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Antitrust Synthesis

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ANTITRUST SYNTHESIS

Moderator

ROBERT H. LANDE

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Commentators

WILLIAM F. BAXTER

Professor, Stanford Law School

ALFRED E. KAHN

Professor, Cornell University

MR. LANDE: We will now hear from Professors Baxter and Kahn, whom I encourage to comment not only on the material presented by the speakers on the self-regulation panel, but also about the topics covered by the prior panel on interfirm relationships. In addition, since it's now the end of the seminar and there will be an election this November, if Professors Baxter and Kahn would like to make any prediction or general comments about the future of antitrust, regulation, or deregulation, we would love to hear them. After they finish, I'll be delighted to take questions from the audience, whether to our panelists or to Professors Kahn or Baxter. Fred, would you like to start?

MR. KAHN: As I've listened to this afternoon's panels, I have tried to concentrate on the subject of interfirm relationships, which was the subject of the first, and self-regulation, which was the subject of the second. For a long time I was struggling to see how to bring order, simply what one can say by way of summary.

The first way in which one tries to bring order is by taxonomy, so I found myself—I'm not sure how illuminating it is—classifying some of these collaborative ventures, self-regulatory ventures, joint ventures, and the like, in these areas. I think it has been quite clear how pervasive these problems are in the regulated and recently deregulated industries. And I find them falling under three headings.

One that can be dismissed, I think, quite quickly intellectually, is that there are some of these ventures that have seemed to be necessary because there have been gross derelictions somewhere else. The airline agree-

ments dividing up scarce slots is a perfect example of that. If we were pricing airport services correctly, this would be unnecessary. I think it's unnecessary anyhow. It is obviously being done by people who don't understand competition, engineers who would like to see that everybody flies at evenly spaced hours—at 12:00 a.m., at 3:00, at 3:30, and 4:00 o'clock in the morning.

I think to some extent that's true also of the laws that prevent airports from making surplus profits. They can charge only historic costs; therefore, their pricing cannot take into account the scarcity value or the congestion value of the slots. And the failure to price air traffic control services—I suspect that if they were priced similarly, we would have an elimination of some of those problems.

This first category, I suspect, is a small minority, but it's an interesting one because it's easy to point your finger and say, "These dopes don't know how a market works."

The second is also not a very big category, I fear. Some are clearly required for productive efficiency—perhaps savings of transactions costs, as in the pricing agreements for the exchanges of power in electric power pools—and it's undeniable that these collaborative ventures minimize costs both of short-run generation of power and of providing system reliability. Perhaps all one can say is that if there are demonstrable competitive problems, then the solution has to take the form of free entry, or non-discriminatory entry, or non-discriminatory access, and that's probably all that you need say in that case.

The trouble with my taxonomy is that the third category includes most of them, and that's where the joint actions are necessary in order to offer a service—it's really close to the second category—but also involve some genuine restraint of competition.

Code sharing undeniably permits airlines to offer a superior service—it provides the equivalent of online transfer, which is really better than interline transfer.

Another example is the offer of hassle-free cash that you get from these associations of card-issuing banks and providers of automatic teller machines, with mutual agreements that you referred to where you've got to have them, or clearing arrangements, which are clearly efficient and offer services that you couldn't otherwise offer.

The use of uniform ticket stock—maybe that comes under the second—is obviously more efficient.

Sports leagues, where the product has to be jointly arranged, is another example. There's a deplorable tendency for people in the public to confuse the competition that is the spectacle that's being offered with commercial competition, which is quite another thing.

Railroads' exchanging of box cars—there's got to be some device for doing it.

In all of these cases it's hard to imagine the service being offered, or offered efficiently, without some joint arrangement. The critical question, then, is the ancient antitrust question: To what extent is it necessary to have restrictive ancillary agreements to make it work?

In the case that Bill Baxter and I were involved in, the critical question was not should you have these electronic networks for the mutual acceptance of cards, but is it necessary as part of that to have an agreement in advance on a compensation fee that will be paid in the settlement of balances between the card-issuing banks and the automatic teller machine deployers, where the latter have a surplus of transactions in which they honor the cards of other people and give them cash over the cases in which other machines honor their cards.

You will recognize in many of these cases that there is some settlement device. The railroad box car case, without getting into the substance of it, is a traditional antitrust question, and there's nothing to do but apply a rule of reason. Is there suppression of competition, is there some less anticompetitive way of doing it, or is it generally reasonably ancillary? That's my typology.

A final comment. It seems to me we do have a genuine danger that deregulation will be discredited, in some cases unjustifiably, in others with some justification.

Let's look at the unjustifiable cases first. When I hear that California has taken some steps in the direction of re-regulating trucking because of the belief that deregulation has threatened safety, I feel apoplectic. They have simply fallen for propaganda of the Teamsters and the American Trucking Association. The figures on accidents, the most reliable ones are on accidents involving fatalities, but also the statistics offered by the ATA itself, both demonstrate, if you look at them intelligently, that accident rates have gone down markedly per million trips.

The ATA makes a great deal of the fact that their figures show a sharp increase in the absolute number of accidents between 1982 and 1986 or 1985. But trucking deregulation, to the extent we had it, goes back to 1980. Moreover, those are the reported figures involving all accidents

involving property damage in excess of \$2,000. First of all, there's no trend if you convert those figures to accident rates. Second, DOT, quite correctly, said, "Let's just adjust the \$2,000 for changes in the purchasing power of the dollar." \$2,000 in 1976 is equivalent to \$4,300, thanks to the great success I had in controlling inflation. With that single adjustment, the accident rates go down substantially.

Most ironic of all, the California Department of Highways and the Public Utility Commission issued a report in the summer of 1987 which showed what had happened to trucking accident rates in California. They show a definite long-term downward trend. Even more interesting, they show a striking negative correlation—so striking that I don't believe it—between the number of random roadside inspections and the number of accidents. Year by year, where the one goes up accidents go down; when the one goes down accidents go up. But the long-term trend is down.

So, some of the trend to re-regulation is, I think, unjustifiable. Some of it, however—and I'm getting to Sue Braden's comments—is in some degree justified.

For example, there is a genuine problem of captive shipper protection from railroads with undeniable monopoly power. I have represented coal shippers from the Powder River Basin, where there was only one train that would get coal from there to the Southwest to utility companies that had entered into take-or-pay long-term contracts for the coal, and after they had entered into the contracts the rates began to go up. Now, you could make a very legitimate case that as long as the railroads fall short of their overall revenue constraint, they should be permitted unrestricted Ramsey pricing; that as long as they don't earn excessive returns, you'll get the proper pricing.

But Congress did not trust that. Congress put in the Long-Cannon provisions which say, "Well, the railroads may not be efficient, they may be lazy, they may pass on excessive labor costs, as God knows they are forced to do by our Railway Labor Act, and therefore we think there ought to be some separate protection for captive shippers."

For a long time the ICC really was not willing to do that. I think the ICC has made important steps in that direction, and I certainly am opposed to the CURE bill; but, in part, that bill was a response to the feeling that there was a danger of monopolistic exploitation, and shippers facing that prospect weren't going to buy the notion that you could leave it to the profit-maximizing motives of the railroads, who would in any event price according to Ramsey principles—a monopolist will have mark-ups inversely proportional to elasticity of demand—as though that's all that was involved.

The cable case is an interesting one. I'll say just one more word about it and then stop. I testified myself in favor of deregulation in localities receiving four good Contour B—whatever that means—signals, over the year that, I felt, provided sufficient competition. My impression is that the FCC suddenly turned that into three, which means you don't have to be able to get public TV.

But, in any event, I raised a different kind of question about the wisdom of deregulation at the national level. I didn't quite see why it was the business of the federal government if localities were setting, as many of them were, ridiculously onerous restrictions, with the result that they were not getting good cable service. The people suffering from such regulatory excesses were the people in those localities. So it seemed to me kind of paternalistic for the federal government to step in and protect the localities from the results of their own errors. In any case, I had a certain queasiness about that, and my impression is that the FCC has been somewhat ideological here and has not really been tough about demanding the competitive protection of at least four excellent over-the-air signals.

Finally, I must agree with Sue. Without regard to whether it has or has not been so, antitrust enforcement must be seen to be vigorous. I think the antitrust agencies ought to be willing to lose some cases in order to seem to be vigorous—I don't say that simply cynically—as a price for avoiding a return to regulation.

MR. BAXTER: I have only a few random observations. The point of data availability is an interesting one. If one reviews the academic literature, it appears that we have learned a great deal because there were mountains of data available in the regulated industries that were not available in other areas. One of the things that agencies do is make industries collect enormous quantities of data, probably far more than could be economically justified, but which is marvelous for academics. So that, in a sense, regulation was hung with its own rope. Because of these data we were eventually able to show how dreadfully inefficient regulation was.

After ten years pass and that kind of data is no longer available, the old stuff can be put aside as too old. It may be that we will discover that there is a kind of corn-hog cycle at work in this area. We will need another spate of regulation in order to enable us to convince people that it, too, was an abomination.

I was troubled by the assertion that several people made, that deregulation is not political or partisan or some such phrase. It was clear from the context that "partisan" was a word that would have suited their purpose

better than "political." It is probably true that there is no great party identification with regulation as opposed to deregulation. The Republicans have their industries and the Democrats have their industries.

But to say it's not political seems to me terribly naive. The reason regulation occurs and deregulation occurs is not because of academic articles, but because there are strong lobbies. The politicians regulate industry for the same reason that Willy Sutton robbed banks: that's where the money is.

There is no prospect that this is going to change. The only question is whether the public's attention has been sufficiently diverted by spurious safety arguments to permit that camel back in the tent.

The notion that is sometimes raised that the expansion of international trade is going to solve these problems, that we are not going to be able to go back to regulation because, after all, regulation is inefficient and the economy has to be efficient in order to deal with Japan—this is a very serious misconception. There are, indeed, some industries where there is intense international competition that would tend to prevent the implementation of inefficient regulatory schemes.

But the fact is that the industries we like to regulate, by and large, are service industries with markets that, in the case of cable for example, are SMSA-wide at most, often smaller than an SMSA, and where the prospect of foreign competition is not realistic at all. We are not going to be saved from our own worst political instincts by any such international development.

The prospect of some very intense political fighting lies ahead as a consequence. I hope we continue to maintain a deregulatory posture. We have really made very, very little progress. What have we really deregulated in the period which we now fondly look back on as "the deregulatory period?" Outside of the financial industries, brokerage fees and banking, where have we made some progress? Some progress has been made in trucking, but the regulation that remains in trucking is substantial, seriously distorting, and wholly unjustified. Some progress has occurred with respect to railroads, but really quite little. There is almost nothing else.

We have come a very small portion of the way. It is going to be difficult to make further progress, and we'll be lucky if we don't slip back. But it won't be because people didn't know any better.