	3.00
August 6	1.81	102	1.52	85	2.70
August 7	1.81	102	1.44	81	2.70
August 15	1.72	97	1.44	81	2.70
August 21	1.81	102	1.44	81	2.70
August 29	1.81	102	1.46	82	2.70
Sept. 8	1.81	102	1.42	80	2.70
Sept. 11	1.90	107	1.42	80	2.70

NOTE 1: Regulated rail rate calculated by dividing total cost per car including refrigeration by 2532 cartons (TCFB 4106, Item 5135 and PPT-619, Item 25500).

NOTE 2: Southern Pacific cost per carton calculated from a Group 6 origin and is obtained by dividing cost per car by 2532 cartons, including refrigeration.

NOTE 3: Santa Fe cost per carton calculated for a 48' rail car containing 2532 cartons and includes refrigeration.

SOURCE: SUNKIST GROWERS, INC.
SHIPMENT RECORDS

RS: 9/12/79

EXHIBIT 4

SUNKIST GROWERS, INC.
INTERSTATE SHIPMENTS OF FRESH CITRUS BY RAIL
-IN STANDARD CARTONS-

	NOVEMBER 1978-JULY 1979		NOVEMBER 1977-JULY 1978	
	RAIL CARTONS	% RAIL	RAIL CARTONS	% RAIL
Atlanta	6,000	0.6%	0	0.0%
Boston	787,000	65.4%	1,164,500	74.3%
Buffalo	50,000	26.8%	111,000	39.7%
Calgary	54,000	6.4%	77,000	8.5%
Chicago	197,000	22.0%	262,500	27.2%
Cincinnati	30,000	5.6%	75,000	10.5%
Cleveland	29,000	5.6%	52,000	7.8%
Dallas	23,000	2.1%	10,000	0.9%
Denver	44,000	4.3%	20,000	2.0%
Des Moines	36,000	4.2%	19,000	1.8%
Detroit	164,000	35.0%	289,000	43.3%
Grand Rapids	24,000	6.5%	37,000	8.7%
Hartford	113,000	30.2%	202,000	59.1%
Houston	0	0.0%	0	0.0%
Indianapolis	1,000	0.3%	13,000	3.3%
Kansas City	13,000	2.3%	0	0.0%
Memphis	0	0.0%	2,000	0.2%
Milwaukee	42,000	9.6%	42,000	8.5%
Minneapolis	64,000	7.1%	46,000	4.2%
Montreal	1,403,00	83.3%	2,118,000	97.7%
New Orleans	0	0.0%	0	0.0%
New York	1,213,500	52.5%	1,796,500	63.6%
Oklahoma City	0	0.0%	0	0.0%
Philadelphia	305,000	36.7%	462,000	43.3%
Pittsburgh	185,000	35.9%	253,000	38.8%
Portland	20,000	2.6%	0	0.0%
Saint John	122,000	64.6%	352,000	97.8%
Salt Lake City	3,000	0.3%	0	0.0%
Seattle	8,000	0.8%	4,000	0.3%
St. Louis	10,000	2.0%	18,000	2.6%
Toronto	606,000	61.9%	1,362,500	87.3%
Vancouver	19,000	2.2%	44,000	4.8%
Washington, D.C.	13,000	3.4%	42,000	8.7%
Winnipeg	31,000	11.8%	49,000	13.7%
TOTAL	5,615,500	22.6%	8,923,000	29.7%
TOTAL INTERSTATE CARTONS BY TRUCK	19,276,500	77.4%	21,077,500	70.3%
TOTAL SHIPMENTS	24,892,000		30,000,500	

SOURCE: SUNKIST GROWERS, INC.
REPORT NO. TR 504

RS: 9/14/79

EXHIBIT 5

NUMBER OF SUNKIST FRESH CITRUS
RAIL SHIPMENTS SINCE DEREGULATION
& ORIGIN CARRIER SHARE OF MARKET

	ORIGIN CARRIER		
	SP	AT&SF	TOTAL
May 28 - May 31	10	12	22
June	137	98	235
July	148	112	260
August	119	123	242
September 1 - September 8	22	26	48
TOTAL	436	371	807
	54.0%	46.0%	

SOURCE: SUNKIST GROWERS, INC.
STATEMENT NO. 1

RS: 9/13/79

Senator JEPSEN [presiding]. Thank you. And Chairman O'Neal, as I understand it, you will rejoin the group now?

Mr. O'NEAL. Yes, sir, I would be happy to do so.

Senator JEPSEN. Mr. Springrose—

Mr. O'NEAL. There is one more witness, I guess, that hasn't been heard from.

Senator JEPSEN. I have been advised, and is this correct, Mr. Levin, that you do not have a prepared statement but you do plan to participate in the questions?

Mr. LEVIN. I don't have a prepared statement. I was asked to be a witness at a very late date.

STATEMENT OF MICHAEL LEVIN

Mr. LEVIN. I would like to express that my experience with deregulation has been very similar to Mr. Stern's. I represent basically the vegetable industry in California. I have experience dealing with other railroads than he does, and the same railroads, and the fact of abandonment of traffic is a fact, and I would basically like to confirm his statement.

Senator JEPSEN. Would you just state your full name and from whence you come, for the record, and then take off.

Mr. LEVIN. I am Michael Levin. I am vice president for transportation for the Western Growers Association. The Western Growers Association is a nonprofit trade association. We represent 850 or so growers, shippers and packers of fresh produce in California and Arizona. Our members, in the aggregate, produce roughly 80 percent of the fresh vegetables grown in that State, which would be approximately 40 percent of those consumed in this country.

Senator JEPSEN. Mr. Springrose presented a highly interesting and challenging approach to deregulation of the rail industry. In substance, he proposes to achieve deregulation largely through the wide use of contracts providing substantive benefits for both railroads and shippers. Those shippers who enter into contracts with the railroads would be considered captive; their rate and service requirements would be reflected in contract provisions voluntarily reached without ICC intervention. Those shippers who do not enter into contracts would be considered noncaptive with adequately competitive alternative modes of transportation available to them. Under these conditions we were told we need to be far less concerned about revising the market dominance test criteria. In effect, the proposal says let market forces come to bear through the instrument of contracts to shake out most deregulation problems.

I am very interested in getting a response to this proposal from other witnesses, both in terms of what they like and what they don't like about it.

I would like to begin with Chairman O'Neal.

Mr. O'NEAL. Well, I can give you some reaction. I have not really had a chance to look at the proposal or really think it through.

I would have one question in my mind would there be access to these contracts by various shippers, and would they be available to any shipper on the same terms, or how would you deal with that kind of a problem.

We have, as you know, and I mentioned in the statement earlier, the Commission has opened up contract rates for the railroads and I think made it fairly clear that contracts are acceptable, but there have been some questions that have come up. One of them is access to contracts by shippers that may not be large enough to attract the attention of the railroads. Indeed, this has been one of the complaints that we have heard from many small shippers who have discussed the subject with us.

Another problem, and I am not sure how this would bear upon it, is the problem or the potential problem of equipment availability to different shippers. If they are not under contract, what will be the effect of freight car shortages on those shippers in that position.

But I think it is an interesting idea and one that I would like to think about a little bit more.

I would like to hear some comments from the other panelists here as to what sort of problems they see.

Senator JEPSEN. That is arranged for.

I would like, if we could though, so we could focus in kind of, maybe examine a little more in detail one thing at a time. If I may feed back what I heard you say essentially in the summary is what about the small country elevators, maybe, or the small shippers whose volume and so on is going to be such that they are not all that attractive maybe, to enter into a big contract, the same arguments you hear when people have concern about deregulation and that is service to everybody?

Would you want to comment on his comment?

Mr. SPRINGROSE. Well, it seems to me Chairman O'Neal voiced three questions, if I perceived all of them correctly, and the small shipper issue is an issue, and I think provides the most valid reason for preserving the antipreference and prejudice and discrimination portions of the present statute. I would visualize contracted railroad service as separate from the common carrier obligation by statute that we know today, and the information source would be public, and in fact, this is not in our paper, but in addressing the question that Chairman O'Neal posed, others have posed that as well, I would advocate that with today's communication and computer networks, the Interstate Commerce Commission in this proposal be given the responsibility to select the appropriate data—and I agree with DuPont that there are some facets to contracts that really have no bearing on the transportation characteristics and ought to remain between the two contracting parties and not available for public review. That may be more important in the chemical business than it is in the grain business.

However, with the Commission having the responsibility to monitor contracts and disseminate information, I believe that captive shippers or small shippers or any other kind of shipper or brokers or whoever could subscribe to the service from the Interstate Commerce Commission on those contracts that are important to them, and have an ongoing information source that would feed information back to them that would be germane to their business, and with the protection against preference and prejudice, they would be entitled to the same sets of circumstances in contracts that have been put into place so long as their shipping characteristics were the same. I believe a system of working out that kind of protection can be devised, and I would advocate that it be included in the legitimatizing of contract ratemaking by a railroad.

Senator JEPSEN. John Norton, do you——

Mr. NORTON. I think that you can tell from our statement we are strong endorsers of the notion of contract rates, and so I can subscribe to very much of what is suggested by Mr. Springrose. I come to a different point, however, when it comes to the question of whether the railroads will always have an incentive to enter into contracts.

To get back to the captive shipper situation, where that is actually true, the railroads may not have an incentive to do other than just simply endorse the status quo and call it a contract or, as has been suggested in other testimony, to present a take-it-or-leave-it contract. This is not the meaning that I suggest be given to contract negotiations, and I believe it rests on the lack of rail-to-rail competition which I spoke of in my testimony.

I would like to give an example of the limited access which a shipper has to the rail network. This network is presented to the public as though it is available openly, and that the shipper has the availability to route his traffic any way he wants. Those of us who are engaged in that process understand the economic blockade that is thrown up when you try to exercise that privilege.

The example I have is metallic sodium shipped from our plant near Memphis, Tenn., to Laredo, Tex., destined for export to Mexico. Shipments originate on the Illinois Central Gulf Railroad. An expeditious and short route for this traffic would be to interchange rail cars at Memphis with the Southern Pacific—Missouri Pacific would be an alternative. This is the most direct route to Laredo and the distance is about 924 miles. The variable cost for the move using form A averages, is about $1.32 per hundred pounds of product. However, the Illinois Central Gulf Railroad is not interested in interchanging the traffic at Memphis, the nearby point. In order to increase its revenue, which is based partly on the distance it moves the cars, the ICG insists that the sodium cars go down to New Orleans. If you can visualize on a map, this route goes due south before it starts the trek down to the southwest. This adds about 300 miles to the trip, adds cost to the trip, and you might suspect that the rate for the present route is therefore higher. But this is not so.

The present rate, for the route over New Orleans, is $2.79 per hundredweight. This measures 161 percent of the variable cost over this route. We are not upset at this rate. It is a reasonable, and we are suggesting there is a rate problem. However, we are suggesting that the ICG railroad has erected an economic blockade against the shorter route by refusing to provide us a reasonable joint rate when cars are interchanged at Memphis. If we were to simply route cars that way, over Memphis, we would have to pay a combination of rates, including a very high charge to move the few miles to Memphis. The resulting total charge would be 41 percent higher than the charge we now pay over New Orleans. Although the rail system costs are lower over Memphis, their price to us would be higher, and equivalent to 300 percent of variable costs, not 161 percent.

To summarize, I see ICG's refusal to interchange their cars at Memphis at a reasonable rate as an effective blockade against our use of the full competitive network of the rail system that exists.

Now, I contend that if we went to the ICG Railroad, requesting a contract for this move to Laredo, they could simply stand pat on the status quo. Only if shippers have access to a wider scope of rail transportation will they have the leverage to persuade the carriers to enter into realistic contracts.

Mr. O'NEAL. I would like to comment on that. I think earlier the question was raised, well, why have we only had since the Commission allowed the railroads to enter into contract rates last November, why have we only had two contracts entered into by the railroads, and I think—now, in looking around, there are a lot of issues that come up, but listening to this testimony and thinking about this a little at other times, it seems to me what we are lacking here basically is some incentive for the railroads to enter into contracts. Now, if the railroad can obtain the rate increase that they want without having to change their service requirements, without having to meet service demands of the shipper, then there is no real incentive for them to enter into a contract.

I think the thought of more competition for the railroads is a good one, but I don't know that it applies or that you can make it apply in every situation because it is just not possible.

One other thing that I feel is important here is for the Government, the Interstate Commerce Commission, perhaps some legislation would be necessary, to force the railroads away from such total reliance on general increases and try to force them to look more and more at individual rate adjustments, and hopefully use the contract approach as one way to make those adjustments, get concurrence from the shipper by promising better service over a longer period of time.

I really think that is one of the key things here.

I want to mention Mr. Springrose's response to my question about how contracts are made available to small shippers, I wonder—it sounds like what he is suggesting is that the contract provisions would be made available to all comers at the Commission and that in effect you would have a rate set by contract and made available to other shippers without the need for entering into a contract, and I wonder if that approach, if I read it accurately, if that provides a disincentive of any kind to railroads to enter into contracts in the first instance.

Now, I don't—I think these are difficult issues. I am just wondering about that.

Senator JEPSEN. I am going to have to ask that we stand at ease for about 5 minutes. I am going to have to go vote, so if we could do that just for 5 minutes, we will be right back.

And in the meantime, I would like to start out, Mr. Norton, I would like to ask you why you think the ICG won't do this.

Mr. NORTON. Why they wouldn't?

Senator JEPSEN. In other words, what do you believe will be the reason they won't do what seems to be reasonable, to cut down the 300 miles and make this change at Memphis?

Mr. NORTON. Well, the ICG is willing to interchange the car at Memphis, but only at charges that are exorbitant to us. This increase is so great that this route is not a viable option.

Senator JEPSEN. Well, are the charges they are making—I have got to go vote. This is interesting—the charges they are making, do you believe that is to—when you say they are exorbitant, are they unreal, or does it cost them that much to do it or what is it?

Mr. NORTON. It is a rather complicated issue. I think I would like to address that when you return.

Senator JEPSEN. OK.

[Brief recess.]

Senator JEPSEN. I hope to have time to spend on this, because it seems to be a railroad day here. We have on the floor of the Senate a debate now on the order of a motion involving the Milwaukee Railroad.

I believe we left off, Mr. Norton, where we were talking about whether you felt that the rates at this point of changing and utilizing the most direct route, but the change in the cost of that was realistic, or what the real reasons were.

Mr. NORTON. Let me describe the background of this first. That is that under section 10705, the Commission is not empowered to require a railroad to establish a joint rate and through route utilizing less than it "long haul" unless there are certain rather rigorous conditions met. Therefore, the Illinois Central Gulf Railroad in this case can insist that the traffic not be turned over at a place we direct but a place they direct, that is, New Orleans. If we were to insist that the ICG turn the traffic over in Memphis and utilize a much more direct route, a less costly route, and a faster route, using the Southern Pacific from Memphis to Laredo, the ICG could simply say it refuses to make a joint rate over that route. They would probably charge us a class rate to Memphis, and that, in combination with the rate from Memphis to Laredo, would add up to 40 percent higher than the rate we now have. Therefore we are economically blockaded from using the more efficient, more direct rail route.

Senator JEPSEN. All right, if it costs more, and you are economically blockaded, then trying to follow this thing through—and I don't want to take all the time here, but I am very interested in this point—who profits? Who stands to profit by this, or who stands to gain? Why the objection to this?

Mr. NORTON. Well, we are a loser. I can identify us as one of the losers.

Senator JEPSEN. You are the loser.

Mr. NORTON. In that we cannot avail ourselves of the more direct, lower cost, quicker route. Also since we furnish the rail cars we are being disadvantaged by not having a route open to us that requires fewer cars because of faster service.

We would not object to the establishment of a reasonable joint rate over the new route, even a rate providing the ICG with the same level of profit. Under existing law there is no incentive on their part to enter into these negotiations.

Senator JEPSEN. Well, what is the history, then? Somebody has got to—in other words, if it doesn't make sense, somebody has to—how does this come about?

Mr. NORTON. I am not sure who wrote section 10705 in its present form, but it is clear that its thrust is to give a preference, and that word is used, to the railroads for maximizing their haul in any route. In other words, if a complaint is filed under that section, under which I would want to have this other route established, the Commission would actually have to lean in favor of the railroad because that section contains the admonishment that the Commission must find preference for the railroad in its long haul.

Senator JEPSEN. So that we don't get ICG as——

Mr. NORTON. All right.

Senator JEPSEN. Forget about ICG, let's call it anything else——

Mr. NORTON. That's just an example.

Senator JEPSEN. Let's reverse the thing. Let's say that it was another line in the same situation. Would they take and do the same thing historically, and as a pattern, as ICG?

Mr. NORTON. Historically they have. I have a whole sheet of examples that I could draw from, but those that are happening now come somewhat out of the consolidations. We used to have many various alternative routes, competitive routes in the Northeast, and now in many cases we only have one.

Senator JEPSEN. So there is a combination of rule and/or legislation that provides and makes this possible, and they are going to take advantage of it, and they do.

Mr. O'NEAL. What is happening here is that the railroad has the opportunity for a longer haul. They are going to take that opportunity; it is in their own economic interest, they feel, to take advantage of the long haul, so they don't interline for what would be a shorter haul and a loss of revenue to them. That is why the railroad does it this way. Historically, railroads have certainly avoided short-hauling themselves, and the Commission's understanding of the act is that that is preserved by the act.

Senator JEPSEN. OK. I am going to turn this—I kind of filled in. It has been very interesting. I intend to take some more notes. I would like to pursue this in detail.

Mr. Florio.

Mr FLORIO. Did Mr. Springrose want to add something?

Mr. SPRINGROSE. If I may, Mr. Florio, before the recess a couple of questions that were raised about the contract rate proposal that we submitted to the committee and that I would like to deal with directly.

First of all, we don't offer this proposal as a panacea and suggest that it is an either/or proposition. We can recognize many circumstances where it might not be an effective remedy for some shippers and some carriers. That is why we maintain in the proposal the fallback position to those shippers who don't see contract ratemaking as a viable alternative, a fallback position to the common carrier obligations that are in effect today.

Now, John here is saying that even those have some shortcomings in his discussion about routing out of his facility in Tennessee. The other is the smaller shipper versus large shipper question raised frequently, more frequently than I think is justified. However, the equipment allocation is a justifiable concern between not small versus large, but contract carriers versus those—or contract shipper versus those who elect to remain with the common carrier obligation or elect to remain with the present law. We have in our statement treated that. We recommend a bold approach as an incentive to stimulate interest in contract railroad service. At the same time, we aren't locked in concrete in that regard and recognize that that particular issue may require some phasein program.

The reason, in my judgment, the major reason, at least from my own personal experience, that the Commission's encouragement for the use of contract rates has not flourished has been the overriding circumstance in the present law which maintains the Commission's authority over directed car service orders and it presents a threat to two parties negotiating a contract in good faith of a third party intrusion beyond either of their control, which third party is motivated by circumstances that may be entirely unrelated to the specifics in that contract, or indeed, even to the types of commodities shipped under the terms of that contract.

Mr. FLORIO. Mr. Springrose, shouldn't the movement and greater emphasis on contracts be a means of resolving or at least contributing to the resolution of the equipment allocation question? The contracts can be used for financing, and to assist the railroads in obtaining more equipment. The negotiations for the contract can have as one of the variables the ability of the shipper himself to provide equipment. Hopefully some of the bigger shippers will now say perhaps we can get the assurance of some service. We would be inclined to obtain equipment ourselves and assist ourselves in negotiating lower rates.

The incentives to contract should contribute to the reducing of the problem of equipment allocation, shouldn't it?

Mr. SPRINGROSE. Yes, I agree wholeheartedly, and I think the only negative count on everything you said has been that for the very short term, the question of equipment allocation, and particularly today in the times of the freight car shortage that we are now experiencing, the question of allocation for the very short term cannot be accommodated by the thesis that you have just described.

But other than that, I think long term, and I would think of fairly medium term, we would begin to see those kinds of results because railroads and shipper alike could plan on business and have an opportunity to impose forward thinking that they have never had available to them before, and I think that would be—

Mr. FLORIO. Though it may be beneficial to the large shipper, because the large shipper almost by definition is going to have larger contracts that can be used to finance more equipment or will have more capital available to buy equipment, isn't it going to provide the large shipper with a competitive advantage with regard to equipment allocation as contrasted with the smaller shipper? Forgetting about the common carrier obligation, the large shipper is going to be in a better position in the long term because more equipment will be available to him, than to the smaller shipper. Doesn't that accelerate the concerns that we have as to contract rate authority not being equal to the shippers. The administration holds out contract authority as the answer to the captive shipper but that doesn't distinguish between shippers and shippers. Certainly the bigger shipper has more security. Even the bigger captive shipper has more security from contracts than does the smaller shipper.

Could I ask Mr. O'Neal to respond to my concerns about putting as much emphasis on contract rates as the DOT proposal does as the answer to the captive shipper proposal.

Mr. Springrose, feel free to comment as well.

Mr. SPRINGROSE. All right. I recognize that as a fear, and I also think in many respects it is a speculation that could very well in time be found to be unjustified, and I base that conclusion on the experience that we have had with unit trains, for the movement of grain for export, and of course, in the development of unit trains, the very same arguments were presented in that case before the Interstate Commerce Commission. The result of that history of something like 11 years now since the first rented train began to operate, has been that there has been two adjustments made in agricultural distribution—and that is really all I can speak to in this regard. One of them has been that shippers who were not participating in the export market historically before unit trains began to operate because the single car rates were so high they couldn't be competitive, and their grains were going in the domestic channels, they began, some of them who couldn't adjust to unit train loading, began to move to unit train loading facilities by truck. They were excluded from loading unit trains. Nevertheless, they were still participating in what amounted to a new market demand that was brought into their production territory.

The second thing that happened was that there were other shippers who were in a position financially and otherwise so as to be able to adjust their facilities to load unit trains, and therefore became active unit train loading shippers in the overall distribution of grain for exports.

Now, I don't believe we should automatically acquiesce to the fears that were addressed without considering that the adjustments that can be made, many of which very likely will be made, ought to be given an opportunity to adjust.

Mr. O'NEAL. Well, I think there are many opportunities for railroads and shippers in contrasts between the two parties.

I think we have got to recognize, though, it is probably not going to be a panacea. We are beginning now at the Commission to receive indications of great concern by many small shippers about contract rates and how they will be effected.

One example that is outside of the grain area, another that is not represented here but which I have had occasion recently to talk to the individuals, involves small lumber wholesalers in Oregon, well, actually nationally, but they happen to be headquartered, the association president is in Oregon. They have a great concern because the giants of the industry—in that case, Weyerhaeuser is the largest group and much larger than any of the other shippers—obviously can pretty much determine well ahead of time its needs, what the market is at specific points, how much it can generate at its own origin points, and can enter into a pretty tight contract based on those volumes. They have not done so yet. There is great concern among the smaller wholesalers that if that does happen, they are at a tremendous disadvantage because they will not be able to take advantage of better service which they think might flow from these contracts, or certainty in the rates or certainty in the availability of equipment. So they can see themselves in a real disadvantage in the market.

Mr. FLORIO. Mr. Chairman, isn't that just a part of the business process, that some shippers will plan better and anticipate market conditions and contract appropriately and some shippers won't plan as well as others? Is it our responsibility to be building into a system protection against inappropriate planning?

Mr. O'NEAL. First, I am not saying we should build it in. I am saying this is a problem, the world as they are perceiving it. And I have asked them, why can't you form shipper associations, gather together your resources and take advantage of large volume movement. They have some fear of the antitrust laws in that area. They also have a concern that the railroads will not recognize them as large enough, at least individually, to contract with. But they just don't attract the attention of the railroads as would a Weyerhaeuser or somebody of that size.

Some of it is fear of the unknown. I am not sure it would work out as they suggest, and perhaps the suggestion that Mr. Springrose has made about contracts would take care of much of their concern. I am not sure. I think there is a great deal of uncertainty here, and it is awfully hard to tell exactly what would happen.

But contract rates can be anticompetitive to the extent they freeze out shippers who for some reason can't take advantage of better service that might flow or better rates that might flow from these contracts.

I want to say something about unit trains. Unit trains have been a real boon to the grain industry, but I don't think that the comments made by Mr. Springrose should be interpreted as suggesting that unit trains have answered all the problems of the movement of grain, or that even most of the grain moves by unit trains. In fact, I think the railroads for the most part that are in that business dedicated something less than 25 percent of their cars to the movement in unit trains. So the rest of the traffic is single-car traffic, or multiple-car traffic, something short of unit trains.

Mr. SPRINGROSE. I need to clarify that because I didn't mean to imply that unit trains was a panacea either, and as a matter of fact, as I evaluate my responsibility to my employee I can see far more single-car contracts being negotiated and placed into effect which under the antipreference and prejudice provisions, which I would encourage be placed against contracts could be utilized by other smaller shippers who can load a single car.

Mr. FLORIO. Mr. Norton, did you want to make a comment?

Mr. NORTON. Thank you.

It is always easier to focus on negatives. They are easier to see than positives. But I am sorry that I didn't emphasize as much as I think the chairman has emphasized, the possibility that contracts, bankable securities in essence, can be used to alleviate many of the equipment problems railroads have.

I mentioned in my oral testimony that we have considerable experience in contracts, and that about one-third or more of our tonnage is moved under contracts with marine and pipeline carriers. I brought an example contract, primarily to show and to explain the complexity of our contracts, which go to all sorts of conditions. This is one of the problems in arriving at contracts for chemical commodities. We wish to include identification of such things as equipment and safety considerations. However, I am also illustrating a bankable contract which is worth a good deal of money. The example I am showing was used by the carrier to obtain a bank loan in order to obtain the equipment he needed to perform under the contract.

Now, if that same process follows in the railroads, and it certainly is logical that it would, it seems to me that contracts will enable the rail carriers to obtain money for additional rail cars. Alternatively, if the shipper has better credit and pays lower interest rates, the shipper may find it advantageous to supply the rail equipment. Contracts will help flow into the rail system more equipment than the railroads can now obtain by themselves. This should free up equipment for use by others who don't desire to enter into contracts.

I believe that the rail system is probably the largest industry which has to evaluate its workload day by day. The workload is actually known only after the days shipments are tendered probably 99 percent of the time. Contracts will improve on this planning process because the traffic covered by contracts can be preplanned by the railroad, probably using fewer resources than normally required, thereby releasing equipment for use by others. I think this is a key and probably understated benefit of contracts.

Also, I would expect that the contracts would result in new services. We do not have sufficient communication—I'll speak for our company—between ourselves and the people who operate trains. They are being operated to meet certain railroad objectives. These objectives are not necessarily the same objectives that we have. Through contract language we can communicate what our objectives are. This process is underway in the negotiations we are now conducting with railroads, and I can see that there will be new services established, services which better meet both our objectives. We are not talking about chemicals in trainload quantities. We are talking about smoothing out certain runthrough services, parts of trains. When these improved services are established for contractors such as ourselves, the railroads will be eager to fill these trains with traffic from others. This is how I believe contracts will help the so-called little shipper, another understated benefit that will derive from greater freedom to enter into contracts.

Senator McGOVERN [presiding]. I might just say for the interest of my colleagues and also the panelists and others in the hearing room that the Senate is now debating what to do with the Milwaukee crisis. Senator Magnuson went to the floor earlier today with a proposal that he was going to offer on an appropriation bill, that would have required the Milwaukee to continue operating the entire system until the first of May with Government loan assistance. After some discussion on the floor, a compromise was worked out. Some of us pointed out that the difficulty with that approach is that it would probably be challenged by the creditors of Milwaukee in the courts on the grounds that the money tied up would further jeopardize the financial integrity of the road.

In any event, apparently a compromise is going to be worked out in the Senate to extend the effective embargo date from November 1, as ordered by Judge McMillan, to November 30, and with some Government assistance during that 30 day period.

We also got an agreement out of Chairman Cannon of the Senate Commerce Committee that he would report out in the next 2 or 3 weeks a bill that Congressman Florio and I have introduced that comes at the problem from a different point of view. It permits the reorganization to go forward and the embargoed lines to proceed as ordered by the court, but it would then provide long term, low-interest loans to other rail companies or to groups of shippers who are interested in taking over segments of the line that would not be preserved in the main core, and we got public assurance that that legislation would be reported out for floor action before Congress adjourns this year.

I just wanted to direct a question to Mr. Levin and Mr. Stern. It is my understanding they haven't had a chance yet to reply to the matter that is under discussion, but because of the special arrangements under fresh fruits and vegetables, I am wondering how you gentlemen react to the general line of reasoning that Mr. Springrose was developing with regard to contract agreements as the best hope of achieving an effective and equitable deregulation of the rail industry?

Mr. LEVIN. I think a great deal of it will depend upon the desire of the carriers to carry the traffic to begin with, and the level of profitability that that traffic as demonstrated to the carrier in the past.

I have had the experience of dealing with the Western Pacific Railroad this year in attempting to secure transportation for a number of melon shippers in the upper San Joaquin Valley. It was one of the most distressing experiences a shipper dependent upon transportation could experience. I was told, we do not want your traffic. The shippers, cumulatively over the course of the 2-month season, ship approximately 170 carloads of honeydews to Florida. When I was told that they did not want our traffic, I requested them and the Southern Pacific separately to agree to a switching arrangement whereby the Southern Pacific Transportation Co. would come in and serve our customers so that they would not suffer that loss of service. I was then told that was impossible, that they would not discuss it with the Southern Pacific because they were afraid of antitrust violations.

In desperation, we contacted as many people as we could to apply pressure to the Western Pacific—and this, I might add, was also going on during the time of the truck strike, these negotiations were taking place during the truck strike. Eventually, the Western Pacific did institute a rate. The rate was somewhere in the neighborhood of 50 percent above what the regulated rate had been. It offered no through means that we could use their services.

They later did reduce the rate after more pressure was exerted, but in my opinion, for a contract to be meaningful, it requires an open dialog between both parties. In attempting to negotiate a contract with Southern Pacific—and this is a very unique contract. The contract we have with the Southern Pacific is an attempt to take all of the tariffs under which our merchandise had previously moved and to put them into somewhat of a workable agreement. So it is unique and must be viewed in that sense.

Our members were submitted a document with a cover letter that said you must sign this document. That was the first communication we had had from them. We then petitioned for a stay of the effective date of deregulation, which the Southern Pacific objected to, stating that they were ready to go, when in fact not one member in my organization would have been able to ship under the terms and conditions that they had proposed. Their major attempt in that was to completely remove themselves from all common carrier liability. We were later able to negotiate, again in an 11th hour negotiation, a contract which both parties agreed would be an interim contract and which will be further negotiated.

Again it boils down to a desire must be necessary on the part of the railroad to serve the industry, and the historic attitude that I have observed of the railroad industry where traffic is either marginally profitable or nonprofitable, the desire is not there to convert that to a profitable situation but rather to abandon it in favor of other traffic which at that time was demonstrating a higher level of profitability.

Because of the service that we have received from the railroads over the past 15 years, which has caused their percentage of our traffic to drop from 75 percent of our total percentage to somewhere under 10, service is a very, very major portion of our problem with the railroads. It is a very, very interesting and profoundly miserable state of affairs to have them first say, give us the tonnage and we will give you the service. It cannot work like that when you are marketing a product that will spoil in transit.

So our experience has been very poor to date. But again, I think it must be considered in the context that we are working in a totally different atmosphere. We cannot at this time commit the amount of traffic that would make it truly desirable for the railroads to enter into a service-oriented contract with us, although I believe that it could be done if there was a greater desire on the part of the railroads to do that.

We further have had problems in the disparity between the various railroads serving basically the same points and serving competitors which is very marked. As an example, I have carrot shippers located in Bakersfield and along the coastal regions of California. Current rates for a Santa Fe shipper in Bakersfield to ship a carload of carrots to New York is $4,300. The shipper located directly across the street from them on the Southern Pacific track is now $4,608. The shipper located in the Santa Maria coastal region shipping carrots is over $4,700. Needless to say, that price will come directly out of the farmer's pocket.

So there are a great many problems which are very difficult to work out.

Mr. FLORIO. Isn't that an opportunity as well as a problem? Having the opportunity to, contract on a long term basis, particularly when there are alternative modes of transportation, provides the shipper with the opportunity to play one mode against the other.

Don't you see that as a potential opportunity?

Mr. LEVIN. There is no benefit to that when you are dealing with someone who does not want your traffic to begin with.

Mr. FLORIO. In all three instances that you just gave?

Mr. LEVIN. I believe that the Santa Fe aggressively wants our business, and they have priced themselves in such a way that they will get it. I believe that the Southern Pacific, in limited circumstances, in very limited circumstances, desperately wants our business, and they have priced themselves accordingly when the conditions were such that it was beneficial to them to do so. It has certainly not proved to be of benefit to any shipper in my organization with whom I have spoken, and I am in great contact with many of them.

The real problem the perishable industry has had with railroads is not one of price; it is one of service. The independent owner-operators give us very fast, consistent service to our markets. Our markets are tied directly to a shelf life problem. We only have so long, we'll say an average of 10 to 12 to 15 days, in which to distribute to market and have our products consumed. Otherwise they spoil, they deteriorate and they are of no value.

Currently, if I ship a head of lettuce from the Santa Maria Valley or the Oxnard area to New York City, the transport time routing by the Southern Pacific cotton belt to St. Louis and on to New York will run anywhere from 12 to 16 days, and the railroads obviously will not pay for the deterioration of the product because they have no schedules that apply via that route. However, there is no alternative form for me to use.

The shippers in the Salinas Valley who are in competition with our shippers have the benefit of the lower rate and a consistent sixth morning delivery to the market because that Salinas Valley shipment is the traffic that is attractive to the railroads, and they have done a very commendable job in that area. But it is the southern half of the State of California and the State of Arizona that are suffering greatly because of it.

Senator McGOVERN. Mr. Stern, did you have anything to add?

Mr. STERN. I think Mr. Levin covered many of our problem areas very well. I want to add a couple of things.

First of all, with respect to contracts, we in Sunkist are members of a shippers association located in Chicago involving piggyback service. We are currently in the process of negotiating an annual volume contract rate with the Santa Fe Railroad, and that process has been going on for approximately a year now.

I will say that at the start it was a very difficult process because it was very clear that the railroad personnel had very little idea of the mutual give and take which is required in contract negotiations, and they attempted very rigorously to impose prior tariff obligations upon us, and in turn, tried to rid themselves of every type of tariff obligation that they had previously considered onerous.

But after about a year of intense discussion, we have now succeeded, at least at this moment in time, in reaching what I believe to be a far more fair and workable proposition.

I would say, as Mr. Levin pointed out, it is largely a question of attitude. The Santa Fe are reasonably responsible businessmen. I would point out here we in Sunkist deal with many, many motor carriers, fleet operators, agricultural trucking cooperatives, and owner-operators. We deal with them on a daily and weekly basis, and I will tell you categorically that we do not have the environment where one party tries to take advantage of another. There has to be a mutual give and take and fairness on both sides. We would not be able to continue our relationship with these exempt motor carriers if we at Sunkist attempted to take advantage of them. We would not survive economically, and we would all be in court all the time.

I would have to say that our first 4 months with the railroads have been rather mixed. The Santa Fe railroad generally attempts to be as fair and as evenhanded as they possibly could be. We have not had that experience always with the Southern Pacific. They have attempted, I believe, to take advantage of the situation. Not always. I think in some cases their attempts are just honest mistakes.

Be that as it may, it is a very difficult situation we are confronted with. I am here as one who has gone through a lot of very interesting experiences in the past 4 months in that respect, and not a function where one of the parties simply says here it is, take it or leave it. That is what it is going to be.

Mr. FLORIO. The Southern Pacific recently reported that their rail lettuce traffic has increased by 63 percent; celery, 50 percent; mixed vegetables, 60 percent compared to last year.

Do you know if this traffic is diverted from trucks, other carriers, or is a result of just an increased crop?

Do you have any information with regard to that?

Mr. LEVIN. I would think that there would be two reasons for that experience. Primarily that has been caused by the strike by the independent owner-operators when we had no effective alternative means of transportation. We were literally forced to go back to the railroads. It was the one time in our history when we could honestly be considered a captive shipper. During that time, the rates rose to 47 percent above what they had been under regulation.

The other reason for that is there is a very, very strong desire on the part of our industry to see railroads return. We have become literally a captive of the independent owner-operators. We feel very strongly that a balanced transportation system serving our industry would be highly beneficial. So my office encouraged the use of the railroads, and we still do, to give them an opportunity to implement some services that will be mutually beneficial.

I think that the later figures, after the strike, once the situation has had an opportunity to calm down, I believe that later data will support that. There is a very minor increase in rail participation at this time which could, I believe, be attributed to the enormity of the crop that we have this year.

Senator MCGOVERN. Mr. Massey, you haven't had an opportunity to comment on any of this discussion since your opening statement.

Did you have any points that you wanted to make?

Mr. MASSEY. Oh, indeed. Let me say that the coal industry and the railroads have for the past several months been sitting down together in an informal way trying to study out jointly these very problems that you are considering here today, and I think that collectively we have determined that anything short of Government ownership of all of the roadbed, that there is absolutely no way to deregulate the railroads as we have trucks or airlines. As long as there is private ownership of right-of-way, that there has to be regulation.

However, what can we do to help things as they stand. Well, the answer to that is let's have a little more contract ratemaking, in other words, to get out of this extreme regulation of the ratemaking process, particularly when we are looking to our future in the coal industry, with the energy crisis and the heavy dependence on foreign oil. We are forecasting ahead here that within the 1985–87 period, the railroads will be called to haul twice as much coal as they are now. Now, that is a tremendous problem, and an opportunity for the coal-carrying railroads.

We have something very similar to contract rates already established. We won't call them contract rates; more, they are negotiated tariffs. For instance, a typical example would be because you can load a 10,000 ton unit train, or 100, 100-ton railroad cars in 4 hours on one end at one mine, and then unload it at the other end in 4 hours, you are given a break of maybe 20 percent on the freight rate for this volume. The results of this have been astronomical in the ability of what the railroads can do. The turnaround time, typically 48 hours where heretofore the turnaround time on the hopper cars might have been 16 days.

Mr. FLORIO [presiding]. Mr. Massey, with regard to contract rates or whatever they are called in the coal industry, it is my understanding that they are not as binding on both sides as they could be. The coal company is required to guarantee volumes, but the degree of service and the rates are not quid pro quo. There is no set rate.

That seems to me to be antithetical to the concept of contractual obligations.

Can you clarify that point? Am I correct?

Mr. MASSEY. Well, like I say, there haven't been any in the coal industry made even though, as I understand, there is no direct prohibition of contract rates today.

If you would rephrase that.

Mr. FLORIO. You referred to tariff rates. Are there contractual understandings between railroads and the coal industry such that there is the ability for the coal company to contract with the railroad and guarantee that they will give them certain volumes in return for which there is a nonbinding representation made on the part of the railroads that they will give certain discounts. However, if they see fit to not give those discounts or to change the rates, they can. That doesn't seem to be a bilateral understanding.

Mr. MASSEY. That is why I say that this arrangement is very close to a contract rate. It is not, it is still a tariff.

Mr. FLORIO. The mutuality of cooperation doesn't appear to be there.

Mr. MASSEY. It is not at the present time. For instance, the problem with the thing we have got now is that this works very fine until there is a car shortage. When there is a car shortage, the railroad is obligated by present ICC rules to break up these unit trains, distribute the available 100-ton railroad cars to the available shippers on a percentage basis, and therefore they cannot then give the service.

Mr. FLORIO. It is very difficult to talk about this in terms of a contract.

Mr. MASSEY. Well again, the assumption being that if you have a contract in the coal industry, that there would be a dedication of either railroad equipment or shipper equipment to the haul. Such equipment would be dedicated to the contract and would not be subject to the ICC rules to give equal car service to a small shipper, for instance coming into the market on a spot or intermittent basis.

Now, with due respect for the small shippers in the coal industry, there are going to be in the future very few small consumers. Basically the consumer is the guy we negotiate the rate with anyway, not the shipper. The electric utility industry takes up 70 percent of the coal burned in the United States, and that percentage is going to increase substantially in the years ahead. So most of the coal industry including the small shippers is talking about shipping coal to very large consumers of coal in very large quantities.

We feel that an improvement on what we have now, since we cannot deregulate, is to expand the scope of our ability to contract with the railroads the deals under which we would ship these large quantities of coal in the future.

Mr. FLORIO. I wonder if I could shift the subject to one of the other items that we were concerned about, market dominance. I'd like to direct a question to the Chairman with regard to the proposal that the ICC apparently is considering to eliminate the market share and the substantial investment tests for determining market dominance and relying almost exclusively on variable costs as a measurement of whether a captive shipper is a captive. The determination of variable costs is based upon the ICC's regulatory cost accounting procedure. Aren't we relying upon a system that has come under some criticism? The criticism is that those costs, as determined by that system, are really not relevant to individual movement costs. The system costs are based upon historical data which is sometimes distorted with regard to the particular costs of a particular railroad between two specific points.

If you are going to rely upon that test, aren't you going to have to rethink your accounting requirements and regulations?

Mr. O'NEAL. First, let me say that the use of variable cost as a test is merely a threshold test. In other words, we are not saying that if a movement is above 180 percent of variable costs, that it is for sure captive, and we are not on the other hand saying that if it is below that it is not captive. What we are saying is that the burden of proof will shift depending on where that number is. We think it offers a possibility at least of a simple test that everybody can understand more easily than what we are using right now.

Obviously it depends on how good the cost data is. We have established or changed the uniform system of accounts. We are also at the present time working on establishing a cost center basis for the railroads which we hope will improve the data that is available.

Also I think it is important to recognize we are talking here about variable costs as the measure. We are not looking at fully allocated costs which would tend to have more of the historical costs in them, perhaps, than the variable costs. I think there are a lot of, just summarizing what we are trying to do is deal with a cost that is more easily identifiable, variable cost. We are trying to improve the validity of the cost information that is available.

Mr. FLORIO. Would you explain the basic rationale for using variable costs and the relationship between variable costs and why a shipper would be regarded as captive if a rate is above a certain percentage of variable costs?

Mr. O'NEAL. Right. Variable cost is basically the cost of providing the service that we are concerned with. If you meet that cost, then at least you are meeting the cost of providing that service. Anything above that contributes something to the railroad operations. It does not necessarily contribute profit until you get above fully allocated costs, which generally is about 140, 145 percent of variable costs in most instances. That is why we say that at 140 percent of variable cost, the carrier probably is not making a profit, the commodity—there is a very good likelihood, then, that that commodity is not captive to that railroad, and the Commission should be very chary about using its suspension powers or investigating the rate; that when it moves above 140, 145 and gets up to the 180 percent range, we are saying okay, in that area the carrier is making a profit. There may be a question as to whether that traffic is captive, so the burden then is still on the shipper to show whether the traffic is captive or not. Over 180 percent we feel there is a very good chance that the traffic is captive to the carrier.

Mr. FLORIO. What is your opinion of a measure of captivity based upon a percentage of motor carrier or water carrier rates?

Is there a correlation that can be used to compare rates between alternative modes?

Mr. O'NEAL. Well, I suppose you could do that. It gets much more difficult.

Chances are, though, that if there is competition from the motor carriers or water carriers, the railroads are not going to be charging rates that are 180 or 190 percent of variable costs. They will have to keep their rates down because of the competition.

I want to make it clear that first of all, this is a proposal; that second, that we are not saying that this is a precise technique for establishing market dominance. We are saying that balancing the need for simplicity in having a test, meeting the requirements of the statute, that this provides, we think, at this stage, at least, the easiest way to meet the obligation under the statute.

Mr. FLORIO.We heard questions this morning about the quality of service along with the question of the rate.

Do you feel that the ICC should consider the level of service provided by the carrier in return for that rate? Is there a way to quantify service in order to include it as a factor in considerations?

Mr. O'NEAL. It is a very difficult thing to quantify the service that a railroad provides.

Mr. FLORIO. On-time performance, is not too difficult to quantify. I am sure that there can be indicators or——

Mr. O'NEAL. Well, let me say, we at one point, we had a rulemaking underway to establish some standards of performance in the perishable area. This went on for a long period of time and the reason was that it was extremely difficult to identify what was a good standard of performance between any two points. There are thousands of points being served by the railroads. How do you establish that this particular elapsed time is the proper time against which you can measure the carrier's performance.

I think we have washed that out now in the perishable area when we exempted fresh fruits and vegetables. We kind of gave it up as a very difficult concept to get a hold on and try to regulate.

Mr. FLORIO. Are you concerned about the point that Mr. Levin made that the exemption with fresh fruits and vegetables and the removal of a common carrier obligation, there are apparently segments of the country that are no longer being serviced?

Mr. O'NEAL. Yes, I am listening with interest to what he said. I think it is important, though, to keep in mind that one of the reasons the Commission exempted the movement of fresh fruits and vegetables by railroads is that only about 8 percent of all fresh fruits and vegetables moving in the United States at that time were moving by rail. Everything else was moving by motor carrier, exempt motor carrier. So there is a way of moving the commodity. They are getting a good combination of rate and service from the motor carriers.

The opportunity available to the railroads here is for them to improve their combination of rate and service and try to take some business away from the motor carriers. And I have understood that the railroads seem to feel that they have picked up some business in the past several months.

We want the shippers to feel they do have an adequate option here, and obviously we are going to be looking at how this thing is working. We are going to have a study to review the experiences under this action that the agency took.

Mr. FLORIO. Is the ICC's rationale to exempt commodities based on a steadily declining share of the relevant market as the only test that the——

Mr. O'NEAL. No, no, it is not the only test, but certainly looking at this market, we would have to say that there is a lot of competition for the movement of fresh fruits and vegetables. When the railroads only have 8 percent and the rest of it is moving by motor carrier, that is a very good indication that there is a marketplace out there that apparently is meeting the needs of the shippers, and we have got to raise a real question about whether regulation by the Government has any role to play there. Questions are being raised now, and I am sure there are things that will come up that were not anticipated, and we will see if there is something we ought to do.

We are not eager, however—and I want to make this clear—we are not eager to jump back into this area unless there is an awfully good case made.

Mr. FLORIO. Would anyone care to respond?

Mr. Massey?

Mr. MASSEY. On that subject of revenue to variable cost relationships—and they are becoming increasingly important for ratemaking criteria—while at the present time there are no cost center oriented commodity-specific or route-specific data now required of the railroads or currently being maintained by the railroads, and it is a recommendation of the coal industry that rail carrier accounting and reporting requirement should be updated to furnish commodity-specific and route-specific cost center data.

Mr. FLORIO. One of the things that the administration is proposing is a uniform system of cost accounting. The question has been raised, and this committee has considered what that really means. Does that mean a specific definition of what the accounting system should be for each and every railroad, or does it mean a specific statement of accounting principles within which the different railroads could comply in accordance with their own accounting needs. The uniformity of principles would be sufficient to allow the ICC to effectively monitor the situation.

Mr. NORTON. I would like to comment on the question of defining market dominance through the objective test of rate level without getting into the question of the particular numbers that are being used by the ICC now in their proposal. This certainly does present a much simplified way of getting at this question of separating those moves which should be subjected to possible scrutiny from those which should probably be left alone.

I support what is being proposed by the ICC on the virtue of its simplicity. One of the problems we have with the present market dominance rule and also with the market dominance proposals in the administration bill, is this question of relationship to an established truck rate. One should understand that when you have a long history of moving large quantities of bulk chemicals by rail in 200,000 pound net weight units and there has been no interest shown in establishing a competitive truck rate, all you have in comparison with a well-honed rail rate is a truck rate which is so-called untreated. You should not attempt to relate the truck rate, applied to perhaps only 40,000 to 45,000 pounds per shipment versus a railroad rate applied to a carload of perhaps 200,000 pounds. Also you may be comparing the rate for something moving in equipment supplied by the shipper versus a rate for equipment supplied by the carrier. So I don't think that is a good test.

Mr. FLORIO. Could I interrupt?

Mr. NORTON. Yes.

Mr. FLORIO. Unfortunately I must leave to attend a vote on the House floor. It is the continuing resolution to keep the Government operating beyond the first of October and it is highly desirable, that it continues.

We will take a recess for approximately 10 to 15 minutes.

[Brief recess.]

Mr. FLORIO. The hearing will reconvene.

The House Rules Committee has voted a rule for the consideration of what was referred to on the Senate side as the McGovern-Florio approach to the Milwaukee problem. We don't always refer to it the same way on the House side.

I thought the membership here would be interested.

I would like to ask a few more questions, let all of the witnesses summarize, and then conclude.

I would like to ask Mr. O'Neal a few questions with regard to his initial statement about joint rates and the impact of the joint rate provision in the administration's proposal. I don't think there is any question that the existing requirement for concurrence is somewhat anticompetitive. The approach that the administration is taking would be more competitive but perhaps a bit more disruptive to the whole industry.

There have been some proposals floating around the ICC, among other places, for a surcharge approach with regard to divisions to compensate carriers for extra charges.

I have heard suggestions that there be unilateral ability on the part of carriers to impose surcharges. I am concerned that this would reinforce inefficiency that may exist within certain carriers. There would be the ability to pass on, in a surcharge, costs of maintaining operations, even if the maintenance of those operations is somewhat inefficient. That is not compatible with what is the basic rationale of the whole deregulation proposal, that rationale being that marketplace forces will fix rates and the allocation of capital, and that those marketplace forces will make all carriers more efficient.

May I ask Mr. O'Neal his thoughts with regard to my concern about a surcharge approach to the joint rate question?

Mr. O'NEAL. Well, let me say, we have this question before us. ConRail has filed, well, a number of surcharges. The one that we are directing most of the attention to now pertains to pulpwood. What they have done is propose a surcharge which we have allowed to go into effect and which we are now investigating to determine the basic question of what impact this is having on the flow of commerce, what effect it may be having on the other carriers that participate in the interline arrangement. The basic thrust of the ConRail proposal is that they have been carrying this commodity at below variable costs. Thus, every movement of the commodity is a loss to them, and that they ought to be able to at least raise the rate level to compensatory levels.

The argument that has come back is the argument you are raising here, I think, well, the problem with ConRail is that it is the high cost carrier. Its costs are unreasonably high, and that should not be used as a basis for the ConRail surcharge or any adjustment of its interline rates.

This is an age-old argument, in a sense, between the railroads in that part of the country, formerly dominated by Penn Central, and carriers in other parts of the country, in the West and South as to the lineup of divisions. And I am frankly not sure how to answer that question. We have some real problems, I think, if the ICC or anybody in Government is going to have to go in and try to identify whether costs are excessive or not. I think we do have a responsibility under the act to do some review of whether a carrier is operating efficiently and honestly and that sort of thing. These are extremely difficult measures, however, difficult areas to measure, I should say.

All I can say at this time is we are trying to get a handle on this issue and trying to figure out what we should do administratively or what we might propose to the Congress as a different approach to joint rates.

Mr. FLORIO. What do you think about the administration's approach?

Mr. O'NEAL. Well, I think the administration approach, which is just basically to eliminate joint rates, causes some real—could cause some real hardships, some real problems with the railroads, some real problems of interrelationship between the railroads.

Mr. FLORIO. You mentioned ConRail. ConRail fixes its portion of the rate in accordance with what it perceives as its needs.

Mr. O'NEAL. Right.

Mr. FLORIO. It is therefore going to have to negotiate with other railroads in terms of through rates.

It is not going to be an automatic surcharge. What you are saying is the other carriers are going to have to try to exert the leverage that they can on ConRail to keep their charges as low as possible. Therein you have the incentive for more productivity, more efficiency being exerted on ConRail.

Doesn't that provide a mechanism for trying to keep the charges as low as possible, and yet giving the carrier the flexibility to raise them in accordance with their operational costs?

Mr. O'NEAL. I guess the question is, Will the carriers in the other part of the country have the leverage? Now, they would have leverage if they have alternatives to ConRail into the Northeast. ConRail is a huge operation and has a tremendous influence on movements in the Northeast. I have serious questions whether there are alternatives to ConRail in as many instances as would be nice at least. The railroads in the South and the West are using other carriers, I think, to the extent they can, and probably they will be using whatever techniques they can to put pressure on ConRail.

Mr. FLORIO. Thank you.

You also raised the question about general rate increases. I share the feeling of some that the concept of general rate increases, though convenient to the carriers, is again anticompetitive. You are providing industrywide increases to efficient and to inefficient carriers, thereby distorting the market, so to speak. I am wondering if the concerns that carriers have about not being able to keep up with inflation aren't addressed if we use a variable cost measure for rate increases. Certainly for each rate for each commodity, you used the figure 140 percent of variable costs taking care of operational costs, 180 percent taking care of fixed, fully allocated costs, and there is certainly——

Mr. O'NEAL. And at that level, making a profit, as well.

Mr. FLORIO. I would think that you would, on a commodity basis, be able to, with sophisticated accounting systems, take into account inflation in each component as opposed to a general, overall inflationary factor.

Am I correct in my assumption that the product-by-product approach to rates, though somewhat less convenient, can be designed to take into account inflationary pressures?

Mr. O'NEAL. I think it can work. I think the railroads are so accustomed at this time to making rate adjustments on a general basis and relying upon the rate bureau to put the whole act together that they view with real concern moving away from the general increase, and I feel that if we are going to move the railroads away from general increases, it ought to be done on a gradual basis because there will be some adjustments that they will have to make, and I doubt very much that they could handle a change in a short period of time.

But I don't see why over a longer term they can't make their rate adjustments without resort to general increases.

General increases have some of the problems that you mentioned. They tend to be anticompetitive, the least efficient carrier receives as much as the most efficient carrier. You also have the problem that the railroads, I think, are moved further away from their customers. Instead of having to deal with individual shippers on service and rate problems, they can insulate themselves from that process by quite a bit just by saying well, we have got a general increase that is now being considered, and sorry, I can't flag you out of this very easily unless you are really big. I can't deal with your service problems with respect to this general increase.

So there are a lot of things that flow from the reliance on general increases. I think the railroad industry needs to be moved away from that reliance on the concept.

Mr. FLORIO. Thank you very much.

Before concluding, I would like to ask the witnesses if there are any comments they would like to make by way of a conclusion or summary statement.

Yes, Mr. Springrose.

Mr. SPRINGROSE. I would like just simply to conclude by saying that in your evaluation of contract ratemaking and contract for service by railroads, that at least with respect to agriculture, focus be directed to the farmers as opposed to the small or large elements in the distribution system once the production of that farmer moves off the farm and into the market chain because it is the farmer that is the real victim of the breakdowns in the system that we are witnessing today, and I can't really fault entirely the railroads for that breakdown. Many elements of the system have broken down, and in fact, the railroads are hauling record numbers of tons of agricultural products, and they are struggling mightily to keep up with the growing demand. But the ultimate, final victim of a breakdown in the distribution system, whether it is a plugged elevator or a late arrived ocean vessel or a delay of a barge at lock and dam 26, or a freight car shortage, is the farmer himself. And the elements within that distribution system that contribute to its relative efficiency or inefficiency should not take precedence over the primary focus, which in my judgment should be the producers of the United States products of food.

Thank you.

Mr. FLORIO. Thank you.

Mr. Norton?

Mr. NORTON. I would like to conclude by completing a statement on the maximum rate trigger which I think is an innovative approach offered by the ICC and by virtue of its simplicity I think should be given serious consideration as a mechanism to replace the awkward subjective test for market dominance.

I have heard things today that simply reinforce my company's support of contracts as a valuable means for the railroads to increase their market share and for enabling shippers to secure better transportation by rail. One thing that Chairman O'Neal said strikes a good chord, and that is that in working with contracts, the carriers and the shippers will move closer and closer together, and this will have widespread effects and benefits, even when contracts do not result.

Our concern is that we have not yet identified the mechanism the incentive by which railroads will enter into contracts. It is clear that they will have strong incentive to enter into contracts when they are competing with a different mode or with a different carrier, but for that situation where there is true captivity, then I do not see any motivation on the railroads' part to enter into a contract excepting on a take-it-or-leave-it basis.

The answer to that, I think, simply has to go back to the opening statement that you made, and that is that competition must be the source of the incentive for both parties. I have suggested required interlining at reasonable rates one mechanism, or the permission of intermodal carriers to exist. I am wondering whether Mr. Levin would consider that if, let's say, the Santa Fe had the opportunity to move his melons by truck to its line, even though these melons might come from the Southern Pacific territory, whether that might not open up some competition. I am not at all sure that the Santa Fe feels free to do so under today's environment. I suspect that it requires separate negotiations which then don't have the incentive for thorough efficiency. I believe that is a matter which has not yet been addressed—that is, intermodal ownership—and I suggest that it should take its place in the congressional debate at some time.

Thank you.

Mr. FLORIO. Thank you very much.

Mr. Massey?

Mr. MASSEY. Yes, sir. On behalf of the coal industry, we consider ourselves 85 percent captive to the railroads, and we strongly believe that an independent agency of the Interstate Commerce Commission should retain general jurisdiction over rail carrier regulation. The ICC is needed to protect captive shippers who must rely on rail services and who have absolutely no practical transportation alternative for the delivery of their commodities to the market.

Briefly summarizing those items, in the ratemaking area, contract rates should be authorized. The ICC should continue to have powers to set the maximum rates, to suspend rates, to determine the reasonableness of general rate increases both for single line and joint rates. Antitrust immunity should be retained for ratemaking by rate bureaus. Reduced rates for Government traffic should be eliminated.

In a couple of nonratemaking areas, the coal industry recommends that ICC jurisdiction should be retained and ICC decisions should be expedited with respect to rail mergers and acquisitions of control. Rail abandonment procedures should be simplified and time required for discontinuing unprofitable rail services should be reduced.

Actions on routine car service matters, the complaint end of the business, should be the direct responsibility of the rail carrier industry.

The commodities clause should be retained, and the rail carrier accounting item that I mentioned should be implemented.

Mr. FLORIO. What do you see as the main virtue in retention of the rate bureaus, inasmuch as we have been talking about competition? Do you have any difficulty with that being incompatible with the idea of competition?

Mr. MASSEY. Of the rate bureau?

Mr. FLORIO. Yes. I thought you said that you felt strongly about the need to retain the rate bureau. I assume not just for publication of rates, but for the negotiations that are currently taking place.

Mr. MASSEY. Yes, and for arbitration of rate disputes. In other words, it is a forum for a shipper who feels he is not being treated fairly on the rate.

Mr. FLORIO. Do you see any inconsistencies?

Mr. MASSEY. No, both published rates and contracts. It is not an either/or situation between the published rates and the contract rates.

Mr. FLORIO. Mr. Stern?

Mr. STERN. I would endorse the comments made by the gentleman from DuPont concerning true competition, and let me illustrate what I mean. Since May 28 we have been operating essentially with what amounts to the railroads' pricing our traffic according to the age-old concept of what the traffic will bear, and they essentially have been pricing their services in relation to the charges imposed by the motor carriers to destinations anywhere in the United States or Canada.

Now, I have no quarrel with that means of ratemaking. I have in fact no quarrel with, in the case I illustrated in my opening comments with the Southern Pacific raising its rate to 47 percent above their prior regulated rate. In fact, I quite frankly don't mind if they raise it 100 percent, but I do quarrel with and what I do have a great deal of problem with is the fact that we as shippers are not allowed to then take advantage of another alternative form of rail transportation; that is, choosing to price his services, which are at least comparable to if not better than Southern Pacific's. In our case it is over 50 cents per package less from the same origin to the same destination.

Mr. FLORIO. Why do you regard yourself as not being able to take advantage of the situation?

Mr. STERN. Let me briefly explain how we are organized, and these comments hold true for the whole industry. About 65 percent of the packinghouses in California and Arizona are located on the rail lines of the Southern Pacific Railroad. The remaining 30 percent or so are located on the Santa Fe, about 5 percent on the Union Pacific or Western Pacific, and these are round numbers. And that percentage also holds true for my company. We have about 85 packinghouses located in the two States. Of all of those 85 packinghouses, and dividing them 65–35, only about two, I believe, have so-called joint track, which means they are served by both Santa Fe and the Southern Pacific. Then we find on a given day the Southern Pacific is asking $4,000 including refrigeration for a car of oranges to New York City from California, and the Santa Fe is asking $3,000, and that was not an uncommon case all summer long. In effect, the Santa Fe was offering better services.

My packinghouse has no effective means other than loading the perishable commodity aboard a truck, hauling it some distance, and then unloading it and reloading it on a Santa Fe platform. We have no effective means of utilizing this more efficient, lower cost transportation that is available within the industry.

Mr. FLORIO. That is a factor of geography and other considerations. There is no legal prohibition.

Mr. STERN. That is correct, no legal prohibitions other than pure economics and handling. There are three physical areas in California and Arizona; namely, Yuma, Ariz., the Salinas Valley and Ventura County, Calif., that are physically isolated from any other rail line of any sort. They are served solely by the Southern Pacific Railroad. They are in a true sense, to the extent that rail transportation is used, totally captive. It is uneconomic for someone to haul fruits and vegetables to another railhead to handle it, and quite frankly, I think it is undesirable to handle perishable commodities at the waste of energy, the trucking expense, and so forth, when trying to deliver a marketable commodity to the consumer.

So the proposal made for interline switching versus a system of perhaps credits or debits for true competitive bidding among the railroads in some fashion for our traffic would be most appreciated, would be very workable.

I also endorse the statements about intermodal competition I said earlier that we are in a shippers association and we now own some refrigerated piggyback trailers. We are using those trailers in high cost rail transportation areas to offset these high costs. That, however, necessitated a fairly substantial investment on the part of our company to do so, and I think that frankly is, in some senses, a misallocation of our corporate resources.

Mr. FLORIO. Your suggestions with regard to interline switching as well as discussions about trackage rights point out an area that needs some exploration by this committee. In my own area, the Northeast is served by ConRail and may benefit from the competition that might result from some of those changes.

Mr. Levin?

Mr. LEVIN. Yes. Lest any of my remarks be misconstrued, we strongly favor retention of the exemption of fresh fruits and vegetables. We do believe that the program has not had a sufficient time in operation to be adequately evaluated. We do also believe that before further exemption be granted, that safeguards should be instituted to prevent some of the problems that we have experienced that were very traumatic for our industry; to take 95 years of regulation and throw it out the window, it is amazing the amount of details that need to be covered that had previously been covered by the regulations, and they are all gone.

The railroads and the shippers should be afforded and be required to negotiate many of these items prior to any effective date of deregulation. There are many, many items that must be covered in order to facilitate fair and equitable transportation for all.

I think primarily the competition potential for discrimination must be adequately explored. In the case of potatoes, for example, one section of the country, Idaho, is a 65 percent rail market; California is a 42 percent rail market. If a disparity in rates occurs between those two areas of the country, it can effectively kill one industry in a very, very short period of time. Things of that nature must be adequately explored before a large segment of any industry is totally deregulated after the amount of regulation that we have had for the previous years. I am not saying it shouldn't be done. It should be done carefully and with adequate preparation.

Mr. FLORIO. Gentlemen, I thank all of you for your contribution. It has been very, very helpful to the committee.

Notwithstanding the speculation that there has been a lack of enthusiasm or loss of enthusiasm for a deregulation proposal in the Congress, that is not the case with our committee. We fully intend to report out a deregulation proposal and hopefully have it considered by the House, and hopefully the Senate as well, in this session of Congress.

We are committed to go forward with a deregulation proposal, and hopefully see it enacted into law. To say that is one thing. To talk about the specifics of what that deregulation proposal will encompass is another thing. But, the motivation in the committee, as I read it, is to move as expeditiously as possible to attempt to balance the interests and come forward with a bill that will result in a substantially reduced amount of regulation on the railroad industry.

I thank you for your contribution, and the meeting stands adjourned.

[The following statements were received for the record:]

NATIONAL ASSOCIATION OF BRICK DISTRIBUTORS
1750 Old Meadow Road, McLean, Virginia 22102 703/734-0110

Walter E. Galanty, Jr.
Executive Director
National Association of Brick Distributors
1750 Old Meadow Road
McLean, Virginia 22102

STATEMENT OF
THE
NATIONAL ASSOCIATION OF BRICK DISTRIBUTORS
BEFORE THE
CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE
OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
SEPTEMBER 27, 1979

Dear Members of the Subcommittee:

On behalf on the National Association of Brick Distributors and and small shippers throughtout the country, we wish to make a statement regarding railroad deregulation.

The National Association of Brick Distributors (NABD) represents over 250 small business throughout the country who distribute and sell all types of brick, tile, motar, and related masonry items in the hard building materials field. This industry is one of the foundations of the American building industry, for all of the above mentioned items flow through distributors before they get to the job site.

All brick distributors in this country are small businesspersons and small shippers, and as such are subjected to the same rules and regulations as big businesspersons and big shippers. As an active member of the Small Business Legislative Council (SBLC), an organization for national trade and professional associations whose membership is primarily small business, we realize the needs of all small businesses. The SBLC supports our efforts to try and get relief for the small shipper and the small business community.

SBLC focuses on issues of common concern to the entire small business community. The SBLC membership and their affiliates represent approximately folr million small business firms nationwide.

On behalf of the brick distributors throughout the country, we wish to applaud the efforts of the President, the White House staff, and the Congress in trying to regulate the railroad industry and redefine the role of the Interstate Commerce Commission. We feel these efforts will eventually achieve results for the betterment of the entire shipping community.

This subcommittee is currently studying the President's Railroad Deregulation Act of 1979. Before the final act is put to a vote, NABD would like to express its concern about a few aspects of the Railroad Deregulation Act in the hopes that some of the areas in conflict to small shippers could be resolved.

First of all, we would like to give you some facts about our industry, and how they relate to railroad shipments.

In 1977, approximately 48.2 percent of all the structural clay products (brick) produced in this country was shipped by rail at the entry point (the manufacturer's plant). In 1977, there were only 220 manufacturers of brick throughout the country and they accounted for shipments of over 8.3 billion brick. Brick, like many other commodities, move best by railroads at distances of over 250 miles from the manufacturer's plant. For distances under 250 miles it is fairly impractical to ship by rail, and truck is the primary mover of brick. This fact must be taken into consideration in any discussion of brick shipments because removing shipments of less than 250 miles from the discussion would really mean that brick is shipped by rail in excess of 70 percent of all cases.* (See Attachment A)

The amount of manufacturers of brick in this country has steadily declined from 463 manufactueres in 1964, to 267 manufacturers in 1974, and 210 today. This fact will mean that in the future, distributors of brick and members of NABD will be farther and farther from the manufacturing point, and will need more and not less transportation by rail.

Besides brick, the members of NABD sell and distribute a number of other items which move in similar ways to their company location. These items contribute heavily to the livelihood of their businesses and the country as a whole, and since most material is shipped by rail f.o.b. factory our concern in deregulation is well justified.* (See Attachment B)

In the discussion that follows we will attempt to explain our concerns regarding specific points in the Railroad Deregulation Act of 1979. We will try to give positive proposals that will affect and help all small shippers.

ABANDONMENTS

While it is an established fact that non-productive trackage contributes substantially to the railroads' difficulties, a sudden and unwarranted withdrawal of service can be devastating to a receiver relying totally on rail transportation.

Florida over the past several years has emerged as a substantial market for brick, after a long history of stucco and other construction. A brick dealer in Homestead, which is on Florida's East Coast, for example, is at least 500 miles from the nearest source of clay brick. He has invested large sums in plant contruction and site location to accommodate rail sidings. He has tied his transportation future to rail movement, for after all it simply is not feasible to consider any other mode, even if it were available. Trucking would require special equipment, suitable only for brick, resulting in an empty return to point of origin. Investment capital for such equipment could not be obtained. As noted previously, truck transportation is now considered feasible for brick only to a maximum of 250 miles.

We have then a captive receiver, but perhaps of such small consequence in the overall rail network scheme that there would be no hesitancy in abandoning his trackage if considered to be non-productive.

The American Association of Railroads (AAR) has proposed that the railroads be permitted to abandon a line upon 120 days notice, with a three-month delay to allow for negotiations if a public body thinks the service should be continued in the public interest. The carriers would be reimbursed for any losses sustained after the 120-day period.

The original legislation would have permitted abandonment within 30 days if not objected to; and 90 days for resolvement if there were an objection. This would have been totally unacceptable to our industry.

Proposal: The ICC, in our opinion, should retain jurisdiction over railroad abandonments. NABD feels that abandonments, in many instances, are important to the survival of a railroad, and need to occur, but we also feel that the railroads should look at each situation individually as a way to keep instead of lose business.

RATES - PUBLICATION - INCREASES - REDUCTIONS

Rail carriers should continue to be required to publish joint-rates as well as provide joint-routes.

Our members do not have the expertise to determine factored rates. The cost and space requirements for the tariffs which would be required without through rates are staggering. The railroads themselves would have extreme difficulty in determining appropriate transportation costs. They do, even now.

Even with the present 30-day notice provision, our members have had difficulty in keeping abreast of rate changes that affect them. NABD has been faced with the loss of its right of protest in suspension proceedings because of the too-late receipt of supplemental material from the tariff publisher. Complaints to the ICC has resulted in reprimands, but no appreciable improvement.

Proposal: The 30-day notice might be reduced if appropriate and timely notification were given. Perhaps 20 days would be sufficient if the carriers were required to inform a "designated agent" of the industry affected in some fashion no later than three days after the issuing date, and providing further that the protesting date for entry of a suspension request were reduced from twelve to seven days. All of this, of course, presumes that the ICC would retain and utilize its suspension powers, which NABD supports.

INTRASTATE RATES
AS THEY PREJUDICE INTERSTATE
RAIL CARRIER EARNINGS

Section 13 of the Interstate Commerce Act provides for ICC intervention, upon proper cause, in matters involving intrastate commerce, where those rates, rules or practices discriminate against interstate or foreign commerce.

Rail carriers have historically complained of the lag time for approval of general rate increases on intrastate traffic following the effectiveness.

Recently, an interstate rate adjustment was denied simply because a major carrier was protesting its general inability to obtain relief allegedly necessary on its intrastate movements of the same material.

A 13th Section procedure is a long and costly process as it is administered today. However, Section 13(4) provides, in part, that the Commission, after full hearing, if finding discrimination against interstate traffic, shall find the intrastate rates unlawful and shall prescribe the rate(s) that will remove the discrimination.

Proposal: We believe that in general rate increase proceedings, the ICC, after proper consideration, should be empowered to order the proven revenue needs of the carriers applied to all traffic. This would require modification of the Act, but is in consonance with its present intent - that all traffic, both interstate and intrastate, should bear a fair share of the carriers' revenue without prejudice or preference, one to the other.

RATE BUREAUS

NABD and its members filed a statement in Ex Parte 297 (Sub-No. 3) on April 23, 1979, urging that motor carrier rate-making meetings be opened to the public. Our position would be the same with respect to rail rate-making meetings.

We favor a continuation of the conference method of rate making and a continued immunity from the antitrust laws as presently embodied in Section 5a of the Interstate Commerce Act. Our members have communicated this information to their legislators, the DOT, and the ICC.

Proposal: NABD agrees with the Administration position that all rate bureau meetings except administrative ones should be open to the public. We also agree that the railroads should have the authority to collectively publish rates for the good of all shippers.

RATE INCREASES

The AAR calls for rate-making freedom, ranging upward or downward as much as 20 percent per year. Increases greater than 20 percent per year would be subject to ICC jurisdiction. The Administration proposal called for a 7 percent "zone of reasonableness" with no regulatory interference, plus for the first two years industry wide increases to cover the economy wide rate of inflation.

Increases as great as 20 percent per year are greatly inflationary and would be disastrous to our industry as well as to small shippers in general.

Beyond 250 miles, the railroads generally have no competition for brick traffic. Truck transportation simply is not a factor.

Many manufacturers and distributors of brick experienced difficulties (and some failed to survive) during the recession in 1974; we now are experiencing another period of reduced construction and inactivity in the building industry.

Proposal: NABD does not disagree with the proposal of a 7 percent increase every year but cannot go along with the inflation rate being added on top of that figure. We would agree with a 7 percent increase or the inflation rate increase, whichever is greater, but not both.

CONTRACT RATES

With our limited rail revenue - producing power, we and all other small shippers (receivers) would have little clout in negotiating contract rates with the railroads. Were the Administration's proposal regarding contract rates approved, the nation would revert to the dark days of pre-regulation when "big tonnage" was heavily favored.

Proposal: If contract rates are to be enacted they should treat all shippers as equal and not eliminate the small shipper because of his size.

ICC SUSPENSION POWER

Under the Administration's proposal, rates could be published without notice, thus effectively removing the Commission's power of suspension upon shipper protest.

Although NABD has unsuccessfully filed numerous protests in the past two years, ranging from a Burlington Northern Railroad withdrawal of absorption of reciprocal switching charges on brick traffic (only brick) for cars going to Minneapolis-St. Paul, to a protest of substantially increased demurrage charges, and including several specific rate increases (not general rate increases) directed to brick traffic alone, we should continue to have that opportunity.

Proposal: The vehicle of "protest" is the only way we have to change or suspend a railroad proposal. NABD feels as small shippers, we must have some way to express our displeasure about new rules. The Administration has stated that carriers should be able to ship what they can ship best, and if the shippers do not like a specific proposal they can go to other modes of transportation presumably truck or water carrier. We feel this action would be a little hard on our industry because we think that as a "captive shipper" we deserve other privileges. Americans have historically been given the right to protest anything they believe is wrong, and we feel this right should not be taken away.

CLASSIFICATION RULES AND PRACTICES

The Administration would eliminate the ICC's authority to prescribe reasonable classification rules and practices.

Proposal: We do not think this proposal would be in the public interest. There must be a restraint on carrier options in this area. We favor no statutory change.

TOTAL DEREGULATION

Much has been said of the air cargo carriers under deregulation by the CAB - how the rates and charges have risen dramatically and how service has been curtailed, and in fact eliminated in many instances, but we have seen little comment about the recent deregulation of rail shipments of fresh fruits and vegetables.

In Ex Parte 346, Sub 2, Rail General Exemption Authority-Miscellaneous Commodities, where the ICC is considering an expansion of the exempt list to include such articles as dried beans, dried peas, fish, mushrooms and others, Sunkist Growers, Inc. has commented not at all favorably on the existing deregulation of the fruits and vegetables.

Sunkist states:

> "It's our position that deregulation has not worked in the public interest with respect to fresh perishables."

Further, it is stated:

> "Although denied by the railroad industry and by certain governmental agencies, it was widely predicted that deregulation of perishables would result in increased costs and charges. Unfortunately, the prediction of shippers have proved true, even beyond the most pessimistic estimates. Attached is a chart which shows the cost of representative movements of perishable commodities since deregulation. The chart demonstrates that, after deregulation, transportation prices rose by as much as 47 percent. Undoubtedly the price rise was facilitated in large part by the energy crisis and the resultant disruption in motor transportation of perishables. Some price reductions have occurred recently. However, the energy crisis appears to be permanent, rather than temporary. Present quotations are now 17 percent higher on the Southern Pacific. The theory that motor carrier competition would provide an effective limitation on railroad price increases must now undergo a re-examination."

SUMMARY

In summary, we believe that reregulation is the answer, not total deregulation. The railroads are necessary. They must survive, and we acknowledge that they must realize earnings sufficient to provide an adequate return on investment. We do not, however, always agree with their definition nor determination of an adequate rate of return.

We are small businessmen. We intend to survive too, but there is no guarantee that we will nor is there substantive assistance available when we falter. We have to seek relief within our own companies, effecting economies and innovating. We cannot raise prices (alone) and continue in business. The railroads must be imaginative and right their own houses. Continual transportation price increases, without restraint, will bring us all down in the same heap.

The ICC must again assume its prerogatives under the law and administer them boldly and fairly, ignoring political and other outside pressures.

There is an insufficient amount of competition in many of the transportation market-places and too many captive shippers to rely on that factor as a curb against disasterous rate increases under deregulation as the rail carriers advocate.

We, as small shippers, must have statutory protection. If the railroads are now overregulated, let us not overreact and underregulate them, making them responsible to no governmental agency.

We are appreciative of this opportunity to offer input on this vital matter, and we should like to be of continued assistance in the future.

A T T A C H M E N T   A

Figures developed from Department of Commerce statistics and Interstate Commerce Commission Statistics, Class I, Railroads, 1972-1977, (1978 has not been published yet).

1. 1977 8.300 billion brick shipments
7.000 million tons of brick shipped by rail at entry point
(Average brick weighs 3.5 pounds)
48.19% shipped by rail

2. 1976 7.200 billion brick shipments
5.385 million tons of brick shipped by rail at entry point
42.6% shipped by rail

3. 1975 5.824 billion brick shipments
5.149 million tons of brick shipped by rail at entry point
50.5% shipped by rail

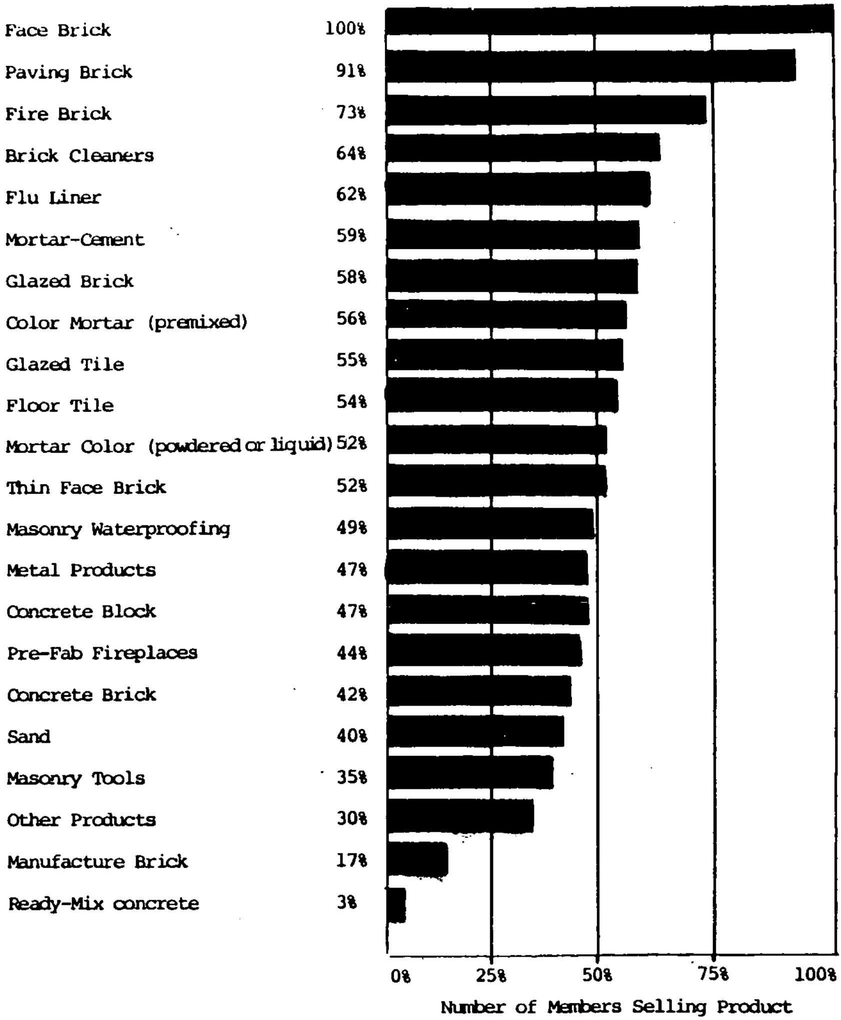
4. 1974 6.678 billion brick shipments
2.631 million tons of brick shipped by rail at entry point
22.5% shipped by rail

5. 1973 8.674 billion brick shipments
2.798 million tons of brick shipped by rail at entry point
18.4% shipped by rail

6. 1972 8.399 billion brick shipments
7.187 million tons of brick shipped by rail at entry point
48.9% shipped by rail

A T T A C H M E N T B

Products Sold by NABD Members



National Farmers Union

STATEMENT OF

REUBEN L. JOHNSON
DIRECTOR OF LEGISLATIVE SERVICES
NATIONAL FARMERS UNION

PRESENTED

TO THE

SUBCOMMITTEE ON ECONOMIC GROWTH AND STABILIZATION
OF THE
SENATE JOINT ECONOMIC COMMITTEE

AND THE

SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE
OF THE
HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE

Relative to H. R. 4570

Proposed "Railroad Deregulation Act of 1979"

September 27, 1979

Mr. Chairman:

I am Reuben L. Johnson, Director of Legislative Services for National Farmers Union, a general farm organization with some 300,000 farm familes as members, together with some 500,000 farm families who are members and patrons of Farmers Union-related farm supply and marketing cooperatives.

Delegates and members of National Farmers Union, at the March 11-14, 1979, convention of the organization held at Kansas City, Missouri, again called for a balanced transportation policy aimed at providing an integrated transportation system to serve America's farmers, ranchers, and other rural residents.

The Farmers Union policy statement deplored the "inability of the transportation system to move the output of our farms, ranches, mines, and forests to markets and ports," and decried the shift to high "energy consumptive" transportation methods.

Suite 600, 1012 14th Street, N.W., Washington, D.C. 20005 – Phone (202) 628-9774

Particularly pertinent to the subject of H. R. 4570, our Farmers Union delegates declared for:

> "Continued regulation of the nation's rail system to assure (a) that rural areas will not be denied adequate service; (b) that captive shippers are not charged excessively high rates; and (c) that railroad trackage will not be denied adequate maintenance."

Farmers Union further proposed a moratorium on all rail line abandonments "until a formula for abandonment determinations is enacted by Congress which will weigh all economic and social costs prior to abandonment approval."

Mr. Chairman, we like the language of the bill which proposes "to assure the development and maintenance of a healthy, efficient freight transportation system, in the private sector, in which the various modes of transportation are subject to impartial regulation."

We also favor the language which declares for "development and maintenance of a transportation system responsive to the needs of the public, in which the regulatory decisions are reached fairly and expeditiously."

But, we are afraid, subsequent sections of H. R. 4570 ignore the goals of a "transportation system responsive to the needs of the public" and, if adopted and implemented, would be an abdication of the overall interests of shippers and the general public.

We in the Farmers Union regard the railroads as a vital section of the overall transportation system. We are also well aware of the severe economic plight of some of the nation's railroads, and we recognize that concern needs to be exercised for their future viability.

But, we regard federal regulation as only a very marginal cause, if any at all, of the economic problems of the railroads. Thus, we fail to see economic deregulation as any sort of cure-all.

We do not realistically imagine that total deregulation of the rail industry will result in improved performance for the shipper. Neither do we expect the competitive problems of the railroads to evaporate simply because of a change in their regulatory status.

One of the most far-reaching provisions of the bill, in terms of farm and rural shippers, is the provision which would breach the common carrier obligations of the existing law. The bill proposes that commitments of equipment under long-term contracts would take precedence over demands for common carrier obligated service. This, it seems to us, would tend to encourage the concentration of equipment in unit-train operations and leave small shippers and remote elevators largely without dependable service.

We are also tremendously concerned about the provisions of the bill for abandonment on notice -- only a slight step short of abandonment at will.

We do not regard total deregulation to be a viable option for a highly-urbanized, highly-industrialized society, yet one which is heavily dependent upon food production from a widely-dispersed system of family farming and ranching units.

Frankly, we fail to see that adoption of H. R. 4570:

-- will save any branch lines now slated for abandonment;

-- will build any additional boxcars;

-- will allocate any rail-cars where they are needed by rural shippers and country grain elevators;

-- will maintain common carrier obligations of service;

-- will protect shippers who have no alternative transportation services; or

-- will keep the cost of transportation services within reasonable bounds.

More specifically, we would like to comment on major provisions of H. R. 4570 as follows:

1. Rate Increases:

Railroads may raise or lower rates 7 percent per annum plus inflation between now and 1985. Then rails may set rates at whatever the traffic will bear. Rails may receive greater rate increases than 7 percent per annum plus inflation by going through the ICC. The ICC, under the 4R Act protects the captive shipper by setting rates. Where there is competition, the rails are free to set rates accordingly. What this bill seeks to do is allow the rails to exploit the captive shipper who has no alternative.

2. Demand-Sensitive Rates:

Rails may raise or lower rates by 3 percent within minimum and maximum to respond to fluctuations in service demand. As of today, nothing prohibits the rails from cutting rates under the yo-yo provision of the 4R Act. The rails are free to cut rates but haven't done so.

3. Elimination of Requirement of Joint Line Rates and Through Rates:

On January 1, 1985, rails would be free to continue or discontinue any rate or route as they see fit.

Since 85 percent of all freight traffic moves by more than one transport mode, this would be highly disruptive to the smooth flow of goods across the country. Also, it would be impossible to maintain any continuity in the rate structure. A shipper would not be able to know in advance the freight rate on a commodity to be shipped any distance at all.

4. Elimination of Provisions Requiring Railroads to Reimburse Shippers Who Use Their Own Rail Equipment:

This bill would allow rails to charge the full fee to shippers owning or leasing cars. This is confiscating property. Shippers have made a substantial investment in rail equipment and would lose the per diem now granted in their freight rates.

5. Rate Bureaus:

Rails are exempt from the Sherman, Clayton, Federal Trade Commission, Wilson Tariff and 1936 Trade Acts. This bill would end this immunity.

6. Elimination of Port Equalization:

Rails would be free to set different rates for moving a similar commodity a similar distance; thus, the cost of commodities may, under this bill, differ considerably. This would give a competitive edge to a shipper who has the clout to negotiate a better rate, and captive shippers would be at a competitive disadvantage in negotiating a rate because there are no alternatives.

7. Notice and Publication:

Rails are required to publish rates with the ICC so that, ostensibly, the public interest will be served. However, the first year after the Act's passage, the rails are required to give 21 days notice of an increase, the second year 14 days notice, and the third year, the rates are effective upon publication. So the end result of this public awareness provision is to lull shippers as to rate increases with absolutely no warning.

Also, rails are not obligated to maintain any rate established before January 1985 unless there are contract rate agreements. Thus, shippers will have a difficult time negotiating a rate with no ICC protection. The rails have no incentive or reason to write favorable terms into contract rates.

8. Abandonment and Discontinuance of Service:

ICC will allow abandonment if --

* there is no objection to the abandonment or discontinuance 30 days prior to date of termination of service;

* the applicant carrier demonstrates that revenues attributable to the line of service do not meet or exceed the "full cost" of operating the line or service, as defined by the Act; or

* the ICC determines that the benefit to the applicant carrier from abandonment or discontinuance, including any benefit arising from the ability to put capital used on the line or service to other railroad use, exceeds the detriment to the protestant and other similarly situated from loss of service, taking into account any impact the abandonment or discontinuance may have on rural and community development.

Once a rail is granted permission to abandon a branch line, a shipper may offer to subsidize a line by offering to pay the difference between revenues attributable to keep a line open and the full cost of continuing service. The carrier and offerer must agree on a price or the matter goes to binding arbitration. Railroad figures will be used and the burden of proof is on the shipper. Thus, the shipper must go to court, using rail figures to prove they deserve any service.

9. Mergers:

The ICC shall allow carriers to coordinate services, exchange markets, make joint use of facilities, grant trackage rights to each other, or transfer rail assets, unless the transfer substantially lessens competition, creates a monopoly, restrains trade or service of freight surface carriers, or the anti-competitive effects outweigh the public interest in public transportation needs.

10. Elimination of Captive Shipper Provision:

Today, the 4R Act's "Market Dominance Rule" protects captive shippers.

If a shipper moves 70 percent of all freight by one mode of transport or pays 160 percent of variable cost, or has a substantial investment in rail equipment, he is captive. Thus, his rates are set by the ICC in such a way that a monopoly railroad won't be able to take advantage of a captive situation. This bill eliminates captive protection on January 1, 1985. At that point, shippers will clearly be hostages to the monopoly railroad.

11. Car Service Orders:

This bill removes ICC authority to order cars to areas that are having shortage problems. The rails are free to service as they see fit. Shippers with economic clout are sure to fare better than those who have survived with ICC protection.

The ramifications of this bill would be devastating to all shippers except the powerful ones who could bargain with the rails from a position of strength. For the rest of us, it would be either the end of reasonably-priced rail service, or the end of rail service altogether.

[Whereupon, at 1:07 p.m., the subcommittees adjourned.]

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