

SUNSETTING THE ICC: IS IT REALLY DEAD?

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ABSTRACT

The Interstate Commerce Commission (ICC) was created in 1887 to regulate railroads. By the mid-1970's it had grown into the premier independent agency in the federal government, regulating all domestic transport modes except air. But starting in the '70's, the Commission began to shrink in both size and power. By 1995's end, it disappeared, and was replaced by the Surface Transportation Board (STB) that regulates only railroads, although to a lesser extent than the ICC had. There remains the question of whether the ICC is really dead or just renamed.

Birth and Growth of the Interstate Commerce Commission

By the early 1880s the clamor for regulation of the railroads had grown to the point where Congress could no longer ignore it. Railroads had a monopoly over most transportation, with the only true competition being intra-modal, i.e. between railroads. Even then, competition was limited to routes served by more than one railroad. This situation left those at non-competitive places, typically smaller communities populated in large part by farmers, to bear the brunt of making up for the low rates between competitive points. So it should be no surprise that the backbone of the populist movement, which favored rail regulation, was composed of those who made their living through agriculture.

Railroads, of course, earned this monopoly due to the fact that they were so superior to any previous mode of transportation. Farmers needed the railroads to get their produce to market. This fact was so evident that many small towns spent themselves into bankruptcy to ensure that they would not be bypassed by a railroad building through its area.¹ While obtaining a railroad did not ensure prosperity, not having one ensured extinction.

Certainly, the farmers were not the only group believing that railroads needed to be brought under some kind of control, but they might have been the most vocal. One of the outcomes of the Populist movement was the institution of state commissions, primarily in those states where the Grangers² were strong enough to overcome the free passes and other favors railroads bestowed on the legislators.³

In truth, federal regulation had many fathers. First, attempts to regulate the railroads on the state level were not very successful. For the most part, it was an all or

nothing regulation in that the only penalty the states could impose was to revoke the railroads' charters, which was not the purpose of regulating railroads. Losing all service would be a fate worse than abiding the railroads' abuses. Second, Supreme Court decisions stated that businesses could be regulated in the public interest.⁴ And even more importantly, interstate commerce was reserved for the federal government to regulate.⁵ At least one prominent source has made the case that the railroads, seeing that some control was inevitable, came down heavily on the side of federal, rather than state regulation, in order to achieve some uniformity. There is even at least one claim that the railroads wrote the original Act to Regulate Commerce, which brought the railroads under federal regulation in 1887.⁶

The Act To Regulate Commerce consisted of four sections that prohibited and/or required certain actions by the railroads. In order to oversee the adherence to these provisions of the Act, a five member independent Interstate Commerce Commission (ICC) was created, the members of which were to be appointed by the President with approval by the Senate. The Commission was empowered to hear complaints concerning violations of the law. It was to order such violations, if found to exist, to be stopped and to determine the amount of damages suffered. The Commission could also investigate the railroads' internal management and require annual reports. However, the ICC was not given the power to impose the penalties required by the Act. Instead, the ICC had to prosecute cases before the federal courts, which would impose penalties, if they concurred.⁷

As events turned out, the courts, especially the Supreme Court, hardly ever concurred with the ICC's decisions. In a series of cases in the 1890s, the courts took away much of the Commission's power, leaving it little more than a collector of statistics.⁸ However, several pieces of legislation restored ICC jurisdiction over the areas outlined in the Act to Regulate Commerce.⁹

One of these pieces of legislation, the Hepburn Act of 1906, gave the ICC power to set maximum rates, increased its size to seven Commissioners, and extended its jurisdiction to include express companies, sleeping car companies, switches, spurs, yards, depots, terminals, and oil pipelines.¹⁰ As a result, the ICC's staff grew in size, more than quintupling from 1890 to 1909.¹¹

As the ICC's duties and responsibilities continued to increase, its size kept pace. By 1917 the Commission had nine commissioners organized in three divisions.¹² The Transportation Act of 1920, which ended World War I's nationalization of the railroads by returning them to private ownership, placed many responsibilities on the ICC. To accommodate the increased workload, the Commission added two more divisions in 1920 and another in 1925. By the end of the decade there was a staff numbering 2,000. But even so, the ICC was so busy that one division alone decided 1,017 cases in fiscal year 1928. The majority of the cases involved rate regulation, but there were many financial issues, as well as those involving services, abandonments, and consolidations.¹³

By the 1930s the railroads were no longer the transportation monopoly they had been. The trucking industry had grown so by the middle of the Depression it was a force that was siphoning off a substantial amount of what little business there was. Being

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unregulated, motor carriers could undercut the railroads' rates. Rather than lessen the amount of railroad regulation, trucks were brought under the control of the Interstate Commerce Commission in 1935.¹⁴

Having to regulate two competing industries made life very complicated for the ICC. This problem was made even greater when the Transportation Act of 1940 added domestic water transportation to the mix. Surface freight forwarders were brought under regulation in 1942.¹⁵ Of all the basic transportation modes, the only one not within the Interstate Commerce Commission's domain was air, which at the request of the airlines, was regulated by the Civil Aeronautics Board.

The Interstate Commerce Commission retained its position as the premier federal agency, and model for other agencies, into the 1970s. It was never involved in a scandal and its written decisions were models of English that others tried to emulate. To handle its responsibilities the ICC grew to eleven Commissioners, 2,085 employees, and a budget of \$52.455 million.¹⁶ At this juncture it would have been difficult, if not impossible, to think that in twenty years the ICC would no longer exist, or at least its name would be retired.

Voices Favoring Deregulation

Beginning in the late 1950s and early 1960s, arguments for the deregulation of transportation were increasingly being heard. One argument was that over-regulation had stifled growth in transportation compared with other industries.¹⁷ Another was that the poor economic situation of the railroads was the result of shortsighted policies of both management and government, and there should be less regulation especially of minimum rates.¹⁸ Even government reports criticized the ICC for slow and costly procedures, piecemeal solutions, weak personnel, and for striving to preserve the status quo.¹⁹

As the 1960s continued, more critics of transportation regulation and of the commission itself were heard. One critic pointed out that shippers were increasingly moving away from common carriage, the protection of which was a major reason for preserving regulation.²⁰ Another stated that the ICC was a cartel whose purpose was to prevent price cutting. If regulation were to be removed, not only would rates decrease, but the costs of regulation itself would be saved.²¹ Economists blamed regulation for the misallocation of resources which raised the price of transportation to shippers.²² Others pointed out that all agencies tended to protect the interests of the industries they are supposed to regulate rather than the interests of the public and the ICC was no exception.²³

By the early 1970s anti-regulatory sentiments were appearing in the popular business and general press, as well as continuing among academics. Ralph Nader sponsored a study which personally attacked the individual Commissioners as being unqualified and having no vision regarding transportation policy.²⁴ Meanwhile, the ICC soldiered on. Its decline, which began after 1976, was almost unnoticed for quite a while.

The 4R Act And Administrative Deregulation

On February 5, 1976, President Gerald Ford signed into law the Railroad Revitalization and Regulatory Reform (4R) Act. The Act was primarily a vehicle to save distressed northeastern railroads through the creation of Conrail. There were, of course, many other provisions, and one, which went largely unnoticed at the time, gave the ICC power to exempt specific types of railroad traffic from regulation if the Commission determined that continued regulation would be an undue burden on persons or commerce.²⁵

At first, the ICC, exhibiting typical organizational behavior, ignored this provision, as it would any that would decrease its authority. It was not until President Jimmy Carter²⁶ began appointing avowed deregulators to the Commission, that it moved in this direction.

On November 9, 1978, the ICC legalized contract rates for railroads under certain conditions. Previously, the Commission had considered all for-hire rail traffic to be common carriage.²⁷ Later in the year it ended federal regulation of the carriage of fresh fruits and vegetables by railroads.²⁸ This action put railroads on an equal footing with motor carriers, who had never had their carriage of fresh produce regulated.

On January 15, 1978, the procedure for approving mergers was streamlined. On December 27 the Commission issued a statement outlining the criteria it would use in making decisions on mergers.²⁹ Also, during this period the ICC set time limits for itself in making abandonment decisions. Abandonment of a rail line has always been controversial because of the unlikelihood of the service ever being revived. Unlike other modes, which use public rights-of-way, another carrier cannot just step in to provide the service.³⁰

By 1980, the ICC gave up its control over car service rules and per diem payments, letting market forces decide appropriate car supplies and payments.³¹ Rate tariffs and rate filing procedures were also simplified and filing requirements were reduced. While these changes were codified in the Staggers Rail Act of 1980, they had really been accomplished earlier.³²

Entry into the industry is a greater issue for motor carriers than for railroads. The capital required to build a railroad and provide its equipment makes the entrance of new companies a moot point in most cases. However, capital is not the same barrier to entry for trucking companies. For the cost of a down payment on a truck, a new company can be born. Therefore, applicants for certificates or permits had been heavily scrutinized by the Commission. During this period, however, the ICC greatly reduced the requirements for approval. In fact, they have been described as rubber-stamping all applications. The number of applicants who could not cover their processing fee checks supports this assertion. The Commission had administratively decided to let the market determine which companies would succeed. Again, the ICC anticipated the deregulation legislation that was to follow, in this case, the Motor Carrier Act of 1980.

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These examples show how the Interstate Commerce Commission voluntarily gave up much of its authority in the space of four years, and how in some respects, the supposed deregulation acts of 1980 were simply Congress' way of catching up with reality.

With the ICC taking such a proactive stance with respect to lessening regulation, one might think that the deregulators would figuratively pat it on the back and be satisfied. The truth, however, is that the push to continue the deregulation process and eliminate the agencies continued, if not with greater energy, at least without any reduction in vigor. The airline deregulation acts were passed in 1977 for cargo and in 1978 for passengers. The Civil Aeronautics Board was sunsetted on January 1, 1985, thus ending all regulation except consumer protection from fraud and unfair practices, which was shifted to the Department of Transportation and safety, which remained with the Federal Aviation Administration. In the meantime, many changes were taking place at the ICC.

ICC Organizational Structure, 1976-1980

The organization of the Commission had continually changed through the years, and its tendency was to grow larger. But after 1976, it began to slowly shrink. On March 6, 1979, for example, the number of field offices was reduced from 75 to 56.³³ In Washington, the number of bureaus also decreased to the point that there were only two by late 1980.³⁴ The number of divisions was reduced from three to two on November 18, 1977.³⁵

While total appropriations increased in the period 1976-1980 due largely to inflation, employment peaked in 1976 at 2,113. It fell slightly each year afterward until it reached 1,946 in 1980.³⁶

The number of commissioners also decreased. Although the number was not reduced by legislation, there were vacancies that presidents refused to fill. On July 30, 1976, there were ten sitting commissioners and one vacancy. By September 30, 1980, there were only six, of which four had been appointed by Carter, meaning that two-thirds were deregulators. Carter refused to appoint anyone to the other four seats. The shrinkage in the number of commissioners was not the result of any legislation.³⁷

With the reduction in the number of commissioners, it would be reasonable to expect that the Commission's decisions would increasingly be based on staff reports, but it was not the case. The deregulatory philosophy of the Commissioners caused them to often make their own decisions and even overrule the staffers who had a more traditional philosophy.³⁸

In February 1978 the ICC was relieved of its oversight of oil pipelines when their regulation was shifted to the Federal Power Commission within the Federal Energy Administration, part of the Executive Branch.

The Reagan Years

Ronald Reagan, who came into office promising to reduce the size of the government, made a very ironic move with respect to the ICC. The most conservative presi-

dent elected in several decades nevertheless appointed Reese H. Taylor, an avowed regulator as chairman. Many of his backers were appalled, but this appointment was evidently a payback to the Teamsters Union, which had supported Reagan's candidacy. The Teamsters felt that deregulation would weaken the union's position and wanted it stopped or at least slowed.³⁹

Almost immediately upon Taylor's assumption of the chairmanship, the commissioners who favored deregulation resigned and Taylor fired the deregulators on his staff.⁴⁰ As a result there were only four commissioners and only one of them a Carter appointee who was also the only Democrat. Because the Act to Regulate Commerce had specified that neither party could have more than one more commissioner than the other, Reagan's Republican appointees had to wait until he appointed Democrats to restore balance. Finally the situation was straightened out and by mid-1982, there was once again six Commissioners.⁴¹

The reduction in the number of commissioners was made official by legislation passed in August 1982 which reduced the size of the ICC to seven commissioners as of January 1983. It was to be further reduced to five commissioners on January 1, 1986. Additionally, the length of terms for the commissioners was reduced.⁴² Congress was displeased with Taylor. Consequently, this bill, which ostensibly was to reduce the number of commissioners because there was less for them to do with lessened regulation, also made it impossible for him to be reappointed.⁴³

What made Taylor's tenure at the Commission even worse was the fact that Reagan's other appointees were deregulators and overruled the chairman in many votes. Due to the commissioners dislike for each other, meetings were often conducted by memo,⁴⁴ in violation of ICC rules.⁴⁵

During Taylor's Chairmanship the ICC did manage to deregulate Trailer on Flat Car (TOFC, also known as "piggyback") and Container on Flat Car (COFC) movements. This action was first considered during the Carter Administration in the fall of 1979. Shortly after the passage of the Staggers Act, the ICC proposed that all rail and truck service provided in connection with TOFC/COFC should be exempt from regulation, and this was effected on February 19, 1981.⁴⁶

As might be expected, the commission's decreased workload due to lessened regulation also decreased the size of its organization. By the end of 1984, for the first time in years, the ICC had its full complement of seven commissioners and its legislatively mandated split of four Republican and three Democrats. Congress still did not get along with some of the Commissioners.⁴⁷

Along with its regulatory workload, the Commission's budget also decreased. By fiscal year 1988 its appropriation was the lowest it had been since 1974, which considering the inflation of the intervening years, was even lower than the absolute figures might indicate. By the following fiscal year, the staff numbered 699, the lowest level in decades.⁴⁸ Many field offices were closed and the amount of office space was reduced.⁴⁹

Despite the cutbacks, the General Accounting Office reported in 1986 that the Commission had improved its efforts to enforce carrier compliance with federal regulations.⁵⁰ However, early in 1987, Commissioner J.J. Simmons stated that the ICC was

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not able to make informed decisions on some major cases due to a shortage of staff. He called well-informed decision making a goal rather than a reality.⁵¹

At the same time that the Commission was being reduced in size, it continued to make important decisions regarding deregulation. Some of these are discussed below.

Deregulation of Boxcar Traffic

Discussion of deregulating boxcar traffic had originated in the ICC in early 1982.⁵² On May 2, 1983, the Commission decided to deregulate all boxcar movements except those involving nonferrous recyclables such as aluminum cans.⁵³ Deregulation took effect January 1, 1984 except for cars owned by short-line railroads which were deregulated July 1.⁵⁴

Reese Taylor was a strong dissenter to this action,⁵⁵ and in a decision reminiscent of court decisions a century earlier, the U.S. Court of Appeals for the District of Columbia struck down deregulation involving cars moving under joint rates. The Supreme Court refused to hear the case.⁵⁶ The irony is that while the courts after a hundred years were once again overturning an ICC decision, now it was the ICC trying to give up power, and the courts insisting that it keep its authority.

On September 12, 1986, the ICC issued new rules allowing mileage and boxcar hire charges to comply with the court decisions.⁵⁷ For the most part, boxcar traffic today is deregulated.

Relaxation of Intermodal Ownership Restrictions and Deregulation of Trackage Rights

Throughout the years there had been a general prohibition of companies, particularly railroads, owning competing carriers in other modes. This policy stemmed from the Panama Canal Act of 1912 which prohibited railroads from owning competing water carriers.⁵⁸ Only in special cases could carriers own carriers in other modes.

On December 17, 1982, the ICC eliminated its "special circumstances" doctrine. Motor carriers owned by railroads could now perform any service, not just those which were auxiliary to rail service. This decision was *ex parte*, i.e. one instituted by the Commission, not a response to a petition from an outside source.⁵⁹ This ruling was appealed to the courts but Congress made it a moot point in October 1986, by passing an amendment to a law, which legalized intermodal ownership.⁶⁰

On September 14, 1982, the ICC proposed to eliminate the regulation of trackage rights agreements, whereby, for a fee, one railroad runs its trains over another's tracks. The courts upheld the ICC proposal.⁶¹

Changing Policy on Contract Rates

Railroad contract rates had been allowed by the ICC in 1978, as described above. They were formally legalized by the Staggers Act of 1980,⁶² and as the railroads enthusiastically embraced contract rate, the number filed with the ICC soared.⁶³

On May 26, 1983, the ICC issued a rule allowing contract rates to become effective upon filing which eliminated the possibility of ICC approval or public hearings prior to the rates taking effect.⁶⁴ There has been little controversy over the implementation of this rule. Because the contract rates are the result of negotiations between the two parties involved, there is a certain logic to their immediate effectiveness.

Another issue involving contract rates is the amount of information about the contract that is made public. The Commission on November 4, 1982 issued rules minimizing the amount of information to be disclosed.⁶⁵ The water carriers appealed.⁶⁶ On November 15, 1983, the U.S. Court of Appeals for the Second Circuit in New York City upheld the ICC specifications.⁶⁷

The issue was reopened with the passing on October 21, 1986, of the Conrail Privatization Act, which contained a provision requiring contract rate disclosure.⁶⁸ Implementation of the new rules reduced the number of rail contracts, but the ICC fought any further rules for increase in the amount of information to be disclosed.⁶⁹

If transportation was to be deregulated, then there would be no need for an institution to regulate it. Proposals to eliminate ("Sunset") the Interstate Commerce Commission will be discussed in the next section.

Sunsetting The Interstate Commerce Commission

As related above, criticisms of transportation regulation had been around since at least the 1950s. Most of them concentrated on the act of regulation, not the regulating institution. However, with regulation greatly lessened, it was natural to consider the elimination of the regulatory agency.

In 1983, the first legislation to sunset the ICC, the Transportation Improvement Act, was proposed. Among other provisions, it contained one to consolidate the regulatory functions of the Interstate Commerce Commission, the Federal Maritime Commission, and the Civil Aeronautics Board into a single agency.⁷⁰ The bill was never enacted.

In early 1986 the Reagan administration sent a bill to Congress abolishing the ICC. Heather Gradison, ICC Chairman, also advocated abolishment but favored retaining its remaining rail regulatory functions somewhere.⁷¹

The Reagan administration's fiscal year 1988 budget, submitted January 1987, recommended that all economic regulation of motor carriers, freight forwarders, water carriers, and bus companies be ended. As part of the proposal, the ICC would be sunsetted by October 1. Rail regulation would be transferred to the Transportation Department (DOT), except for anti-trust matters which would be handled by the Department of Justice. Heather Gradison endorsed the proposal.⁷² Senate Minority Leader Robert

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Dole (R-KS) introduced legislation in the spring of 1987 calling for sunseting the Commission.⁷³

Of course, not everyone was in favor of sunset. Many carriers, shippers, and the organizations representing them, as well as politicians and academics were on record as being in opposition. One of the most interesting personalities to oppose sunset was Alfred Kahn, former Chairman of the Civil Aeronautics Board and architect of its demise. He stated that the CAB sunset was largely symbolic and was done to convince the public that the United States was serious about deregulating the airline industry. But, in retrospect, he felt that the CAB would have handled deregulation better than the DOT did. Therefore, abolishing the ICC would be a mistake. It should be retained, if only to protect captive shippers.⁷⁴ The Department of Transportation is part of the Executive Branch and is hardly the independent agency that the Interstate Commerce Commission was designed to be.

At the 1986 Association of Transportation Practitioners⁷⁵ annual meeting there were many complaints that the ICC was moving too slowly in making decisions. Fritz Kahn, former general counsel of the Commission, posited that the Commission was purposely delaying important decisions to make it appear that it was doing nothing and thus setting the stage for sunset. It was suggested that the members consider opposing the reappointment of any commissioners that favored sunset because they could hardly do a good job for an organization in which they did not believe.⁷⁶

During the next few years, proposals to sunset the ICC and transfer its functions to the Department of Transportation appeared and were pushed aside. Students of the Commission, for the most part, while realizing that it had lost much of its previous powers, did not believe the ICC would be eliminated completely. One of the authors wrote late in 1991 that, while other modes might be completely deregulated, the railroads would not be and it would be better to leave the duties of rail oversight where they were.⁷⁷ Results of the sunset of the Civil Aeronautics Board had not been as good as expected. In Congressional hearings, the number of complaints were many and varied and even Alfred Kahn, the architect of the CAB sunset, stated that the DOT had not done a good job.⁷⁸

An eclectic group, including such diverse congressional members as the then-obscure Tom Delay and John Kasich, very conservative Republicans, and Barney Frank, a very liberal Democrat, worked to eliminate the ICC during 1993 and 1994.⁷⁹ In July 1993, Senator John Danforth of Missouri, then the ranking Republican on the Senate Commerce Committee, introduced legislation to transfer the functions of the Interstate Commerce Commission to the DOT and sunset the ICC. He claimed that savings would equal almost as much as the whole proposed budget of the commission. Congressman Joel Hefley (R-CO) proposed a similar measure in the House.⁸⁰ While these proposals were defeated in both houses of Congress, they produced much controversy. Transportation executives weighed in with their opinions and many transportation periodicals editorialized. One pointed out that two of the commissioners, Edward Philbin and Gregory Walden, confessed that they were doing nothing to earn their salaries. Ironically, Walden was a George H.W. Bush recess appointee who had never faced Senate

confirmation, but had announced he would fight to keep his seat. Senator James Exon warned of "so-called reformers who believe an agency is good enough to give them a monthly paycheck but not good enough to exist after they leave."⁸¹

In the spring of 1994, ICC Chairman Gail McDonald again had to spend time before Congress fighting for the Commission's life. The General Accounting Office had released a report stating that the ICC was spending half its time on formalities. An article in *The Wall Street Journal* stated that members of Congress liked having the Commission because they could refer complaints of their constituents there and appear to be doing something, while the ICC was spending most of its time filing tariffs.⁸² The ICC survived that year, although the bill to eliminate it passed the House of Representatives by a comfortable bi-partisan margin. In the Senate, a compromise was fashioned whereby rates would not be filed anymore, which would accomplish the purpose of reducing the ICC's budget by one-third.⁸³

Each year the ICC came closer to extinction, and in November of 1994, the process was hastened when Republicans gained control of Congress. Two of the most active in attempting to eliminate the ICC were Alfonse D'Amato (R-NY) and John Kasich (R-OH) who took over as chairman of the Senate Appropriations Committee and House Budget Committee Chairman, respectively.⁸⁴

Sunset, as previously pointed out, was not strictly a partisan issue, as Bill Clinton's budget for fiscal year 1996 proposed to phase out the ICC.⁸⁵ The ICC was singled out in Clinton's State of the Union address as one agency that had outlived its usefulness. Debate soon turned from whether to preserve the ICC to where its functions should be transferred. The Clinton administration favored moving decision-making powers over mergers to the Department of Justice. The railroads preferred that all ICC powers be transferred intact to the Department of Transportation.⁸⁶

A bill to eliminate the ICC was sent to Congress by the Department of Transportation on April 6, 1995. Introduced by Representative William Lipinski (D-IL), it proposed keeping the Commission alive until September 30, 1996, and then transferring its authority over rail mergers to the Department of Justice.⁸⁷ Debate continued over which functions would be retained, but at this time there seemed to be no question that outside of mergers, all other issues would reside in DOT. By June, the House Transportation Appropriations Subcommittee had marked up legislation eliminating the ICC by December 31.⁸⁸

In August, the National Industrial Transportation League proposed that a new agency within DOT be created to handle the ICC's functions. The idea of an independent agency within DOT was gaining support, although different interests, e.g. the National Small Shipments Traffic Conference, the Association of American Railroads, other railroad associations and several coal, grain and chemical shippers associations, disagreed on the details.⁸⁹

On August 9, 1995, Senator James Exon, who less than two years earlier had fought to save the Commission and evidently swayed by the changing general attitude, introduced legislation to eliminate the ICC and transfer most of its responsibilities to a new United States Transportation Board.⁹⁰ By October 1995, the Senate Commerce Com-

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mittee was drafting a bill to eliminate the ICC and transfer its functions to an independent board within DOT. At this point it was a bipartisan first draft entitled, "ICC Sunset and Intermodal Surface Transportation Reform Act."⁹¹ In the meantime, layoffs were occurring at the Commission, as its budget was cut.⁹²

On November 14 the House approved H.R. 2539, The ICC Termination Act. The Act repealed existing rail and motor carrier regulation and replaced it with a 286-page document covering remaining regulation.⁹³ Although there was some conflict with the Senate version, and a White House threat to veto the bill, compromise was reached and on November 28, the Senate passed a very similar bill. The House bill referred to the successor board as the Transportation Adjudication Panel, while the Senate bill referred to it as the Intermodal Surface Transportation Board.⁹⁴ But the details were difficult to work out, and in mid-December Congress was still haggling over the final shape of the legislation. The House-Senate conference committee met for the first time on December 13. Some of the sticky issues involved severance pay and benefits for workers displaced by sale or merger of carriers. Major issues tentatively resolved by that time involved motor carrier liability, motor carrier registration, financial reporting, rail market dominance, and tariff filing.⁹⁵

Meanwhile, the ICC was working on the mechanics of shutting down and starting up. Some employees were to be transferred to the Federal Highway Administration while others were to "remain" at the Surface Transportation Board, the ICC's successor.⁹⁶

The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat., 803 (1995), was finally passed by the Senate on December 21 and the House on December 22, both by voice votes. It was signed by President Clinton on December 29.⁹⁷

The Surface Transportation Board opened for business on January 2, 1996. It consisted of two commissioners and chairman (Linda Morgan) who had held the same positions on the ICC. It was housed in the same building and had the same phone numbers as its predecessor. It was smaller in scope, as almost half its employees were transferred to the Office of Motor Carriers in the Federal Highway Administration.⁹⁸ Some writers have numbered the STB members and chairmen by continuing the ICC's numbers.

One of the authors had the opportunity to see Chairman Linda Morgan speak on January 18, 1996. She appeared harried and obviously had not had a pleasant holiday season. She spoke of the difficulties of splitting the Commission and how hard it had been on the staff.⁹⁹ At a reception that night, Commissioner Gus Owen told the author that the whole sunset was just a perception. As he stated it, "Congress needed a trophy." When asked for a business card, he could only produce his ICC Commissioner's card.¹⁰⁰ The question is whether the ICC is truly dead or just reincarnated as the STB.

Epilogue

Edward Emmett, National Industrial Transportation League President, a former ICC Commissioner, stated in October 2000, that the STB should be abolished. According to Emmett, it does nothing for the shippers and without it, shippers could take matters to the courts, state regulatory commissions, DOT, the Justice Department or

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Federal Energy Regulatory Commission (for matters of coal haulage).¹⁰¹ Even a column in March 2003 issue of *Trains Magazine* called for abolishment of the STB and for letting shippers and the railroads work things out between themselves.¹⁰²

Calls for abolishing the STB have not reached the point where anything is likely to be done, but at one time the same was said about the Interstate Commerce Commission.

Notes

1. Page Smith, *The Rise of Industrial America: A People's History of the Post-Reconstruction Era* (New York: McGraw-Hill, 1984), 101.
2. The Patrons of Husbandry, or Grangers, was the most famous of the populist groups and the state laws regulating railroads were collectively known as the Granger Laws. Although the first regulatory efforts were in the northeast because railroads originated there, the attempts in the Midwest were more widespread because the railroads' abuses there were more blatant.
3. Solon Justis Buck, *The Granger Movement* (Cambridge, MA: Harvard University Press, 1913), 13-15.
4. *Munn v. Illinois*, 94 U.S. 113 (1876).
5. *Wabash Railway Company v. Illinois*, 118 U.S. 557 (1886).
6. Gabriel Kolko, *Railroads and Regulation, 1887-1916* (Princeton: NJ: Princeton University Press, 1965), 34-44.
7. Richard D. Stone, *The Interstate Commerce Commission and the Railroad Industry: A History of Regulatory Policy* (Westport, CT: Praeger, 1991), 6-7.
8. Richard D. Stone and Michael Landry, "The Decline and Rise of the Interstate Commerce Commission: Court Cases from the 1890's and Legislation from the 1900's." *Journal of Transportation Law, Logistics, and Policy*, Fall 2002.
9. *Ibid.*
10. I.L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure*, 5 vols. (New York: The Commonwealth Fund, 1931-1937), 1:15-16.
11. Staff size increased from 104 in 1890 to 178 in 1905, 330 in 1907, and 527 in 1909. *Ibid.* 4:68.
12. Stone, *The Interstate Commerce Commission and the Railroad Industry*, 18.
13. *Ibid.* 20-21; Sharfman, *Interstate Commerce Commission*, 4:53-54, 68, 71-712, 79-81, 3B: 99-101.
14. An irony is that farm products carried by motor carriers, due to lobbying by farmers, were exempt from regulation. Farmers, who were in the forefront of the move to regulate the railroads 50 years earlier, now didn't want it for trucks. This was due in large part to the much greater intra-modal competition in the motor freight industry.
15. Richard D. Stone, "Administrative Deregulation of the Railroads: The ICC's Change of Philosophy," *Transportation Practitioners Journal* (Spring 1994): 279.
16. Interstate Commerce Commission, *90th Annual report to Congress of the Interstate Commerce Commission for the Fiscal Year Ending June 30, 1976* (Washington, DC: GPO, 1976), 139. The Annual Reports will henceforth be designated as follows: *ICC Annual Report, FY year*.
17. John R. Meyer, Merton J. Peck, John Stenason, and Charles Zwick, *The Economics of Competition In the Transportation Industries* (Cambridge, MA: Harvard University Press, 1959), see especially pp. 242-273.
18. James C. Nelson, *Railroad Transportation and public Policy* (Washington, DC: Brookings Institution, 1969), especially pp. 412-435.
19. "Excerpts From Landis Report to Kennedy Criticizing Federal Regulatory Agencies," *New York Times*, 27 December 1960, 16; George W. Wilson, *Economic Analysis of Intercity Freight Transportation*, (Bloomington, IN: Indiana University Press, 1980), 269.
20. Richard N. Farmer, "The Case Against Common Carriage," *ICC Practitioners' Journal* (March 1964): 682-688.
21. George W. Hilton, *The Transportation Act of 1958: A Decade of Experience* (Bloomington, IN: Indiana University Press, 1969), especially pp. 187-188, 204-206.

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22. Ann F. Friedlaender, *The Dilemma of Freight Transport Regulation* (Washington, DC: Brookings Institution, 1969), especially pp. 163-187; Edward J. Donahue and Stanley J. Hille, "National Transportation Policy and the Regulatory Agencies," *MSU Business Topics* (Spring 1971): 67-75.

23. Louis M. Kohlmeier, *The Regulators: Watchdog Agencies and the Public Interest* (New York: Harper and Row, 1969).

24. Robert C. Fellmeth, *The Interstate Commerce Omission: The Public Interest and the ICC* (New York: Grossman, 1970), especially pp. 3, 4, 10, 311-316.

25. Stone, *The Interstate Commerce Commission and the Railroad Industry*, 77-78.

26. Jimmy Carter ran for President as an outsider and enemy of big government. As Governor of Georgia he had abolished 278 out of 300 state agencies. Further, he saw deregulation as pro-consumer, i.e. as a way to lower prices. Jimmy Carter, "For America's Third Century Why Not Our Best? Standards of Excellence," Speech Announcing the Candidacy for the Democratic Presidential Nomination, National Press Club, Washington, DC, 12 December 1974; Stuart E. Eizenstat, law firm of Powell, Goldstein, Frazer, and Murphy, Interview by author, 18 March 1987, Washington, DC. Mr. Eizenstat was Carter's chief issues analyst during the campaign and became his domestic policy advisor when Carter became president.

27. Change of Policy-Railroad Contract Rates, 361 I.C.C. 205 (1978).

28. Ex Parte No. 346, Rail General Exemption Authority (not printed), decided December 6, 1978. An ex parte decision is one which is initiated by a commission rather than one which is the result of a complaint brought before it.

29. Stone, "Administrative Deregulation of the Railroads," 285.

30. Ex Parte No. 274 (Sub-No. 2), Abandonment of rail Lines and Discontinuance of Service, decided November 1, 1976.

31. Stone, *The Interstate Commerce Commission and the Railroad Industry*, 98-100.

32. Stone, "Administrative Deregulation of the Railroads," 285-6.

33. *ICC Annual Report, FY 1979*, 8, 94-97.

34. *Ibid.*, 28; *ICC Annual Report, FY 1980*, 24.

35. *ICC Annual Report, FY 1978*, 14.

36. The 1976 peak was the highest since 1966, but it was not the all time peak. *ICC Annual Report, FY 1980*, 120.

37. *ICC Annual Report, FY 1976*, vi; *ICC Annual Report, FY 1980*, 97.

38. Stone, *The Interstate Commerce Commission and the Railroad Industry*, 103.

39. "The Quarrel Over Who Will Head The ICC," *Business Week* (16 March 1981): 31.

40. Maria Recio, "Trantum, Alexis Resign from ICC," *Fleet Owner* (July 1981): 20; "ICC Nominations: A New Deregulation Test," *Business Week* (20 July 1981): 58, 60.

41. *ICC Annual Report, FY 1981*, 4; "A Third Nominee for the ICC," *Railway Age* (11 January 1982): 12; "For ICC, Help Is on the Way," *Railway Age* (8 March 1982): 15; "ICC Seats No. 6," *Railway Age* (26 April 1982): 4; "Heather Gradison Confirmed for ICC," *Railway Age* (12 July 1982): 4; *ICC Annual Report FY 1982*, 3.

42. *ICC Annual Report FY 1982*, 4; "Bill Would Reduce ICC to Five Commissioners," *Rail News Update*, 25. August 1982, 4; Margaret Garrad Warner, "Chairman of the ICC, FCC Are Targets of Bill Passed by Senate Panel to Cut Membership," *The Wall Street Journal* (16 July 1982): 4.

43. Due to the balance requirements, Taylor had to be replaced by a Democrat. Please note that this bill was passed by a Republican Congress. Warner, "Chairmen of the ICC, FCC Are Targets...", 4; "Is ICC Chief's Job in Jeopardy?" *Railway Age* (9 August 1982): 10.

44. ICC regulations call for regular meetings on the first and third Tuesdays of the month, but by the Summer of 1985 it had been a year since the Commissioners had met.

45. Christopher Conte, "ICC Nears Paralysis as Its Members Feud Bitterly About Deregulation," *The Wall Street Journal* (18 July 1984): 29; Fritz Kahn, Interview by author, 17 March 1987, Washington, DC. (Mr. Kahn was the General Counsel of the ICC from August 1970 through January 1976.)

46. "Watching Washington," *Railway Age* (10 September 1979): 12; *ICC Annual Report, FY 1981*, 7, 9, 71; "ICC Moves To Cut TOFC/COFC Regs," *Railway Age* (29 December 1980): 11.

47. These were especially Reese Taylor, Heather Gradison, and Frederic Andre. Andre, in particular was an embarrassment. He stated that bribes "are probably one of the clearest instances of the free market at

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work." He was also criticized for campaigning for reappointment to the Commission. Fritz R Kahn, Interview by author, 21 November 1990, Washington, DC; Allen R. Wastler, "Rail Labor Goes on the Offensive against Gradison, Andre of the ICC", *Traffic World* (27 February 1989): 12; David M. Cawthorne, "Renomination of Andre Seen Headed for Trouble in Senate Commerce Panel," *Traffic World* (18 April 1988): 40.

48. *ICC Annual Report, FY 1988*, 139; *ICC annual Report, FY 1989*, 128.
49. *ICC Annual Report, FY 1985*, 4-5, 23; *ICC Annual Report, FY 1988*, 4-5; "Streamlined ICC Closes 33 Offices," *Railway Age* (August 1986): 25.
50. "ICC Boosted Enforcement Program Despite Budget, Staff Cuts," *Traffic World* (11 August 1986): 21.
51. "Simmons on Staff Squeeze," *Traffic World* (2 March 1987): 25.
52. "ICC May Deregulate Boxcars Nationwide," *Rail News Update* (27 January 1982): 3; "Exemption of All Boxcar Traffic?" *Railway Age* (8 March 1982): 14.
53. *ICC Annual Report, FY 1983*, 8.
54. "Further Delay Possible in Boxcar Deregulation," *Railway Age* (December 1983): 26.
55. "Taylor Calls Boxcar Decision 'Nonsensical,'" *Railway Age* (June 1983): 33.
56. "Appeals Court Hands ICC Another Setback on Boxcar Decontrol," *The Wall Street Journal* (28 June 1984): 24; *Brae Corporation v. United States of America and Interstate Commerce Commission*, 740 F.2d 1023 (D.C. Cir, 1984).
57. "Final Rules Released Continuing Regulation of Class II Box Cars," *Traffic World* (22 September 1986): 90.
58. D. Philip Locklin, *Economics of Transportation*, 7th ed. (Homewood, IL: Irwin, 1972), 862-864.
59. *ICC Annual Report, FY 1983*, 70.
60. "Truckers, Teamsters Fight Rail Takeovers," *Railway Age* (December 1985): 13; *ICC Annual Report, FY 1985*, 32, 68; "Rail-Truck Merger Law Is Clarified by House," *Traffic World* (20 October 1986): 58.
61. *ICC Annual Report, FY 1982*, 10, 14; *ICC Annual Report, FY 1985*, 8, 44; "Federal Court Backs ICC on Ruling to Deregulate Trackage Rights Pacts," *Traffic World* (25 May 1987): 60.
62. U.S. Congress, *Staggers Rail Act of 1980*, 96th Cong., 2d Sess., P.L. 96-448.
63. *ICC Annual Report, FY 1981*, 31; *ICC Annual Report, FY 1983*, 14; *ICC Annual Report, FY 1985*, 35; "41,021 Rail Contracts Filed Since Staggers," *Rail News Update* (23 July 1986): 4.
64. *ICC Annual Report, FY 1983*, 9.
65. *ICC Annual Report, FY 1983*, 6.
66. Because water carrier rates are usually set at fifteen per cent below rail rates, water carriers generally oppose any lowering of those rates.
67. "Courts Uphold ICC Rail Policies," *Rail News Update* (30 November 1983): 1.
68. This provision was sponsored by Senator Nancy Kassebaum (R) and Congressman Jim Slattery (D), both of Kansas. "Decline in Contract Rate Use, Rate Rise Seen," *Traffic World* (10 November 1986): 18.
69. *ICC Annual Report, FY 1988*, 33-34
70. "Agency Consolidation Bill Introduced by Packwood," *Rail News Update* (9 February 1983): 3.
71. "Congress Sets Feb. Hearings on Elimination of ICC," *Rail News Update* (8 January 1986): 4; "ICC Chairman Gradison Delivers Progress Report on Where Agency's Headed," *Traffic World* (15 September 1986): 30.
72. Allen R. Wastler, "Reagan's FY 1988 Budget Requires More Air Money and End to Amtrak," *Traffic World* (12 January 1987): 11-12.
73. Allen R. Wastler, "ICC Sunset Proposal Materializes in Omnibus Competitiveness Bill," *Traffic World* (2 March 1987): 7.
74. "Deregulation Now—Reregulation Next?" *Railway Age* (April 1983): 8; Markek B. Solomon, "Kahn Calls CAB Sunset 'Symbolic'; Argues Against Abolition of ICC," *Traffic World* (14 April 1986): 25; John F. Donelan, "A Century of the Interstate Commerce Commission: A Shipper's Viewpoint," *Transportation Practitioners Journal* (Winter 1987): 160.
75. The Association of Transportation Practitioners was formerly the I.C.C. Practitioners Association and was composed largely of lawyers who practiced before the Commission.
76. Kathleen R. Keeney, "Keough, ICC Workload in Limelight at Annual ATP Meeting," *Traffic World* (14 July 1986): 21-22.
77. Stone, *The Interstate Commerce Commission and the Railroad Industry*, 191-93.

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78. U.S. Congress, House of Representatives, Committee on Public Works and Transportation, *Consumer Protection for Airline Passengers: Hearing before the Subcommittee on Aviation*, 100th Cong., 1st Sess., 9-10 June 1987, 19-21, 29, 35, 247, 179-80; Mark B. Solomon, "Kahn Calls CAB Sunset 'Symbolic'; Argues against Abolition of ICC," *Traffic World* (14 April 1986): 25.

79. Roger Nober, "My Door Is Open," *ATLLP Highlights* (January-February 2003): 2.

80. John F. Wetzel, Jr., editor, "Railroad Legislative Activities," *Association of Transportation Practitioners Highlights* (September-October 1993): 14.

81. The proposal was defeated by only 15 votes in the House. Jean V. Murphy, "Bad Form," Editorial, *Traffic World* (18 October 1993): 4.

82. "ICC again prepares to defend its role as Congress calls joint committee hearing," *Traffic World* (23 May 1994): 9, 11; David M. Cawthorne, "ICC spends half its time on 'formalities' says GAO," *Traffic World* (13 June, 1994): 16; Daniel Pearl, "ICC Keeps Truckin' Though It Has Lost Much of Its Authority," *The Wall Street Journal* (27 April 1994): 1, 6

83. Robert P. James, "ICC critics drop push to kill agency, filed-rate doctrine to die instead," *Traffic World* (1 August 1994): 14; Roger Nober, "My Door Is Open," 2.

84. Robert P. James, "Republicans 'turn the world upside down,'" *Traffic World* (14 November 1994): 19.

85. David Barnes, "Clinton's 1996 budget phases out ICC; industry slams plan to unify trust funds," *Traffic World* (13 February 1995): 11.

86. Alice C. Saylor, editor, "Organization, Practice and Procedure," *Association of Transportation Practitioners Highlights* (March-April 1995): 11; "Clinton Seen Backing Move of Rail Powers If ICC Is Eliminated," *The Wall Street Journal* (21 February 1995): B2; David M. Cawthorne and David Barnes, "Railroads propose plan for post-ICC regulation calling for basics transferred intact to DOT," *Traffic World* (20 February 1995): 14-15.

87. "DOT sends ICC legislation to Congress; bill would send rail mergers to Justice Dept.," *Traffic World* (17 April 1995): 16-17.

88. David M. Cawthorne, "AAR, regionals, shortlines agree on functions to be transferred to ICC successor agency," *Traffic World* (29 May 1995): 33; "Curtains for the ICC," *Trains* (July 1995): 19; John F. Wetzel, Jr., editor, "Railroad Legislative Activities," *Association of Transportation Law, Logistics, and Policy, Highlights* (July-August 1995): 11; "House budget cuts would eliminate ICC by Dec. 31," *Traffic World* (26 June 1995): 18; David Barnes, "House votes to spend \$21.8 million to kill ICC," *Traffic World* (31 July 1995): 14.

89. The NITL President was Edward Emmett, a former ICC Commissioner. "NITL proposal for new DOT agency to handle ICC functions draws fire," *Traffic World* (7 August 1995): 20; "Former Foes Unite In ICC Replacement Bid," *Inbound Logistics* (August 1995): 6.

90. John F. Wetzel, Jr., editor, "Railroad Legislative Activities," *Association of Transportation Law, Logistics, and Policy, Highlights* (September-October 1995): 10-11; David Barnes, "Exon introduces legislation to phase out ICC," *Traffic World* (14 August 1995): 14-15.

91. David Barnes, "Senate finally drafting ICC sunset bill, proposing independent board in DOT," *Traffic World* (23 October 1995): 12.

92. David Barnes, "With Congress focused on other matters, final round of layoffs begins at doomed ICC," *Traffic World* (9 October 1995): 13-14.

93. David Barnes, "House passes ICC Termination Act, would transfer some functions to DOT," *Traffic World* (6 November 1995): 12-14.

94. David Barnes, "Senate panel prepares to act on ICC bill while House version elicits veto threat," *Traffic World* (13 November 1995): 19, 21; David Barnes, "House votes to kill ICC, protect labor," *Traffic World* (20 November 1995): 8-9; David Barnes, "Senate committee votes to kill ICC and FMC," *Traffic World* (20 November 1995): 9-10; David Barnes, "Details of the Senate ICC Bill," *Traffic World* (20 November 1995): 10-11; David Barnes, "Senate votes to kill ICC, move functions to DOT as deadline for final layoffs looms," *Traffic World* (4 December 1995): 16-17; David Barnes, "House, Senate work out differences in ICC sunset bills," *Traffic World* (11 December 1995): 16-17; Alice C. Saylor, editor, "Organization, Practice and Procedure," *Association of Transportation Law, Logistics and Policy Highlights* (January-February 1996): 10-11.

95. David Barnes, "Congress still haggling on ICC sunset; conference drops provision killing FMC," *Traffic World* (18/25 December 1995): 12.

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96. David Barnes, "DOT and ICC prepare for agency sunset, rebirth," *Traffic World* (18/25 December 1995): 13.
97. David Barnes, "Congress kills ICC after last-minute haggling," *Traffic World* (1 January 1996): 10-12; John K. Maser III, editor, "Rail Transportation," *Journal of Transportation Law, Logistics and Policy* (Winter 1996): 269.
98. "ICC successor opens for business," *Traffic World* (8 January 1996): 17.
99. Special Seminar on Interstate Commerce Commission Sunset Legislation sponsored by the Association for Transportation Law, Logistics and Policy, Washington, DC (18 January 1996).
100. Farewell Party for the Interstate Commerce Commission, Friends of the ICC, Inc., Washington, DC (18 January 1996).
101. Frank N. Wilner, "Fighting Words," *Traffic World* (2 October 2000): 15.
102. Larry Kaufman, "Time to abolish the Surface Transportation Board," *Trains* (March 2003): 16-17.