

COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION. By Carl H. Fulda.* Boston: Little, Brown & Co., 1961. Pp. xii, 533. \$20.00.

Professor Fulda has plunged into the thorniest thicket of the regulatory process; he emerges, scratched but undaunted, with a useful and coherent account of what he finds there. In the transportation industries the reconciliation of regulation with competitive norms is most difficult. Other utilities, notably those with geographical monopolies like telephones, electricity, and gas, offer little scope for rivalry of any sort. Except in special cases such as competition between electricity, gas, and oil for domestic space heating use, we can achieve only a pale simulation of competitive pricing by way of rate regulation.

In transportation, however, either the reality or the prospect of competition is almost always present. There are, to be sure, patches of monopoly, as when one railroad serves a coal-mining area, or one airline a small city with no practical likelihood of another entrant. But in major markets railroads face other railroads, sometimes water carriers too, and, ubiquitously, trucks. Airlines try to woo business from each other, and, without great success, to attract more of the great mass of travellers who insist on driving vast distances in their own cars.

Are the competitive forces pent up in these and other transportation relationships—both within modes of transport and between one mode and another—to be fostered or repressed? If, taking immediately the side of the angels and of Professor Fulda, one desires to foster competition, one imposes on the regulatory agencies an ambivalent role. The historic task of the ICC, at least until 1920 when it was first given the power to set minimum rates, was to regulate monopoly behavior chiefly by restraining discrimination in rates and service. This activity could be described as in aid of competition; but the emphasis was rather on curbing monopolies which were still strong enough to burden shippers, and to make predatory attacks on independent water carriers.

By 1935, when the ICC was given regulatory power over motor carriers, there had been a change in its mission. In the circumstances of the great depression, destructive competition among and between railroads and motor carriers was greatly feared. The ICC's task was now to "coordinate"—in this setting a polite expression for restricting the full play of competition. In the same period the Civil Aeronautics Board was also invested with authority to "coordinate" air transport. In 1940 inland water carriers were partially brought under ICC jurisdiction, again in the name of "coordination" and "stabilization."

The conventional tools of regulation, which in transportation have thus had to be adapted to the control of competition as much as to the control of monopoly, are of three types. First are restrictions on entry and abandonment. Second is control over combinations—either unifications within a particular mode, for example railroad mergers, or acquisitions in other modes, for example railroad purchases of motor carriers. Third is the regulation of rates,

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either directly or through supervision of collective rate-making by members of the industry. When entry is either legally or economically restricted, control over combinations becomes especially important in determining the shape of the industry. This is notably true with respect to the railroads, where it is practically out of the question that new lines will be built. Entry into trucking and into aviation (I put aside inland water carriers as of little importance) is economically more feasible but, given the present patterns of control, difficult. Therefore, Fulda properly pays close attention to control of unifications—his inclusive term for any kind of acquisition or combination—and devotes almost as much space to this regulatory tool as to the other two combined.

The structure of the book further emphasizes the importance that the author attaches to policy about unifications. After a brief introductory description of the overall pattern of regulation of the four modes with which he deals (railways, trucking, aviation, water carriers; there is also a brief chapter on freight forwarders), he has separate chapters on the structural problems of each mode and in these early chapters gives major attention to unifications. Only after these matters of structure have been extensively considered does he turn to rate regulation, and the operation of rate bureaus. Here he has a very useful analysis of the operation of rate bureaus established by railroads and truckers under the protective umbrella of the Reed-Bulwinkle Act. While he notes instances of improper harassment, Fulda concludes that the structure and operation of these rate bureaus recognize a carrier's freedom of individual action, a freedom which he finds is often used. He draws an instructive contrast between the rate-making process of the surface carriers, and the highly restrictive dual rate agreements prevalent in international shipping. The Federal Maritime Board has been somewhat less than diligent in policing the cartel agreements in this industry, and until the Supreme Court temporarily upset the dual rate system in the *Isbrandtsen* case¹ independent ship operators were often faced with these arrangements which, by offering lower rates for exclusive patronage of conference lines, had a considerable coercive effect on shippers. Fulda urges that participation by our shipping lines in international rate agreements should be tolerated only if these agreements preserve some freedom of independent action even by members of the cartel. This device, however, seems inconsistent with the avowed anti-competitive intention of the conferences. Congress rehabilitated the whole system, with only minor reforms, in October, 1961.²

The rigid cartellization of international shipping is matched in the International Air Transport Association. These international fields must of course take into account the policies of other governments, especially in air transport, where so many of the carriers are government-owned and subsidized. The record of United States collaboration in maintaining high rate structures is nevertheless depressing.

1. Federal Maritime Board v. *Isbrandtsen Co.*, 356 U.S. 481 (1958).

2. 75 Stat. 762, 46 U.S.C. §§ 813-18 (1961 Supp.). See Gorman, *Shipping Conferences and the Bonner Act, 1961*, 1962 J. BUS. LAW 24.

Rate-making by the regulatory agencies themselves gets relatively brief attention. Fulda seems eager to return to the examination of policy with respect to combinations, and devotes a major chapter to "Common Ownership of Several Modes of Transportation", notably the elaborate, but uncertain, criteria that the ICC applies to railroad acquisition or operation of motor carriers. The book concludes with a crisp essay on the doctrine of primary jurisdiction, in which Fulda joins with Professors Davis and Schwartz in deploring judicial absence in cases where the applicability of antitrust policy seems to be clear and agency competence to rule otherwise is doubtful. There is, finally, a brief recapitulation of the author's fairly cautious proposals.

It is impossible within the scope of a review to comment on the detailed analysis of hundreds of decisions of regulatory agencies, mostly from the ICC. Professor Fulda deserves our sympathy and gratitude for having tried to explain and rationalize what Mr. Landis characterized, in criticizing the ICC, as "the poorest category of all administrative agency opinions."³ I, for one, will cheerfully accept Fulda's explanation of what the ICC has been trying to say. On the whole he is more tolerant than other critics of the Commission's performance. After all, it is faced with an almost impossible task. On the one hand, Congress calls for competition; on the other, not too much.

Consider the adjustment of inter-modal competition by means of rate cases. The National Transportation Policy, as crystallized in the Transportation Act of 1940, calls for "fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . ."⁴ How does the Commission "preserve the inherent advantages of each?" A persistent strain in the ICC's decisions seems to convert "inherent advantages" into something like "fair shares." In this view, even if the status quo can be altered, it must never be upset to the extent of driving a carrier from a particular market if there would be some advantage to shippers in keeping the service available (Is this advantage perhaps determined simply by the fact that the carrier is there?). Since the National Transportation Policy does direct the Commission to develop a "national transportation system by water, highway, and rail," a protective role is perhaps unavoidable. "Both the Commission and the courts," Fulda observes, "interpreted this as a command to afford equal opportunities to the various modes. Accordingly, rate differentials are established to reflect the relative advantages and disadvantages of each mode: Water transportation is generally inferior to rails because of its slowness, and less costly, hence water rates may be expected to be below rail rates; rail-water parity would drive all traffic to the rails. Truck service may be preferable to rail service because of lower minimum weight requirements or because it is faster and more flexible than, and therefore superior to, rail service, at least within certain distances; if so, rails must

3. LANDIS, REPORT ON THE REGULATORY AGENCIES TO THE PRESIDENT-ELECT. (Dec. 1960) 39.

4. Quoted on p. 22.

charge lower rates than trucks in order to be able to compete. The cost advantage of one mode over the other must be given full play, but the resulting rate differentials must not be so great as to provoke rate wars or threaten the disappearance of a competing mode."⁵

Dissatisfaction, especially railroad dissatisfaction, with this policy led to a 1958 amendment to section 15a of the Interstate Commerce Act. The Commission, in examining allegedly unreasonable minimum rates, is now instructed that "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy. . . ."⁶ This is supposed to forbid "umbrella" rate-making. The author, who concentrates his discussion of rate cases on the 1958 amendment and its consequences, does not think that it has brought about any significant change.

He is more interested, as I have already suggested, in the structural problems affecting competition. Both in rates and in access to shippers, the most deadly conflicts are between the railroad and trucking industries. Have the trucks ruined the railroads? If so, is this progress? If the railroads were not repressed by regulation, would they make one last violent sally and destroy the trucks? Railway entry into trucking has been much constricted on the supposition that the railroads would, if they could, destroy long-distance trucking; the unsavory lobbying tactics recently disclosed in the *Noerr* case⁷ have not helped to allay this view. Fulda concludes his analysis of the railway diversification cases, after observing that the Commission is cautiously moving beyond approvals of merely auxiliary and supplemental truck service, by suggesting that when railroads seek permission to acquire or operate truck routes, the Commission should be concerned with rate economies, as well as with the adequacy of existing service. "In other words, every case involving common ownership of different modes could become a competitive rate-making case, with opportunity for protestants to contest the validity of the rate proposals. This may be a new way of fitting common ownership into the over-all framework of competition."⁸

While he is fairly probing and skeptical about restrictions on carriers moving into other modes, Fulda is less resistant to trends toward increased concentration within particular modes, notably railroads and airlines. Perhaps in this instance he is accepting what many observers consider inevitable, unless there is a major resurgence of antitrust spirit within the administration. In the case of the airlines, he suggests that the Civil Aeronautics Board, in its almost unmanageable task of allotting routes, has dealt too easily with the "Big Four" (American, Eastern, T.W.A., United) as against the "Small Eight" trunk lines and the irregular air carriers. Yet he recognizes the excess capacity that has been created by jets, and concludes that, after all, a Big Four is "a pat-

5. Pp. 355-56.

6. P. 341.

7. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

8. P. 431.

tern prevalent in many unregulated industries."⁹ He wrote before the proposed American-Eastern merger, which would make the Big Four a Big Three.

With respect to the massive movement of proposed railroad mergers, Fulda is not particularly critical about the claims made on their behalf, perhaps because he sees competition between railroads as decadent anyway. Trucking, which provides the competitive spur to the railways, is still an industry of low concentration. Fulda would keep it that way, with some tolerance for "end-to-end" combinations where there is already considerable interchange of traffic between the merging lines. He condemns the ICC's attempts to constrict entry in trucking by extreme route and commodity restrictions which indeed condemn themselves. Congress, at the other extreme, has struck a notable blow in keeping one segment of trucking free by the exemption from any economic regulation of carriers of agricultural commodities. The commodities which the ICC had found to fall within the agricultural exemption were codified in 1958. The list, like other matters that reflect group pressures within and close to agriculture, defies rational explanation. Thus, Congress removed from the ICC's list of exempted commodities frozen fruits and vegetables, but added frozen or fresh cooked fish. Whether or not this catalog of agricultural exemptions makes sense, Fulda supports the exemption simply because it creates competition. If it is inequitable in inter-modal competition, then the solution is to extend it to the railroads (a suggestion also included in President Kennedy's Transportation Policy message to Congress of April 5, 1962).

Another area of competition in trucking, or a major burden for the regulated common carriers, depending on how you look at it, arises from the recognition of contract motor carriers who have only limited service obligations, and the exemption of private motor carriage. There are obviously large areas of private carriage that it would be foolish to attempt to regulate; but there is also a great deal of erosion at the boundaries. The establishment of these boundaries is another regulatory headache, giving rise to two divided Supreme Court cases in the 1961 term.¹⁰ Fulda does not develop these problems, however.

These rapid references to large issues should not suggest that Fulda's work is a superficial treatment of them. On the contrary, it has a solid underpinning in careful and respectful analysis of the cases. There is also a realistic recognition that the cases do not concern pawns on a chessboard but often powerful and aggressive business interests. Examples of this institutional feeling are found in his treatment of inter-city bus transportation, where the cases are shot through with the fact of Greyhound's dominance, and in the peculiar story of the major household goods carriers, who for years defied both the ICC and the Antitrust Division, ultimately accomplishing results that had been repeatedly declared illegal.

9. P. 256.

10. ICC v. J-T Transport Co., 368 U.S. 81 (1961) (contract carriage); United States v. Drum, 368 U.S. 370 (1962) (private carriage). See Note, *National Transportation Policy and the Regulation of Motor Carriers*, 71 YALE L.J. 307 (1961).

Still, in one major respect, Fulda's approach rests on an abstraction that, because it pervades the subject, should be subjected to especially skeptical criticism, and is not. That is the notion that only the tightest of regulatory reins keeps the industries in question from plunging headlong into the fires of "destructive competition." Thus, criteria for approving mergers modeled on Section 7 of the Clayton Act are considered not so much as a means of checking incipient monopoly as of preventing situations in which some competitors may disappear. Again, the discussions of rate-making are overshadowed by concern for preventing rate wars of the sort that once prevailed among railroads in the nineteenth century and among truckers in the depression. Concededly, cutthroat rate wars are possible. But are they likely to occur, given the oligopolistic nature of what competition there is among railroads and air carriers and the increasing stability of the trucking industry? It seems more to be feared that we will never get enough price competition rather than that we will have too much.

The meaning of "destructive competition" and the possibility of its occurrence are primarily matters for the economists to define and decide. It must be said that recent economics writing is divided on the relevance of this ancient appellation. There are other important economic issues where it is probably too much to ask a lawyer writing on the legal framework to settle questions that his colleagues in other disciplines cannot. Thus, permissiveness toward railway and airline mergers is influenced by one's expectations about gains in efficiency balanced against losses in competitiveness. Here also the economists are divided; some argue that mergers of big carriers are not really cost-decreasing at all. Finally, the difficult problems of inter-modal competition cannot begin to be resolved without facing an issue which Fulda ignores—public aids to transportation. If the trucks are ruining the railroads, is it because of their inherent efficiency, or because they are subsidized by our highway system? To the extent that inland waterways take away railroad traffic, is it because they have inherent advantages or because they enjoy access to the most capacious of legislative pork barrels? Here again the studies that attempt to deal with these issues are divided (though I doubt there is much to be said for the inland waterways).¹¹

In any event, Fulda does not undertake to encompass everything. His opening sentence is, "This book attempts to discover to what extent the principles of the antitrust laws are being applied or not applied in industries subject to federal regulation." He accordingly lights up only incidentally another approach to the total problem, the effectiveness of the administrative process in the responsible federal agencies. Setting himself against the current exaltation of procedural regularity as the highest good, he declares that until Congress lays down clearer policy on specific competitive goals, "procedural improvements would be no more than a palliative."¹²

11. See *Time*, Oct. 12, 1962, pp. 26-27, for an account of the beginning of a project which will cost \$1.2 billion (more than the St. Lawrence seaway) to make the Arkansas River navigable.

12. P. 456.

That there is need for both procedural and substantive reform in national transportation policy is widely recognized. The subject, though hardly headline-making in a time of chronic global crisis, has recently evoked a remarkable official and academic output on the same theme as the work under review.¹³ The general disposition of almost all the writers is toward more competition in transportation. Fulda's similar predisposition and his measured analysis of the legal setting combine to form a solid platform for other students and for policy-makers.

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LEGACY OF SUPPRESSION. By Leonard W. LEVY.* Cambridge: The Belknap Press of Harvard University Press, 1960. Pp. xiv, 353. \$6.50.

THE doctrine of seditious libel derives from the English common law. It maintains that the mere expression of critical opinions which disturb the public repose by holding the government up to contumely constitutes a crime. By definition, then, the doctrine is incompatible with the notion of a truly open society, where presumably any citizen is free to express any opinion of the government, no matter how unpopular, as long as the expression does not immediately and directly result in an incitement to crime.

It has long been a school boy's copy book maxim, let alone a fundamental postulate in the constitutional interpretation of the meaning of free speech, that a major objective of the American Revolution and of the enactment of the First Amendment was to repeal the English common law of seditious libel and install in its stead freedom of speech and press. Judges, from Holmes to Brandeis to Black and Douglas, and constitutional historians, from Madison to Schofield

13. Fulda has a thorough bibliography. I mention here only some of the items that have appeared since his book went to press early in 1961: J. F. Kennedy, *Message to Congress on Transportation Policy*, April 5, 1962, in N.Y. Times, April 6, 1962, p. 18; House Committee on the Judiciary, Antitrust Subcommittee, *The Ocean Freight Industry*, H. R. REP. No. 1419, 87th Cong., 1st Sess. (1962); CAVES, AIR TRANSPORT AND ITS REGULATORS (1962); FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962); HEALY, THE EFFECTS OF SCALE IN THE RAILROAD INDUSTRY (Yale Univ. Comm. on Transportation, 1961); RICHMOND, REGULATION AND COMPETITION IN AIR TRANSPORTATION (1961); Barber, *Airline Mergers, Monopoly and the CAB*, 28 J. AIR L. 189 (1962); Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 VA. L. REV. 196 (1962); Symposium, *Antitrust and the Regulated and Exempt Industries*, 19 A.B.A. REP. ANTITRUST SECTION PROCEEDINGS 261 (1961); Note, *Merger and Monopoly in Domestic Aviation*, 62 COLUM. L. REV. 851 (1962); Note, 71 YALE L.J. 307 (1961), note 10 *supra*; Comment, *Restrictions on Entry of Surface Carriers Seeking to Fly*, 71 YALE L.J. 1529 (1962).

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