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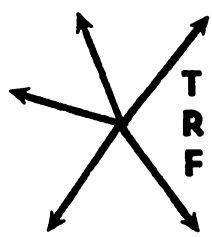

TRANSPORTATION RESEARCH FORUM

I.C.C. Rulemaking Procedures — An Alternative to Deregulation

*by Fritz R. Kahn**

THE INTERSTATE COMMERCE Commission devotes a large portion of its budgetary and personnel resources to the franchising of motor carriers. During fiscal year 1976, of the total 8,857 cases finally disposed of by the Commission, 6,800 involved motor carrier operating authority proceedings. With the exception of 839 of these cases, which were dismissed or discontinued, the average length of time consumed between filing of motor carrier applications and their final disposition was over 12 months. ICC 90th Annual Report, 1976, pages 113-114. Additionally, recent legislation in the area of railroad regulation, most notably the Railroad Revitalization and Regulatory Reform Act of 1976, has added to the Commission's growing caseload.

The push for deregulation of transportation is in part a manifestation of frustration with the Commission's method of handling its growing caseload, particularly in the franchising of motor carriers of property and passengers. The Commission, through its Blue Ribbon Committee, has considered various methods to facilitate the disposition of applications for motor carrier operating authority. The use of rulemaking procedures has been recognized as a significant means to achieve this goal.

Rulemaking procedures have the great advantage of allowing the implementation of significant regulatory reform without the need for Congressional action. In a number of recent decisions the courts have upheld the Commission's right to expand the operating authority of regulated motor carriers on a generic basis, through the use of rulemaking proceedings, rather than through case-by-case adjudication. In **Greyhound Corporation v. United States**, 221 F. Supp. 440 (N.D. Ill. 1963), the District Court upheld the validity of the Commission's Superhighway and Deviation Rules, 49 C.F.R. §1042. The court rejected the contention that the Commission was required to proceed only upon an **ad hoc** determination of whether the public convenience and necessity required the operations over the new routes. The Commission has the power, the Court observed, to adopt regulations to carry out the policies of the laws that it administers if such regulations have a reasonable and rational basis, even though no specific authority to promulgate regulations on the subject is contained in the statute. In doing so, the Court cited **American Trucking Ass'ns v. United States**, 344 U.S. 298, 73 S. Ct. 307 (1953). 221 F. Supp. at 444.

In **National Automobile Transporters Assn. Declaratory Order**, 91 M.C.C. 395 (1962), the Commission by rulemaking proceeding determined that a motor carrier holding authority to transport motor vehicles in initial movements, from point of manufacture or assembly, may also transport motor vehicles in secondary movements from railheads to points within that carrier's initial movement authority. Such secondary movements were authorized where the initial movement was by rail from the manufacture or assembly point to an intermediate point not within the motor carrier's existing authority. Rather than requiring such motor carriers to file individual applications for authority to handle these secondary movements, which would have placed a "great burden" upon applicants, protestants and the Commission, the desired result was accomplished by allowing the filing of petitions for modification of existing authority. 91 M.C.C. 395, 415.

The Commission's decision in **Automobile Transporters** was upheld by the District Court in **Motor Convoy, Inc. v. United States**, 235 F. Supp. 250 (N.D. Ga. 1964), **aff'd mem.**, 381 U.S. 436, 85 S.Ct. 1575 (1965). The Court rejected the contention that the contemplated petitions for modification could only be granted after a full hearing, followed by complete findings of fact showing public convenience and necessity. 235 F. Supp. at 252-253.

A further expansion of the operating authorities of regulated motor carriers by rulemaking procedure occurred in **Removal of Truckload Lot Restrictions**, 106 M.C.C. 455 (1968). It was there determined that the public convenience and necessity required the removal of "truckload lot" restrictions from all outstanding certificates, and that removal of these restrictions was in the public interest and consistent with the National Transportation Policy. 106 M.C.C. at 493.

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The Commission's **Truckload Lot** decision was challenged in **Regular Common Carrier Conference v. United States**, 307 F.Supp. 941 (1969), on the basis that such amendment or modification of existing certificates constituted "licensing," and that adjudicatory proceedings to accomplish this result were required under sections 206 and 207 of the Act, 49 U.S.C. §§306, 307. 307 F.Supp. at 944. In rejecting this contention and upholding the Commission's decision, the District Court declared that a rulemaking proceeding that affects uniformly the interests of a class of licensees or certificate holders is valid, citing **American Airlines, Inc. v. Civil Aeronautics Board**, 359 F.2d 624 (1966), **cert. denied**, 385 U.S. 843, 87 S.Ct. 73 (1966).

The view that an adjudicatory hearing was required for each certificate holder was seen by the Court to be an unnecessarily restrictive interpretation of agency discretion under the Administrative Procedure Act, 5 U.S.C. §500, **et sec.** An agency is not bound to pursue individual **ad hoc** adjudications in an area better suited to a broad policy determination through rulemaking. The Commission, being the best judge of its policies and having the skill and resources to deal with them, is allowed broad discretion in the choice of the method and course of action appropriate for dealing with transportation problems. 307 F.Supp. 941, 944-946.

Perhaps the most ambitious use of rulemaking by the Commission to grant new operating authority to regulated motor carriers is found in **Transportation of "Waste" Products for Reuse**, 114 M.C.C. 92 (1971). In a general investigation and rulemaking proceeding, the Commission recognized an unmet need for truck transportation of waste products by motor carriers for recycling. A general finding of public convenience and necessity was made, requiring operation by qualified motor carriers in the transportation of waste products for recycling or reuse in the furtherance of recognized pollution control programs. 114 M.C.C. at 111. Motor carriers desiring to perform operations pursuant to this "special" certificate were required to file a sworn and notarized request containing, **inter alia**, a copy of the carrier's tariff under which the service authorized would be performed, a statement describing the involved pollution control program, and a statement demonstrating the applicant's fitness to perform the service. Motor carriers found to be eligible would be notified by appropriate acknowledgement letters. 114 M.C.C. at 125.

Once again, the Commission's use of rulemaking was challenged in **Chemical Leaman Tank Lines, Inc. v. United States**, 368 F.Supp. 925 (D. Del. 1973), on the basis that the Commission may issue a certificate of public convenience and necessity only after consideration of an individual application and only in an adjudicatory setting. It was alleged that the generalized, prospective finding of public convenience and necessity was improper. Once again, the District Court rejected this argument, stating that the "Waste" Products proceeding did not constitute "licensing" within the meaning of the Administrative Procedure Act, but had merely declared the general criteria by which licenses would be issued to eligible carriers wishing to operate under the general finding of public convenience and necessity. Such use of rulemaking for the purpose of declaring general licensing criteria was ruled proper even though those criteria would influence, and perhaps summarily decide, the fate of later license applications. 368 F.Supp. at 935-936.

Although the District Court upheld the Commission's use of rulemaking to issue a general finding of public convenience and necessity, the "Waste" Products case was remanded to the Commission to allow it to demonstrate that a rational basis existed for its finding of public convenience and necessity, and to comply with the requirements of the National Environmental Policy Act. The Commission on remand satisfied these two requirements in **Transportation of "Waste" Products for Reuse**, 124 M.C.C. 583 (1976). In addition to issuing a final environmental impact statement, the Commission made specific findings of public convenience and necessity in light of the three-part test described in **Pan-American Bus Lines Operation**, 1 M.C.C. 190 (1936).

Most recently, in **Ex Parte** No. MC-37 (Sub-No. 26), **Commercial Zones and Terminal Areas**, the Commission by rulemaking has adopted revised regulations that expand existing commercial zones and terminal areas as defined by the Commission. The effect of the new regulations is to expand those areas, surrounding and encompassing municipalities, in which motor carriers may conduct operations free from ICC regulation. By this rulemaking procedure the Commission has effectively expanded the authorities of motor carriers operating in these municipal areas.

An example of the use of rulemaking procedures to address generic questions of public need for service in the franchising of motor carriers is found in the Herman Bros.' proposal before the Commission, docketed as **Ex Parte** No. MC-

103. Herman Bros., a motor common carrier of bulk commodities subject to the Commission's regulation, believes that a great opportunity exists for the replacement of private trucking operations by for-hire common or contract carriage. The Commission has recognized that the regulated motor carrier industry is vital to the economy, and that the enormous extent of unregulated motor carriage represents a continuing competitive challenge to for-hire motor carriers. See **Intercorporate Parent-Subsidiary Transportation**, 123 M.C.C. 768 (1975) The percentage of the Nation's traffic handled in private and exempt trucking remains as great today as it was 20 years ago, and whatever growth regulated motor carriers have enjoyed in the interim has been at the expense of the railroads.

Herman Bros. firmly believes that compelling reasons may exist that would lead shippers to want to convert some or all of their proprietary operations to for-hire carriage. Unfortunately, shippers desiring to convert their proprietary operations to for-hire carriage often find themselves frustrated by current regulatory procedures. They frequently find that carriers already holding some or all of the required authority are unable to provide the requisite level of service or, alternatively, that a carrier that can perform the requisite service does not hold the necessary operating rights. In the latter case, the shipper supports the carrier's application before the Commission, only to run into obstacles which the regulatory system imposes upon new grants of operating authority.

It is Herman Bros.' contention that the Commission's present procedures afford existing carriers the opportunity to block applications for new authority although they may hold only a fraction of the required rights. Protests to the application are entertained even though the protestant carriers have handled none of the involved traffic and, indeed, may have no real interest in transporting it. Such protests, at a minimum, prolong operating rights proceedings and may also result in total or partial denial of the necessary authorities.

Herman Bros. believes that existing carriers should not be allowed to frustrate a shipper's attempt to convert from private to for-hire carriage solely on the basis that their operating authority gives them a theoretical ability to render the service desired by a shipper. It has petitioned the Commission to institute a rulemaking proceeding to establish regulations for the issuance of limited-term, interim certificates or permits granting the requisite authority to supplant private carriage operations. The Commission is asked to find that the non-participation by existing for-hire carriers in the movement of proprietary traffic establishes a presumption: that a grant of new authority to perform the service will serve a useful public purpose responsive to a public need; that this public purpose cannot be served as well by existing carriers; and that new services can be instituted without endangering or impairing the operation of existing carriers contrary to the public interest and the National Transportation Policy.

It is proposed that the Commission make a general finding that, to the extent it is demonstrated that their operations will supplant the private carriage of bulk commodities: (a) the public convenience and necessity require operations by qualified motor common carriers, and (b) operations by qualified motor contract carriers are consistent with the public interest and the National Transportation Policy.

Herman Bros. believes that expeditious action by the Commission on these applications would be crucial to a shipper's decision to convert to for-hire carriage. Accordingly, letter acknowledgment would issue to an applicant authorizing the proposed operations, within 50 days after Federal Register publication of its application, unless the Commission finds that the applicant is unfit to conduct the proposed operations, or that the applicant has not met its burden of proving that the proposed service would supplant some portion of the shipper's private carriage operations.

Perhaps the most significant aspect of the proposal is the fact that protests to applications filed under the procedure would be permitted only to the extent that they rebut the showing of an applicant's fitness or the shipper's representations upon which the Commission's general findings of a need for service are based. Protests would not be entertained if based solely upon allegations of conflicting operating authority.

The Herman Bros.' proposal requires no Congressional action, as it does not involve any amendment to the Interstate Commerce Act. It is consistent with the recent decisions in which the courts have upheld the Commission's right to expand the operating authority of regulated motor carriers on a generic basis, through the use of rulemaking proceedings, rather than through a case-by-case adjudication.

In the "Waste" Products case, discussed above, the Commission demonstrated that its generic finding of public

convenience and necessity was consistent with the three-part test described in Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936).

The Pan-American criteria require that the Commission consider whether the proposed rule would serve a useful public purpose responsive to a public demand or need, whether the public purpose can and will be served as well by existing carriers, and whether the new services can be instituted without endangering or impairing the operation of existing carriers contrary to the public interest and the National Transportation Policy.

The Herman Bros.' proposal satisfies these three tests. First, the proposed rule will serve a useful public purpose responsive to a public demand or need, as many shippers engaging in proprietary trucking want it supplanted, at the desired level of service and at a net cost savings, by for-hire motor carriers. The proposal provides a streamlined method to allow shippers to take advantage of such for-hire service without the necessity of becoming involved in a prolonged application proceeding in which existing carriers, which may not have handled the involved traffic, may be able to postpone or even prevent licensing of the for-hire carrier whose services the shipper desires to use.

The second and third Pan-American criteria, whether the public purpose can and will be served as well by existing carriers, and whether the new services can be instituted without endangering or impairing the operation of existing carriers contrary to the public interest and the National Transportation Policy, are satisfied by the fact that existing carriers have not carried the freight handled in proprietary trucking and that applicant will do so. The potential problem of diversion of other traffic, handled by existing carriers, is relieved by the requirement that the applicant and supporting shipper set forth in detail in the application the private carriage operations to be supplanted. Further protection is afforded by the requirement that applicant file a performance report if it desires to extend its operations beyond 18 months. Evaluation of these reports will allow the Commission to police applicants' operations and protect existing carriers against diversion of traffic.

The Herman Bros.' proposal also satisfies the statutory requirements for the franchising of contract carriers, set forth in sections 203(a)(15) and 209(b) of the Interstate Commerce Act. Under section 203(a)(15) of the Act, a contract carrier is defined as a motor carrier that engages in transportation, under continuing contracts with one or a limited number of persons either: (a) through the assignment of motor vehicles for a continuing period of time to the exclusive use of the person served, or (b) for the furnishing of services designed to meet the distinct need of each individual customer. The Herman Bros.' proposal in no way relaxes these statutory requirements. Additionally, the fact that a shipper has undertaken to perform its own transportation is persuasive, if not conclusive, that its transportation needs are such that they cannot or will not be met by existing carriers; in other words, that they are "distinct" within the meaning of section 203(a)(15).

Under section 209(b), the Commission is required to consider five factors in determining whether issuance of a permit to operate as a contract carrier will be consistent with the public interest and the National Transportation Policy. Again, the Herman Bros.' proposal in no way relaxes these statutory criteria. The Commission can evaluate the first two criteria, the number of shippers to be served by an applicant and the nature of the service proposed, from the information required by the application. The third factor in section 209(b) requires consideration of the effect that granting the permit would have upon the services of protesting carriers. Having not participated in the private carriage operations, it is unlikely that a protesting carrier could demonstrate any adverse affect by a grant of authority. However, the proposed procedures would not prevent them from doing so in their protests.

The fourth and fifth factors in section 209(b) consider the effect that denying the permit would have upon the applicant and/or its shipper, and the changing character of the shipper's requirements. The Supreme Court in Interstate Commerce Commission v. J-T Transport Company, 368 U.S. 81, 82 S. Ct. 204 (1961), has interpreted these factors to require an applicant to first establish that its proposed service is specialized and tailored to the shipper's distinct need. Protestants then may present evidence to how they have the ability and willingness to meet that specialized need. Following this prescribed procedure, an applicant and its supporting shipper will be able to establish the distinct need for applicant's service to replace existing proprietary operations. Having not participated in the involved traffic, it is highly unlikely that any protestant could then demonstrate its ability and

willingness to perform the required service.

The Herman Bros.' proposal outlined above, if adopted by the Commission, is not seen to diminish the value of existing motor carrier franchises. It does not relax the statutory standards for the issuance of common and contract motor carrier authority. It merely seeks to have these determinations made on a generic, rather than a case-by-case basis. The opportunities for securing operating authority under the proposal would be limited and apply only to the extent that private trucking would be supplanted by regulated motor carriage.

The proposal provides for expedited franchising of motor carrier operations only to replace proprietary trucking and then only in situations where no motor carriers are authorized to render the service or, if licensed to perform it, are failing to do so. Existing common or contract carriers which have handled the traffic would be able to protest the application and show that the applicant's proposed operations in fact would not supplant the private motor carrier operations of the shipper. In such a case the Commission thereupon could deny the authority sought.

Unlike the drastic proposals for deregulation and regulatory reform that have been heard in recent years, the Commission's use of rulemaking procedures requires no Congressional action. In a number of such rulemaking procedures, upheld by the Courts, the Commission has successfully expanded the operating authorities of regulated motor carriers. In light of its expanding caseload and its desire to reduce the time consumed in disposing of the proceedings before it, the Commission can be expected to continue to make advantageous use of the rulemaking procedure.

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