STATEMENT BY STANLEY N. BARNES, ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE ANTITRUST DIVISION, BEFORE THE SENATE SELECT COMMITTEE ON SMALL BUSINESS, THURSDAY, DECEMBER 1, 1955, AT 10 A.M.

I appear today at the request of your Chairman. My plan is to discuss, generally, restrictions on entry into the interstate motor carrier business and limitations on competition among motor carriers and between such carriers and alternative modes of transport.

Necessary at the outset is some description of the regulatory pattern Congress has set. From this description the diverse roles accorded the Interstate Commerce Commission, various state regulatory commissions, and the Department of Justice emerge. Against this background I shall discuss, so far as available data permit, the effect of this regulatory pattern on motor carrier entry and price competition. I then turn to steps the Department of Justice has taken to minimize whatever anticompetitive consequences this regulatory pattern produces. And, finally, I take the liberty of suggesting possibly profitable paths for this Committee's factual inquiry.

I

First, statutory restrictions on motor carrier entry. Section 206 of the Interstate Commerce Act, with unimportant exceptions, bars any interstate common carrier by motor vehicle from use of "any public highway" without "a certificate of public convenience and necessity issued by the Commission." 1/ Such certificates are not required,

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1/ 49 U.S.C. 306.

section 206 continues, from "any such carrier lawfully engaged in operation solely within any State * * * if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board." 2/ Further, even if a trucker seeks operating rights in more than one, but less than four, states, section 205 requires the Commission to assemble representatives of each state with a Commission Examiner to hear the trucker's application. And, where an applicant-trucker proposes traffic in more than three states, section 205 permits, but does not require, reference to a joint board similarly composed of representatives from each affected state as well as a Commission Examiner. 3/ The recommendations of such boards, like those of any Commission Hearing Examiner, are merely advisory, and hence for the Commission to accept or reject. 4/ So much for the regulation of motor carrier entry.

Motor carrier rates are also regulated. Section 217 requires, for example that "[e]very common carrier by motor vehicle shall file with the Commission * * * tariffs showing all the rates, fares, and charges for transportation * * * of passengers or property * * *." 5/ And

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2/ Id.

3/ 49 U.S.C. 305. In practice, where a trucker-applicant proposes operation in more than three states, in only several instances has the Commission exercised its discretionary right to refer this application to a board comprised of state representatives. See, for example, Denver-Chicago Trucking Co., Inc. --Extension to New Mexico Points, Vol. 53 M.C.C. (1951).

4/ See, 49 U.S.C. 305 and 49 U.S.C.A. p. 475 (General Rules of Practice Before the Interstate Commerce Commission, Rule 97). Cf. Universal Camera Corp. v. National Labor Relations Board, 304 U.S. 474 (1951).

5/ 49 U.S.C. 317.

section 216(g) empowers the Commission "upon complaint of any interested party or upon its own initiative * * * to enter upon a hearing concerning the lawfulness of such rate, fare, or charge." 6/ Considering "any rate, fare, or charge," section 216(i) prescribes that the "Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect or rates upon the movement of traffic * * *; to the need, the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service." 7/

Beyond this regulation of individual carrier rates, section 5a of the Interstate Commerce Act (commonly known as the Reed-Bulwinkle Act) immunizes concerted rate action by carriers through rate bureaus. That section provides that "any carrier party to an agreement * * * relating to rates, fares * * * or charges * * * may, * * * apply to

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6/ 49 U.S.C. 316.

7/ 49 U.S.C. 316. Underscoring this specific mandate, is the general direction, contained in the preamble to the Interstate Commerce Act, entitled "National Transportation Policy," [i]t is hereby declared to be the national transportation policy of the Congress to provide 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; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . ."

the Commission for approval of the agreement." The Commission "shall not," section 5a continues, "approve * * * any agreement * * * with respect to a pooling, division" or "any agreement" that fails to accord "to each party the free and unrestrained right to take independent action * * *." 8/ Absent these or like objectionable provisions, however, the Commission may approve any rate agreement that it finds will further "the national transportation policy." 9/ And upon Commission approval, parties to the agreement and "other persons," section 5a states, are exempt "from the operation of the antitrust laws with respect to the making of such agreement" and its "carrying out * * * in conformity with the terms and conditions prescribed by the Commission."

Against this background of regulation, what role is accorded the Department of Justice? Any aggrieved applicant who has pursued his remedies before the Commission has the statutory right to court review

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8/ This phraseology the Commission construed in Western Traffic Assn.--Agreement, 276 ICC, 183, 210. There the independent action provision, cast in statutory language, reserved to each member the "free and unrestrained right to take independent action either before or after any determination" arrived at under procedures established by that agreement. The Commission reasoned that agreement preserved for each member the decision to"(1) place a proposal in channels for consideration under bureau or committee procedure, (2) proceed by independent action to establish the proposed rate or charge without regard to bureau procedure, or (3) take independent action during or after bureau consideration." In other words, as held in Central States Motor Freight Bureau, Inc.--Agreement,"the member carrier is to be accorded the right to take independent action at any time, whether before, during, or after consideration pursuant to procedures established by the particular agreement to which it is a party." 278 ICC 581,584.

9/ Effectuating this policy, the Commission has explained, "necessitates a broad examination of conditions which affect the public welfare, the interests of the carriers, and the needs of commerce of the postal service, and of the national defense." Western Traffic Assn.--Agreement, 276 ICC 183, 211.

of the Commission's action. 10/ Though the Commission has the unlimited right to intervene "unaffected by the action or non-action of the Attorney General," 11/ the statutory defendant in such review proceedings is the United States represented by the Attorney General. 12/

At this point, then, the Department of Justice enters directly in the proceedings. At the outset, the Department carefully considers whether the Commission's order is erroneous as a matter of law. Our responsibility, I emphasize, is limited to determining merely if Commission action can be supported by law; we cannot substitute our judgment for the Commission's on factual issues or even on questions of law where alternative views are reasonable.

And the possibility of alternative reasonable views on questions of law is a real one. For the Commission's statutory guides are vague and oftentimes contradictory.

Consider the vague standard governing the Commission's grant of certificates of public convenience and necessity. Section 207 directs the Commission to issue a certificate of public convenience and necessity "if it is found that the applicant is fit, willing, and able properly to perform the service proposed * * * and that the proposed service * * * is or will be required by the present or future public convenience and

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10/ 28 U.S.C. 2321 and 28 U.S.C. 1336.

11/ 28 U.S.C. 2323.

12/ 28 U.S.C. 2322.

necessity . . ." 13/ Applying this standard, the Commission has held that the "national transportation policy as set forth in the Interstate Commerce Act" prescribes its duties. 14/ This policy, I repeat, sets the diverse standards of "fair and impartial regulation of all modes of transportation * * * as to recognize and preserve the inherent advantages of each; * * * safe, adequate, economical, and efficient service * * * sound economic conditions in transportation * * *; * * * maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *; and [finally the encouragement of] fair wages and equitable working conditions." It is the Commission's blend of these diverse standards that, in any one case, the Department of Justice must consider with an eye toward determining its support in law.

If despite these vague guides, we conclude that the order is insupportable, then I consult with counsel for the Commission in an effort to avoid a conflict in the courts between this Department and the Commission. In some instances (and they aggregate not more than 5% of the total number of cases where a Commission order is reviewed by the courts), we have been unable to compose our differences. In these cases the Department confesses error and sides with parties challenging

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13/ 49 U.S.C. 307.

14/ Kenosha Auto Transport Corp., Extension--Gadsden, Ala. 52 MCC 123, 126 (1950).

the Commission order. Occasionally, after conferences with the Department, the Commission may retract an opinion and thus remove our objections. In those cases where we have confessed error, we have been remarkably successful in sustaining our position in the courts. For the record, I submit in tabular form a breakdown of cases since January 1, 1952, in which the Department of Justice has supported the Interstate Commerce Commission, has confessed error, has remained neutral, or, after conferences with Commission counsel, has prevailed upon them to recommend revision of the Commission's order.

II

Against this background of statutory regulation, what problems emerge for the small trucker who seeks to enter business, or, once in business, to compete by cutting rates or extending his service?

First, numerous obstacles may block his path for entry into interstate trucking. At the outset, ICC Act Section 207 requires a potential trucker to convince the Commission that he is "fit, willing, and able properly to perform the service proposed * * * and that the proposed service * * * is or will be required by the present or future public convenience and necessity . . . ." 15/ Before the Commission, the applicant may face opposition by railroads, sometimes levelled on the sole ground that railroads already adequately service an area. 16/

15/ 49 U.S.C. 307.

16/ Jimmie Ayer d/b/a Home Transportation Co. v. U. S., et al, Civil No. 5219, N.D. Ga. Atlanta Div. (pending) ICC Docket MC-111545 (Sub. 3); A. J. Metler Extension-Crude Sulphur-ICC Docket MC-108676 (Sub. 1, 1953); Kenosha Auto Transport Corporation, Extension-Gadsen, Ala. 52 MCC-123 (1950).

This despite the fact that there may be no competition from other motor carriers. 17/ And where there is other competition from motor carriers, an applicant may, of course, face opposition from existing truckers. 18/

Even if a trucker meets his burden of proof, overcomes all opposition, and convinces the Commission, he still cannot begin business. Ahead may be the possibility of litigation to review the Commission's grant of his operating authority. This litigation, as I have explained, begins in a three-judge federal court. If that court sustains his certificate, there remains the possibility of direct appeal, as a matter of right, to the Supreme Court by any of the protestants before the Commission. 19/ And as a final straw, if the trucker succeeds in upholding before the Supreme Court the judgment of the three-judge court granting the grant of the certificate, he still may not go into business, still ahead is the hurdle of convincing some state regulatory agency that his operations will not impair public safety. 20/ So much for a few of the disabilities barring entry.

Assuming our trucker gets into business, how does the statutory pattern permit him to agree not to compete with his fellow truckers, or, should he want to compete, even discourage him from doing so?

17/ A. J. Metler Extension-Crude Sulphur-ICC Docket MC-108676 (Sub. 1, 1953); Producers Transport Assn. Extension-Benzd 54 MCC-621,624 (1952); Kensosha Auto Transport Corp., Extension-Gadsen, Ala. 52 MCC 123 (1950).

18/ Jimmie Ayer d/b/a Home Transportation Co. v. U. S., et al, Civil No. 5219, N.D. Ga. Atlanta Div. (pending) ICC Docket MC-111545 (Sub. 3); St. Johnsburg Trucking Co. v. U. S., 99 F. Supp. 977,981 (Overmont 1951); Lemon Transport Co., Inc., Extension-North Carolina, 54 MCC 635,638 (1952).

19/ 28 U.S.C. 1253.

20/ See Thompson v. McDonald, 95 F. 2d 937 (C.A. 5 (4/12/38), aff'd. sub nom McDonald v. Thompson, 305 U.S. 263 (12/5/38).

First, the Reed-Bulwinkle Act, as I have explained, authorizes truckers subject to Commission approval to agree on rates. 21/ Before Reed-Bulwinkle, such agreements had, of course, been held to transgress the Sherman Act. 22/ But Reed-Bulwinkle exempts carrier parties to rate agreements and "other persons" from "the operation of the antitrust laws * * *." 23/

As a result, Reed-Bulwinkle may well tend to seal off competition between otherwise competing motor carriers. True, Section 5b(6) bars the Commission from approving "any agreement" that fails "to accord to each party the free and unrestrained right to take independent action * * *." 24/ Equally true, however, this safeguard may in actual practice be more formal than real. As the Supreme Court once put it, referring to a typical rail rate bureau procedure: 25/

> A company desirous of deviating from the rates agreed upon and which its associates desire to maintain is at once confronted with this probability of a war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus the power to commence

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21/ 49 U.S.C. 5b.

22/ United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897); United States v. Joint Traffic Assn., 171 U.S. 505 (1898); State of Georgia v. Penn. R. Co., 324 U.S. 439 (1945).

23/ 49 U.S.C. 5b(9).

24/ 49 U.S.C. 5b(6). See also, footnote 8, supra.

25/ United States v. Joint Traffic Assn., 171 U.S. 505, 563-564 (1898).

> such a war on the part of the managers would operate to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member. * * *

And even without such formal coercion, real pressure toward rate conformity exists. As the Supreme Court reasoned in a case involving a trade association's statistical program, even absent formalized pressures, "[t]he sanctions of the plan obviously are, financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals." 26/ So it is that, despite the "right to take independent action" safeguard, Reed-Bulwinkle nonetheless may permit cramping of competition within a given mode of transportation.

Beyond such intra-mode restrictions, one recent Commission decision presages like limits on competition even between alternative modes. 27/ In the Kenosha Auto Transport Corp., Extention proceeding a truck company sought to extend its route to reach a profitable tractor plant area. Opposing this application were railroads already serving that region. Despite the fact that no truck services were available, Kenosha's application was denied 28/ on the sole ground of adequate rail service.

26/ United States v. American Column and Lumber Co., 257 U.S. 377, 399 (1921).

27/ Kenosha Auto Transport Corp. Extension--Gadsden, Ala. 52 MCC 123 (1950).

28/ Id., pp.126-127.

Reaching this conclusion, the Commission reasoned that "[t]o deprive the rail carriers of the material volume they are now enjoying for the advantages which may accrue to shipper by use of motor transportation is not warranted. The fact that shipper's competitors may have motor service available to them in the absence of more definite evidence as to any injurious effect, is inconclusive. We have in the past denied an application for authority to operate as a motor common carrier where only rail service was available for the movement of traffic (see Bailey Common Carrier Application, 33 M.C.C. 537) and deem that the facts herein justify the same conclusion." 29/ From this I suggest that truckers may have a tough row to hoe, not only when they seek to compete among themselves, but also with the railroads.

29/ Id., p. 127.

III

In light of this statutory pattern as well as the limited role accorded the Department of Justice, what has this Department done to promote competition and thus aid farmers as well as carrier competition?

First, we have refused to support the Commission's new doctrine that adequate rail service to a given area is sufficient ground for denial of truck service. And, second, we have opposed what we believe to be unwarranted constriction of the so-called agricultural exemption contained in Interstate Commerce Act Section 203(b)(6). To a detailed discussion of our steps in these areas I now turn.

First, promotion of competition between rails and trucks. The Motor Carrier Act (Part III of the Interstate Commerce Act) was enacted in 1935. 30/ For the first fifteen years of its administration, the Commission repeatedly held that the existence of adequate rail service was insufficient ground for denial of motor carrier authority to serve the same area. 31/ As the Commission reasoned in

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30/ 29 U.S.C. 901, et seq.

31/ Maas, 4 M.C.C. 65, 67 (livestock), Petroleum Transit Corp. Com. Car. Application, 3 M.C.C. 607, 609 (petroleum products), Intercity Trucking, 4 M.C.C. 155, 159 (general commodities), Jossey & Livingston, 8 M.C.C. 143, 144 (general commodities), L. & N. Moving & Storage, 9 M.C.C. 130, 132 (new furniture), Murphy Transfer Co., 9 M.C.C. 361, 363 (granite), War Eagle Oil Co., 10 M.C.C. 710, 713 (petroleum), Brooks-Gillespie Motors, Inc., 10 M.C.C. 151, 154 (automobiles and trucks), Heartz, 10 M.C.C. 634, 636 (granite), Commercial Carriers, 12 M.C.C. 479, 484 (automobiles), Petroleum Transit Corp. Ext., 11 M.C.C. 164, 166 (petroleum products) Crossett, 14 M.C.C. 363, 364-65 (petroleum), Clemans, 16 M.C.C. 235, 237-38 (general commodities), Clark Ext., 16 M.C.C. 535, 539 (automobiles, trucks, etc.), Reeser, 16 M.C.C. 663, 666 (automobiles

the Boles Common Carrier Application proceeding, 32/ "we are advised by statute that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation, but we are also directed in section 202(a) to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages for this period." For this reason the Commission said "That a particular point has adequate service is not a sufficient reason for denial of a certificate; shippers and consignees * * * are entitled to adequate service by motor vehicle as well as by rail. 33/ Recently, however, the Commission has shown signs of departing from this policy. 34/

With this recent tendency by the Commission, this Department disagrees. In at least two instances recently the Department of Justice, after consultation with Commission counsel, has succeeded in prevailing on the Commission to retract its orders denying a motor carrier authority on the ground of existing adequate rail service. 35/

31/ and trucks, Swanson, 17 M.C.C. 251, 252 (livestock), Philadelphia-Detroit Lines, 23 M.C.C. 211, 216 (new automobiles), Brady, 23 M.C.C. 767, 778 (general commodities), Western Auto Transports, 26 M.C.C. 97, 99 (new automobiles, McDowall, 26 M.C.C. 755, 760 (automobiles and trucks), Smith, 27 M.C.C. 533, 535 (general commodities), Pittman, 27 M.C.C. 679, 682 (general commodities), Northern Truck Line, 28 M.C.C. 200, 203 (petroleum), Burlington Truckers, Inc., 29 M.C.C. 345, 350 (general commodities), Newton, 43 M.C.C. 787, 792 (frozen fruits and vegetables), Thrun, 46 M.C.C. 484, 487 (general commodities), Kenosha Auto Transport Corp. Ext.--Laredo, 49 M.C.C. 423, 425 (new motor vehicles and chassis), Thomas Trucking Co., Inc. Ext.--Glass, Docket No. MC-64806 (Sub.-No. 1), (Div. 5, unreported, decided October 27, 1950) 52 M.C.C. 809.

32/ 1 M.C.C. 589, 591.

33/ Ibid.

34/ Kenosha Auto Transport Corp., Extension--Gadsden, Ala. 52 MCC 123, 126 (1950)

35/ Metler v. United States, et al., Civil No. 2150 (E.D. Tenn.,

In two other instances we now defend the Commission's orders on the ground that existing rail service, coupled with existing trucking service, justified denials of the application. 36/ Because of the limited quantum of existing truck service, in those cases, the rail lines and the Commission may argue that the existing rail service alone is justification for the denials. In that way an effort has been made to procure a holding that the existing rail service alone was sufficient to justify the denial. If such arguments are made, we intend to tell the court that we do not agree with them.

In sum, then, this Department's unswerving position is that shippers are entitled to a choice between rail and motor carrier service. This free choice may be the essence of competition in the distribution process. To preserve that choice, has been, and will continue to be, the goal of our efforts. These efforts to promote inter-mode competition to take increasing importance, I emphasize, in light of Reed-Bulwinkle's limitations or intra-mode rivalry.

35/ Northern Div.), I.C.C. Docket MC 108,676, sub. 1; McCullough Transfer Co., et al. v. United States, et al., Civil No. 30,638 (N.D. Ohio, Eastern Div.), I.C.C. Docket MC 10,900, sub. 16.

36/ Ayer v. United States, et al., Civil No. 5219 (N.D. Ga., Atlanta Div.); I.C.C. Docket MC 111, 545, sub. 3; Schaffer, et al. v. I.C.C., et al., Civil No. 624 (N.D. South Dakota, Northern Div.), I.C.C. Docket MC 93,529, sub. 2.

Second, beyond problems of rail-truck competition, what has the Antitrust Division done to prevent undue constriction of the agricultural exemption?

Section 203(b)(6) of the Interstate Commerce Act exempts from all but safety and health regulations "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers for compensation; * * *." Crucial to this exemption's scope, of course, is construction of the words "agricultural commodities (not including manufactured products thereof)."

The Commission, on the one hand, has prior to 1949 held numerous commodities not within the exemption. Among these were: cleaned rice, polished rice, pasteurized milk, fresh cut-up vegetables in cellophane bags, quick frozen fruits and vegetables, shelled peanuts, poultry killed and picked though not drawn, redried leaf tobacco, washed spinach.

In 1949 the Commission conducted an investigation, entitled "Determination of Exempted Agricultural Commodities." As a result of that survey, 37/ the Commission in 1951 held that the following were not exempt agricultural commodities: fresh or frozen dressed poultry, feathers, raw-shelled peanuts and other nuts, chopped hay, cotton linters and cottonseed hulls, frozen milk and cream, seeds which had been de-awned or scarified for seeding purposes, redried tobacco, nursery stock flowers and bulbs, scoured wool and mohair.

37/ 52 MCC 511.

Motor carriers, on the other hand, have frequently challenged these findings by the Commission. And in two very recent instances we have sided with the plaintiffs and opposed the Commission. In Frozen Foods Express v. United States, 38/ in which the Supreme Court has noted probable jurisdiction, the Department successfully urged that chickens, with their heads off, and plucked and eviscerated, were not manufactured products. Similarly in Consolidated Truck Service, Inc. v. United States et al., 39/ the Department argued that raw-shelled nuts were agricultural commodities and not manufactured products and confessed error, again siding with the plaintiffs and the Secretary of Agriculture and opposing the Commission.

In other cases where the United States has not been involved in the controversy, courts have struck down Commission findings with respect to agricultural commodities. In the Kroblin case, 40/ for example, the court, reversing the Commission, held that dressed or eviscerated poultry was not a manufactured product. Similarly, in the Gladiolus case 41/ the court, again contrary to the Commission, held that cut gladiolus and gladiolus bulbs were agricultural commodities. As a final example, the

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38/ 128 F. Supp. 374.

39/ Pending and as yet undecided, Civil Action No. 2-55, in the District of New Jersey.

40/ Interstate Commerce Commission v. Allen E. Kroblin, Inc., 113 Fed. Supp. 599, affirmed 212 F. 2d 555 (C.A. 8); certiorari denied, 348 U.S. 836.

41/ Florida Gladiolus Growers Association, et al. v. United States, et al. 106 F. Supp. 525 (S.D. Florida, Tampa Div., 1952).

Sixth Circuit in Interstate Commerce Commission v. Yeary Transfer Company, Inc., 42/ rejected the Commission's contentions and held, as a matter of law, that redried tobacco is an agricultural commodity.

These differences between carriers and the Commission over the scope of the agricultural exemption vitally affect the farmers of our nation. They need flexible, cheap transportation for the product of their labors. The agricultural products' exemption, properly construed, means more and more farmers can bargain directly with enterprising small independent truckers over prices, and other terms of service. Thus the services they want can be tailored, on a flexible case by case basis, to farmers' special needs. For these reasons the Department of Justice's actions attacking the Commission's constriction of the exemption is of real importance to every agricultural sector of our economy.

Also important to farmers are Department of Justice actions aimed at striking down Commission decisions prejudicing shippers by barge. As a good example, we confessed error in the Mechling case. 43/ The record there revealed that for many years eastern railroads had carried grain from Chicago eastward for reshipping rates some cents per hundred pounds lower than local rates. Up to 1939 these reshipping rates from Chicago east had been identical for grain, whether brought to Chicago by connecting railroads or connecting barge lines. The result was that the combined barge-rail rate was considerably cheaper than the haul on straight rail rates--the difference measured by the relative cheapness

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42/ 202 F. 2d 151 (C.A. 6).

43/ Interstate Commerce Commission v. Mechling, 330 U.S. 567 (1947).

of shipping over the barge leg of the through route.

This difference operated against the railroads. To counteract the lower barge rates, the eastern railroads filed schedules with the Commission which imposed on "ex-barge grain" the local rate from Chicago eastward but allowed "ex-rail grain" the benefit of the lower reshipping rates on the eastern haul. The Commission approved the schedules. Mechling and others, including the Secretary of Agriculture, sued in the District Court to enjoin the enforcement of the Commission order. They alleged that the order was void because it approved rail rates which penalized "ex-barge grain" solely because the grain had been transported to Chicago in barges. The United States, represented by the Department of Justice, admitted the truth of these allegations, and opposed the order. The Interstate Commerce Commission intervened and defended the order. Rejecting the Commission's position, and adopting this Department's, the district court invalidated the rate schedule prejudicial to barge shippers. And this opinion the Supreme Court affirmed.

Similarly, in Tennessee Valley Authority, et al. v. United States, 44/ this Department's action should benefit free competition and the farmers of our country. There goods moved on barges floated on the Tennessee River into Knoxville. When barges docked at Knoxville the goods were removed and placed in railroad cars. The Commission approved the action of the railroads in establishing switching charges at Knoxville, which placed a higher charge for switching these "ex-barge cars" than for

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44/ 96 F. Supp. 405 (N.D. Ala., Northwestern Div. (1951)).

switching any "ex-rail cars" from place to place in Knoxville. A three-judge court set aside the order of the Commission, holding that the Commission had misapplied the law by failing to make the basic findings required to support its order. We confessed error in this case because of our desire to preserve rail-water competition, and their respective inherent advantages. We believed, and the court agreed, that the Commission had erred as a matter of law.

IV

So much for the Department's efforts to curb limitations on opportunities for trucking entry and competition, as well as to promote competitive distribution of agricultural products. These efforts, as I have explained, are necessarily limited by the minor role the regulatory pattern as developed by Congressional action has accorded this Department. Much more important, I finally suggest, are those questions which this Committee might well consider, going to the heart of competition in the whole transportation picture.

First you might well wish to survey the question posed by the Commission's attitude toward the practice of trip-leasing. Trip-leasing is a practice of greatest importance to the farmer, and particularly to the small farmer, and the isolated farmer. A trucker of farm products, exempt from regulation by the Commission, unloads at a market and if his rates are to be attractive, he must seek to secure a return haul. Since he does not have operating authority from the Commission, but only the privilege of hauling exempt agricultural commodities, he frequently seeks to lease his truck to an authorized carrier. Only in this way may the small trucker obtain revenue on his return trip. (Of course, the practice can be reversed and the going trip can be under the lease, with a return load of agricultural commodities.) Without such revenue it is doubtful that he can attract the farmer's business, and, in fact, he might not survive. And should he fail, farmers who depend upon his one-way trip, when he hauls exempt agricultural commodities, will suffer.

On May 8, 1951, the Commission issued an order regulating this practice. The order, among other things, specified that no lease should be for a period less than 30 days. This 30-day provision would have

abolished the long-established practice of trip-leasing.

The Commission's order was soon challenged by the American Trucking Association, Inc. In January of 1953, the Supreme Court held promulgation of trip-leasing rules for authorized carriers within the powers of the Commission, despite no reference to leasing practices in the Interstate Commerce Act. 45/

To override this decision, H.R. 3203 was introduced in the 83rd Congress. The arguments over the adoption of this bill were extremely heated. The 83rd Congress adjourned without adopting the bill. And a similar bill, S. 898, was introduced and met a like fate in the 84th Congress.

Meanwhile, the Commission amended its regulations on a number of occasions. The most far-reaching was one amendment providing that trucks, which had completed hauling exempt agricultural commodities, would not be subject to the thirty-day rule on the following trip or on the series of loaded movements to the place of origin of the trucker. At present the 30-day period provision as amended, will go into effect March 1, 1956.

The Department supported the Commission when its trip-leasing rules were questioned in the courts, believing that the Commission had the power to do what it did, as a matter of law. The Supreme Court sustained this view. The wisdom of the Commission's order, or of Congress adopting legislation to override the Supreme Court's decision seems peculiarly a matter for this Congressional inquiry.

45/ American Trucking Associations, Inc. v. United States, 344 U.S. 298 (1953).

Finally, more broadly, you may well wish to survey whether regulation of interstate trucking, on grounds other than safety, is needed. Any answer, of course, turns on factual data which Congressional Committees are best suited to garner. At the outset, is cost of entry sufficiently low to warrant any hope for effective price or service competition? Beyond that, would untrammeled competition among truckers cripple federal regulation of related forms of transportation, such as railroads or airlines? Such questions seem to demand full Congressional inquiry.