Refining the Antitrust Immunity of Railroad Ratemaking: The Railroad Revitalization and Regulatory Reform Act of 1976

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On February 5, 1976 President Ford signed into law the Railroad Revitalization and Reform Act of 1976, a $6.4 billion program designed to "help restore the health and vitality of our nation's private railroad system." A key element of this ambitious program, embodied in the rate reform provisions of the Act, is the implementation of a policy favoring the substitution of competitive forces for regulatory controls. As a means of effectuating this controversial policy, the Revitalization Act, by amending section 5a of the Interstate Commerce Act, narrows the existing statutory exemption provided railroad ratemaking by federal antitrust law. Consequently, the new amendments require a change in traditional railroad ratemaking practices.

The Department of Transportation, which sponsored the legislation, maintains that the amendments will eliminate predatory pricing and that, "far from causing the collapse of a carefully ordered structure, they will open the way to healthy competition and cost-based rates." Critics contend that the amendments unnecessarily

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2. Comments of President Ford at the signing of the bill. Stephen Ailes, President of the Association of American Railroads, called the bill "the most comprehensive railroad legislation enacted in this century." TRAFFIC WORLD, Feb. 9, 1976, at 11, col. 1.
4. For a discussion of this policy and the reasons favoring its implementation see Snow, Exploding Myths about Transportation Regulatory Reform, 42 ICC PRAC. J. 731 (1975) [hereinafter cited as Snow]. Mr. Snow is Deputy Under Secretary of Transportation, Washington, D.C.
5. 49 U.S.C. § 5b (1970). Prior to the Revitalization Act amendments, this section applied to common carriers by rail, common carriers by motor vehicle and freight forwarders. The Revitalization Act, however, removes rail carriers from the application of section 5a of the Interstate Commerce Act and inserts a new section 5b which is applicable solely to common carriers by railroad.
6. Since 1948, when Congress overrode President Truman's veto to enact section 5a, Interstate Commerce Commission (ICC) approved rate bureaus, organizations of carriers which provide forums and procedures for the joint determination of rate matters have enjoyed an express statutory exemption from the operation of the antitrust laws. See S. REP. No. 499, 94th Cong., 2d Sess. 14, 15 (1976). This article is concerned only with the antitrust immunity of railroad rate bureaus.
7. Snow, supra note 4, at 739. He also stated:
What we seek is increased reliance on the self-regulating effects of competitive market forces. Our goal is a safe, efficient, and reliable national transportation system which will best serve the needs of the consuming public through a wide
inhibit the conference method of ratemaking which they consider essential to the realistic nondiscriminatory determination of railroad rates and to the continued availability of national rail transportation services.¹

This article will focus on the relevant provisions of the 1976 amendments to section 5a and their effect on the antitrust exposure of the railroad pricing structure.

THE FUNCTION OF THE RAILROAD RATE BUREAUS

Railroad rate bureaus are unincorporated associations of individual rail carriers that are organized generally on a regional basis. Their primary function is to serve as a forum for the collective determination of rate matters and to act as an agency publishing tariffs for participating member carriers.² They also serve as important informational sources—gathering and disseminating traffic and transportation information.³ According to an industry spokesman, the bureaus constitute the core element in the railroads' ratemaking process and shipper participation in that process:

Through bureau procedures, shippers are notified by mail when a proposal is filed; shippers and carriers have an opportunity to develop complete information as to the effects of the proposal; and compromises can be worked out through collective action which avoid disruption of market relationships sensitive to transportation costs, avoid changes in rates which prefer one shipper or community over another, and avoid needless litigation before the Commission. These procedures bring the collective judgment of shippers and carriers to bear on the difficult question of what rate level will enable the carrier to maintain the service and at the same time

variety of competitive services with dependable, prompt delivery and cost-based rates. We want to encourage greater price competition and service flexibility, ease, not abolish, entry restrictions for motor carriers, reduce anticompetitive practices, and encourage the most efficient use of transportation resources.

Id. at 735.


Prior to the enactment of the Revitalization Act amendments, in Ex Parte No. 297, Rate Bureau Investigation, 349 I.C.C. 811 (1975), the ICC disapproved the curtailment of antitrust immunity as a means of effectuating the goals of the national transportation policy and effective regulation. See text accompanying note 89 infra.


10. Id. Railroad rate bureaus have existed in one form or another for over 100 years. The first was the Southern Freight Association founded in approximately 1875.
be low enough to induce movement of the commodity in question.

Thus, bureau procedure and action makes it possible to consider the consequences of a prospective rate change in light of the best information as furnished by the affected shippers and other railroads.\footnote{11}

THE NECESSITY OF JOINT ACTION IN RAILROAD RATEREMAKING

Any analysis of the application of the antitrust laws to the railroad rate bureaus must begin with the threshold consideration of two principal factors involved in railroad ratemaking that mandate a certain amount of joint action on rates by competing carriers: first, the integrated nature of the national rail transportation system; and second, the legal requirements and standards imposed on rail carriers by the Interstate Commerce Act and the Interstate Commerce Commission (ICC). These factors combine to make competition among the railroads essentially different from competition in other enterprises.

The integrated nature of the national rail system provides the railroad industry with one of its most fundamental and unique features—individual railroad companies are \textit{at the same time} both competitors and partners in providing transportation services.\footnote{12} A simple example illustrates this feature: two individual connecting railroads may combine to form a joint line (through) route between two geographic points. Their relationship as partners necessitates agreement between them on the applicable rate to be applied to this joint line route and on the division of the revenue generated by traffic moving over it. As bona fide partners, they may jointly determine the joint rate without incurring antitrust liability. However, a problem arises in the relatively common situation in which one or both of the carriers has its own single line route between the same two points which competes with the joint line route. Consequently, the same carrier that determines what its own single line rate will be, will also participate in the determination of the rate for the competing joint line route in which it is a partner. In reality, this situation is often multiplied since there may be several joint line routes between two points, involving many different carriers, any


number of which may have competing single line routes. A rate
bureau spokesman has noted:

Because of the interrelated nature of railroad operations, one
railroad often needs the cooperation of another railroad, which is
a strong competitor, in order to give its customers good service over
through routes and at a reasonable joint rate. There are few, if any,
competing enterprises in this country that are so interdependent
for financial success.13

The second factor which mandates collective ratemaking by com-
peting carriers is the existing legal framework in which they operate.
Provisions of the Interstate Commerce Act require in certain situa-
tions that an individual carrier's single line rate relate to the rates
of other railroads, whether the corresponding rates are for single or
joint line movements. For example, under section 3 of the Interstate
Commerce Act,14 an individual carrier can be subjected to an ICC
order to eliminate undue preference and prejudice should it partici-
pate in rates that unduly prefer point A and unduly prejudice point
B, where both points ship competitive products to a common destina-
tion. The carrier may maintain a single line route from point A but
serve point B only by participation in a joint line route with con-
necting railroads which are also competitors. Compliance with such
a Commission order necessitates joint consideration and agreement
on both joint line and single line rates to abate the unlawful prefer-
ence and prejudice.15

This interrelationship of rates and the necessity for joint action
is illustrated by Washington Potato and Onion Shippers Association
v. Union Pacific R.R.16 In that case the ICC found that single line
and joint line rates on potatoes from points in Washington to points
east of the Rocky Mountains, were up to 38 cents higher than the
corresponding rates on potatoes from southern Idaho and eastern
Oregon to the same destinations. To the extent that the Washington
rates were higher by more than 7-11 cents than the Oregon-Idaho
rates, this rate structure violated section 3 of the Interstate Com-
merce Act by unduly prejudicing shippers in Washington and un-
duly preferring shippers in Idaho and Oregon. The Commission or-
dered the imbalance corrected.17 In referring to the facts of the

13. Verified Statement of James M. Souby, Before the Interstate Commerce Commission
at 25, Ex Parte No. 297, Rate Bureau Investigation, 349 I.C.C. 811 (1975).
17. Id. at 544-55.
Washington Potato case eighteen years later, the Commission, in Ex Parte No. 297, noted:

Joint action of the involved railroads accomplished the required adjustments. This would not have been possible without consideration of single-line as well as joint-line rates.¹⁸

This interrelationship of single line rates with joint line rates is further recognized in the “aggregate of the intermediates” clause of section 4(1) of the Interstate Commerce Act, which in pertinent part provides:

It shall be unlawful for any common carrier subject to this chapter . . . to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter. . . .¹⁹

This provision makes every rate for a single line movement over an individual railroad potentially part of a rate for a joint line movement should it ever, in combination with the local (single line) rate of a connecting and competing railroad, result in a charge which is lower than the applicable through (joint line) rate.²⁰ Thus, under section 4 as under section 3, collective determination of rates by competing carriers is necessary to avoid violating the Act.

Restrictions attached by the ICC in merger approvals also frequently necessitate joint action on both single line and joint line rates by competing carriers. The Commission, for example, required the Burlington Northern to “maintain and keep open all routes and channels of trade via existing junctions and gateways” and to open new gateways benefiting the Milwaukee Road and other competing railroads.²¹ Rates via these gateways are required to be maintained at levels competitive with rates for Burlington Northern single line routes. These conditions compel Burlington Northern to agree with its competitors on changes in the level of rates applicable to its single line routes in order to keep the joint line routings competitive as required by the Commission. Similar conditions have been attached to the mergers of other railroads.²²

This “necessity” for joint action by competitors in the railroad ratemaking system has been recognized by the ICC, Congress and the courts. In Ex Parte No. 297, the ICC noted that there exists

a symbiotic relationship between single-line and joint-line rates which must be considered in order to maintain competitive equality for carriers as well as shippers, remove distortions in port relationships, effect compliance with statutory restraints against discrimination and preferences, and simply observe the realities of diverse rates in a coordinated transportation network.\textsuperscript{23}

Congress was aware of the necessity for collective action embodied in the regulatory scheme when it enacted section 5a in 1948:

It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder, and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent.\textsuperscript{24}

Federal courts have recognized this fact. In \textit{Georgia v. Pennsylvania Railroad},\textsuperscript{25} decided before the statutory antitrust exemption in section 5a was enacted, the Supreme Court acknowledged the existence of a "legitimate area of collaboration"\textsuperscript{26} in the making of railroad rates. In a more recent antitrust case, \textit{Riss & Co. v. Association of American Railroads},\textsuperscript{27} the district court in discussing the antitrust immunity provided by section 5a observed:

The railroads are right in their contention that cooperative or joint rate-making is often essential, especially when the goods in question are normally handled by many companies on a vast, interlocking rail system.\textsuperscript{28}

Thus, the need in certain circumstances for the collective determination of rates by competing carriers has been recognized as a consequence of the integrated nature of the national rail system and the regulatory scheme embodied in the Interstate Commerce Act. This inherent feature of railroad ratemaking cannot be ignored in any realistic application of the antitrust laws to the railroad pricing structure.

\textsuperscript{23} 349 I.C.C. 811, 849 (1975).
\textsuperscript{24} 2 U.S. Code Cong. Serv. 1847 (1948).
\textsuperscript{25} 324 U.S. 439 (1945). For further discussion, see text accompanying notes 47 through 49 infra.
\textsuperscript{26} Id. at 460.
\textsuperscript{27} 170 F. Supp. 354 (D.D.C. 1959). For further discussion, see text accompanying notes 56 through 58 infra.
\textsuperscript{28} Id. at 365-66.
THE EVOLUTION OF RATE BUREAU ANTITRUST IMMUNITY

The clash between the collective ratemaking features of the railroad rate bureaus and the pro-competitive policies of the federal antitrust laws is as old as the Sherman Act itself. The current conflict, rekindled by passage of the 1976 amendments to section 5a, is another in a long series of various attempts at reconciliation.

The controversy began in 1889, when a group of western railroads formed the Trans-Missouri Freight Association "... for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic both through and local ...". Under the provisions of the agreement, rates were established by a committee, and any member which agreed with a shipper to reduce the rates or change the regulations adopted by the Association was subjected to a penalty. In 1892, the Justice Department filed an antitrust suit against the Association under the recently enacted Sherman Act, charging that the railroads' agreement was a contract in restraint of trade. The railroads defended on the basis that they were under the exclusive jurisdiction of the ICC (created in 1887 under the Interstate Commerce Act) and that the rates so established were reasonable. Finally, the Supreme Court, in United States v. Trans-Missouri Freight Association, held that the railroads were subject to the Sherman Act and that all contracts in restraint of trade were illegal under the Act without regard to any standard of reasonableness.

The following year the Court heard an antitrust challenge to the Joint Traffic Association which had been formed in 1896 by railroads operating between Chicago and the eastern seaboard. Under this agreement, unlike the one in Trans-Missouri, each individual railroad reserved the right to change the rates applicable over its own lines. This injection of an early version of the right of independent action into the agreement did not persuade the Court which, following its decision in Trans-Missouri, declared the combination...
unlawful and perpetually enjoined the operation of the Association.\footnote{171 U.S. at 577-78.}

Nevertheless, organizations composed of railroads and their representatives did not disappear. The railroads, convinced of the necessity for joint ratemaking,\footnote{The railroads were convinced that such bureaus were necessary and in fact indispensable for compliance with the Interstate Commerce Act, particularly with respect to through routes and joint rates. To them, numerous amendments and additions to that Act since the turn of the century indicated that Congress had “not intended that ordinary commercial competition shall operate freely in the making of railroad rates.” Dickinson, \textit{Rate Conferences in the Railroad Industry Under the Sherman Act to Regulate Commerce}, 12 \textit{Law & Contemp. Prob.} 470, 483 (1947).} believed that the association condemned in \textit{Trans-Missouri} had too much power and that the freedom of action of the individual carriers was not sufficiently safeguarded. Accordingly, they sought to form rate bureaus which would conform to the views expressed by the Court.\footnote{The railroads attempted to protect themselves by providing for shipper consultation on rates and by guaranteeing freedom of rate submission by individual carriers. Hilton, \textit{Experience Under the Reed-Bulwinkle Act}, 28 \textit{ICC Pract. J.} 1207, 1208 (1961) [hereinafter cited as Hilton].} Thus, “rate bureaus” continued to function.\footnote{The bureaus attempted to protect themselves by providing for shipper consultation on rates and by guaranteeing freedom of rate submission by individual carriers. Hilton, \textit{Experience Under the Reed-Bulwinkle Act}, 28 \textit{ICC Pract. J.} 1207, 1208 (1961) [hereinafter cited as Hilton].} In addition, organizations in the nature of trade associations were formed to carry out joint activities.\footnote{Berge, supra note 29, at 451-52 thoroughly describes the association employed.} Although the legality of these associations was questionable in light of the earlier Supreme Court precedents, for the next forty years no further antitrust prosecutions were made.\footnote{One commentator noted: Whether the forbearance of the Department represented an acquiescence to these modifications or a recognition of the unworkability of the doctrine of the 1897-98 cases, one cannot say. Hilton, supra note 38, at 1208.} Perhaps encouraged by this lack of prosecution, during the 1930's the railroads engaged in more determined efforts to accomplish the joint consideration of rates.\footnote{In 1932, the western railroads entered the Commissioner Plan, Western District, under the Western Agreement for joint consultation on rates and policies. The railroads in 1934 formed the Association of American Railroads which had supervisory and appellate powers over rate bureaus. See Hilton, supra note 38, at 1208.} This time, however, the Antitrust Division of the Department of Justice, greatly expanded in size by the end of the
decade,43 responded to the extension of rate bureau activity with a renewal of prosecutions.44

While these suits were pending, the railroads briefly enjoyed an express exemption from the antitrust laws for joint action on rates as a result of the entry of the United States into World War II. At the urgent request of the Office of Defense Transportation, the ICC, and the War Department, Certificate No. 4445 was issued by the War Production Board to remedy the confused situation concerning the antitrust liability of the railroad rate bureaus. Basically, Certificate No. 44 approved joint action by common carriers through rate bureaus in the initiation and establishment of rates, fares and charges and certified that such action was considered necessary to the war effort. It was revised somewhat after considering the objections of the Antitrust Division of the Justice Department.46

The fact that Certificate No. 44 was only a temporary wartime solution was underscored in 1945 by the Supreme Court in Georgia v. Pennsylvania Railroad,47 a decision which cast considerable doubt on the future of railroad conference ratemaking. In that case, the State of Georgia initiated a sweeping antitrust challenge to the railroad rate bureaus. The State charged, among other things: that some 60 rate bureaus, committees, conferences, associations and other private rate-fixing agencies had been utilized by 20 defendant railroads to fix their rates; that no railroad could change joint through rates without approval of these private agencies; that bureau rate-fixing, which was not sanctioned by the Interstate Commerce Act and prohibited by the antitrust laws, had put the effect-

43. In the foreword to a symposium published in 1940 on the Sherman Act the editor observed:

During the past two years, the fifty-year-old Sherman Act has achieved a vitality unprecedented in its existence. Its invigoration is due to no amendment of its terms nor to sudden change in the economy in which it operates. What has happened is that the personnel of the agency charged with the Act's enforcement, the Antitrust Division of the United States Department of Justice, has been increased to approximately eight times the size which it had averaged during the preceding fifteen years and the range of its activities has been extended in like proportion.

7 LAW & CONTEMP. PROB. 1, 1 (1940).

44. In 1941 the Division prosecuted motor carrier rate bureaus in Denver. In 1944 it brought suit against operation of the Western Agreement in Lincoln, Nebraska. Simultaneously, the State of Georgia filed suit against several railroads and rate bureaus charging an illegal conspiracy to maintain discriminatory freight rates. For further discussion of the State of Georgia suit, see text accompanying notes 47 through 49 infra.

45. Certificate No. 44 was issued under section 17 of the Small Business Concerns Act of 1942, 56 Stat. 351, ch. 404 (1942). It was allowed to expire with other wartime emergency regulations on October 1, 1946.

46. Berge, supra note 29, at 455.

47. 324 U.S. 439 (1945).
tive control of rates to and from Georgia in the hands of the defendants. The State alleged that, as a result, such rates (to and from Georgia) were 39 percent higher than rates for like commodities and distances between points in the North; and that northern railroads dominated and coerced southern railroads in the publication of joint through rates.48 Although the decision was precipitated by a preliminary motion of the State, the Supreme Court seized the opportunity and proceeded to state, in dictum, that railroad rate-fixing combinations were not immune from the operations of the antitrust laws, and that none of the powers acquired by the ICC since the enactment of the Sherman Act related to the regulation of rate-fixing combinations.49

The language of the Court in the Georgia case caused grave concern among all those having a direct interest in transportation who saw in the situation “a threat to long-standing practices in the transportation industry that were developed in cooperation with the shippers and have proved their worth.”50 Efforts to procure a legislative resolution of the uncertainty were intensified. Finally, Congress, amid much controversy and after considerable debate, passed the Carriers Rate Bureau Act of 1948,51 incorporating section 5a into the Interstate Commerce Act. President Truman vetoed it52 but Congress overrode his veto.

Basically, section 5a authorized the railroads to apply to the Commission for approval of agreements “relating to rates, fares, classifications, divisions, allowances or charges . . . or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof . . . .”53 Section 5a(9) contained the sought after antitrust exemption:

48. Id. at 443-44.
49. Id. at 457.
50. H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 (1947). The decision of the Supreme Court in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), added to the concern. In that case the Court held that price fixing by competitors was per se illegal.
51. 49 U.S.C. § 5b (1970), also known as the Reed-Bulwinkle Act.
52. His unsuccessful veto message concluded:
   Our present transportation policy contemplates a pattern of partial regulations, within the framework of which the pressures of competition will remain substantially effective. Regulations cannot entirely replace these competitive pressures. It can guard against some of the potential abuses of monopoly power, but it cannot be an effective substitute for the affirmative stimulus toward improved service and lower rates which competition provides. By sanctioning rate control by groups of carriers this legislation would represent a departure from the present transportation policy of regulated competition.
2 U.S. CODE CONG. SERV. 2499 (1948).
Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission. Approval of the agreement can be granted only if the Commission finds that applying the antitrust relief in section 5a(9) to the agreement would further the "National Transportation Policy." Approval is prohibited if an agreement establishing a procedure for joint determination does not accord to each party "the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure." Enactment of section 5a in 1948 settled the issue to the satisfaction of the rail carriers concerning their recognized need to act collectively on rate matters without incurring antitrust liability. But the controversy was not over. Although the Supreme Court has never decided a case involving railroad rate bureau immunity under section 5a, two lower court decisions in the post-1948 period reveal that there are certain limitations on the scope of the immunity provided by the section. In Atchison, Topeka and Santa Fe Railway v. Aircoach Transportation Association, four supplemental air carriers and their associations filed an antitrust suit against 40 railroads and two rate bureaus alleging that the defendants violated the antitrust laws by utilizing certain bidding practices for United States military traffic. The Court of Appeals for the District of Columbia Circuit ruled that the district court should exercise its discretion and withhold its decision until the ICC had ruled on whether the challenged practices were made pursuant to an approved agreement under section 5a. The court noted that the practices complained of constituted a system of price-fixing by competing, non-connecting carriers which would be illegal per se unless

58. Id. at 886.
made pursuant to an approved section 5a agreement.\textsuperscript{59} The court pointed out, however, that ratemaking practices otherwise immune from antitrust liability under section 5a would lose that protection if they were used as "part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition . . . ."\textsuperscript{60} The court did not believe that the Interstate Commerce Act or any agreement made under it could authorize the use of such practices for the purpose of eliminating competition.

In a similar case, \textit{Riss \& Co. v. Association of American Railroads},\textsuperscript{61} a motor vehicle common carrier sought treble damages and injunctive relief from a number of railroads which had allegedly conspired to eliminate the motor carrier as a competitor for explosives traffic. The railroads moved to suspend the proceedings and to refer the case to the ICC for a ruling on whether the challenged rate reductions were relieved from the operations of the antitrust laws by section 5a(9) because they were covered by approved agreements. The district court denied the motion, stating that because the plaintiffs had adequately alleged a violation outside the scope of the immunity an ICC ruling would not be conclusive and would only result in further delay.\textsuperscript{62} Following the rationale in \textit{Aircoach}, the court stated that if one of the purposes of the rate reduction was to effectuate the elimination of the plaintiff as a competitor, then no amount of coverage by approved agreements and no degree of immunity under section 5a(9) of the Interstate Commerce Act could remove the rate reductions from the prohibitions of the Sherman Act.\textsuperscript{63}

Thus, after a long period of ineffective reconciliation and resultant uncertainty, the enactment of section 5a in 1948 enabled rail carriers to engage in the joint ratemaking necessitated by railroad operations, the Interstate Commerce Act and the ICC without threat of prosecution.\textsuperscript{64} Analysis of the \textit{Riss} and \textit{Aircoach} cases make it clear, however, that the exemption does not confer blanket immunity. It will not shield the carriers from antitrust liability when the carriers engage in anticompetitive activity beyond the scope of that immunity.

\begin{itemize}
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id. at 887.
  \item \textsuperscript{61} 170 F. Supp. 354 (D.C. Cir. 1959).
  \item \textsuperscript{62} Id. at 365.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} See text accompanying notes 12 through 28 \textit{supra}.
\end{itemize}
Restricting the Antitrust Exemption—The Amendments to Section 5A

The relevant provisions of the 1976 amendments to section 5a were incorporated by Congress into what is now section 5b(5) of the Interstate Commerce Act. Basically, sections 5b(5)(a)(i) through (iii) narrow the current antitrust immunity provided in section 5b of the Act by barring: 1) agreement or voting on the single-line rates of any individual carrier; 2) agreements or voting on rates relating to a particular interline movement by carriers which can not practically participate in such a movement; and 3) joint action to protest a rate established by independent action. Proponents of these amendments argue that they were drafted for the express purpose of eliminating anticompetitive practices in railroad ratemaking. Several problems arise, however, concerning the statutory language utilized to achieve this desired goal.

Section 5b(5)(a)(i), the restriction barring joint agreement on single line rates, presents the first problem. It states in pertinent part:

In no event shall any conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section—

(i) permit participation in agreements with respect to, or any voting on, single-line rates, allowances, or charges established by any carrier[.]

Under this section, the extent of anticompetitive conduct that will be eliminated is somewhat less than what it might appear from a literal reading of the language. As a means of preventing “coercive” agreement on single line rates, the restriction is superfluous. Under the carriers’ right to take independent action, set forth in the same paragraph, an individual railroad can establish or change its own

65. Pub. L. No. 94-210, § 208(b) (Feb. 5, 1976) [to be codified at 49 U.S.C. § 5c(5)(a)], amending 49 U.S.C. § 5b(6) (1970). Under the legislative scheme of the amendments, the Commission cannot approve a section 5b agreement which contains any procedures permitting the prohibited conduct. Any rate action by the carriers not in compliance with these restrictions therefore, cannot be conduct performed pursuant to an approved agreement, and thus falls outside the antitrust immunity provided by what is now § 5b(8).


[We] are concerned that the scope of rate adjustments processed through rate bureau procedures has had an inhibiting effect on rate innovation and that measures to encourage initiative in rate making and greater competition among carriers of the same mode are necessary.


single line rate at any time without going through a rate bureau. This right of independent action is considered by the ICC as "paramount to maintaining the integrity of the grant of antitrust immunity." There is evidence that the right is not illusory. Statistics support the conclusion that an individual railroad will take independent action whenever it determines that it is in its own interest and the interest of its shippers to do so.

With respect to the prevention of "friendly," non-coercive agreements between carriers on single line rates, the restriction is qualified by the definition of "single line rate" provided in the Act:

As used in clause (i) of this subdivision, a single-line rate, allowance, or charge is one that is proposed by a single carrier applicable only over its own line and as to which the service (exclusive of terminal services provided by switching, drayage, or other terminal carriers or agencies) can be performed by such carrier.

Application of the restriction under this definition would not bar all agreements on single line rates. The situation of two carriers participating in a joint line route while maintaining competing single line routes provides an example. Agreement on a proposed change in the joint rate might be conditioned on agreement to certain changes in the competing single line rate to avoid a rate imbalance and possible diversion of traffic. Such agreement as to the single line rate would presumably constitute the anticompetitive conduct sought to be prohibited. However, under the definition of "single line rate," the rate must be one "proposed by a single carrier applicable only over its own line." Therefore, in the example, if both carriers filed the proposal to be applicable over both the single line and joint line

The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration, unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action, without fear of any sanction or retaliatory action, at any time before or after any determination arrived at through such procedure.

Therefore, any action by the carrier restraining this right of independent action cannot be conduct performed pursuant to an approved agreement and thus falls outside the antitrust immunity provided by section 5b(8).

70. Evidence submitted by the western railroads in Ex Parte No. 297 supports this position: 1407 notices of independent action were submitted to the rate bureaus in the western district during 1973—an average of 5 each working day. Of these, 660 were submitted without any proposal having previously been filed before a bureau. Statistics cited in Comments of the Association of American Railroads, supra note 12, at 15.
72. Id.
routes, the proposed rate apparently would not come within the
definition of a single line rate, and thus, their action would not
constitute prohibited agreement on a single line rate.

When construed together, section 5b(5)(a)(i) and the definition of
single line rate implicitly recognize the concept discussed pre-
viously,\(^73\) that under certain circumstances, collective considera-
tion of single line and joint line rates is mandated by the integrated
nature of the system and the Interstate Commerce Act. While pro-
hibiting collective interference with an individual carrier's deter-
mination of a single line rate for its own single line route, this restric-
tion nevertheless provides for carrier freedom to collectively deter-
mine both single line and joint line rates when necessary. Since the
right of independent action under section 5b(5) already prevents
coerced agreement on single line rates, this restriction serves only
to reiterate and reinforce the importance of the right to the grant of
antitrust immunity.

Regarding the effect on antitrust immunity, the statutory lan-
guage of the restriction places the bureaus and their members in a
state of uncertainty. No definition of "agreement" is provided.
Could permissible agreement by competitors on a joint rate at some
point become "agreement" on the competing single line rate? Even
more significantly, when does permissible collective "discussion"\(^74\)
on single line rates become an "agreement" with respect to that
single line rate? An apparently permissible discussion of the antici-
pated response of a single line carrier to a proposed change in a
competing joint line rate could conceivably be interpreted later as
an "agreement" with respect to the single line rate, if the joint rate
change and the "discussed" response of the single line carrier are
later implemented. Arguably, some meeting of the minds would
minimally be necessary to establish an "agreement." Although con-
cerned with the determination of what constitutes an agreement for
purposes of establishing a Sherman Act violation, the following
cases disclose various factors tending to show "agreement." In
Interstate Circuit, Inc. v. United States,\(^75\) the Supreme Court held
that an inference of "agreement" could be drawn from the course
of conduct of the alleged conspirators.\(^76\) The Court found that
knowledge of the competing interests of the parties, the motive for

\(^{73}\) See text accompanying notes 12 through 28 supra.

\(^{74}\) "Discussion" on single line rates was originally prohibited in the proposed amendment
but was later deleted.

\(^{75}\) 306 U.S. 208 (1939).

\(^{76}\) Id. at 221.
concerted action, the risk that without agreement diversity of action would follow, and the substantial unanimity of action that resulted were important factors to be considered in determining whether an “agreement” had been reached.\textsuperscript{77} In \textit{United States v. Masonite Corp.},\textsuperscript{78} the Court held that it was enough that the competitors, knowing that concerted action was contemplated and invited, gave their adherence to the scheme and participated in it.\textsuperscript{79} Proof of mere parallel business behavior, however, does not conclusively establish “agreement.”\textsuperscript{80} This holding is reflected in a provision incorporated by the 1976 amendments into what is now section 5b(5):

\begin{quote}
In any proceeding in which it is alleged that a carrier voted or agreed upon a rate, allowance, or charge, in violation of the provisions of this section, the party alleging such violation shall have the burden of showing that such vote or agreement occurred. A showing of parallel behavior is not, by itself, sufficient to satisfy such burden.\textsuperscript{81}
\end{quote}

At present the demarcation between permissible discussion and prohibited agreement on single line rates under section 5b(6) is an uncertain one. Without a definition of the key term “agreement,” the extent of permissible discussion cannot accurately be determined beforehand. Bureaus that do not maintain strict control over discussion of single line rates may be permitting the carriers to stray beyond the presently amorphous borderline of antitrust immunity.

The second restriction, section 5b(5)(a)(ii), suffers from the same definitional infirmity. That provision states:

\begin{quote}
In no event shall any conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section—
\begin{enumerate}
\item (ii) permit any carrier to participate in agreements with respect to, or to vote on, rates, allowances, or charges relating to any particular interline movement, unless such carrier can practicably participate in such movement.
\end{enumerate}
\end{quote}

\begin{footnotes}
78. 316 U.S. 265 (1942).
79. \textit{Id.} at 275.
82. Pub. L. No. 94-210 § 208(b) (Feb. 5, 1976) [to be codified at 49 U.S.C. § 5c(5)(a)(ii)], amending 49 U.S.C. § 5b(6) (1970). As with the previous restriction, the term “agreement” is not defined and it remains unclear when permissible “discussion” may become prohibited
\end{footnotes}
Any carrier which participates in an agreement on a joint rate for a joint movement in which that carrier cannot practicably participate would not be acting pursuant to its approved agreement. Such actions would fall outside the antitrust immunity provided by section 5b(8). Thus, the Act requires an initial determination of which carriers can "practically participate" in the joint movement to which the proposed rate will apply before any agreement on the rate can be made. The Act itself does not define the key term "practically participate," nor does it provide any standards concerning the method of selecting eligible carriers. Nevertheless, application of the restriction would seem to minimally require: 1) a determination of existing routes and participants, if any, currently moving traffic under present rates; 2) the formulation of a "circuity limitation" that could be used to determine the point at which circuity would be so great as to foreclose practicable participation; and 3) some kind of a "mileage check" to determine which carriers meet the circuity test. Without any standard of practicable participation only those carriers, if any, currently participating in the interline route for which the rate is proposed and those railroads serving exclusively either an origin or a destination named in the proposal could be assured that they would have antitrust immunity to agree on the joint rate.

The third restriction, section 5b(5)(a)(iii), prevents a bureau...
from establishing any procedure permitting joint action to protest a rate established by independent action. Compliance with this restriction should not present any practical difficulties, since rate bureaus do not protest rates established by independent action. Rather, this restriction seems to reflect an apparent confusion of railroad rate bureau practices with those of other transportation modes, particularly the motor carrier bureaus. With respect to railroad rate bureaus, this provision should have no discernible effect on the antitrust exposure of the bureaus and their members.

**Should Rate Bureau Antitrust Immunity Be Abolished?**

The enactment of the amendments to section 5a gives rise to speculation regarding the possibility of further restrictions on, or even ultimate repeal of, what is now the section 5b exemption. Although the conference method of ratemaking has been sanctioned, the necessity of the antitrust exemption has been a continuing source of controversy since the enactment of section 5a in 1948. The ICC has made its position clear:

> We are convinced from the evidence of record that the Commission's administration of section 5a has contributed significantly to the creation of an effective and dependable national transportation system. The changes mandated herein, and the investigative approach utilized, are a more effective method of ensuring such a system than the denial of antitrust immunity. Such denial would be a giant step backwards in effective regulation of stable rate structures and reduce this Nation's transportation system to a state of uncertainty with respect to reasonable and lawful levels of rates. We conclude that immunity from antitrust laws should be continued.

Not everyone agrees that antitrust immunity is necessary to the continued existence of the rate bureaus. Some commentators

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87. For example, motor carrier bureaus have protested rates established by independent action of member carriers. See, *Ex Parte No. 297*, Rate Bureau Investigation 349 I.C.C. 811, 841-45 (1975). The ICC concluded that bureau protests interfere with the right of independent action and therefore are prohibited.
88. See text accompanying notes 22 through 27 *supra*.
have argued that bona fide negotiations between carriers, which are intended to implement the requirements of the Interstate Commerce Act, fall within the "legitimate area of collaboration"\(^2\) alluded to by the Supreme Court in *Georgia v. Pennsylvania Railroad*. Under this rationale, full exposure of railroad ratemaking to the antitrust laws would not result in the abolishment of rate bureaus but, instead, would limit them to the proper areas of collaboration.\(^3\)

However, this analysis, which suggests a "rule of reason" analysis,\(^4\) runs contrary to the well settled antitrust approach to the joint determination of prices by competitors:

> Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.\(^5\)

Therefore, in the absence of a definitive Supreme Court ruling to the contrary, it must be presumed that a *per se* standard would be applied to railroad conference ratemaking. Under such a standard the realities of the railroad ratemaking process—the integrated nature of the system and the requirements of the Interstate Commerce Act—are not appropriate consideration. Therefore, the wisdom of proposals to eliminate antitrust immunity under existing law can seriously be questioned, since in the absence of antitrust immunity, it appears doubtful that any realistic reconciliation of the broad policies of the antitrust laws and the necessities of railroad ratemaking could be reached under a *per se* standard.

Fortunately, with the enactment of section 5b(10) as part of the Revitalization Act amendments, such drastic action as total repeal is wholly unnecessary. Paragraph 10 now provides:

> The Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, shall periodically prepare an assessment of, and shall report to the Commission on (a)...

\(^{1149}\) *Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 2d Sess. 505 (1974).*

\(^91\) *See, e.g., Wiprud, supra note 90, at 576.*

\(^92\) *Georgia v. Pennsylvania R.R., 324 U.S. 439, 460 (1945).*

\(^93\) *But see, Spychalski, On Transport Deregulation, ICC PRAC. J. 37, 39 (1971) which contains an excellent analysis of some of the problems that might result following total deregulation.*

\(^94\) *The rule of reason is a principle of construction which requires that interpretation of the Sherman Act be made in the light of the broad public policy favoring competition and condemning monopoly. The court must decide whether the challenged conduct is significantly and unreasonably anticompetitive in character or effect. See Standard Oil Co. v. United States, 221 U.S. 1 (1911).*

\(^95\) *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).*
any possible anticompetitive features of (i) any agreements approved or submitted for approval under this section, and (ii) any conferences, bureaus, committees, or other organizations operating under such agreements, and (b) possible ways to eliminate or alleviate any such anticompetitive features, effects, or aspects in a manner that will further the goals of the national transportation policy and this Act. The Commission shall make such reports available to the public. 96

This cooperative approach toward the elimination of anticompetitive conduct in a manner that will further the goals of the national transportation policy presents the best opportunity for a final resolution of this long-running controversy. Under this provision, the features of railroad ratemaking that require collaboration can be given their due weight, and the elimination of identified anticompetitive practices can be accomplished gradually without precipitating the collapse of the entire railroad pricing structure.

CONCLUSION

The three restrictions incorporated by the Revitalization Act amendments into section 5b(5)(a) were drafted for the purpose of protecting the individual carrier's right to determine its rates according to its own assessment of market conditions free from the possible coercion or interference of other carriers. To implement this goal, the restrictions remove certain previously permitted joint actions from the antitrust immunity provided in section 5b. Collective action taken in violation of these restrictions cannot be performed pursuant to an approved agreement under section 5b and therefore constitutes activity falling outside the parameters of antitrust immunity.

However, before the full extent of this contraction of antitrust immunity can be determined, workable definitions of certain key terms used in the restrictions must be formulated. Until the meaning of these terms is clarified, the demarcation between permissible conduct and prohibited action under these restrictions cannot readily be determined beforehand.

Once these definitional infirmities have been corrected, continuation of the rate bureau ratemaking process seems assured. Instead of implementing a total withdrawal of antitrust immunity, the Revitalization Act amendments refine the immunity to eliminate certain suspected anticompetitive features. Thus, Congress has

Implicitly recognized the continued utility of the conference method of ratemaking. These amendments may be construed as an effort to confine carrier ratemaking powers to what proponents of the amendments perceive as the "legitimate area of collaboration" which was alluded to but never delineated by the Supreme Court in Georgia v. Pennsylvania R.R.

Finally, the provisions of paragraph 10 of section 5b may hold the key to the future viability of the rate bureau process. Paragraph 10 provides for communication and cooperation between the Federal Trade Commission, the Justice Department and the Interstate Commerce Commission which will foster identification and elimination of anticompetitive practices in a manner that will further the goals of the "National Transportation Policy." This provision is a sensible approach to a complex problem and deserves to be utilized fully. Under this plan, a realistic and mutually acceptable reconciliation between the practices of the rate bureaus and the policies of the antitrust laws may yet become a reality.

William C. Sippel

97. The Senate Report on the legislative history of the Revitalization Act notes:

A large measure of cooperation and collective action by and among common carriers is necessary if the national transportation policy is to be effectuated and the public is to receive the kind of transportation service to which it is entitled and if the rates are to be reasonable and nondiscriminatory.