

GAO

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Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives

June 1987

# RAILROAD REGULATION

## Competitive Access and Its Effects on Selected Railroads and Shippers



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United States  
General Accounting Office  
Washington, D.C. 20548

**Resources, Community, and  
Economic Development Division**

B-226509

June 18, 1987

The Honorable John D. Dingell  
Chairman, Subcommittee on Oversight  
and Investigations  
Committee on Energy and Commerce  
House of Representatives

Dear Mr. Chairman:

This report, prepared at your request, discusses the Interstate Commerce Commission's (ICC) implementation of the Staggers Rail Act of 1980 provisions related to railroad joint rate and reciprocal switching cancellations, generally known as competitive access. It addresses ICC's processes available to those affected by cancellations, the effects of cancellations on selected railroads and shippers, and the availability of the antitrust laws to obtain relief from competitive access problems.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time we will send copies to the Chairman, Senate Committee on Commerce, Science, and Transportation; the Chairwoman, ICC; the Secretary of Transportation; the Director, Office of Management and Budget; and other interested parties.

This work was performed under the direction of Herbert R. McLure, Associate Director.

Sincerely yours,

J. Dexter Peach  
Assistant Comptroller General

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# Executive Summary

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## Purpose

To improve their financial stability, railroads have cancelled reciprocal switching agreements—an agreement under which, for an agreed-upon charge, a railroad will interchange cars of another railroad originating or terminating on its tracks. In addition, the Staggers Rail Act of 1980 (Staggers Rail Act), among other things, made it easier to cancel certain joint rates—a single rate applicable to the movement of goods over two or more railroads.

Some railroads and shippers believe that joint rate and reciprocal switching cancellations have reduced railroad competition and hindered shippers' ability to get their goods to market. Railroads and shippers affected by cancellations may protest and ask the Interstate Commerce Commission (ICC) to suspend—that is, halt the cancellation action—and/or investigate the cancellation.

At the request of the Chairman of the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, GAO examined issues related to the cancellation of joint rates and reciprocal switching agreements. Specifically, GAO focused on

- identifying the criteria required for suspension and investigation of cancellations,
- identifying the effects of cancellations on selected railroads and shippers, and
- evaluating the ability of railroads and shippers to use the antitrust laws when faced with a cancellation, instead of protesting the cancellation to ICC.

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## Background

Joint rates simplify dealings between railroads and shippers because shippers are billed one rate even though their goods may move over more than one railroad. Railroads agree among themselves about the division of the revenues from joint rates. Reciprocal switching allows railroads access to shippers to whom they cannot provide direct service. Charges for switching are usually absorbed by the railroad gaining access but may be passed on to the shipper (see ch. 1).

A major goal of the Staggers Rail Act was to improve the financial stability of the rail industry. To accomplish this goal, the act allowed railroads to unilaterally cancel joint rates not yielding specified revenue levels. The act also changed the criteria under which a protesting railroad or shipper could obtain a suspension of a cancelled joint rate or reciprocal switching agreement. Finally, the act permitted ICC to require

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reciprocal switching where it is practical and in the public interest or necessary to provide railroad competition (see ch. 2).

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## Results in Brief

ICC adopted Ex Parte No. 445 (Sub-No.1), Intramodal Rail Competition, to govern the handling of joint rate and reciprocal switching cases. This ruling, negotiated and proposed by railroad and shipper organizations, specified the factors and conditions required to obtain a suspension of a joint rate cancellation. While some ICC officials believe this ruling could make it easier to obtain a suspension of joint rate cancellations than prior to passage of the Staggers Rail Act, it is still too early to tell whether ICC will construe it to make suspensions easier to obtain (see ch. 2).

GAO reviewed the effect of cancellations on 7 protesting railroads and 12 shippers in 18 joint rate and reciprocal switching cases (some protesting railroads and shippers were involved in more than one cancellation). Four of 7 affected railroads said they lost money and 8 of 12 shippers said they experienced service deterioration, such as increased delays in shipping their goods. Retaliation for another railroad's cancellations appeared to be an important factor motivating cancelling railroads (see ch. 3).

The antitrust laws are available to railroads and shippers faced with a cancellation. However, several factors exist that could limit the relief available from these laws. Legislation introduced in the 100th Congress addresses some but not all of these factors (see ch. 4).

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## GAO's Analysis

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### Suspension Criteria Modified

The Interstate Commerce Act, as amended, specifies the criteria for obtaining suspensions. The ICC may not grant a suspension unless a protestor presents evidence that (1) it is substantially likely to win its case, (2) it will be substantially injured if a suspension is not granted, and (3) its peculiar economic circumstances prevent the "keep account" provision from protecting it. The keep account provision requires that the railroad requesting a cancellation keep account of all amounts received under a proposed rate increase and refund those amounts that are found unreasonable.

The Congress, in 1976, increased the difficulty in obtaining suspensions by adding the likelihood of winning requirement and the word "substantial" to the injury requirement. The Staggers Rail Act further changed the criteria for obtaining suspensions by adding the keep account requirement. The Conference report on the Staggers Rail Act stated that the changes were intended to make suspensions more difficult to obtain.

Ex Parte No. 445 (Sub-No.1), adopted by ICC in October 1985, established the factors and conditions for obtaining a suspension of a joint rate cancellation. A persuasive presentation that a joint rate cancellation would eliminate effective rail competition for the affected traffic between the origin and destination, and that either the protesting shipper or railroad has used, or would use, the joint rate for a significant portion of its traffic, is sufficient to meet the statutory suspension requirements. In addition, ICC decided that the keep account provision could not offer adequate protection to protestors seeking suspension of joint rate cancellations because if the traffic continues to move by rail, it will generally move over the alternative route. Therefore, the cancelling railroads would not be able to keep account of traffic they no longer carried.

Some ICC officials said this ruling could make it easier for protestors to obtain a suspension than prior to 1976. For example, the Director of ICC's Office of Proceedings said that prior to 1976, protestors had to prove the likelihood of success of winning their case on the merits before a suspension was granted. Under Ex Parte No. 445 (Sub-No.1), however, a protestor need only show the elimination of effective railroad competition for the affected traffic between the origin and destination.

Ex Parte No. 445 (Sub-No.1) is a compromise between shipper and railroad interest groups adopted by ICC to promote railroad competition. It is still too early to tell whether the effect of this ruling will be to make suspension of joint rate cancellations easier to obtain.

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## Effects of Cancellations

GAO examined nine joint rate and nine reciprocal switching cancellations protested to ICC since 1980. Since the universe of cancellations is unknown, the cases were judgmentally selected from the 93 protests filed with ICC between October 1980 and September 1985. Although cancellations may have been motivated by a desire to increase profitability and/or to achieve efficiency gains, cancelling railroads told GAO that retaliation against a competitor's prior action was a major reason why

cancellations were made. They did not, however, identify the market and financial implications of this retaliation.

Four of the seven protesting railroads said they lost revenues—from \$3 million to \$7.7 million annually—as a result of the protests. Eight of the 12 shippers GAO spoke with said they experienced service deterioration, including transit time delays of from 1 to 10 days. Captive shippers—those shippers who must use rail to transport their goods—generally said they experienced both increased costs and service effects.

Some railroad and shipper officials, in the protests GAO reviewed, told GAO that their ability to compete was affected. Four of the protesting railroads told GAO that they did not believe they were as competitive for business on their lines. Three of the shippers believed the cancellations affected their shipping alternatives and reduced competition.

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## Use of Antitrust Laws

In addition to seeking suspensions, the antitrust laws provide a means for shippers and railroads to obtain relief from cancellations. GAO found, however, that several factors restrict the antitrust relief available to rail shippers.

- The Keogh doctrine prevents the award of monetary damages in private antitrust suits where the claim is based on a rate filed with ICC.
- Section 16 of the Clayton Act prohibits the award of injunctive relief—court orders prohibiting or commanding the doing of some act—to a private party against common carriers for any act regulated by the Interstate Commerce Act.
- The doctrine of primary jurisdiction permits a court to refer some or all of a case to ICC, which often can cause additional delay or expense.

While several of these factors were developed to preserve the integrity of the regulatory process, they limit the availability of the antitrust laws as an alternative form of relief from cancellations.

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## Recommendations

This report provides GAO's analysis of joint rate and reciprocal switching issues; it makes no recommendations.

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## Agency Comments

GAO discussed the results of its review with agency officials and has included their comments where appropriate. As requested, GAO did not obtain official agency comments on this report.

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**Abbreviations**

GAO      General Accounting Office  
ICC      Interstate Commerce Commission

# Introduction

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Railroads are a principal mode of transportation for many bulk materials and agricultural products. Prior to 1980, the financial health of the nation's railroads was poor. From 1975 to 1979, the nation's railroads earned an average return on shareholders' equity of only about 2 percent. This compared to such other industries as manufacturing companies and public utilities that earned rates of return of about 15 percent and 12 percent, respectively. Poor financial performance led to a deterioration in the condition of railroad plant and equipment and needed maintenance was deferred.

One of the reasons the railroads gave for their weakened financial condition was that they were not earning adequate revenues from joint rates they maintained with other railroads. Railroad joint rates are single rates applicable to the movement of goods over two or more railroads; they are commonplace because most goods move over the facilities of more than one railroad. In addition to inadequate revenues, the railroads stated that joint rate routes were inefficient.

Reciprocal switching agreements that many times were not priced to recognize revenue needs also contributed to the railroads' poor financial performance. According to the Interstate Commerce Commission (ICC), railroads historically have switched for each other without regard to the specific costs involved in each particular case, believing that this best served their long-run interests. Reciprocal switching agreements allow two railroads, for an agreed-upon charge, to interchange cars originating or terminating on their track. This allows railroads to serve customers not on their lines. ICC, referring to conditions during the 1970s, concluded that because reciprocal switching rates rarely were subject to general rate increases, existing reciprocal switching rates in many cases did not cover the cost of the service provided.

To rationalize rate structures by eliminating inefficient rates and routes, railroads have cancelled joint rates and reciprocal switching agreements. According to the Association of American Railroads (a railroad trade group), these cancellations have been motivated by railroads' desire to increase traffic, eliminate inefficient routes, and increase their revenues. Some shippers have suggested that cancellations have been motivated by a desire to reduce railroad competition. These shippers contend that cancellations not only may be an exercise in market power but may force them to use railroads operating over less efficient routes. According to ICC, such factors as the distance travelled, the average transportation time and expense, and effects on energy consumption determine the efficiency of a cancellation.

## Joint Rate and Reciprocal Switching Regulation

Railroads are regulated by the Interstate Commerce Commission under the Interstate Commerce Act, as amended (49 U.S.C. 10101, *et seq.*). Because railroads are considered to be "common carriers," they are obligated to provide transportation services between points on their lines at reasonable rates. Rates, including joint rates and switching rates, are contained in tariffs filed with ICC. Tariffs containing rate increases must be published on 20 days' notice, and tariffs resulting in rate decreases must be published on 10 days' notice. Tariffs may be cancelled in whole, or in part, by publishing supplements and amendments to the tariff and tariff cancellations may be protested to ICC (see ch. 2).

Railroads are required by the Interstate Commerce Act to establish through routes with each other. Through routes are arrangements made between connecting railroads that allow goods to move from an origin on one railroad to a destination on another railroad. Different types of rates may be applicable to through routes. Joint rates simplify dealings between railroads and shippers because shippers are billed at one rate even though their goods move over more than one railroad. In 1980, an estimated 70 percent of property transported by rail moved over routes subject to joint rates.

When joint rates are used, railroads agree among themselves as to what portion of the total revenue generated will go to each of the participants in the movement. Railroads generally voluntarily choose to establish joint rates but they are not required to do so. The Interstate Commerce Act allows ICC to prescribe joint rates if appropriate and to decide disputes over the division of joint rate revenues.

The cancellation of a joint rate does not necessarily preclude the use of a through route. Instead, shippers may be required to use either local or proportional rates to continue to move their goods over the route. Local rates are rates for transportation from an origin to a destination on one railroad. A shipper may have to combine a number of local rates to obtain a rate over the entire through route. Combined local rates may be higher than a joint rate. "Proportional rates" mean a rate published to apply only to traffic having a prior movement of goods, a subsequent movement of goods, or both, to be applicable. Again a shipper may have to combine a number of proportional and/or local rates to obtain a rate over the entire through route. These combined rates are generally lower than the combined local rates but may equal joint rates.

Reciprocal switching may take place for the pickup or delivery of goods from shippers not on the tracks of the railroad wanting to serve the

shipper. Reciprocal switching allows railroads access to shippers for whom they cannot provide direct service. Railroads are not required to provide reciprocal switching services but ICC may require it in certain circumstances (see next section). Switching charges are usually absorbed by the railroad gaining access through the switch. However, that portion of the charge not absorbed may be passed directly on to the shipper. Switching charges may also be built into the rates the railroads charge to carry goods and passed directly on to affected shippers. ICC regulations require that railroads file tariffs containing the charges for switching services. The tariffs must explain the amount of the switching charge to be paid by shippers and the amount to be absorbed by the railroads.

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## Recent Legislation

In 1976 and 1980, the Congress passed legislation, the purpose of which was to reform the regulation of railroads to restore the financial stability of the railway system. The Railroad Revitalization and Regulatory Reform Act of 1976, among other things, sought to improve the operation and structure of the railroad industry through ratemaking and regulatory reform. This act encouraged railroad competition and allowed railroads greater freedom to change rates in response to changes in market conditions. It also made it more difficult for other parties to obtain a suspension of rate actions—that is, halt an action pending the outcome of an investigation. In addition, the act clarified the criteria ICC should consider when evaluating cancelled rates, including joint rates.

The Staggers Rail Act of 1980 (Staggers Rail Act) also sought to improve the financial condition of the railroad industry. As with the previous legislation, this act encouraged railroad competition and gave railroads greater freedom to change rates. The latter included allowing railroads to unilaterally cancel joint rates that yield specified revenue levels (i.e., revenue-to-variable-cost ratio of less than 110 percent). The act also further increased the difficulty in obtaining a suspension or investigation of a rate action. To offset some of these freedoms, the act permitted ICC to require reciprocal switching agreements where they were practical and in the public interest, or necessary for competitive rail service.

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## Objectives, Scope, and Methodology

In his April 22, 1985, letter, the Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, asked that, among other things, we review ICC's implementation of the Staggers Rail Act of 1980. In particular, the Chairman was concerned that ICC was not doing an adequate job of reviewing railroad matters before it

and that ICC's implementation of the Staggers Rail Act was imbalanced in favor of large railroads. Through discussion with the Chairman's staff, we agreed to examine several aspects of ICC's implementation of the Staggers Rail Act, including the issues involved with joint rate and reciprocal switching cancellations.

Specifically, we had four objectives:

- Identify the policies and procedures applicable to joint rate and reciprocal switching cancellations and for ICC's prescription of reciprocal switching.
- Determine why ICC has not taken an active role in suspending and investigating joint rate and reciprocal switching cancellations.
- Identify the effects of joint rate and reciprocal switching cancellations on a selected number of railroads and shippers.
- Evaluate the ability of railroads and shippers to use the nation's anti-trust laws to remedy anticompetitive rate or switching cancellations.

To identify the policies and procedures applicable to railroad joint rates and reciprocal switching, we examined (1) legislation pertinent to joint rates and reciprocal switching, (2) Ex Parte decisions<sup>1</sup> issued by ICC since passage of the Staggers Rail Act dealing with joint rate and reciprocal switching issues, and (3) selected joint rate and reciprocal switching investigation decisions issued since 1980. The legislation and Ex Parte decisions identified the legal and policy criteria applicable to joint rate and reciprocal switching cases while the investigation decisions demonstrated how ICC applied these criteria.

To determine ICC's role in protested joint rate and reciprocal switching actions and how the Commission reached suspension and investigation decisions, we identified and documented both the protest and complaint processes<sup>2</sup> and the remedies available to shippers and railroads experiencing joint rate and reciprocal switching actions. We also interviewed Suspension Board and other ICC officials about how suspension and investigation decisions are made, including what factors they consider in these decisions.

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<sup>1</sup>An "ex parte" decision is a rulemaking decision.

<sup>2</sup>Protests are filed with ICC before the effective date of a cancellation, whereas complaints are usually filed after the effective date of a cancellation. See chapter 2 for a more complete discussion of these processes.

To determine why ICC has not suspended and/or investigated many joint rate and reciprocal switching cancellations, we first discussed the Commission's rationale with officials on ICC's Suspension Board. To validate their general views, for each of the 18 joint rate and reciprocal switching protests we selected for review, we identified ICC's disposition of the case and what rationale ICC applied to reach its decision.

We also reviewed the evidence submitted by protestors in these 18 cases to see if protestors submitted verified statements of their protest, if revenue and variable cost and/or public interest information was presented, and whether the statutory requirements for a suspension were met. We did not try to evaluate the sufficiency of the evidence for a suspension decision, evaluate the accuracy of the evidence, or judge the correctness of ICC's decision in the case.

To identify the effects of joint rate and reciprocal switching cancellations on shippers and railroads, we selected and evaluated 9 joint rate and 9 reciprocal switching cancellations of the 93 protested joint rate and reciprocal switching cancellations between October 1980 and September 1985. We used protested cancellations because the universe of joint rate and reciprocal switching cancellations is unknown. ICC stated that it is not feasible to identify every cancellation since this information is embedded in tariff changes. In fiscal year 1985, ICC received over 1.4 million tariffs—over 60,000 were rail tariffs.

To select these cases, a list was prepared of all of the joint rate and reciprocal switching cancellations protested to ICC between October 1980 and September 1985. We decided, based on staff and other resources available, that cases would be selected at those locations where the maximum number of railroads and/or shippers could be contacted. Those cases associated with the seven locations where the highest number of railroads and shippers were located were identified. The 18 cases were selected after eliminating those cases where either the cancelling railroad and/or the main protestor was not in one of the seven cities.

Protests, rather than complaints, were evaluated because, since 1980, more joint rate and reciprocal switching protests have been filed than complaints. In addition, protest data were readily available. Focusing on the protest process allowed us to evaluate how many shippers and railroads seek relief from joint rate and reciprocal switching actions, including cancellations.

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In evaluating the specific effects of joint rate and reciprocal switching cancellations on the selected railroads and shippers, we developed case histories for each protest reviewed. We interviewed cognizant officials at 8 railroads and 12 shippers to determine (1) why joint rate and reciprocal switching actions were taken, (2) why a protest was initiated, and (3) what financial (e.g., increased revenues or costs) and service-oriented (e.g., increased transit time) effects were experienced. We also asked these officials for their views on related topics such as the protest process, Ex Parte No. 445 (Sub-No.1), Intramodal Rail Competition, and potential antitrust legislation. The results of what they told us is summarized in terms of effects on cancelling railroads, protesting railroads, and affected shippers.

The evaluation of the ability of rail shippers to use the antitrust laws, when faced with anticompetitive actions by railroads, involved a legal analysis using relevant case law, statutes, literature, congressional testimony, and pending cases. This analysis enabled us to identify three major legal factors that would affect a shipper when bringing an antitrust case. These factors were the Keogh doctrine, Section 16 of the Clayton Act (15 U.S.C. 26), and the doctrine of primary jurisdiction. We recognize that there may be other factors, such as the time and expense involved with bringing an antitrust action; however, we believe that the factors we identified are the primary issues that a shipper would most likely have to face when bringing an antitrust claim against a railroad.

Finally, we also examined antitrust legislation considered by the 99th and 100th Congresses. The bills we reviewed either attempted to expand the applicability of the antitrust laws or sought to make it easier for shippers to obtain relief before ICC.

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## Data Limitations

We were precluded from selecting a random sample of joint rate and reciprocal switching cancellation actions because the universe of such cancellations is unknown. As a result, we selected a judgmental sample of joint rate and reciprocal switching actions protested to ICC on the basis of the information and resources available. Consequently, the information developed from the 18 protests we evaluated may not be projected to any past or future cancellations.

We were also unable to contact all of the parties involved with the protest cases selected for review. In some instances organizations were unwilling to participate in our study and in other instances a railroad's

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or a shipper's lack of information about a protest precluded a meaningful discussion. Despite these difficulties, every attempt was made to contact the cancelling railroad and at least a representative sample of the protestors.

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Our work was conducted between January 1986 and March 1987 in accordance with generally accepted government auditing standards. We discussed the results of our review with agency officials and have included their comments where appropriate. At the Chairman's request, we did not ask the agency for official comments on a draft of this report.



# Processes Are Available for Those Affected by Cancellations

Since passage of the Staggers Rail Act, railroads have cancelled joint rates and reciprocal switching agreements to eliminate inefficient rates and routes. Although affected railroads and shippers have used mechanisms at ICC to protest these cancellations, ICC has allowed most protested cancellations to go into effect.

Some railroads and shippers have voiced concern about the cancellation of joint rates and reciprocal switching agreements. For example, Railroads Against Monopoly, an association of 10 relatively small, regional railroads, has complained about restrictions on their ability to compete and reductions in routing options available to shippers. Shippers have also complained that cancellations reduce railroad competition, which in turn leads to higher transportation costs and reduces their ability to use the most efficient routes. According to shippers, reduced rail competition affects their ability to market their products.

In October 1985, ICC adopted Ex Parte No. 445 (Sub-No.1), Intramodal Rail Competition, to govern the handling of joint rate and through route cancellations and to evaluate the need for reciprocal switching among railroads. This ruling resulted from a compromise proposed by railroads and shippers and modified by ICC. It was designed to promote competition among railroads, provide shippers with more routing alternatives, and ensure access where needed.

## Railroad and Shipper Concerns About Joint Rate and Reciprocal Switching Cancellations

The primary reason the Congress passed the Staggers Rail Act of 1980 was to improve the financial stability of the railroads. The continuous decline in the profitability and traffic base of the industry since the 1940s, caused in part by extensive regulation and the development of less regulated modes of transportation such as trucks, required action to increase revenues and maximize the railroads' utilization. To accomplish this, the Staggers Rail Act placed greater reliance on the marketplace to establish rates and minimized regulatory control where possible. However, the Congress specified that there be a regulatory process that balanced the needs of the railroads, the shippers, and the public.

One of the reasons the railroads gave for their weakened financial condition was that they were not earning adequate revenues from joint rates they maintained with other railroads. To provide relief to railroads earning less than adequate revenues from joint rates, the Staggers Rail Act permitted the railroads to unilaterally cancel joint rates when they are noncompensatory—as measured by a revenue-to-variable-cost ratio of less than 110 percent. The Congress intended that these joint

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rate provisions would ensure that a railroad, with a minimum of regulatory interference, could earn a minimum revenue level on routes with joint rates.

Railroads do not have to provide reciprocal switching services. However, to encourage railroad competition, the Staggers Rail Act allows ICC to require reciprocal switching agreements when they are practical and in the public interest, or are necessary to provide competitive rail service. The Congress intended that reciprocal switching would provide shippers with an avenue of relief for inadequate railroad service.

Since passage of the Staggers Rail Act, railroads have cancelled joint rates and reciprocal switching agreements. The Association of American Railroads, representing the major North American railroads, has stated that the railroads have cancelled joint rates and reciprocal switching agreements to rationalize their rate structures by eliminating inefficient rates and routes. In addition, in the Association's view, increased competition—enhanced since passage of the Staggers Rail Act—has led to more competitive attitudes about reciprocal switching.

Other railroads and shippers, however, have expressed concern about the cancellation of joint rates and reciprocal switching agreements that occurred after the Staggers Rail Act was passed. For example, Railroads Against Monopoly, a voluntary association of 10 relatively small, regional railroads, has complained that the cancellation of joint rates and reciprocal switching agreements by large railroads harms the small railroads' ability to compete for traffic. As a result, in their view, shippers lose their routing options, the nation loses inter-railroad competition, and eventually rail service may be provided by fewer and fewer railroads.

The National Industrial Transportation League, representing both rail and nonrail shippers, has complained that joint rate and reciprocal switching cancellations reduce railroad competition, affecting shippers' ability to effectively market their products, and increase shippers' captivity to a single railroad. The Procompetitive Rail Steering Committee, an ad hoc organization of industrial and agricultural companies, has stated that cancellations lead not only to higher transportation costs but also to poorer service and lost marketing opportunities.

## Protest and Complaint Processes Are Available to Railroads and Shippers Affected by Cancellations

ICC's protest and complaint processes allow railroads and shippers to voice concerns about joint rate or reciprocal switching cancellations that they are about to experience or that they have experienced. Protests are filed before the effective date of a cancellation and are intended to prevent the cancellation from becoming effective. Complaints are usually filed after the effective date to overturn a cancellation already in effect. ICC's role is to act as an arbiter and independent assessor of the public interest regarding rail transportation policy. Appendixes I and II contain flowcharts that illustrate the protest and complaint processes.

Protests are initially reviewed by ICC's Suspension Board. This three-member board reviews the evidence submitted by protestors (railroads, shippers, etc.) and reaches a decision to

- suspend a tariff proposing a cancellation (e.g., halt a cancellation action pending the outcome of an investigation),
- investigate the tariff but not suspend the action,
- both suspend and investigate the tariff, or
- allow the cancellation to take effect.

The Suspension Board may send protests to the full Commission (i.e., all five ICC commissioners) for a decision if an important policy issue is involved. Decisions to suspend and/or investigate are transferred to ICC's Office of Proceedings where a formal investigation is begun. Appeals of Suspension Board decisions go before the full Commission. The Commission can suspend and investigate, investigate but not suspend, or allow the cancellation to take effect. Suspension Board decisions are not judicially reviewable.

Complaints may be filed by either railroads, shippers, or both and automatically initiate an investigation of a cancellation. The process primarily involves ICC's Office of Proceedings, which serves complaints, collects information, prepares decision documents, and in general handles the investigation. Final decisions may be reviewed by the full Commission, including any appeals of initial decisions. The Commission may disallow a cancellation and require that previous joint rates or reciprocal switching agreements be restored, or allow the cancellation to continue in effect. By law, ICC must issue a decision within 5 months after the effective date of a new rate or tariff. However, an additional 3-month extension may be granted if ICC notifies the Congress. Commission decisions are judicially reviewable.

Relief from joint rate and reciprocal switching cancellations may come from the suspension of the cancellation. Suspensions are valid for up to 8 months or until an investigation decision is reached. In cases where a cancellation is not suspended, ICC may, following an investigation, disallow the cancellation and require that previous joint rates or reciprocal switching agreements be restored. In cases where suspension is granted, ICC may in essence continue the suspension by not allowing the disputed cancellation.

According to the Rail Section Branch Chief in ICC's Office of Proceedings, the disallowance of a cancellation is not a permanent suspension because a carrier may at some future date again cancel the disputed joint rate(s) or reciprocal switching agreement(s). Cancellations that are suspended but not decided within the 8-month time limit take effect subject to refunds of any rate increases that may later be disallowed.

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## Legislation and Policy Decisions Define the Conditions for Joint Rate and Reciprocal Switching Actions

The criteria applied to evaluate joint rate and reciprocal switching cancellations come from several sources. The Interstate Commerce Act, as amended, (1) specifies the conditions under which joint rates may be cancelled, (2) defines the factors ICC considers in deciding the suspension of cancellations, and (3) specifies under what circumstances reciprocal switching may be required. ICC's investigation decisions have further defined how the Commission evaluates joint rate and reciprocal switching cancellations and have illustrated the types of conditions and factors that ICC considers in joint rate and reciprocal switching cases. Finally, two ICC policy decisions since 1980 have (1) eliminated the automatic imposition of restrictions on railroad mergers that reduced a railroad's ability to adjust joint rates and (2) established new rules for handling joint rate and reciprocal switching cases.

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## Legislative Criteria for Handling Joint Rate and Reciprocal Switching Cases

The Interstate Commerce Act, as amended by the Staggers Rail Act, permits railroads to unilaterally cancel joint rates that are noncompensatory—those yielding a revenue-to-variable-cost ratio of less than 110 percent. Unilateral joint rate cancellations are precluded, however, if a railroad participating in a cancelled joint rate, or a shipper having no competitive alternative to the joint rate route, demonstrates that the revenue to the cancelling railroad from the joint rate is equal to or greater than the 110-percent level. A lesser percent may be applicable if the cancelling railroad maintains a competing route for which joint rates were not cancelled.

ICC considers whether to uphold or overturn a cancellation under criteria specified in the Interstate Commerce Act as amended by the Staggers Rail Act. These criteria (called the public interest test) require that the following factors be considered:

- The distances traveled and the average transportation time and expense of using the through route and alternative routes.
- Reductions of energy consumption resulting from the cancellation.
- The overall impact of the cancellation on affected shippers and railroads.

In determining whether to suspend a proposed cancellation (i.e., halt a cancellation action), ICC is required to consider three basic criteria:

- The substantial likelihood that the protestor will win its case based on the evidence presented.
- The protestor will suffer substantial injury if the cancellation is not suspended.
- Whether peculiar economic circumstances prevent the “keep account” provision from protecting the protestor. The keep account provision requires the railroad requesting the cancellation to keep account of all amounts received under a proposed rate increase and refund those amounts that are found unreasonable.

ICC may prescribe reciprocal switching agreements when such agreements are practicable and in the public interest, or are necessary to provide competitive rail service. Although the Interstate Commerce Act, as amended, does not specifically address how ICC should review the cancellation of reciprocal switching, a Suspension Board member stated that ICC applies the public interest test used for joint rate cancellations when evaluating reciprocal switching cancellations. In particular, the efficiency of the routes in question and the competitive impact on shippers and railroads are the primary factors considered.

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## The Congress Has Changed Suspension Criteria

The current statutory criteria for deciding suspension cases resulted from changes the Congress enacted in the Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act. The Railroad Revitalization and Regulatory Reform Act required the party seeking a suspension (protestor) to show a likelihood that it would win the case and that failure to suspend the cancellation would cause the protestor substantial injury.

ICC has stated that prior to 1976, it suspended cancellation and rate cases routinely. In that year, with passage of the Railroad Revitalization and Regulatory Reform Act, the Congress changed the criteria so that, in ICC's words,

"... the Commission's discretion under 49 U.S.C. 10707(c) to suspend tariff changes was curtailed to the extent that a verified complaint for suspension virtually must satisfy the terms for issuance of a temporary restraining order."<sup>1</sup>

In 1980, with passage of the Staggers Rail Act, the Congress further changed the suspension provisions by requiring not just a likelihood of success but a "substantial" likelihood that the protestor would win the case based on the evidence presented. In addition, the Congress added the third requirement—that a protestor show that, due to its peculiar economic circumstances, the keep account provision would not protect the protestor.

In its report on the Staggers Rail Act, the House noted that it was adopting a more stringent standard for suspension than under existing law. The House report also noted that it intended ICC to construe the suspension requirements narrowly and that suspension would occur only in the most extraordinary cases.<sup>2</sup> In adopting the House changes to the suspension criteria, the Conference report stated that these changes were intended to make suspension more difficult than before passage of the Staggers Rail Act.

As of April 1987, 95 joint rate and reciprocal switching protests had been filed with ICC since 1980. Of these, 14 investigations have been conducted and 8 suspensions have been granted.

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<sup>1</sup>A temporary restraining order is generally granted only when it is necessary to protect the applicant from immediate harm or to protect the court's ability to issue a final decision. In order to obtain such an order, the applicant must generally show a substantial likelihood of success on the merits, substantial harm if the order is not granted, and that the harm could not be remedied if the order were not granted.

<sup>2</sup>In a recent decision, upholding Ex Parte No. 445 (Sub-No.1), *Baltimore Gas and Electric Co. v. I.C.C.*, 85-1761, (D.C. Cir. April 21, 1987), the court of appeals said that extraordinary cases could be interpreted to mean those cases in which the protestor has no adequate keep account remedy.

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Investigation and Policy  
Decisions Clarify  
Conditions for  
Cancellations

Selected decisions ICC has issued in joint rate and reciprocal switching investigation cases since 1980 have illustrated how ICC interprets and applies the statutory criteria. For example, these decisions have (1) shown an increased consideration of railroad revenue needs by ICC, (2) established that in considering joint rate cancellations the three public interest factors may take on different weights and relevance, and (3) illustrated that there must be some actual "necessity or compelling" need to find reciprocal switching in the public interest. ICC's evaluation of the public interest has included consideration of such factors as transit time, route circuitry, and cancellation impacts on shippers and railroads, as well as the feasibility of reciprocal switching and the degree of competition among railroads.

Two policy decisions ICC has made since 1980 related to joint rates and reciprocal switching have (1) eliminated the automatic imposition of restrictions on railroad mergers that have hindered the adjustment of joint rates and (2) established additional guidelines for considering joint rate and reciprocal switching cancellations. Other decisions have simplified the procedures for determining how revenues are divided among railroads participating in joint rates when railroads cannot agree among themselves and established new requirements for the information to be supplied when requesting railroad variable cost and revenue information from ICC.

In March 1982, ICC eliminated the automatic imposition of restrictions imposed on railroad mergers that, in part, required merged and consolidated railroads to keep open routes and gateways<sup>3</sup> that existed prior to the merger. ICC stated that this requirement obstructed a railroad's ability to adjust joint rates to attract or retain traffic. One railroad official we talked to indicated that eliminating these restrictions set the stage for railroads to use the flexibilities of the Staggers Rail Act to make cancellations and close inefficient routes.

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<sup>3</sup>A gateway is a common point on two or more routes at which interchange of traffic may take place.

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## Ex Parte No. 445 (Sub-No.1) Specifies the Rules for Handling Joint Rate and Reciprocal Switching Cases

In October 1985, ICC decided Ex Parte No. 445 (Sub-No.1), Intramodal Rail Competition, which outlines ICC's rules for handling joint rate and through route cancellations and determinations of need for reciprocal switching. ICC adopted rules that modified a proposal that was a product of negotiation between the Association of American Railroads, the National Industrial Transportation League, and the Chemical Manufacturers Association and incorporated some features of a proposal introduced by Railroads Against Monopoly. ICC, in adopting these rules, indicated that it was responding to shipper and small railroad concerns to ensure access where needed. This access, in turn, would give shippers more routing alternatives, while promoting competition among railroads.

The Ex Parte No. 445 (Sub-No.1) ruling established several new procedural steps for proposed cancellations.

- A 45-day notice period to affected railroads and shippers for all cancellations. This is an increase of 25 days for cancellations made under statutory rail tariff filing requirements.
- The cancelling railroad must, if requested, provide an explanation of, and justification for, a cancellation to the affected railroads and shippers. This is to include pertinent mileage and cost data.
- The cancelling railroad and affected railroads and shippers must attempt to negotiate to resolve their differences prior to initiating an action at ICC.

According to ICC, the notification provisions were intended to increase the amount of time available for shippers and railroads to review a cancellation and either resolve their dispute or narrow the issues. The explanation provision was seen as potentially avoiding disputes, aiding negotiation of disputes, and providing ICC with additional information if a cancellation was ultimately protested. The negotiation requirement was designed to promote cooperation between railroads and shippers and, to the extent railroads and shippers can work together without resorting to litigation, minimize the need for regulatory control.

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## Ex Parte No. 445 (Sub-No.1) Provides the Factors and Conditions for Meeting Suspension Requirements

Ex Parte No. 445 (Sub-No.1) also established additional guidelines for suspending joint rate cancellations and for prescribing reciprocal switching. As stated in the ruling, a persuasive presentation that a joint rate cancellation would eliminate effective rail competition for the affected traffic between the origin and destination, and that either the protesting shipper or protesting railroad has used, or would use, the



joint rate for a significant portion of its traffic, is sufficient to determine that the statutory requirements have been met and that a suspension and investigation of the proposed cancellation is warranted.

Ex Parte No. 445 (Sub-No.1) specifies that a reciprocal switching arrangement will be required if it is determined that the arrangement is (1) necessary to remedy, or prevent, an anticompetitive act and is practical and in the public interest or (2) necessary to provide competitive rail service. ICC must find that either the protesting shipper or railroad has used, or would use, the arrangement for a significant portion of its current or future transportation needs. According to ICC, if reciprocal switching is needed to remedy an anticompetitive act, the overall revenue inadequacy of a railroad—a situation when return on investment is less than the cost of capital—will not be a basis for denying the order.

According to Ex Parte No. 445 (Sub-No.1), in conducting investigations of joint rate cancellations, ICC will find a joint rate cancellation inconsistent with the public interest if it is contrary to the competitive policies of the Staggers Rail Act, or is otherwise anticompetitive. ICC states that it will consider all relevant factors in making this determination, including the revenue from the traffic moving over the routes, the efficiency and costs of the routes, and the rates charged, or sought to be charged, by the cancelling railroad. In determining whether reciprocal switching is needed, ICC will consider such factors as the revenues of the railroads on the affected traffic, the efficiency of the routes in question, and the rates or compensation charged, or sought to be charged, for the service.

### ICC Says Past Experience Justifies the Suspension Rules Adopted in Ex Parte No. 445 (Sub-No.1)

In Ex Parte No. 445 (Sub-No.1), ICC decided that the keep account provision could not offer adequate protection to protestors seeking suspensions of proposed joint rate/through route cancellations. According to the Director of ICC's Office of Proceedings, the keep account provision applies only to the cancelling railroad. Since after the cancellation the shipper may decide to use other means to ship his/her goods, in the Director's view, it would not be possible for the cancelling railroad to keep account of the rates charged for traffic it no longer carried. The Director of the Office of Proceedings and the Deputy Director of the Bureau of Accounts told us that the Commission's decision that the keep account provision does not protect shippers was based on its expert opinion and not on a particular set of suspension cases.

Since Ex Parte No. 445 (Sub-No.1) was negotiated among private parties, we contacted two of the industry trade associations involved in the

discussions to determine whether they considered the effect of removing the keep account provisions. National Industrial Transportation League and Association of American Railroads officials both stated that their negotiations over the terms of Ex Parte No. 445 (Sub-No.1) had focused on railroad competition.

National Industrial Transportation League officials said that any time effective competition was eliminated the keep account provision would not protect the protesting shipper. They also pointed out that the Rail Transportation Policy section of the Interstate Commerce Act (49 U.S.C. 10101a) indicates a desire to foster competition in the railroad industry. Thus, they said, it makes sense to remove consideration of the keep account provision because any time effective competition will be eliminated, the circumstances are extraordinary and require suspension.

## Expectations About Ex Parte No. 445 (Sub- No.1) Are Generally Positive

In general, ICC officials expect positive results from Ex Parte No. 445 (Sub-No.1). Officials in the ICC Chairman's office, Office of Hearings, and Suspension Board told us that they expect the ruling to reduce the number of protests brought before the Commission. Their view is based on an expectation that railroads and shippers will negotiate their problems and cooperate in resolving difficulties.

ICC officials also expressed the view that the ruling would make it easier to obtain a suspension. In particular, the Chairman's Chief of Policy; the Director, Office of Proceedings; and the Deputy Director, Bureau of Accounts, all expressed the view that, as a result of Ex Parte No. 445 (Sub-No.1), it could be easier for a protestor to obtain a suspension than it was prior to the changes made by the Railroad Revitalization and Regulatory Reform and Staggers Rail Acts. The Director of the Office of Proceedings explained that prior to 1976, protestors had to prove the likelihood of success on the merits before a suspension could be granted. After Ex Parte No. 445 (Sub-No.1), however, a protestor need only show the elimination of effective rail competition for the affected traffic between the origin and destination. She also noted that since the adoption of the ruling three protests have been brought before the Suspension Board. In each case, the proposed cancellation was suspended.<sup>4</sup> A Suspension Board official noted that railroads may perceive that the ruling makes it easier for protestors to obtain a suspension and thus would be more willing to negotiate differences. Another Suspension Board

<sup>4</sup>One cancellation was eventually upheld. Two cancellations were dismissed—one because the parties settled and one because the cancellation was withdrawn.

member supported this view by noting that the ruling requires only a persuasive showing of the suspension criteria.

Railroad officials we spoke with also had generally positive comments about Ex Parte No. 445 (Sub-No.1), although some saw drawbacks. An official at Illinois Central Gulf Railroad believed that negotiations are the key to the success of the ruling and that such negotiations will save time and money. An official at Seaboard System Railroads believed the increased notification time will benefit protestors by improving the quality of the evidence submitted. An official with Norfolk Southern Corporation noted that the ruling will assist shippers in making their case before ICC, while the official at Seaboard thought that fewer protests would be brought because of negotiations. Among the drawbacks that one railroad saw is that the ruling is too vague and does not address industry needs for effective competition, and another railroad said that railroads do not have the cost information to provide to potential protestors called for in the explanation and justification requirements.

Some of the shippers we spoke to were unfamiliar with Ex Parte No. 445 (Sub-No.1); however, over half of them had positive comments about its provisions. Among the positive comments were that negotiations will save time and money, that negotiations will give shippers an opportunity to be heard, and that the ruling will decrease the number of protests that are filed because problems could be solved directly with the railroad. Some shippers also saw drawbacks. Negative comments included that the railroads will not cooperate and provide cost information, or may be slow to provide it, and that the ruling will not change ICC's pro-railroad position. Although some of the shippers thought negotiations would be beneficial, two we spoke with believed the railroads would be unresponsive to small shippers.

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## Conclusions

The Staggers Rail Act had as a primary goal improving the financial stability of the nation's railroads. To accomplish this goal, the act, as a part of the nation's rail transportation policy, placed increased reliance on competition, instead of regulation, to maintain reasonable rail rates. The Congress also established as a goal the continuation of a regulatory process that balanced the needs of the railroads, shippers, and the public.

To promote these goals, the Congress made several legislative changes related to joint rates and reciprocal switching. To improve the railroads'

financial stability, the Congress permitted railroads to unilaterally cancel joint rates not yielding specified revenue levels. In addition, the Congress changed the criteria governing suspension of joint rate and reciprocal switching cancellations. Finally, to encourage railroad competition, the Congress allowed ICC to require reciprocal switching when it was necessary to provide competitive rail service.

Ex Parte No. 445 (Sub-No.1) established the conditions and factors a protestor must show to meet the statutory criteria for obtaining a suspension of a joint rate/through route cancellation. As part of this ruling, ICC decided that the keep account provision, which the Congress had added in the Staggers Rail Act, would not protect protestors in joint rate cancellations. This decision effectively removed the keep account provision from the conditions and factors a protestor must show in order to obtain suspension of a cancelled joint rate.

Ex Parte No. 445 (Sub-No.1) represents a compromise between shipper and railroad interest groups that was designed to promote railroad competition. In adopting this compromise, ICC has responded to one of the policy goals (to increase competition) that the Congress established in the Staggers Rail Act. Some ICC officials believe that Ex Parte No. 445 (Sub-No.1) could make it easier to obtain suspensions than it was prior to passage of the Staggers Rail Act. It is too early to tell whether the effect of Ex Parte No. 445 (Sub-No.1) will be to make suspensions of joint rate cancellations easier to obtain.

# Railroad and Shipper Experiences With Selected Cancellations

ICC allowed most of the protested cancellations we evaluated to take effect. It did not suspend or investigate 13 of the 18 protests we selected—5 of 9 joint rate cases and 8 of 9 reciprocal switching cases. Of the four cases suspended or investigated (one protest was withdrawn), in only one instance (a joint rate case), did ICC disallow the proposed tariff cancelling joint rates.

According to a Suspension Board official, few protestors have made a case for suspension because most of the data submitted are general and of limited use to the Board. We reviewed the evidence submitted by protestors in the 18 cases we selected to determine if sufficient information was presented to obtain a suspension. We found that most of the protestors did not submit evidence addressing all of the criteria required for ICC suspension of a proposed tariff.

The effects of the cancellations we examined varied. Although a desire to increase profitability and/or achieve efficiency gains could have motivated the railroads to make cancellations, most cancelling railroads said retaliation against a competitor's prior action was an important reason why cancellations were made. They did not, however, identify the financial and market implications of this retaliation. Four of the seven protesting railroads, however, told us they lost revenues from the cancellations. Where quantified, these loses ranged from \$3 million to about \$8 million annually. Many of the protesting railroads also believed that the cancellations limited their ability to compete for business.

Shippers also experienced adverse effects from these cancellations. About one quarter of the shippers identified increased shipping costs directly related to the cases and about two thirds identified service problems, such as increased transit times. Several shippers indicated that these cases limited their shipping alternatives or reduced competition.

## Profile of Railroads and Shippers Involved in the Cases We Reviewed

To examine the effects of joint rate and reciprocal switching cancellations on railroads and shippers, we interviewed 8 railroads and 12 shippers that participated in nine joint rate and nine reciprocal switching cancellations protested to ICC since 1980. Seven of the eight railroads we interviewed were large Class I railroads. According to ICC, Class I railroads are railroads that have annual gross revenues of \$87.3 million or more. One railroad we contacted was a Class III switching and terminal railroad.

Five of the 12 shippers had annual rail shipping costs of over \$1 million. These shippers' annual rail shipping costs ranged from \$6 million to \$44 million per year. Four shippers we interviewed were small by comparison, with annual rail shipping costs of \$1 million or less. We were unable to obtain annual rail shipping costs for the remaining three shippers; however, based on the number of annual inbound and outbound rail carloads, two of these shippers may be classified as relatively small shippers because they used fewer than 400 total rail cars each year. The remaining shipper no longer used rail transportation but did at the time of the protest.

The large and small shippers we spoke with appear to be about equal users of rail transportation, as indicated by the percentage of their commodities shipped by rail. Those shippers with annual rail shipping costs of \$1 million or more shipped or received, on average, 60 percent of their commodities by rail, whereas those under \$1 million used rail to ship or receive, on average, 50 percent of their commodities. Detailed profiles of the railroads and shippers we interviewed are presented in appendixes III and IV.

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### Railroad and Shipper Participation Varied in the Cases Selected

The cases we selected represented 19 percent of all the joint rate and reciprocal switching cancellations protested to ICC from December 1980 through September 1985 (18 of 93 cases). As shown in table 3.1, the railroads we contacted participated as both protesting and cancelling carriers in the selected cases. Seven of the 18 cases we reviewed involved railroads protesting against other railroads, with no shippers involved.

Shippers participated in 61 percent of the cases we selected. As shown in table 3.2, shippers in the cases selected protested alone in five instances and in conjunction with a railroad in six cases. Of the 12 shippers we contacted, 10 protested in conjunction with a railroad and 2 protested alone or with other shippers. Five of the shippers we interviewed said they protested at the request of a railroad or trade association. An additional six shippers were in contact with a railroad or association regarding their protest.

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**Table 3.1: Summary of Railroad Participation in Selected Cases**

<b>Railroad</b>	<b>Protesting</b>	<b>Cancelling</b>
Norfolk Southern <sup>a</sup>	X	X
Chessie System	X	X
Illinois Central Gulf	X	X
Chicago & Northwestern	X	X
Seaboard System	X	X
Conrail	X	X
Indiana Harbor Belt	•	X
Grand Trunk Western	X	•
<b>Total</b>	<b>7</b>	<b>7</b>

<sup>a</sup>Norfolk Southern spoke on behalf of both Southern Railway and Norfolk & Western Railway.  
Source: ICC.

**Table 3.2: Frequency of Protests by Railroads and Shippers in Cases Selected for Review**

	<b>Number of cases</b>
Protests filed solely by railroads	7
Protests filed solely by shippers	5
Both railroads and shippers protested	6
<b>Total protests reviewed</b>	<b>18</b>

Source: ICC.

## ICC Allowed Most Protested Cancellations to Go Into Effect

As shown in tables 3.3 and 3.4, ICC allowed most of the 18 cancellations we selected to go into effect. ICC did not suspend or investigate five of the nine joint rate cases we selected. One joint rate cancellation was suspended and investigated, and ICC investigated two other joint rate protests without suspending the cancellation. The protestor withdrew its protest in one joint rate case after negotiating an agreement that allowed the protestor to continue to use the joint rate. Only one reciprocal switching case was suspended and investigated. ICC allowed the eight other reciprocal switching actions to go into effect.

Final disposition of the four cases we reviewed that were suspended and/or investigated was as follows:

- In the suspended and investigated joint rate case, the protestor discovered during the course of the investigation that no salt cake traffic had moved over the disputed route for 6 years. As a result, the protestor cancelled the commodity rate applicable to salt cake and requested that ICC dismiss the case. ICC subsequently agreed and dismissed the case.

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- ICC allowed a cancellation of one investigated joint rate case to stand. ICC investigated whether this cancellation affected the public interest and found that, because the alternative routes were less circuitous and more efficient, the cancellation was in the public interest. The Commission stated that adverse impacts on shippers (or the protestor) had not been demonstrated.
- The other joint rate case ICC investigated involved, in part, a question of whether a proposed cancellation of joint rates on iron ore and substitution of higher proportional rates was reasonable. The protestor took the case to court and obtained an injunction preventing the new rates from taking effect. During their review of the case, ICC determined that the joint rates established prior to the rate increase were reasonable. ICC did not allow the tariff to go into effect.
- The cancelling railroad withdrew the tariff in the reciprocal switching case after it had been suspended and was under investigation.

**Table 3.3: ICC Actions on Protested Joint Rate Cancellations Selected for Review**

ICC action	Decided solely at Suspension Board	Appealed and decided by a division	Decided by the full Commission	Total
Did not suspend or investigate	1	2	2	5
Suspended and investigated	•	1	•	1
Investigated but not suspended	•	1	1	2
Protest withdrawn	1	•	•	1
<b>Total</b>	<b>2</b>	<b>4</b>	<b>3</b>	<b>9</b>

Source: ICC.

**Table 3.4: ICC Actions on Protested Reciprocal Switching Cancellations Selected for Review**

ICC action	Decided solely at Suspension Board	Appealed and decided by a division	Decided by the full Commission	Total
Did not suspend or investigate	2	5	1	8
Suspended and investigated	1	•	•	1
<b>Total</b>	<b>3</b>	<b>5</b>	<b>1</b>	<b>9</b>

Source: ICC.



## Most Protestors Did Not Provide Sufficient Evidence to Prove Their Case Before the Suspension Board

One of our objectives was to determine why the Commission had not suspended most joint rate and reciprocal switching cancellations since 1980. Of the 18 cases we examined, only 2 protestors out of 81 provided evidence addressing each of the statutory suspension criteria required by the Interstate Commerce Act. In the first case, the Board voted not to suspend but did investigate the protested action. In the second case, the Board voted to neither suspend nor investigate. Both cases were ultimately settled after court proceedings: the first resulted in a judgment for the protestor and the second was settled before trial.

According to ICC, prior to the passage of the Railroad Revitalization and Regulatory Reform Act, most cases were suspended. After 1980, and passage of the Staggers Rail Act, of the 93 protests filed as of September 1986, only 7 were suspended. We examined ICC's suspension decision rationale and the papers filed by the protestors in the 18 cases to determine why most of the cases we selected were not suspended.

In general, the Commission's ability to suspend is limited by Section 10707(c) of the Interstate Commerce Act, which requires the protestor to show three things.

- The protestor has a substantial likelihood of success on the merits.
- Without the suspension the protestor will suffer substantial harm.
- The refund provisions of the statute would not protect the protestor due to the protestor's peculiar economic circumstances.

The Director of ICC's Office of Proceedings stated that most protests are not suspended because protests seldom contain enough information to make a suspension determination. Because the protest process is informal, according to this official, protests are not well documented, making it difficult for the Suspension Board to adequately analyze the situation. Suspension Board officials agreed, saying that much of the information submitted by protestors is general and not of sufficient quality to meet the criteria discussed above.

In order to test whether sufficient information was actually submitted to ICC for the Suspension Board to be able to suspend a proposed new rate or cancellation, we reviewed in detail the 81 individual protests filed as part of the 18 protested cancellations we examined. We reviewed the information submitted in terms of the statutory criteria set forth above. We looked for a linkage between the statutory criteria, the allegations, and the evidence submitted. We considered all protests making this linkage as having complied with the statutory criteria, and

therefore as containing “sufficient” evidence. We did not, however, attempt to judge the adequacy of the evidence for suspension purposes.

Where the statute requires the protestor to show evidence that the new rate or cancellation will cause the protestor substantial harm, the linkage between the evidence and the substantial harm must be made clearly. Thus, although the statement “I will be substantially harmed,” in our view, was not sufficient, if there was some explanation about the cause of that harm, for the purposes of our test, we accepted it as evidence. Conversely if there were facts in the protest, but those facts were not linked to one of the statutory criteria, for the purposes of our test, we did not make the connection.

This approach had two weaknesses. First, it did not eliminate insubstantial or frivolous evidence. Second, it did not include facts which, although related to the claim, were not linked by the protestor to specific statutory criteria.

Although, we did not attempt to determine why all 81 protestors did not address all of the required criteria in their protests, several shippers told us that they were not aware of the statutory criteria, ICC’s protest process, or how to prepare a defensible case. They also told us that their companies did not have legal departments nor could they afford to hire attorneys or other professionals to help them prepare their case. Two informed us that they usually depend on their trade association to protest on their behalf.

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## Impact of Cancellations on Selected Railroads and Shippers

The impact on the railroads and shippers we contacted from the joint rate and reciprocal switching cancellations we reviewed varied. Most of the cancelling railroads told us they used cancellations to retaliate against actions previously taken against them, or to prevent future actions that could reduce their revenues. Four of the seven protesting railroads said they lost revenues. These losses, when quantified, ranged from \$3 million to about \$8 million annually and, according to some of these railroads, affected their ability to compete.

Shippers were also affected in the cases we selected. About one quarter of the shippers experienced increased shipping costs and about two thirds of the shippers experienced service-related effects, such as increased transit time. This caused some shippers to begin using trucks to ship some of their goods. One half of the captive shippers—those

shippers who must use railroads—experienced both financial and service effects. Shippers also expressed concern that the cancellations limited their shipping alternatives and reduced competition.

### Most Cancelling Railroads Said Retaliation Was an Important Reason for Cancellations

While it is possible that the profits of cancelling railroads may have been enhanced by the cancellations and some railroads may have been attempting to reduce costs rather than increase revenues, it appears retaliation against a competitor's prior action was an important reason why cancellations were made. For example, officials from two cancelling railroads said they retaliated against another railroad's joint rate actions by cancelling reciprocal switching agreements. Retaliation may also prevent actions by other railroads. One railroad official told us that the ability to threaten a large railroad with a reciprocal switching cancellation provides smaller, regional carriers with the ability to protect their markets. The cancelling railroads, however, did not identify the specific market or financial implications of retaliation.

Five cancelling railroads either did not have, or were unable to identify, any increase in profits from the selected cancellations. In one cancellation case, a court prohibited the proposed rate increase, preventing financial gain. In another case, an obsolete tariff was eliminated. Since there was no traffic moving on the route there was no gain. In five instances, however, railroads said they increased charges to cover the cost of providing a service. In four of these instances, switching fees were increased and in the fifth instance the railroad proposed to increase joint rates to cover the variable costs of the service. The increased rates never went into effect due to a court injunction. Although profits in these latter five cases may have been affected, the railroads did not identify any financial impact.

Officials of two remaining railroads said they cancelled joint rates and reciprocal switching agreements to improve earnings and efficiency by attempting to carry goods further and eliminating unnecessary interchanges. These railroads told us they gained revenues as a result of their actions. However, they were able to quantify their revenue gains in only one case. In this instance, a railroad official estimated that cancelling joint rates on noncompensatory routes and restricting traffic to his railroad when it served both the origin and destination enabled it to increase revenues by \$650,000 annually. However, he indicated the cancellation was made not so much to increase revenues but rather to retaliate against a competitor's prior action. Neither railroad said what the profit impact was in these two cases.

According to officials from three cancelling railroads, the Staggers Rail Act has encouraged competition and resulted in railroads that are more efficient. They said these improvements have resulted from the railroads' ability to close inefficient routes and change rates. However, they did not think their actions had affected shippers. In some cases rates did not change, so in their view no shippers were hurt.

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### Most Protesting Railroads Lost Revenues as a Result of Cancellations

Four of the protesting railroads in the 18 cases we reviewed told us they suffered financial losses. Two of the protesting railroads estimated that their losses ranged from about \$3 million to about \$8 million per year beginning as early as 1981. One of these railroads estimated it lost another \$7.7 million at the conclusion of a series of retaliatory actions that attempted to keep open an interchange with another railroad. A third railroad estimated that it lost an undeterminable portion of \$52.5 million over 4-1/2 years due to another railroad's joint rate cancellations, including increased reciprocal switching charges from three of our cases. The fourth railroad did not quantify its loss but attempted to offset its lost business by offering shippers a special reciprocal switching fee.

The three other railroads in the cases we examined told us they did not have or could only speculate on the financial effects. One railroad was able to avoid an increase in switching costs of about \$2 million per year by diverting its traffic to another railroad. The second railroad speculated that a significant amount of business would be lost but did not identify specifically how much traffic would have been affected. The third railroad stated in its protest that potentially in excess of 270,000 carloads, yielding more than \$300 million in revenues, could have been affected as a result of a reciprocal switching cancellation. The latter case was not suspended or investigated by ICC.

Protesting railroads used different means, in addition to protesting to ICC, to respond to the selected joint rate and reciprocal switching cancellations. For example, one protesting railroad filed an antitrust suit. This railroad believed that another railroad, by restricting traffic to service over its own lines, had taken actions designed to eliminate competition. Another railroad was able to negotiate with the cancelling railroad and reach an agreement. This agreement allowed the protestor to continue to use a joint rate and avoided a potential revenue loss of about \$500,000 annually. A third railroad negotiated for new joint rates following a reciprocal switching case.

Many of the protesting railroads believed that the joint rate and reciprocal switching actions they protested limited their ability to compete for business. Officials from four protesting railroads believed they were no longer as competitive for business on affected rail lines following reciprocal switching fee increases or cancellations. Officials from another railroad said that it was denied future profits and the ability to compete for new business because a routing restriction associated with the cases prevented it from reaching certain markets.

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### Shippers Said Cancellations Resulted in Higher Costs and Poorer Rail Services

Three of the 12 shippers, in the cases we reviewed, told us they had financial effects, including increased shipping costs. Higher costs resulted from increased reciprocal switching charges to two of the three shippers. One of these shippers estimated the increased switching fees cost his company an additional \$225,000 per year. Annual rail shipping costs for this company were estimated at about \$30 million. Another shipper's costs increased because of a joint rate cancellation that in effect nullified a contract providing a rebate to the shipper. The loss of this rebate cost the company \$28,000 per year. Annual rail shipping costs for this company were estimated at about \$20 million per year.

Three other shippers told us that there could have been potential cost effects from their cases. In one instance, cost increases of up to \$11.5 million could have been experienced by one shipper if a joint rate cancellation had remained in effect. In another instance, reciprocal switching fees could have increased between \$800 and \$1,000 per car if the shipper had not taken actions to offset the increases by rerouting traffic.

Railroad services deteriorated after cancellations, according to eight shippers we interviewed. Transit time increased for all eight of these shippers, adding from 1 to 10 days to the time required to move their goods. Five shippers also cited their inability to efficiently route shipments as a problem created by the cancellations. For example, more circuitous routing resulted in delays and unpredictable delivery schedules for these shippers.

Shippers responded to the impact of the selected cancellations in a variety of ways. Four shippers adjusted to increased transit time and other service effects by leasing additional terminal facilities, maintaining extra inventory, or using trucks to supplement inventories. Three of the eight shippers whose transit time increased switched some of their traffic to trucks; they noted that trucks were more convenient, provided more dependable delivery dates, which allowed more precise scheduling,

and in some instances were cheaper. One of these shippers also avoided high reciprocal switching fees by using trucks to move his commodities.

Shippers were often able to avoid or offset negative effects of cancellations by negotiating with cancelling railroads. Four shippers were able to obtain adjustments from cancelling railroads regarding a joint rate or reciprocal switching cancellation. Cancelling railroads agreed to absorb reciprocal switching charges for two shippers, and another agreed to change the routing of goods for a shipper. This latter change provided faster service and a more reliable delivery schedule. The fourth shipper was able to negotiate a contract rate with the cancelling railroad. Three of the 12 shippers we spoke with told us they had no leverage to use in negotiating with railroads because their companies were small.

Captive shippers<sup>1</sup> identified more effects than other shippers in the reciprocal switching and joint rate cancellations we reviewed. Three of the six shippers we interviewed who categorized themselves as captive to rail services said they suffered both financial losses and poorer service. In contrast, those shippers who did not consider themselves captive did not identify any financial effects, although two thirds said that rail service deteriorated following the action they protested.

Some shippers we spoke with expressed general concern that the cancellations limited their shipping alternatives and reduced competition. One shipper said that retaliation restricted his company's routing of its products, forcing the company to use one railroad rather than another. Another shipper told us his company is at a competitive disadvantage because of high reciprocal switching charges. These fees prevent this company from reaching markets outside of its servicing railroad's system and hinders its ability to use another carrier's lower rates. Yet another shipper commented that the reciprocal switching case his company was involved with reduced his company's power to deal with competing railroads. Because his company has access to only one railroad's tracks, the shipper believed it was more difficult to negotiate rail rates.

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## Conclusions

Because the universe of cancellations is unknown and the number of cancellation cases we reviewed is limited, we are unable to reach general

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<sup>1</sup>Six of the shippers we interviewed said they were captive to rail services. They based this judgment on several factors. Three said they were captive because the bulk and volume of their products require rail transportation. Two shippers categorized themselves as captive because, due to high reciprocal switching fees, they have access to only one railroad. The final shipper said his company was captive because one of the raw materials it uses can only be shipped by railroad.

conclusions about the effects of joint rate and reciprocal switching cancellations on shippers and railroads. In the cases we reviewed, however, the net effect on railroads or shippers was not clear. While some of the cancelling railroads gained revenue, and possibly improved profitability and/or reduced costs, it appeared that retaliation was a more important consideration in motivating cancellations. We did not identify or analyze the market and financial implications of railroad retaliation. However, retaliation could be a means for railroads to protect or enhance their business and improve their financial condition and the latter is encouraged by the Staggers Rail Act.

On the other hand, in the cases we evaluated, many of the protesting railroads lost revenues and most of the shippers experienced service deterioration. These were adverse effects for these businesses. Whether these effects outweighed the increased revenues and/or potential enhanced markets for the cancelling railroads is unknown. For a railroad both making cancellations and being affected by cancellations, the overall effect may be minimal. However, for a shipper experiencing the brunt of cancellations and unable to negotiate solutions, the overall negative effect may be greater. This may be particularly true for small shippers that do not have other shipping alternatives.

# Antitrust Laws Could Provide Relief for Cancellations but May Be Difficult to Use

Since passage of the Staggers Rail Act in 1980, captive shippers—shippers whose commodities can be shipped only by rail and who have access to only one railroad—have complained that railroads are cancelling joint rates and reciprocal switching agreements, as a result, shippers face higher prices and poorer service. Although the Staggers Rail Act did not intend to leave shippers without protection against these practices, some captive shippers claim that because ICC has not overturned many cancellations and because antitrust laws are ineffective in dealing with railroads, they have been left without a viable remedy for their problems. Our review of antitrust law indicated that several unique factors exist that, apart from the merits of any claim, can prevent award of either damages or injunctive relief in a private suit against a railroad. These factors may discourage the use of the antitrust laws by those seeking relief.

Shippers' complaints led to the introduction of legislation in both the 99th and 100th Congresses aimed at providing them with relief. The Clayton Act Amendments of 1987 would make the full range of antitrust remedies available to shippers. The Consumer Rail Equity Act would modify ICC's statutory and regulatory standards to make it easier for shippers to obtain relief at ICC from railroad access problems. Each proposal is intended to provide shippers with additional remedies, through different approaches.

## The Antitrust Laws May Not Provide Shippers With a Complete Range of Remedies

The Staggers Rail Act, among other things, provided railroads with greater freedom to alter rates and improve their financial condition. However, it did not intend to leave shippers without protection from unreasonable railroad actions. Some shippers state that ICC has not overturned many cancellations<sup>1</sup> and the antitrust laws do not offer them protection. They conclude that neither protesting to ICC, nor bringing an antitrust suit, are viable alternatives for relief from their railroad access problems.

We found that in addition to the procedural and substantive issues faced by any plaintiff seeking antitrust relief, a rail shipper is confronted by several unique factors. The first two relate specifically to the types of recovery that a plaintiff can obtain, and the third functions in part to protect the integrity of the regulatory process.

<sup>1</sup>We found that between October 1980 and April 1987, 14 of 95 joint rate and reciprocal switching cancellation protests were suspended and/or investigated by ICC.



- The Keogh doctrine prevents the award of treble damages in private antitrust suits where the claim is based on a rate filed with ICC.
- Section 16 of the Clayton Act (15 U.S.C. 26) prohibits the award of injunctive relief—court orders prohibiting or commanding the doing of some act(s)—against common carriers for anything regulated by the Interstate Commerce Act.
- The doctrine of primary jurisdiction permits courts to refer some or all of the issues in an antitrust claim to an agency because of the agency's regulatory expertise.

While these factors were developed in part to preserve the integrity of the regulatory process, they also may limit the availability of the antitrust laws as an alternative form of relief from cancellations.

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## The Keogh Doctrine Protects Filed Rates

Private parties may not obtain monetary damages<sup>2</sup> from railroads for antitrust claims based on rates filed with ICC. The Supreme Court put forward four reasons for this rule in Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922).

- First, any private party objecting to a rate could apply to ICC for rate relief.
- Second, the Court reasoned, the antitrust laws were meant to give a right of action to anyone injured in business or property as a result of a violation of the antitrust laws. Injury in this context implied violation of a legal right. Since, for the purposes of rate regulation, the legal rights of a shipper and railroad are defined by the rate the railroad filed with ICC, such a rate could not serve as the basis for an antitrust injury. If a court attempted to award damages based on such a rate, it could disrupt ICC's carefully balanced rate structure. The disruption would create the discriminatory rates that the Congress sought to avoid when it passed the Act to Regulate Commerce, now known as the Interstate Commerce Act.
- Third, any claim based on a filed rate implies that some lower rate would have been more appropriate. Since such a hypothetical lower rate also would have to be legal within the meaning of the Act to Regulate Commerce, ICC would be the appropriate forum for such a determination, not the courts.
- Finally, ICC was engaged in a constant process of regulating rates to ensure that shippers did not suffer from discrimination by railroads. If the rates fixed by ICC had been lower, then all shippers would have been

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<sup>2</sup>Generally, in antitrust cases the damages actually awarded to the plaintiff are trebled (tripled).<sup>15</sup> U.S.C. 15.

affected equally. Thus, since every shipper was entitled to be put on an equal footing, any award of damages would be speculative because the court could not say if a shipper or the shipper's customers would have benefited from lower rates.

Although all four reasons are distinct, they focus on ICC's regulatory power and the possible confusion courts might create if permitted to set rates on an ad hoc basis through the award of antitrust damages based on filed rates.

Recently, some government, private, and congressional industry observers have said that the Keogh doctrine is no longer applicable because of regulatory and legal changes. Some of these organizations point out that the Staggers Rail Act prevents ICC from taking jurisdiction over rates that fall within the zone of rate flexibility. The zone of rate flexibility is a statutory provision that permits railroads, without interference, to set rates that are less than or equal to 180 percent of the variable costs of producing the rail service. According to 1985 data, ICC estimates that about 75 percent of the railroads' business is operating within the zone of rate flexibility. This estimate includes traffic moving under private contracts between railroads and shippers. Although under the Staggers Rail Act these contracts are subject to ICC approval, ICC does not have jurisdiction over rates agreed to by railroads and shippers in contracts.

These same observers state that the existence of changes to the regulatory scheme leads to several conclusions that potentially undercut the rationale behind the Keogh doctrine. First, unlike the conditions at the time of the Keogh decision, railroad deregulation and the existence of contracts precludes ICC review of most railroad rates. Second, the lack of ICC jurisdiction over some rates means that ICC is not able to balance all rates to avoid discrimination. Third, because ICC no longer has jurisdiction over certain rates, the courts would no longer have jurisdictional problems in reviewing those rate matters. Fourth, the argument that the award of damages would be speculative has been rejected by the Supreme Court.

Although some observers believe that the Keogh doctrine is no longer applicable, the Supreme Court's recent decision in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. \_\_\_\_\_, 90 L.Ed.2d 413 (May 1986), reaffirmed its continued validity. The plaintiffs in this case alleged that the Niagara Frontier Tariff Bureau had set rates in violation of the antitrust laws. In its decision, the Supreme Court was unwilling to say that in a partially deregulated environment, ICC-regulated

carriers, including railroads, should be subject to the same antitrust actions as other industries. The Supreme Court's decision in Square D was based on the fact that Keogh was settled law. The Court reasoned that the Congress had repeatedly acted in the ratemaking area by amending the Interstate Commerce Act and had done nothing to alter the Keogh doctrine. Thus, if any change were to occur, it would have to come from the Congress, not the Supreme Court.

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### Section 16 of the Clayton Act Limits Injunctive Relief

Section 16 of the Clayton Act (15 U.S.C. 26) prohibits private parties from obtaining injunctive relief—court orders prohibiting or commanding the doing of some act(s)—against railroads based on any matter subject to ICC's regulation, jurisdiction, or supervision. Since joint rates and reciprocal switching fall within ICC's jurisdiction, Section 16 of the Clayton Act would bar recovery.

Private parties may obtain injunctive relief, however, in those instances where a railroad engages in conduct over which ICC has no jurisdiction. This may include rate-fixing, refusals to deal,<sup>3</sup> and attempts to monopolize. For example, in Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945), the state of Georgia alleged that 20 railroad companies had conspired to fix noncompetitive rates for freight transportation into and out of the state. The key issue in the case was whether the state could bring an antitrust suit against a group of railroads for monetary and injunctive relief, if the complaint was based on filed rates that ICC had found to be reasonable. The court decided that, although the Keogh doctrine barred treble damage recovery, the plaintiff could still obtain injunctive relief. This was because the Interstate Commerce Act did not give ICC jurisdiction over filed rates that were more than the legal minimum and less than the legal maximum. In addition, since the conspiracy took place outside of ICC's jurisdiction, the court could enjoin the railroads from future collusion over rates.

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### The Doctrine of Primary Jurisdiction Protects the Regulatory Process

The courts developed the doctrine of primary jurisdiction to promote proper relationships between the judiciary and administrative agencies—like ICC. When the issues in a lawsuit can be heard by either an administrative agency or court, and the questions raised are either

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<sup>3</sup>In general, there is no legal requirement to deal. However, there are instances where a refusal to deal is a violation of the antitrust laws. For example, if one company has monopoly power and that company acts in an unreasonably exclusionary manner vis-a-vis rivals or potential rivals by refusing to deal, then there has been a violation of the antitrust laws.

outside of a judge's conventional experience or within the special competence of the administrative agency, then the court can ask the administrative agency to rule on the issues within that agency's jurisdiction. If issues within the agency's jurisdiction are involved, the court could stay (hold) the resolution of the remaining issues until the agency has reached a decision. In some instances, a court may refer a claim to an agency and dismiss the case when a plaintiff can obtain relief at a later time.

We found that in cases involving ICC-regulated railroads and antitrust issues,<sup>4</sup> simply pleading a violation of the antitrust laws was not always sufficient to avoid having a case stayed pending referral to ICC. It might be possible to argue that no referral should occur for claims based on circumstances outside ICC's jurisdiction, for example, a rate that fell within the zone of rate flexibility. Although primary jurisdiction does not prevent recovery, it often creates additional delay and expense, which may hinder the ability of some plaintiffs to maintain a lawsuit.

## Legislative Approaches to Provide Alternative Remedies to Captive Shippers

In both the 99th and 100th Congresses, legislation was introduced which seeks to provide captive shippers with alternative remedies in joint rate and reciprocal switching cases. Legislation now before the 100th Congress takes two different approaches to answering shipper complaints:

- Modification of the antitrust laws to permit full use of all antitrust remedies (H.R. 941 and S. 443 Clayton Act Amendments of 1987).
- Modification of the Staggers Rail Act to make it easier for shippers to obtain relief from ICC (Consumer Rail Equity Act, H.R. 1393 and S. 676).

The Clayton Act Amendments would bring the railroads within the scope of the antitrust laws. This draft legislation would repeal restrictions that prohibit injunctive relief against railroads over matters within ICC's jurisdiction<sup>5</sup> and overrule the Keogh doctrine. If approved, this legislation would permit the award of monetary damages and injunctive relief against railroads, as is permitted in cases against unregulated and some regulated industries.

<sup>4</sup>See, Hansen v. Norfolk & Western Railway, 689 F.2d 707, 709, 714 (7th Cir. 1982); Seatrains Lines v. Pennsylvania R. Co., 207 F.2d 255, 260 (3d Cir. 1953); Pinney Dock & Transport Co. v. Penn Central Co., 600 F.Supp. 859, 904 (N.D. Ohio 1983); Transkentucky Transp. v. Louisville and Nashville R. Co., 581 F.Supp. 759 (E.D. Ky. 1983).

<sup>5</sup>15 U.S.C. 26.

The Consumer Rail Equity Act (H.R. 1393 and S. 676) would amend the Staggers Rail Act to make it easier for shippers to obtain relief from ICC. In lieu of changing the antitrust laws, this legislation, among other things, would modify ICC statutory and regulatory standards by (1) shifting the burden of proof in rate change cases to the party proposing the change and (2) prevent cancellation of reciprocal switching agreements unless the cancelling railroad can demonstrate either that the switch is not practicable or that it is not necessary to provide alternative competitive rail service. Proponents of this legislation claim that captive shippers' problems should be handled by ICC. Thus, their proposal would not alter existing limitations in bringing antitrust claims against railroads, but rather would make it easier to obtain relief at ICC.

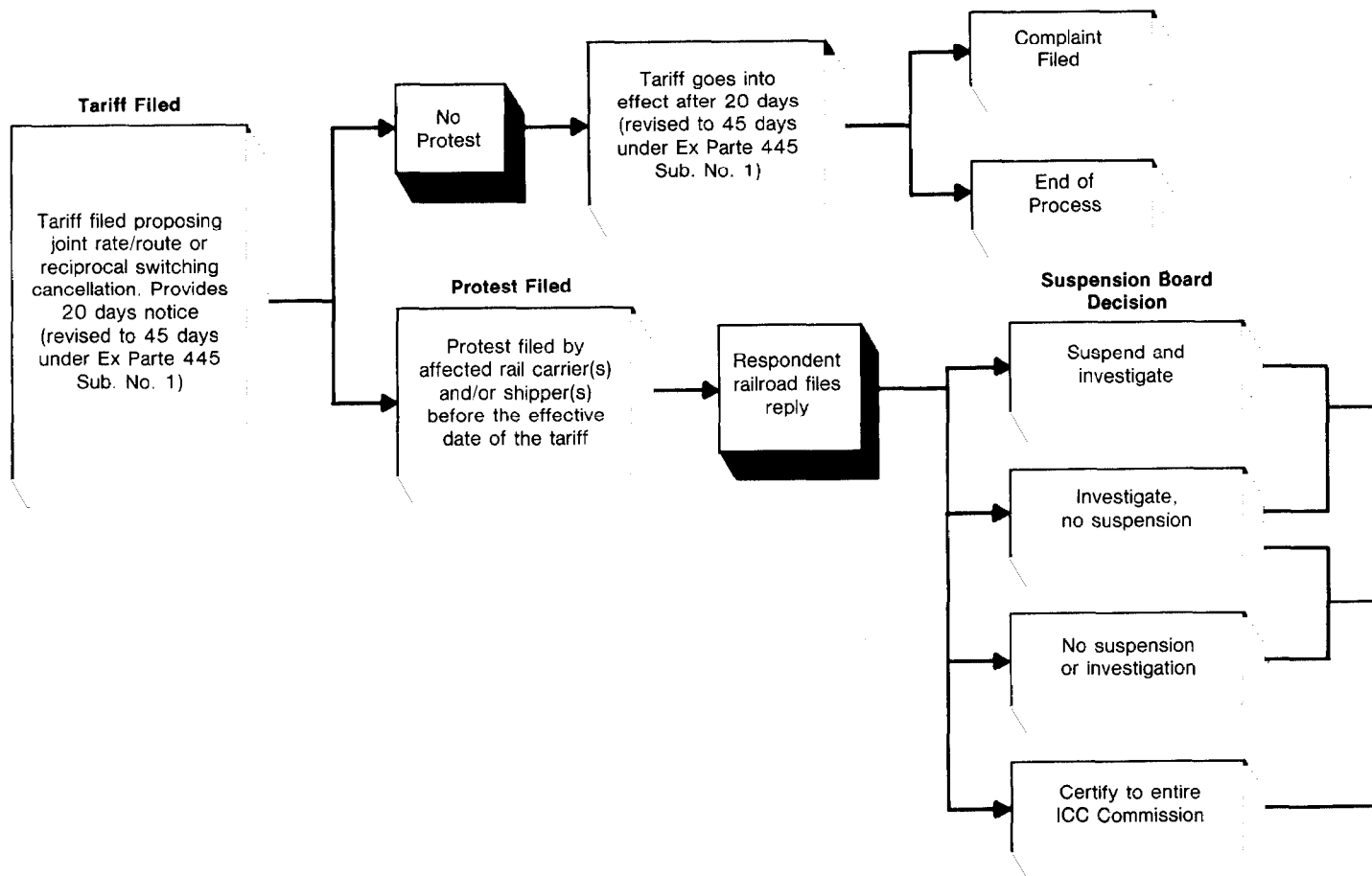
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## Conclusions

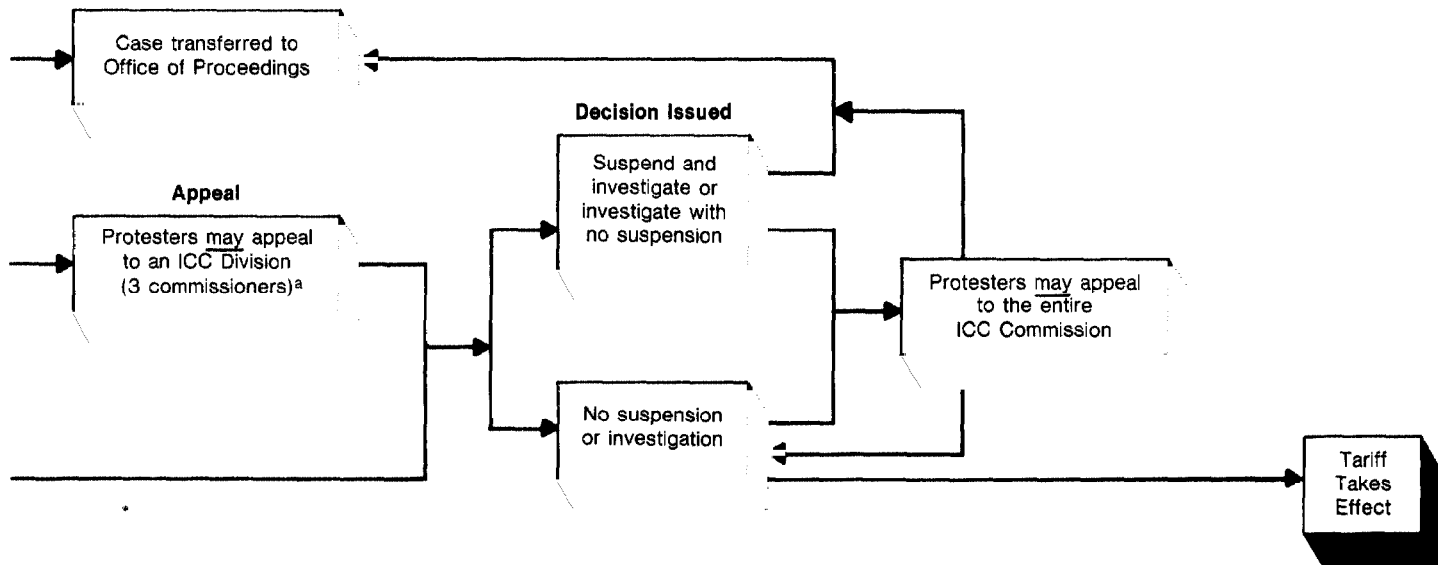
The antitrust laws, rather than protests to ICC, have been suggested as an alternative for railroads and shippers to obtain relief from joint rate and reciprocal switching cancellations. However, several factors potentially limit the availability of these remedies to plaintiffs. While our analysis suggests that these factors may not prevent bringing a successful antitrust suit, they do prevent the recovery of damages in filed rate cases and limit availability of injunctive relief. Further, although primary jurisdiction does not prevent recovery, it often creates additional delay and expense, which may hinder the ability of some plaintiffs to maintain a lawsuit. Taken together, these factors may act to discourage the use of the antitrust laws by those seeking relief.

Recent legislative proposals were designed to expand the remedies available to captive shippers. One would permit full antitrust remedies to plaintiffs in railroad cases, and the other seeks to ensure that captive shippers are given competitive rail alternatives. The latter proposal would not alter the present doctrines limiting the remedies available to private plaintiffs in antitrust cases against railroads, and therefore it may continue to be difficult to bring a successful antitrust suit.

# Flowchart of ICC's Protest Process

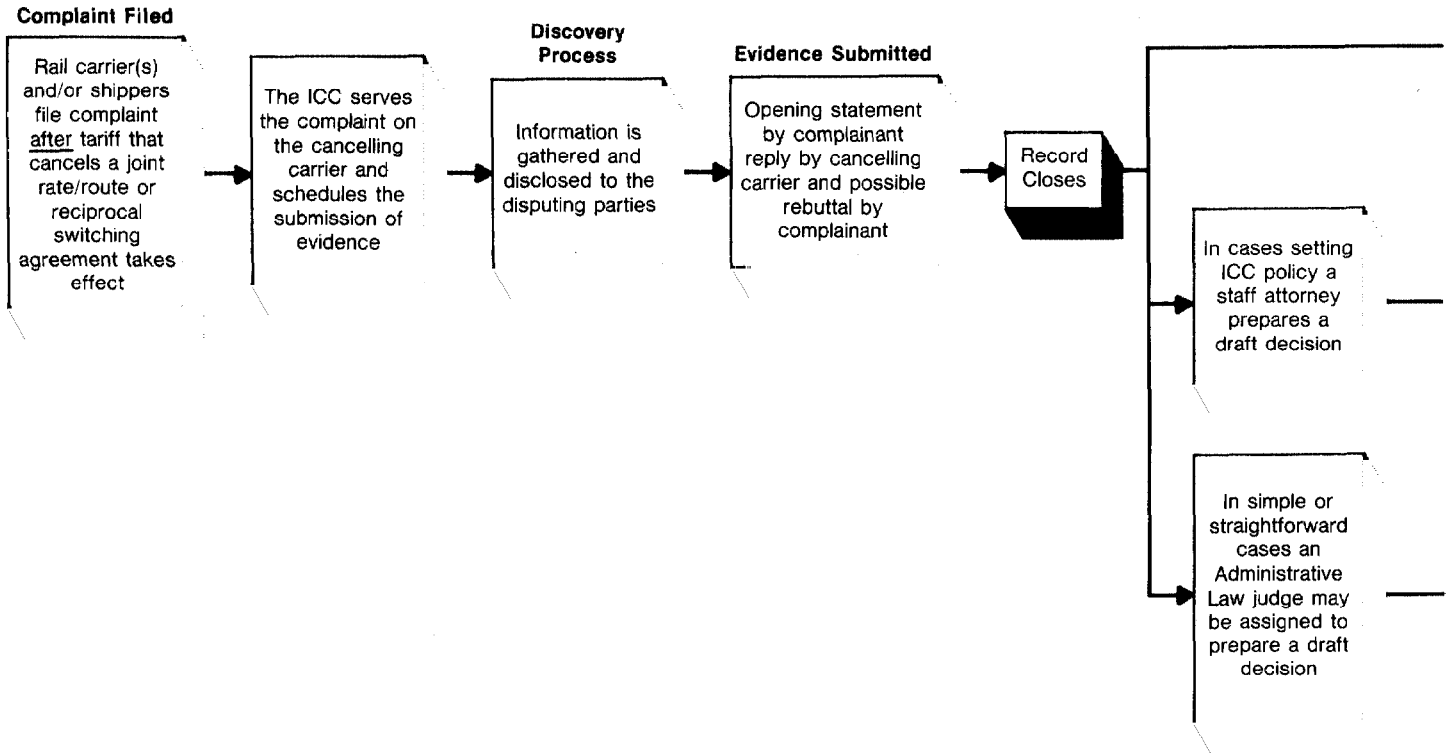


**Appendix I**  
**Flowchart of ICC's Protest Process**



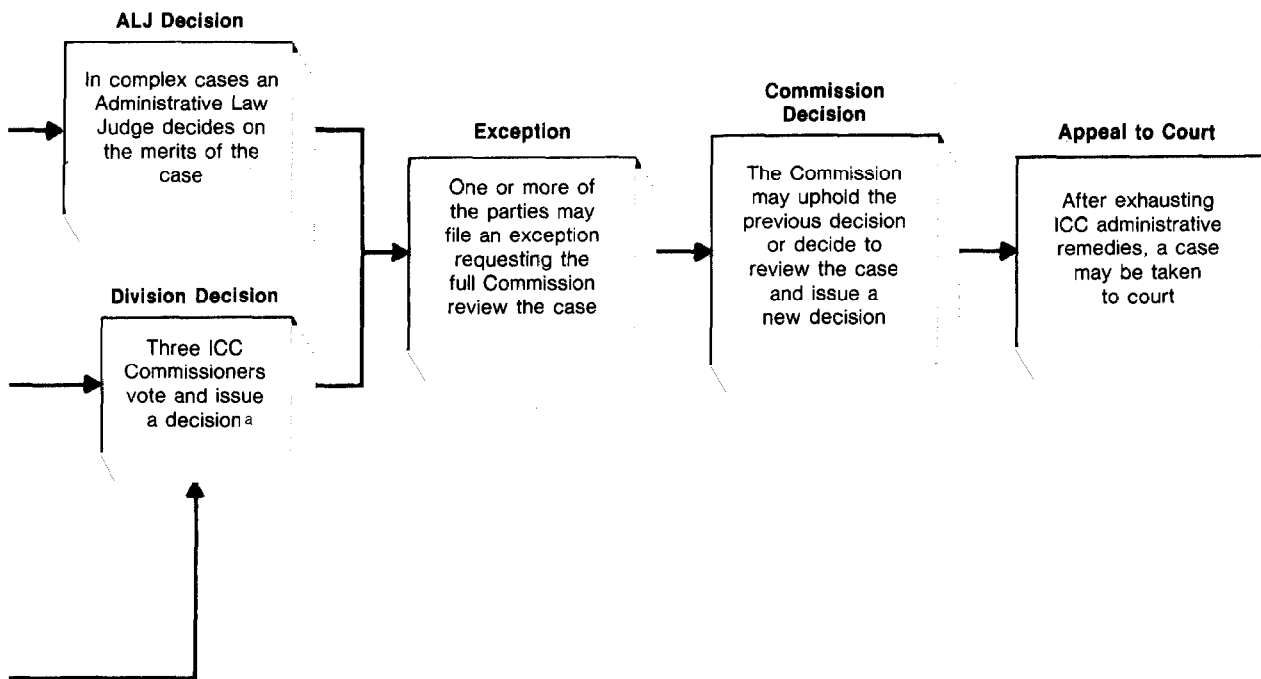
<sup>a</sup>In July 1986, ICC disbanded use of divisions. The Commission is currently drafting rules to make this change permanent.

# Flowchart of ICC's Complaint Process





**Appendix II**  
**Flowchart of ICC's Complaint Process**



<sup>a</sup>In July 1986, ICC disbanded use of divisions. The Commission is currently drafting rules to make this change permanent.

# Profile of Railroads Contacted During Review of Joint Rate and Reciprocal Switching Cancellations

Dollars in billions

Railroad	Class	Revenue ton miles <sup>a</sup> calendar year 1984		Operating revenues <sup>b</sup> calendar year 1984	
		Total	Percent	Total	Percent
Conrail	I	76.8	8.3	\$3.3	11.3
Seaboard System	I	80.2	8.7	2.7	9.3
Southern Railway System	I	48.9	5.3	1.8	6.1
Norfolk & Western	I	43.8	4.7	1.7	5.8
Chessie System <sup>c</sup>	I	59.2	6.4	2.1	7.1
Illinois Central Gulf	I	27.0	2.9	1.0	3.2
Chicago & Northwestern	I	24.4	2.6	.9	3.0
Grand Trunk Western	I	5.6	.6	.3	1.2
Indiana Harbor Belt	III	<sup>d</sup>	<sup>d</sup>	<sup>d</sup>	<sup>d</sup>
<b>Totals for carriers contacted</b>		<b>365.9</b>	<b>39.5</b>	<b>\$13.8</b>	<b>47.0</b>
Totals for remaining Class I Carriers		555.6	60.5	\$15.7	53.0
<b>Total all Class I carriers<sup>e</sup></b>		<b>921.5</b>	<b>100.0</b>	<b>\$29.5</b>	<b>100.0</b>

<sup>a</sup>Revenue ton miles is the movement of 2,000 lbs. of revenue freight a distance of 1 mile.

<sup>b</sup>Operating revenues are moneys received for the rail transportation of passengers and property.

<sup>c</sup>Includes the Chesapeake & Ohio and the Baltimore & Ohio railroads, listed jointly as the Chessie System.

<sup>d</sup>Data were unavailable. This carrier is a switching terminal carrier owned by Conrail (51 percent) and Milwaukee Road (49 percent).

<sup>e</sup>There are 28 Class I carriers, including the Chesapeake & Ohio and Baltimore & Ohio railroads.

# Profile of Shippers Contacted During Review of Joint Rate and Reciprocal Switching Cancellations

Rail shipping cost in millions

Company <sup>a</sup>	Primary commodity	Estimated percent of commodities shipped or received by rail	Estimated annual rail shipping costs	Estimated inbound & outbound rail carloads per year
A	Iron ore/Coal	96	\$44.00	185,000
B	Natural Gas/ Chemicals	45	30.00	13,000
C	Scrap metal	85	0.83	750
D	Cement	75	<sup>b</sup>	156
E	Chemicals	60	10.00	2,199
F	Cotton seed meal	40	0.05	156
G	Scrap metal	<sup>c</sup>	<sup>c</sup>	350
H	Scrap metal	70	0.10	265
I	Bricks	55	8.20	4,368
J	Sodium silicate	50	20.00	3,640
K	Wood products	<sup>d</sup>	<sup>d</sup>	<sup>d</sup>
L	Waste paper	15-20	0.81	390

<sup>a</sup>The companies in this table are not identified to maintain the confidentiality of the information provided.

<sup>b</sup>This company was unable to separately identify rail shipping costs because the costs are included as prepaid items.

<sup>c</sup>Data were unavailable.

<sup>d</sup>This company has not used rail transportation since 1981.



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