STATEMENT FOR THE RECORD OF
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BEFORE THE SURFACE TRANSPORTATION SUBCOMMITTEE
OF THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
REGARDING MOTOR CARRIER DEREGULATION
AND THE SHIPPER UNDERCHARGE PROBLEM
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Introduction

Thank you for inviting us to submit a statement discussing the Department of Transportation's views regarding trucking deregulation and the "shipper undercharge" issue. Ten years after the substantial reforms of the Motor Carrier Act of 1980 (MCA), much has been learned and much has been gained.

Shippers' overall distribution costs have been significantly reduced as a result of new price and service options. The 1980 reforms played a major role in the way U.S. industry conducts its shipping, merchandising, and inventory functions, resulting in substantial reductions in logistics expenditures. A 1990 study by the Brookings Institution estimated annual savings to be about $15 billion for just the transportation costs alone.

With the freer entry permitted under deregulation, the number of firms with Interstate Commerce Commission (ICC) operating authority has grown, from roughly 18,000 in 1980 to about 45,000 in 1990, resulting in greater competition, more price and service options, and increased employment. Total employment in the trucking services industry has increased from 1.4 million in 1979 to 1.9 million in 1990. Carriers have become more efficient and innovative at restructuring routes, reducing empty backhauls, providing simplified rate structures, and offering shippers incentives to move freight more efficiently.

Fears about loss or degradation of service to rural areas and small communities have proven groundless, as surveys indicate that truck service remains good. Shippers in the many communities surveyed reported little or no change in the quality of service.

Other witnesses will undoubtedly discuss the financial condition of large motor carriers since 1980. However, systematic information about smaller carriers is not routinely available. The ICC requires yearly financial reports from only about 2,000 of the largest motor carriers subject to its jurisdiction. However, a recent study conducted by the Small Business Administration (SBA) has examined the impacts of regulatory reform of interstate trucking on small and medium sized carriers. The study found that productivity measures improved in all categories. The results showed that under interstate deregulation, the percent of empty miles was reduced by about 15 percent, revenue miles per power unit increased by 21 percent, and number of loads per power unit increased by 60 percent. Gross revenues per carrier rose sharply, by 250 percent between 1979 and 1989. Net revenues, however, grew at a much more modest pace, 25 percent. Profit margins tended to be lower in 1989 than in 1979 due to higher operating costs.

Although the number of motor carrier bankruptcies has increased since passage of the Motor Carrier Act of 1980, the condition of the overall economy has been a major determinant of this trend. The recession of the early 1980's resulted in sharply increased numbers of business failures in other sectors of the economy, as well as in trucking. Within the trucking industry, business failures rose sharply for both local and intercity carriers. Since local trucking was not directly affected by federal deregulation, this evidence suggests that overall economic conditions have been a more important determinant of trucking failures than deregulation.

A more recent comparison of the increase in the number of trucking failures versus the increase in the number of overall business failures also indicates the importance of economic conditions. During the first half of 1991, according to Dun & Bradstreet, overall business failures were up 50 percent, while failures in the trucking and warehousing sector rose by a virtually identical 51.6 percent.

It should be noted that while we can compare changes in the <u>numbers</u> of motor carriers that fail, it would be misleading to compare failure <u>rates</u> because of limitations in the underlying data base. The number of carriers that fail must be divided by the total number of carriers, in order to obtain the failure rate. However, there is no accurate measure available of the total number of carriers, most of which are not regulated by the ICC and are not required to report financial data.

In any event, there has been no overall decline in the number of motor carriers. The quantity and quality of service available to shippers has remained high, even in small rural towns, and safety has not deteriorated.

Critics had claimed that deregulation would result in a serious deterioration in truck safety. However, there is no connection between economic regulation and truck safety. Economic regulation did not promote safety and deregulation did not lessen it. Safety is a function of safety regulations and strong enforcement of those regulations.

Fatal accidents and fatalities involving interstate trucks have been consistently lower than they were in the pre-deregulation years of 1978 and 1979. While these figures were trending upward and peaked in the last years before deregulation, they have been lower ever since. The 1989 fatal accident rate per million vehicle miles is 40 percent lower than 1978.

The Undercharge Problem

Partial deregulation has encouraged shippers and carriers to negotiate rates, in many cases in the form of discounts from tariff rates on file with the ICC. The negotiation of prices between buyer and seller is a common business practice for most industries, and we see no good reason, from a policy perspective, why it should not be permitted in the trucking industry as well.

For the past several years, shippers have been besieged by undercharge claims and related court collection cases. These matters have arisen primarily from motor carrier bankruptcies and financial reorganization proceedings.

In a typical case, the motor carrier has negotiated a rate with the shipper, agreed to it either in writing or verbally, and then either filed the rate incorrectly or failed to file it with the ICC at all. Such a negotiated discount rate is not legal, unless it is filed with the ICC. Common carrier truckers must still file all their tariffs with the ICC, although contract carriers have been exempt from this requirement since 1983.

If the discounting carrier subsequently goes out of business, the shipper may be sued by a collection agent.

Trustees for some bankrupt carriers, attempting to maximize the assets to be distributed to the stockholders and creditors, have sold the carriers' old accounts receivable to auditors and collection agencies, who compare the freight charges paid with the actual tariffs on file at the ICC and in effect on the date of the shipment. If the charge on the bill is a discounted rate not on file, the auditor sends a bill to the shipper for the balance due, the "undercharge." Shipper representatives have estimated that about a total of $100-200 million in undercharges are at stake. Should a shipper fail to pay these undercharges, the trustee or auditor for the bankrupt motor carrier may take the shipper to court to collect the difference between the filed rate and what was actually paid.

The Supreme Court, in its 1990 decision in Maislin Industries v. Primary Steel, 100 S. Ct. 2759, found that the Interstate Commerce Act requires that a motor common carrier publish its rates in a tariff filed with the Commission. The Court held that this statutory requirement, referred to as the "filed rate doctrine," forbids equitable defenses to the collection of the filed tariff rate. Moreover, it found that the Commission had not established that the failure to file the negotiated rate was an unreasonable practice which justified a deviation from the filed rate doctrine. Finally, the Court noted that the Motor Carrier Act of 1980 did not alter this statutory requirement. Legislation is necessary to eliminate this archaic and obsolete requirement.

A compromise proposal, as embodied in S. 1675, the Negotiated Rates Equity Act of 1991, would allow the ICC to review such cases and make a finding as to the unreasonableness of higher published tariff rates as compared to other rates charged and paid for comparable transportation services, and thus would constitute a defense to the filed rate doctrine. However, it would not address the cause of the problem.

Causes of the Undercharge Problem

"Truck deregulation" has been extremely successful in providing benefits to shippers, as well as to the overall economy. Consequently, it is not surprising that it has been one of the more popular economic reforms of recent decades. Nevertheless, we should bear in mind that what actually occurred in 1980 was not total "deregulation."

For example, while entry into the trucking industry was made somewhat easier by the MCA, motor common carriers must still acquire certificates from the ICC in order to operate. In addition, although there is now increased rate competition in response to market forces, collective ratemaking still exists. Moreover, motor common carriers must still file their rates at the ICC, even when those rates are independently set. These are just a few of the more significant statutory requirements that continue to apply to interstate trucking.

Many of the reforms that this Committee examined in 1980 remain on the agenda in 1991. The "shipper undercharge" issue relates in a very direct way to one of these key issues: the requirement that interstate motor common carriers file their tariffs at the ICC. In addition, these carriers must also -- as the Supreme Court recently reiterated in Maislin -- adhere to the exact letter of their tariffs even where the shipper and carrier had agreed to a different rate. However, if the tariff filing requirement had been abolished, there would be no shipper undercharge problem.

Imagine for a moment that auto prices had to be filed at a federal agency by dealers across the nation. Negotiations take place between you and the salesman; the manager approves a discount price, and a deal is struck -- except that two or three years later, the dealer comes to collect the difference between the price you paid and the filed price. And to top it all off, the courts agree that you have to pay.

Is this the way to do business in <u>any</u> industry? We see no reason why the trucking industry should be treated any differently from most other industries with respect to the sanctity of business contracts.

<u>Proper Context for Solving the Undercharge Problem</u>

We would prefer to deal with the shipper undercharge problem in the context of additional deregulation of the motor carrier industry. Eliminating tariff filing would also solve future undercharge problems. However, we recognize that shippers face an immediate problem because of the Supreme Court's ruling.

S. 1675 may be an acceptable first step toward developing a bill that would address the Court's decision in <u>Maislin</u>, and we have no objection to its enactment.

At the same time, however, we urge you to consider several other broader alternatives that address the undercharge problem and that could provide greater flexibility for shipper/carrier agreements.

One option would be to eliminate the statutory requirement that motor common carriers file their tariffs with the Commission. This could be done in several ways. Rates that result from negotiations between a shipper and a common carrier could be specifically exempt from tariff filing requirements. The

Commission could also be given the administrative option of exempting motor common carriers from tariff filing requirements; this is similar to an option which ICC has already exercised, to exempt motor contract carriers from tariff filing requirements. The ICC is also considering an expansion of the scope of contract carriage that would reduce the impact of the filed rate doctrine.

Another possibility would be to modify the tariff filing requirements so that only a common carrier's maximum rates would have to be filed with the Commission. This would give carriers the flexibility to charge lower rates without running afoul of the filed rate doctrine. We believe that it makes no sense for the ICC to spend a lot of money trying to police the millions of motor carrier rates filed with it each year. Moreover, sophisticated technological approaches -- such as the development of an electronic tariff filing system -- do not go to the heart of the basic problem: the anachronistic tariff filing requirement itself.

However, we would propose one caveat to these options. The tariff filing requirement should not be eliminated for motor common carrier rates that are collectively set pursuant to section 10706 of Title 49, United States Code. Although the best solution would be to eliminate the ICC's authority to allow collective ratemaking, as long as rate bureaus continue to have antitrust immunity, the collectively set rates should be filed with the ICC and subject to their scrutiny.

We believe the shipper undercharge problem should be addressed, in the interest of good business practice and fairness to shippers and carriers. However, we would prefer to address the problem in the context of further deregulation.

The trucking regulatory reforms enacted in 1980 were a good first step toward increasing competition, providing for more efficient distribution of goods, and simplifying motor carrier rate structures. We believe that now would be a good time to take the final steps necessary to complete the process.

The Problem of State Economic Regulation

While the interstate trucking industry has become more competitive and efficient as a result of the MCA and its interpretation by the ICC, the 50 States have a wide variety of different policies in force regarding the regulation of intrastate freight by motor carriers.

At the State level, New Jersey and Delaware never enacted laws to regulate common or contract motor carriage of freight. Since 1980, several States have either deregulated or become less regulated. Alaska, Arizona, Florida, Maine, Wisconsin, and Vermont have deregulated. South Dakota and a number of other States have enacted less sweeping regulatory reforms. Some other States have become stricter in their regulation. California has vacillated between liberal and strict rate regulation.

Overall, 42 States still maintain some form of State economic regulation. Some of these States exercise very strict regulation, e.g., Texas, Illinois, and Washington.

In the last several years the Department of Transportation has undertaken a number of studies to show the impact of the remaining regulation in the States that still impose such regulation, as well as the impacts of such regulation on interstate commerce -- that is, on consumers in other States. One of these studies was conducted by the Wharton School at the University of Pennsylvania. The Wharton analysis showed that the aggregate national savings from State economic deregulation would be $2.86 billion per year, as intrastate trucking rates would fall to competitive levels.

Another study was conducted within the Department at the request of the Congress. This study concerned the impact of State trucking regulation on the more than $20 billion package express industry, which is made up of carriers in the bus, truck, and airline industries. The largest express carriers are the "integrated" carriers, which have extensive coordinated truck and air operations.

As a result of the Airline Deregulation Act of 1978, air carriers are generally exempt from State and Federal economic regulation; and under the Interstate Commerce Act, truck movements which precede or follow an air movement are also exempt from State and Federal regulation. Truck freight movements which begin and end in a single State are subject to the regulatory policy of that State. Cases have been brought in the States of Tennessee and California concerning whether the single-State truck movements of air carriers are subject to regulation by those States.

The California case was recently decided by the United States Court of Appeals for the Ninth Circuit. Federal Express, the plaintiff, argued that it is exempt from regulation by the California Public Utilities Commission (CPUC) because it is an air carrier, and that its trucking operations, which are an integral part of its business, are also exempt. Federal Express also argued that California regulation was an unconstitutional burden on interstate commerce, because it prevented the carrier from conducting its operations in the most efficient manner and thereby added to Federal Express' costs. Essentially, the regulation forced Federal Express to ship all of its intrastate California packages by air through its hub in Memphis, even if they could be shipped less expensively by truck.

In its June, 1991, the appellate court ruled in favor of Federal Express, on the basis of the exemption provided by the Airline Deregulation Act. We are told by staff at CPUC that they intend to file a petition for a writ of certiorari from the Supreme Court. However, unless the decision is overturned, Federal Express can conduct intrastate trucking operations free of State regulation, at least in the States comprising the Ninth Circuit (generally, the West Coast States plus Alaska and Hawaii).

While we in the Administration are strong supporters of less State regulation over trucking, we believe this situation gives Federal Express (and any other air carriers which also conduct surface trucking operations) a considerable cost advantage over other carriers. In the course of our package express study we were told that shipment by truck costs only about one-fourth as much as by air, so considerable savings can be had by transporting intra-state cargo by intrastate truck movements rather than transporting them via air to a Memphis hub and back to the State destination. In addition, this exemption means the carrier would be relieved of all legal and administrative expenses related to the filing of intrastate tariffs, submission of annual and quarterly State reports, and legal expenses for acquiring State operating authority. Such expenses can be substantial.

We believe the opportunity for this cost advantage should be extended to all participants in this industry. One proposed solution is H.R. 3221, but this bill would only extend the exemption from State regulation to other "integrated" carriers which provide "national interstate intermodal air-ground transportation service" through common ownership between a motor carrier and air carrier. This would add United Parcel Service, Airborne Express, and Emery Worldwide, for example, but would continue to leave such participants as Roadway Package System and the intercity bus industry at a considerable disadvantage.

Several other solutions would apply the exemption in a non-discriminatory way. The Hastert bill, H.R. 1064, and Section 508(a) of S. 610, the Administration's Surface Transportation Assistance Act of 1991, would prohibit State economic regulation of all interstate motor carriers.

Neither H.R. 2950 nor S. 1204, the Senate-passed version of the highway/transit reauthorization legislation, contains this important provision. I recently sent a letter to Chairman Roe of the House Public Works Committee, listing a number of issues which, if not addressed in the bill, would cause me and other senior advisors to recommend that President Bush veto the bill. State deregulation was one of those items. The decision by the Ninth Circuit Court is simply one more compelling reason to enact either of these solutions, and we urge the Congress to do so.

Conclusion

This concludes our prepared statement. We look forward to working with all interested parties to solve the immediate undercharge problem and make sure the existing benefits of trucking deregulation are not thwarted at the State and local levels.