Transportation

Thomas G. Moore

THE GREATEST SUCCESS of the Carter administration was in the area of transportation regulation. Unfortunately, the Reagan administration seems to be taking a new direction. This pattern is evident in both air transportation and surface freight transportation.

Airlines. It's now generally agreed that the airline deregulation has worked out very well. Rates have come down significantly in most markets. New low-cost carriers have been introduced, and high-cost carriers have readjusted their labor contracts and their practices. It's been a tremendous success.

But in 1981 we had enormous change. For example, one of the less-observed consequences of the air-traffic controllers strike is that Secretary of Transportation Drew Lewis has become the regulator of entry into the airlines industry. Today, if a new carrier wants to enter a market, it has to get a slot from Lewis or his agent, the head of the Federal Aviation Administration (FAA). It also appears that the cutback of capacity ordered by the FAA in view of the strike has improved the profitability of a number of the airlines. In other words, by reducing capacity, the FAA has created, at least temporarily, a limited cartel. It is to be hoped that, as more air-traffic controllers come on line and things loosen up, these effects will disappear and the FAA will get out of airline regulation.

Moving on to international air transport, in May 1981 the Civil Aeronautics Board (CAB) promulgated its final "show cause order," one that originally was to have been wide-ranging, but was confined in the final version to restricting U.S. airlines from participating in International Air Transportation Association (IATA) agreements applying to the North Atlantic routes. In other words, under this order, our airlines would not be allowed to collude with other international airlines on transatlantic rates. However, the President himself asked the CAB to stay the order until January 15. In December the international airlines met in Switzerland and agreed on higher rates across the North Atlantic. The administration and the CAB decided in January to allow collective ratemaking, provided that some European countries agreed to establish a band within which airlines would have fare-setting freedom.

As for the CAB, Congress is considering a bill to "sunset" the agency ahead of the 1985 statutory deadline, and the administration supports the bill. Clearly it's time to put the CAB out of its misery and go to a totally deregulated airline industry—which is basically what we have. However, when the CAB goes out of business, certain residual functions will have to be handled by somebody else, and no doubt most of these will be transferred to the Department of Transportation (DOT).

There are attempts by some city interests to amend the CAB sunset bill to provide for monopoly operating rights into small and medium-size cities. And the commuter airlines seek the continuation of the CAB's rate-sharing formula for "interlining" between commuter airlines and trunk carriers. When I talked to DOT officials about this, they shuffled their feet and said, "Well, we're not really interested in regulating the airlines, and if Congress wants to give us the power, we really won't use it. But, you know, it wouldn't be harmful for us to have it," and so on.

Thus I think there's some reason to worry about what's happening in air transportation.

Surface Freight Transportation. But where we really have to worry is in trucking, railroads, and buses. Here, once again, legislation passed during the Carter administration has been very successful. First, the Motor Carrier Act of 1980 was a major step in deregulating trucking. A year after it went into effect the *Wall Street Journal* reported that it had led to discounted rates, more trucks, improved service, service innovations, and more Teamster concessions. In fact, the Teamsters got together with the trucking industry much earlier than ever before and negotiated what were, essentially, union wage concessions. The reason for this was, of course, that nonunion truckers were entering the industry at a rapid rate and eroding the monopoly power of the Teamsters.

However, here too the Reagan administration has been backsliding—even though its own regulatory task force (which Murray Weidenbaum chaired), its transportation policy task force (which Drew Lewis was on), and its transition team for the Interstate Commerce Commission (ICC) had all recommended full steam ahead with the deregulation. Four examples come to mind:

- The first thing the administration did was to replace Darius Gaskins, the deregulation-minded ICC chairman, with Reese Taylor, a former regulatory commissioner from Nevada and a law partner of Senator Laxalt (Republican, Nevada). Taylor has either fired staff members who were interested in deregulation or moved them to harmless positions. He has shifted ICC resources to enforcing the old economic regulation.
- Taylor has also persuaded a majority of the ICC commissioners to restrict new operating authorities. Thus firms that ask for certificates to carry general commodities within a large territory receive instead very narrowly drawn certificates for much more limited territories.
- When carriers have negotiated lower rates with individual shippers, Taylor has called the rates "discriminatory" and "illegal." In a recent case, for example, Roadway Express was entering a new market and, as firms often do in that situation, it offered a low introductory rate as a promotional gimmick. Taylor said this looked discriminatory to him and wanted the rate

suspended while it was being investigated.

• Finally, you may have read that Taylor says he favors continued deregulation and wants to eliminate the "needs test" in trucking (eliminate, that is, the necessity to show that shippers want the proposed service). What has not been made clear in most of the newspaper reports is that he also wants to strengthen the "fitness test" by requiring that firms must have extensive financial backing and must already have the vehicles they will need to provide a new service before the authority is granted. This could seriously restrict entry.

Now, what I'm especially sorry to report is that I'm unsure Chairman Taylor's actions are at odds with the administration's wishes. In fact, there is evidence that he is following the White House's objectives. The *New York Times* reported in early December that President Reagan had assured the Teamsters of his opposition to trucking deregulation. He told them, "We can't do it all at one time" and "it must be phased in." Since only the last two statements were in quotes, it's not clear what or how strong President Reagan's position really is. Nevertheless, if I were Reese Taylor, I would not consider this a directive to change my proregulation stance.

In railroad transportation, the Staggers Act of 1980 has been generally successful. It is not as significant a deregulation effort as the Motor Carrier Act, but it has permitted some useful reforms. In what has been a very successful action, the ICC moved quickly to exempt fruit and vegetable transport from regulation, and piggybacking as well. The rate freedom allowed under the act has permitted the railroads to pick up new business. The railroads and most shippers seem very happy. Only the coal shippers, who feel their rates have been increased too much, have been murmuring against the Staggers Act.

However, even here, there is danger from an ICC chaired by Reese Taylor. His attitude toward price competition in the trucking industry does not augur well for railroad ratemaking, and he has voted consistently against proposals from the railroads for abandoning unprofitable routes.

Finally, on bus transportation the administration is supporting a deregulation bill. But Taylor has also changed that around to strengthen the fitness test while eliminating the needs test. The result, once again, is that we don't have a clean deregulation effort from the Reagan administration.

WHAT CAN WE CONCLUDE? It has to be that things do not seem to be going in the right direction. All is not lost —yet. But it's time for the administration to decide whether it wants to protect the industry or to promote competition in the transportation field.

Discussion

BERT REIN: I want to follow up on Professor Moore's references to control over the airline industry by means other than direct regulation, and in particular, call your attention to the phenomenon of controlling entry to the system by controlling the airport. Take the example of National Airport, where the total number of flights is constrained, not because the airport can't handle a larger number safely, but because residents on the ground won't tolerate them. The question is—who should decide how much of the air space will be used, the federal government, or the local communities through their control over the use of the airports? And if airport capacity is scarce, who's going to allocate that scarcity and under what principles?

The FAA recently has been moving to expand the airport proprietor's responsibility not only for determining limits, but for allocating the takeoff and landing slots created by those limits. Thus, if traffic grows, we may have a situation in which regulation not only comes in through the airport mechanism, but also is delegated to state and local authorities who are the source of such concepts as point-to-point monopolies and who can implement those concepts as easily by airport slots as they can by contract.

Another aspect of the defederalization versus deregulation question is in the area of contract, that is, common carrier rules applied by courts. Contrary to what is generally believed, the time before the Interstate Commerce Act of 1887 was a time of intense regulation of transportation. In many ways, the act simply restated common law principles, particularly in the area of what it means to be a common carrier using the common way. Now, if we deregulate at the federal level, and in particular remove tariff requirements, what legal regime will then govern the relationship between the passenger and the carrier? Under *Erie* v. *Tompkins*, there is no federal common law that fills that interstice. So we would be returning to a regime of state law applicable to contracts of carriage that involve interstate commerce. Would that be a healthy development?

MR. MOORE: You're absolutely right that as federal regulation winds down, the states and local communities will become much more important. And, certainly, the control of entry or slots at airports will come more under local jurisdiction, and there is the potential for monopoly.

On the other hand, airports and cities compete amongst themselves. For example, the Baltimore-Washington airport competes with Dulles and National, and in my part of the country, the Oakland airport competes with San Francisco and San Jose. The potential for monopoly is much less under local controls than under the federal system where there is only one authority.

I believe, of course, that we ought to move towards market allocation of airport capacity—that is, a system in which slots are auctioned off or something like that. This would provide a mechanism for free entry. But even if this does not occur, local control is still better than what we have had until now.

And I would argue that the same thing is probably true about the common carrier situation, though I haven't given that much thought. You're right, it is a potential problem.

MR. REIN: It seems to me there are ways to deal with the problem without resorting to regulation. We could, for example, follow the precedent of the Labor Management Re-

lations Act and impose a federal contract in interstate commerce that would avoid the state-by-state adjudication under fifty systems of law. I think we're at a time when we can't afford to have state-by-state contract regulation of interstate commerce.

ELIZABETH BAILEY: I would like to mention one other source of the airline reregulation that's occurring. The key problem is that deregulation has been a success for the public, but definitely not for labor. For example, new airlines like People Express and New York Air are paying jet pilots less than half of what the established airlines have to pay under their very generous contracts with labor. Airline labor enjoyed enormous rents under regulation, and those rents are being eroded in a deregulated environment.

I think this helps explain the "Christmas tree" package being hung on the CAB sunset bill, especially the introduction of a labor hiring-hall provision, where airlines have to give preference in hiring to personnel that other airlines have let go. It also helps explain what's happening at the ICC. Labor is moving there to block deregulation, because the rents to the drivers who are unionized are clearly enormous. So we shouldn't be too hard on the Reagan administration. Any administration will respond to groups that display a great deal of dissatisfaction. The pressure was not so strong a few years ago when labor didn't fully realize how much deregulation would reduce its rents.

MARVIN KOSTERS: I think that's an important point, but there are differences in viewpoint about whether that's a cost of deregulation or a benefit. [Laughter.]

ALFRED KAHN: I'd like to add a word here, by way of underlining Betsy's and Marvin's observations. There is no doubt that certain labor groups profited greatly from regulation. But there were others who were injured by it, and who are benefiting now from deregulation. In that second group I would include the long line of people who were applying for pilots' jobs at those $80,000 to $100,000 salaries and couldn't get them, and who are now working for one of the new airlines at $15,000 to $30,000.

It's very much like the situation in the auto industry. The auto workers' wages and fringe benefits increased much more rapidly than average manufacturing wages during the decade of the 1970s—because for most of that period the auto industry was inadequately competitive. At whose expense? Well, one very large group of people who were exploited are the unemployed auto workers, who would have kept their jobs if wages had been lower. So it's particularly distressing that as Japanese imports intervened to make the industry more effectively competitive and imposed some discipline on those wages, the Reagan administration stepped in and exerted pressure on the Japanese government to limit that healthy influence. ■

The Environment

Robert W. Crandall

THERE'S NOT MUCH to be said about the substance of President Reagan's environmental policy because, frankly, very little of substance occurred in the first twelve months. Instead, I can only comment on the tone which has been set and the apparent lack of direction in major policy areas. Let me begin with a quote dated October 12, 1981—a little old, perhaps, but still a useful measure of the impression being created by Reagan's Environmental Protection Agency (EPA).

> In the ten-year history of EPA, there have been periods of turmoil, but none rivals what is happening now under the reign of Anne Gorsuch. What was once a robust, dynamic entity has shriveled to a gray shadow of its former self, wracked by internal dissension, run by people with little expertise in environmental issues, and dogged by a paranoia that has virtually brought it to a standstill.

Now, that statement is not from the Environmental Defense Fund's house organ or from Ralph Nader. It's from *Automotive News*, a probusiness trade publication—part of Reagan's own constituency.

And, in my judgment, the statement rather accurately portrays the confusion and paranoia that has developed at EPA in the past year. The agency's new leadership can fairly argue that the policies it inherited were so confused and inefficient that more than one year (or one administration) will be needed to straighten them out. Nevertheless, that leadership can't duck blame for the likelihood that the agency is now in such a state of disarray that it will not be able to recover even in the next three years. It is also worth noting that EPA Administrator Gorsuch and Interior Secretary James Watt are doing wonders for the membership drives of organizations like the Sierra Club. In fact, it appears to me that they are helping greatly to rearm the GOP's opposition for the next electoral battle.

Instead of serving up fodder for the environmentalists, the Reagan EPA could have used its first year to great advantage. The political climate was favorable for launching major changes in environmental programs and even in federal environmental statutes. By now, however, the administration's EPA appointees have so tarnished their credibility that I do not expect to see significant legislative changes any time soon—particularly with congressional elections coming up this fall.

Had the administration been ready and willing in early 1981, it surely should have been able to launch a major assault on the more