RECENT DEVELOPMENTS

INTERNATIONAL TRADE—CANADA - UNITED STATES—MOTOR CARRIERS—RECIPROCITY

In early 1982 the American Trucking Association (ATA)[1] raised before the United States Interstate Commerce Commission (ICC)[2] the issue of possible discrimination against United States motor carriers by Canadian laws and policies.[3] After the ICC held hearings, but prior to the issuance of its final report, President Reagan signed the Bus Regulatory Reform Act of 1982 (Reform Act),[4] lifting a moratorium on United States licensing of Canadian carriers[5] in all instances except transborder operations.[6] In its final report on its investigation into Canadian licensing practices, which was released after passage of the Reform Act, the ICC made two find-

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[1] The American Trucking Association (ATA) was founded in 1933 as a non-profit national trade organization (a federation of state trucking associations). The purpose of the ATA is to keep abreast of changes and trends in the fields of safety, engineering, law, taxes, and energy and to give advice to the state associations. *See generally* AMERICAN TRUCKING ASSOCIATION, INC., THE ORGANIZATION AND OPERATION OF THE NATIONAL FEDERATION OF THE TRUCKING INDUSTRY IN THE UNITED STATES (2d ed. 1981).

[2] The ICC was established by the Interstate Commerce Act, 24 Stat. 379 (1887) (amended 92 Stat. 1337) (codified as amended at 49 U.S.C. §10301). Independently established by the federal government, it is an administrative body with quasi-legislative and judicial powers whose function is the administration of the provisions of the Interstate Commerce Act. *See* J. BERNHARDT, THE INTERSTATE COMMERCE COMMISSION 1 (1923).

[3] Investigation into Canadian Law and Policy Regarding Application of American Motor Carriers for Canadian Operating Authority, 132 M.C.C. 870, 871 (I.C.C. 1982) [hereinafter cited as Investigation into Canadian Law & Policy]. *See also* Transport Topics, Sept. 27, 1982, at 1, col. 3.

[4] Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982) (codified as amended at 49 U.S.C. §§10101-10922 (West Supp. 1983)).

[5] *Id.* at §6(G). Section 6(G) of the Reform Act imposes a moratorium on the issuance of certificates or permits to motor carriers domiciled in or owned or controlled by persons of a foreign country. The Reform Act also authorizes the President to remove the moratorium in the national interest with sixty days notice to Congress. The President determined that the sixty day advance notification provision was not presently applicable to the Canadian trucking dispute. The moratorium was partially lifted on September 20, 1982 to permit the ICC to "(1) grant permanent and temporary authority to motor carriers; and (2) grant to Canadian-owned, controlled, or domiciled firms ICC authority for operations wholly within the United States." Investigation into Canadian Law & Policy, *supra* note 3, at 904-05. *See also* Transport Topics, Sept. 27, 1982, at 1, col. 3.

[6] Investigation into Canadian Law & Policy, *supra* note 3, at 903-04. *See also* Transport Topics, Sept. 27, 1982, at 1, col. 3.

ings: (1) that the Canadian government does not grant reciprocity[7] in licensing policy to United States motor carriers and (2) that the absence of reciprocity in Canadian policy does not constitute discrimination adversely affecting United States carrier applicants.[8]

Early in this century, conflicts began to arise in trade regulations between the United States and Canada.[9] Accordingly, the Motor Carrier Act of 1935 (1935 Act)[10] and pre-1980 amendments[11] were enacted in response to complaints by United States transportation industries that interstate trade regulations were treating them unfairly.[12] The purpose of vesting the ICC with regulatory authority under the 1935 Act was to facilitate equalization of trade regulations among the states through federal regulations.[13] However, under the 1935 Act the ICC regulated both foreign and domestic carriers by issuing certificates which authorized applicants to perform common carrier services in the United States, provided that the applicant agreed to observe the law and regulations of the com-

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[7] Reciprocity is a concept of equal competitive opportunities for American motor carriers in foreign countries. *See* Investigation into Canadian Law & Policy, *supra* note 3, at 874. Historically, reciprocity was defined in relation to tariffs. A reciprocity arrangement between two countries would provide a mutual reduction or exemption from protective tariffs, giving each country a competitive advantage vis-à-vis other non-reciprocity countries. *See* J. LAUGHLIN & H. WILLIS, RECIPROCITY 1-2 (1903). Reciprocity has been defined in a specialized sense as a treaty or convention whereby the contracting parties grant particular concessions to each other without the expectation that these concessions will be generalized. *See* 14 SCHOLARLY RESOURCES, INC., THE INQUIRY HANDBOOKS 59 (1974). A more contemporary definition of reciprocity is a mutual exchange of trade or other concessions or privileges between two countries, e.g., a reduction of tariffs combined with a liberalization of quota and exchange restrictions. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1895 (1981).

[8] Investigation into Canadian Law & Policy, *supra* note 3, at 885-86.

[9] *Id.* at 885. The notion of free trade between the United States and Canada has been a recurring issue for more than a century. Despite the interest in reciprocity, little work has been done to improve economic relations. *See Foreword* to R. WONNACOTT & P. WONNACOTT, FREE TRADE BETWEEN THE UNITED STATES AND CANADA at vii (1967). In 1854 the United States and Canada entered into their first reciprocity agreement. This agreement was the result of years of negotiation over an attempt to settle disputed fisheries questions. *See* J. LARKIN, TRADE AGREEMENTS: A STUDY IN DEMOCRATIC METHODS 20 (1940).

[10] Motor Carrier Act of 1935, Pub. L. No. 255, 49 Stat. 543 (1935) (codified as amended in scattered sections of subtitle IV of 49 U.S.C. (Supp. V 1982)).

[11] Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898 (1940) (codified as amended in scattered sections of subtitle IV of 49 U.S.C. (Supp. V 1982)). For the location of amendments up to 1972, see AMERICAN TRUCKING ASSOCIATION, INC., THE INTERSTATE COMMERCE ACT PART II, at 9 (1972). The Act was substantially rewritten, however, in the 1978 revision of Title 49.

[12] Harper, *The Federal Motor Carrier Act of 1980: Review and Analysis*, 20 TRANSP. J. 5 (1980).

[13] *Id.*

mission and that transportation would promote public convenience and necessity.[14]

Motor carrier regulations in the United States and Canada were complementary until the passage of the Motor Carrier Act of 1980 (1980 Act).[15] The similarity between the two countries' regulations fostered the creation of an interline network[16] which facilitated international freight movement and allowed carriers to maintain transboundary operations across the national border.[17] However, despite the benefits of reciprocity, over 80% of international freight was still transported through joint-line service,[18] whereby United States and Canadian motor carriers transported freight within their respective countries.[19]

By the late 1970's, Congress considered the 1935 Act outdated.[20] It believed that the regulatory structure of the 1935 Act inhibited market entry, carrier growth, and opportunities for minorities and others to enter the trucking industry.[21] The 1980 Act was intended to revise the 1935 Act to reflect modern transportation needs.[22] The 1980 Act was a domestic law binding only on individuals within the United States.[23] The bill was intended to reduce regula-

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[14] The applicant bore the burden of proving public convenience and necessity. *Id.* at 8. *See also* AMERICAN TRUCKING ASSOCIATION, INC., *supra* note 11, at 10-11.

[15] Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified as amended at 49 U.S.C. §10101 (Supp. V 1980)). Before the passage of the Motor Carrier Act of 1980 there existed no express policy between the two countries for the granting of reciprocal treatment in international trade. In practice, however, movement of freight between the two countries was facilitated by similarity of entry controls. Furthermore, although some carriers were authorized to perform single-line service across boundaries, most freight was transported by "joint-line" cooperation with each carrier moving the segment in his own country. Investigation into Canadian Law & Policy, *supra* note 3, at 873.

[16] An interline network is the movement of freight by a single party from the point of origin to its destination by using the authorization of two or more trucking lines. *See* M. TAK, TRUCK TALK 89 (1971).

[17] *See* Investigation into Canadian Law & Policy, *supra* note 3, at 873.

[18] Joint line service exists when carriers within two countries perform the segment of the movement of international freight within their respective countries. The international freight is transferred to a domestic carrier at the boundary line. *Id.*

[19] *Id.*

[20] *See* Harper, *supra* note 12, at 7.

[21] *Id.*

[22] Section 3 of the 1980 Act provides that Congress shall conduct periodic hearings on the effects of the legislation. The 1935 Act did not provide for Congressional hearings. The 1980 Act also added a paragraph dealing specifically with the transportation of property by motor vehicle. Prior law stated generally that it was the policy of the federal government to preserve advantages of each mode of transportation. Harper, *supra* note 12, at 7-8. *See also* President's Remarks on Signing Motor Carrier Act of 1980 Into Law, 16 WKLY. COMP. OF PRES. DOC. 1261-67 (July 1, 1980).

[23] *See generally*, Harper, *supra* note 12.

tion and thereby enhance development of the United States trucking industry.[24] More United States motor carriers could compete in the highly regulated international trade arena because national prerequisites to eligibility for international trade were reduced.[25] Several factors which previously had to be considered by the ICC before issuing a certificate of authorization to perform common carrier service were eliminated from consideration.[26] Under the 1980 Act, a certificate is issued unless the proposed service is inconsistent with public convenience and necessity.[27] There is no requirement that the service perform a useful public need as required by the 1935 Act.[28] This reduction in prerequisites to international trade allowed Canadian truckers to gain entry through single-line service into the United States more readily.[29]

In 1982 an ICC proceeding concerning Canadian licensing policy was instituted by the ATA because of its belief that the Canadian government was unfairly restricting single-line service into Canada.[30] The ATA argued that the 1980 Act allowed Canadian truckers single-line entry into the United States, but that Canadian laws did not provide reciprocal rights to United States carriers.[31] The ATA further alleged that anti-competitive practices by the Foreign Investment Review Agency (FIRA),[32] an agency of the

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[24] *Id.* at 7.

[25] *Id.* at 9.

[26] *Id.* at 8-9.

[27] *Id.* at 9.

[28] *Id.*

[29] Single-line service is the exercise of authority by a carrier to operate across an international boundary. In other words, single-line service allows a single truck to travel freely from one jurisdiction to another. Therefore, it does not require that a foreign carrier receive special permission to enter another jurisdiction nor that the goods be transferred to a domestic carrier of the foreign jurisdiction at the border. *See generally* Investigation into Canadian Law & Policy, *supra* note 3, at 873. *See also* Transport Topics, Sept. 7, 1982, at 2, col. 3. The United States removed many of the regulations from its trucking industry in 1980. After 1980, many Canadian carriers received permission to operate a single-line service to United States partners. *See* King, *Reagan Ends Cross-Border Trucking Feud*, Globe and Mail, Dec. 1, 1982, at 2, col. 1.

[30] Investigation into Canadian Law & Policy, *supra* note 3, at 871. *See* Transport Topics, Feb. 22, 1982, at 1, col. 2.

[31] Investigation into Canadian Law & Policy, *supra* note 3, at 873. *See also* King, *supra* note 29, at 2, col. 1.

[32] *See* Transport Topics, Feb. 22, 1982, at 1, col. 2. The Foreign Investment Review Agency (FIRA) is a Canadian agency which screens incoming investments. In judging an application by a foreign investor, FIRA considers whether there is a significant benefit to Canada. Although FIRA's mandate essentially concerns new investment, it also reviews changes in ownership of Canadian subsidiaries of foreign firms. 82 DEP'T STATE BULL. 52 (June 1982). *See generally* Carasco, *The Foreign Investment Review Agency (FIRA) and*

Canadian government, discriminated against license applications by United States carriers.[33]

Canadian representatives at the ICC hearing contended that the available statistical information failed to establish that Canadian policy accorded unfair treatment to United States carriers.[34] The representatives stated that several United States carriers were entering into or expanding their Canadian operations[35] and, furthermore, that United States motor carriers had come to dominate the Canadian transportation market through ownership of Canadian subsidiaries.[36] They contended that the strength of United States trucking interests within Canada negated the ATA's allegations of discrimination.[37]

The ICC found that FIRA requires a non-Canadian controlled corporation to receive approval from the federal government of Canada before engaging in trade or business in Canada.[38] It also determined that, aside from this approval procedure, the role of the Canadian government is restricted to assisting the development of cooperative regulations among the various provinces.[39] The ICC noted that, because Canada has no administrative agency like the ICC,[40] the Canadian federal government had delegated the power to further regulate motor carrier transportation to each individual province.[41] In order for an applicant to transport commodities

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the General Agreement on Tariffs and Trade (GATT): Incompatible?, 13 GA. J. INT'L & COMP. L. 441 (1983).

[33] Investigation into Canadian Law & Policy, *supra* note 3, at 873.

[34] *Id.* at 875-76.

[35] *Id.* at 876.

[36] Without statistics or documentation, Canada argued that more than 10% of the largest carriers in Canada are owned by United States firms and that Canadian domiciled carriers engaging in international operations are 95% owned or controlled by United States interests. Canada also argued that over 50% of all international freight between the United States and Canada was transported via United States motor carriers, although no statistics were presented in support of this argument. Investigation into Canadian Law & Policy, *supra* note 3, at 876.

[37] In the province of Ontario, however, there appeared to be a closer balance, if not a Canadian advantage. *Id.* at 876-77.

[38] *Id.* at 880. Approval is not required if the non-Canadian party (1) carries on activities without establishing a location to which employees normally report for work or (2) already operates a business in Canada and seeks to acquire control of a related business with gross assets of less than $250,000 and gross revenues of less than $3 million. In addition, non-Canadians already operating in Canada on the effective date of the Foreign Investment Review Act were not required to seek approval. *Id.*

[39] *Id.* at 882.

[40] *Id.* at 881.

[41] *Id.* at 881-82.

from one province to another, both provinces must grant approval.[42] Therefore, the ICC concluded that transportation between a province and the United States as well as between provinces was regulated by the individual provinces.[43] All Canadian provinces apply tests of public convenience and necessity which, similar to tests applied by the ICC prior to 1980, are strict compared to the present test under the 1980 Act.[44]

It was then determined that Canadian provinces do not intentionally discriminate against United States motor carriers in favor of domestic interests.[45] In making this finding, the ICC noted that in the eight years that the FIRA had been in existence, the Canadian government had approved the majority of United States proposals.[46] As a result of these findings of fact, the ICC reported that United States carriers seeking to operate in Canada were required to satisfy the same qualifications as Canadian carriers.[47]

On the other hand, it was found that Canadian provincial licensing standards were more restrictive in general than those enforced by the ICC under the 1980 Act.[48] Despite the finding that there was no Canadian discrimination against United States applicants,

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[42] *Id.* at 882.

[43] The Commission also perceived this province-based system of regulation as evidence of non-discriminatory practices since the system applies to all common carriers. For example, a Canadian or United States carrier operating between Toronto and Montreal must have the approval of both Ontario and Quebec licensing authorities. Therefore, the Commission did not consider Canadian government supportive of discriminatory practices in this instance. *Id.*

[44] Under prior law the ICC could issue a certificate of public convenience and necessity to an applicant to perform common carrier service if the applicant were fit, willing, and able to provide the transportation and to conform to the law and regulations of the ICC and if the transportation were or would be required by the present or future public convenience and necessity. *See* Harper, *supra*, note 12, at 8. *See also* Investigation into Canadian Law & Policy, *supra* note 3, at 882-83.

[45] This determination was based upon statistical information provided by the Canadian government concerning the percentages of denial of licenses to Canadian and United States carriers. Statistics for Quebec showed a slightly higher denial rate for United States carriers from April 1, 1980 to March 31, 1981. Ontario statistics covering the period 1979-81 indicated a slightly lower denial rate for United States carriers. For arguments made by the Canadian representatives which were unsupported by documentation, see *supra* note 36. Even though the statistics given in those arguments lacked support, the ICC gave deference to them. This was due to the need for a prompt decision and the absence of other available data. *Id.* at 876, 882.

[46] The Canadian government issued 3,600 FIRA decisions (2,000 involving United States investors). Approximately 90% of the proposals were approved. Only 29 of the proposals involved motor carriers, of which 24 were made by United States carriers; 20 of those 24 were approved. *Id.* at 881.

[47] *Id.* at 883.

[48] *Id.*

the more restrictive standards generally applied by FIRA made it easier for Canadian carriers to be granted United States operating authority than for United States carriers to obtain reciprocal authorization.[49] Hence, United States carriers were placed at a competitive disadvantage in international transportation.[50] The ICC accordingly held that FIRA does not grant reciprocity to the United States because it requires United States carriers to engage in a more complex and costly process than Canadian carriers seeking United States entry.[51] It also noted that there was some evidence that the FIRA process deterred United States nationals from engaging in motor carrier operations in Canada.[52] However, the FIRA process had not proven to be a significant impediment to international trade by United States motor carriers.[53] In addition, the ICC could not conclude from the record that the ability of United States nationals to compete in the international market would be adversely affected by Canadian motor carriers in the United States.[54] There was no evidence that the effects of FIRA were placing United States motor carriers in any economic hardship.[55] Therefore, it was ordered that the ICC proceedings be discontinued.[56]

The ATA has continued to assert that its interests are being adversely affected by the alleged anti-competitive aspects of Canadian licensing policies, despite the contrary determination made by the ICC.[57] However, two days after the decision of the ICC, FIRA approved an application by Roadway Express,[58] giving Roadway access to the southern Ontario-Toronto corridor, one of the richest transport markets in Canada.[59] Canadian officials stated that the approval was meant to be a signal that Canada is softening foreign investment restrictions.[60] United States officials told President

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[49] *Id.*

[50] *Id.*

[51] *Id. See also* Transport Topics, Oct. 25, 1982, at 1, col. 1.

[52] Investigation into Canadian Law & Policy, *supra* note 3, at 884.

[53] *Id.* at 885. *See also* Transport Topics, Oct. 25, 1982, at 1, col. 1.

[54] Investigation into Canadian Law & Policy, *supra* note 3, at 884-85.

[55] *Id.* at 886.

[56] The Commission discontinued the proceeding because it did not "significantly affect the quality of the human environment on the conservation of energy resources." *Id.* at 887.

[57] *See* Transport Topics, Nov. 8, 1982, at 1, col. 1.

[58] Roadway Express is a state association of the ATA. It is the pre-eminent carrier in the United States trucking industry. *See The No. 1 Trucker Joins a Price-Cutting Convoy*, BUS. WK., Feb. 8, 1982, at 32.

[59] *See* The Citizen, Dec. 1, 1982, at 2, col. 1.

[60] *Id.* at 2, col. 3.

Reagan that the Roadway application had been delayed as a negotiating tactic.[61] The President, however, perceived the approval as evidence that applications to FIRA will be dealt with on an objective basis.[62] Nevertheless, the ICC has stated that it will continue to monitor the reciprocity issue and to take further action if necessary.[63]

One implication of the ICC decision is that in order for a complainant to prove a foreign country's policy discrimination, that party must show disadvantageous regulations applicable only to its interests.[64] If the same regulations are applicable to both foreign and United States nationals, there can be no discrimination merely because the foreign regulations are more restrictive in general than United States regulations.[65] In addition, the ICC report appears to require that United States international trade be adversely affected by foreign licensing policy before the ICC may convene a hearing.[66] Although the ICC concluded that Canadian licensing policy does not discriminate against United States motor carriers, there still remain grounds for the assertion that even if there is no discrimination, reciprocity does not exist between the two countries.[67]

There are certain factors which may have influenced the ICC decision. The first factor is that there was little information available to support a determination that Canadian trucking regulations discriminated against United States interests.[68] Secondly, there was a lack of precedents or standards to determine whether discrimination existed.[69] In any case, the question became moot when President Reagan lifted the moratorium on United States licensing of Canadian carriers.[70] In view of the Roadway Express approval,[71] it appears that the ICC was given no choice but to find that there was no discrimination.

Bernard Snell

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[61] *Id.*

[62] *Id.* at 2, col. 4.

[63] Investigation into Canadian Law & Policy, *supra* note 3, at 870.

[64] *Id.* at 881-82.

[65] *Id.* at 881, 885-86.

[66] *Id.* at 885-86.

[67] *Id.* at 883.

[68] *Id.* at 875-76.

[69] The ICC failed to articulate a standard to determine whether discrimination existed. *See generally* Investigation into Canadian Law & Policy, *supra* note 3, at 870.

[70] *Id.* at 903-04. *See also* Transport Topics, Sept. 27, 1982, at 1, col. 3.

[71] *See* The Citizen, Dec. 1, 1982, at 2, col. 1.