CURRENT REGULATION AND MODERN TRANSPORTATION SCHEMES

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The era of intermodal transportation, the dynamic method of transporting goods has arrived. Containerization has caused the existing transportation companies to shed the old methods of doing business which tie them to traditional systems of transportation. These companies, i.e., railroads, motor carriers, airlines, and ocean carriers, now offer the shipper through door-to-door transportation utilizing two or more different modes of carriage. By offering speed, efficiency, less paperwork, and lower costs, it has become a modern as well as simple means of transporting cargo. Intermodal transportation has not evolved free of the disturbances which change traditionally brings about. It has caused certain disruption amongst existing competitive carrier relationships and has drastically changed the economics of ratemaking.

One problem which has arisen, is that of the proper role of government and particularly the regulatory agencies, in the area of modernized sophisticated transportation systems.

Should intermodal transportation result in increased governmental surveillance? Should the existing statutory rules be case aside and in their place should permissive guidelines be established? The Federal Maritime Commission (FMC) is investigating and evaluating the problems of intermodal transportation. Although existing statutes, and regulations adopted as early as 1887, are not incapable of providing the necessary machinery, it has become apparent that they are not totally in pace with facilitated transportation methods.

Critics of any legislative change contend that there will always be change in the transportation systems of this country and that every

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change need not result in new regulations or laws. In fact, the FMC recently interpreted the Shipping Act, 1916, as amended, to permit the existence of these new intermodal concepts and the filing of through single factor rates between ports in the United States and inland points abroad.[1] While it is true that many of the present intermodal systems can be regulated under our present statutes, it is also true that to some extent regulatory confusion has resulted in vague and ambiguous guidelines which do not in all instances serve the requirements of the shipping public.

It is not in this atmosphere of uncertainty that guidelines and policies should issue which could perhaps bind the shippers and carrier, as well as the Government, for the rest of this century. It is up to the regulatory agencies to re-examine existing statutes and policies to determine within their regulatory framework whether current rules are sufficient to provide efficient and imaginative regulation. If current rules are found to be deficient the regulatory agency concerned should request the legislation necessary to keep up with the times.

The regulatory agency of today cannot limit itself to the consideration of that which affects the particular transportation industry which it regulates. The very existence of intermodal transportation requires it to be concerned with the effects of its actions upon all transportation modes.

With these general considerations in mind, I should like to discuss below some of the problems with which we are faced and present suggestions as to how they may be best resolved.

TYPES OF CARRIERS

Pursuant to Section 1 of the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*) the Federal Maritime Commission is charged with the regulation of common carriers by water both in our foreign ocean borne commerce and in our domestic commerce (including only Alaska, Hawaii, Puerto Rico, the Virgin Islands, Guam and Samoa). This article shall be limited to our foreign commerce. In addition to common carriers by water, the FMC regulates the port-to-port rates offered by non-vessel owning common carriers by water. (NVOCC), which regulation is grounded on decision in Docket No.

1.See Docket No. 68-8. *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 & 2, FMC Nos. 10 & 11, 4/23/68* Mimeo: op, NAWFA *et al.* v. FMC, No. 21, 912 DCCA; 8/14/68. This proceeding is presently on remand to the FMC for full evidentiary hearing.

815—*Determination of Common Carrier Status*—6 FMB 245; 287 (1961).

Historically, common carriers by water, with certain exceptions, have operated within the framework of "shipping conferences". A shipping conference is a voluntary association of shipping lines, the main purpose of which is to fix rates. These conferences operate pursuant to written agreements which are filed and approved by the Commission as provided in Section 15 of the Shipping Act, 1916. As long as the agreements remain approved the operations of the carriers are exempt from the antitrust laws.[2]

On three occasions, in 1914,[3] 1958[4] and 1960,[5] congressional committees studied the conference system in depth and concluded that if properly regulated, it is a useful and necessary device for maintaining rate stability and reliable service in our foreign commerce. Non-conference carriers (independents) do exist, but although they often offer lower rates than conference carriers, they usually do not provide the frequency of service and attendant reliability required by the shipping public.[6]

Under Section 14(b) (46 U.S.C. 813a), conferences are permitted to offer a "dual rate contract" to shippers who agree to ship all or a substantial portion of their cargo on vessels of member lines. In general, rates available to contract signatories are 15 % below those offered to non-contract shippers.[7] Although non-conference carriers are

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2.*Carnation v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

3.Alexander Report (H.R. Doc. No. 805, 63d Cong. 2d Sess.).

4.Antitrust Subcommittee of the Committee on the Judiciary, 87th Cong. 2d Sess., House Report No. 1419, "The Ocean Freight Industry (Celler Report.)"

5.Hearings before Special Subcommittee on Steamship Conference of the Committee on Merchant Marine and Fisheries, House of Representatives on H.R. 4299, 87th Cong., 1st Sess., (1961); House Report No. 498, 87th Cong., 1st Sess., (1961); Hearings before Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, U.S. Senate, on Steamship conference/Dual Rate Bill, H.R. 6775, 87th Cong., 1st Sess., (1961).

Senate Report No. 860, 87th Cong., 1st Sess., (1961).

See also Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958), wherein the dual rate system of a particular shipping conference was held to be a "resort to other discriminatory or unfair methods to stifle outside competition in violation of section 14 Third" of the Shipping Act, 1916 (46 U.S.C. 812), 356 U.S. at 493. This decision cast serious doubt upon the lawfulness of all dual rate systems; which resulted in Public Law 87-346 permitting the use of dual rate systems by conferences under certain safeguards.

6.See testimony before Bonner Committee, *supra*.

7.See *The Dual Rate Cases* 8 F.M.C. 16, 38 (1964).

also permitted to utilize dual rate contracts, they are almost entirely used by conferences.

Shipping conferences today consist mainly of break bulk carriers which offer transportation at rates determined by such factors as value of the commodity carried. Rates are traditionally quoted on a weight or measurement basis, whichever produces greater revenue for the carrier. This system of ratemaking has remained unchanged for 40 years, despite significant developments in our North Atlantic trades in the past two years. For example, one such development was the entrance of Sea Land into the North Atlantic trade with an all container service. Sea Land had pioneered container service in our Atlantic Coast to Puerto Rico trades. Although some expected that Sea Land would oppose the break bulk conferences it became a member of several conferences.[8] In addition, several foreign flag carriers combined to form Atlantic Container Line, Ltd. (ACL),[9] a consortium composed of Swedish American Lines, Swedish Transatlantic, Wallenius, Cunard Line, French Line, and Holland America Line. The consortium has commissioned the construction of a modern type of ship, roll-on roll-off, which not only is able to handle containers but can also accommodate vehicles and other cargo not suitable for containerization. ACL requested and was given permission by the FMC to join several conferences.[10] Most recently, Container Marine Lines, a subsidiary of American Export Isbrandtsen Line, has initiated an all container service between the United States and the United Kingdom. The CML operation is unique in that it is the first major common carrier by water to name rates and take through responsibility to inland destinations. The legality of CML's tariff and its membership in the North Atlantic Westbound Freight Association is now the subject of formal proceedings before the FMC.[11]

Thus, all container carriers are now operating within the framework of the existing conferences which are primarily comprised of break bulk carriers. The reaction to this situation is split. Some feel that the container operator is so stifled by traditional methods that the demise of the present conference system is inevitable and that such conferences will either disappear completely or be replaced by all container

8.These conferences offer service between ports in the U.S. and the U.K., Bordeaux-Hamburg range, West Coast of Central and South America and ports in the Far East.

9.Agreement No. 9498, as amended.

10.These conferences offer service between ports in the U.S. and ports in the U.K. and in the Bordeaux-Hamburg range.

11.*Supra*, note 1.

conferences. Others predict that the conferences can and will adopt new methods of doing business that will allow the container operators to thrive in concert with the break bulk operators. The fate of conferences rests initially with the carriers. While the FMC can accept rate filings and adjudicate alleged violations under the shipping acts, it can not order the establishment of new conferences nor does it at this time condemn the present complexion of the conference membership.

Competing with the steamship lines for container traffic are the NVOCCs. An NVOCC is often a land carrier or a land freight forwarder certificated by the Interstate Commerce Commission (ICC). In Docket No. 815, *supra*, the FMC defined NVOCCs as persons who (1) held themselves out by publication of a tariff or otherwise to provide transportation for hire by water in the domestic offshore or foreign commerce of the United States; (2) assumed the responsibility for the carriage of cargo or had such liability imposed upon them; and (3) utilized underlying water carriers for that portion of the transportation that occurred between ports. Companies meeting the criteria outlined above were required by Section 18(b), of the Shipping Act, (46 U.S. 817) to break out the port-to-port portion of their through rates and file said portion with the Commission. As a practical matter, a NVOCC, as an ICC certificated carrier, files its domestic inland rates with the ICC and its port-to-port rate with the FMC. NVOCCs who operate from port-to-port are not required to possess operating authority from any United States regulatory agency. Ideally, the NVOCC quotes a through rate to a shipper under a through bill of lading, consolidates his shipment with others into a container, and when available pays the FAK or lower container rate to a steamship line. In this manner the NVOCC realizes his profit from the difference between the higher break bulk rate his shipper pays and the lower water rate it pays to the steamship line.

The number of NVOCCs increased during the 1950s and early 1960s because there was a need for a middleman to consolidate cargo into a container and tender it to the ocean carrier. This situation is now changing. Common carriers by water, such as Sea Land, Atlantic Container Line, and Matson, now offer all of this container service. Thus, container carriers are in effect competing with NVOCCs for the cargo which originates inland.

To enter the field of soliciting cargo inland as a common carrier, a certificate or permit of operating authority under part I, II, III, and IV of the Interstate Commerce Act (49 U.S.C. 1 *et seq.*) is required.

Presently, the NVOCCs, who for the most part are already certificated ICC carriers, have a competitive advantage.

Railroads discovering foreign markets are considering holding themselves out as NVOCCs (Southern Pacific Railway has already filed its rates as a NVOCC).[12] The next logical step in the development of intermodal transportation is for the ocean carrier and railroads to enter into joint arrangements whereby cargo would be solicited and consolidated by the railroad; the ocean carrier would transport the cargo and the two would divide the revenues. This arrangement leads us into the next problem, that of the establishment of joint rates among different modes of transportation.

Establishment of Joint Rates

The FMC does not have traditional ratemaking authority over foreign and American flag ocean carriers engaged in our foreign trade. The Shipping Act of 1916 requires carriers to file tariffs showing all rates with the Commission; requires 30 days' notice for rate increases (except in the case of contract rates where 90 days' notice is required); permits rate decreases to become effective upon filing; prohibits unjustly discriminatory rates and practices; authorizes the Commission to disapprove rates which are so unreasonably high or low as to be detrimental to commerce; and requires that all agreements between carriers or other persons subject to the act, which in any manner regulate or restrict competition, be filed with the FMC for approval prior to effectuation.

The Shipping Act, 1916, does not expressly provide for the filing of a single factor rate between a land carrier and a water carrier. Until three years ago this situation did not pose a problem in the foreign commerce of the United States. However, the advent of containerization has prompted some common carriers by water to be desirous of offering through transportation at single factor rates for shipments between United States inland points and foreign inland points, and between United States ports and inland points abroad. The Federal Maritime Commission does not have the express authority to accept joint rates established between a water carrier and a land carrier. Another novel issue, that of accepting a single rate offered by a water carrier who takes responsibility at or to an inland point (Docket No. 68-8, *supra.*), is now under review by the Commission.

In the past, FMC water carriers were satisfied to offer a through service from inland point to inland point pursuant to a combination of

12.So. Pac. Marine Transport Inc., Local Frt. Tariff No. 1, FMC-1.

rates; i.e., the ocean rate plus the land rate, and offered a so-called through bill of lading. This rate actually represented the combination of the land and water carriers' rates on file with the ICC and FMC. The water carrier, as agent for the shipper, arranged for the underlying transportation of the cargo with the inland carrier. Although the water carrier issued a "through bill of lading" it was liable only to the extent that a claim arose on the ocean segment of the movement. In other words, no single carrier accepted through responsibility for the entirety of the door-to-door movement.

Another type of rate offered by some water carriers is a rate which encompasses a pick-up and delivery service within the "port" area. The carrier utilizing this system includes in the rate he files with the FMC the charges for pick-up and delivery of goods away from the docks. Recently, the FMC accepted a rate from a port in the United States to Genoa, Italy, which provides for pick-up and delivery service to Rivalta, Scriva, an inland point some 50 miles distant from the piers of Genoa.[13]

The two instances cited above are examples of the kinds of rates the FMC has permitted under present statutes. The limitation of filing to these arrangements however, is not practical for the future because of the economies and advantages realizable under a true intermodal system of rates.

Against this background of regulatory uncertainty concerning the acceptance of joint single factor rates, the Department of Transportation introduced S.3235 (the Trade Simplification Act of 1968), which authorizes and fosters joint rates for the international transportation of property. S.3235 permits different classes of carriers engaged in the domestic, international, and foreign segments of transportation to enter into agreements to establish joint rates, issue single bills of lading for through movements, and interchange or pool equipment and facilities. The existing authorities of the regulatory agencies (ICC, CAB, and FMC) would remain unchanged. The bill, if enacted, would extend each agency's jurisdiction to joint rates for the movement of goods between points in the United States and points abroad.

The benefits to be realized from the enactment of this type of legislation would flow not only to the carriers but also to the shippers. One such benefit could be joint rates which are lower than now possible under existing combination of rates between the same points. The lower

13. Gulf & So. Atl./Med., Tariff No. 10 (FMC-5).

rates would result largely from the cost savings derived from elimination of unnecessary storage of containers between the time of deposit at the ocean terminal and the time of receipt by the ship; a reduction in paperwork due to facilitated interchange of equipment and use of through bills of lading, and joint use of facilities and personnel.

Under S.3235 the participating carriers would file a tariff setting forth the entire single factor rate with each of the regulatory agencies concerned. Each agency would have discretionary authority to order the carriers they regulate to break out the divisions of revenue. Thus, the shipper would simply be required to consult a single tariff to ascertain the total price of moving his goods from Frankfort, Kentucky, to Frankfurt, Germany.

A unique feature of S.3235 is that it permits the establishment of joint rates between a carrier operating in the commerce of the United States and a carrier ["transporter of property"] operating solely within a foreign country. Although the through rate would be filed with U.S. regulatory agencies, U.S. jurisdiction would not extend directly to the "transporter of property" or its division of the revenue.

At present, the cost of moving goods in U.S. foreign commerce between foreign ports and foreign inland points is quoted by water carriers on an *ad hoc* basis. This results in arrangements between ocean carriers and foreign inland carriers which may advantage one shipper over another because of volume and value of goods, or carrier influence. It is hoped that this practice would be eliminated by the enactment of S.3235 because the carrier would be required to quote a through rate in accordance with the tariff filed with one of the agencies.

Another important feature of S.3235 is that a conference of water carriers might be permitted to establish a joint single factor rate with a conference of inland carriers. If the regulatory bodies approved such an agreement it would be immune from the operation of antitrust laws. Although the power to grant antitrust immunity to a foreign transporter of property of goods from or to points in the United States is questionable, the thrust of the bill would seem to allow this (Section 8 of S.3235).

Section 7 of S.3235 provides for the promulgation of a single set of rules and regulations concerning the form of and the manner of filing and publishing of tariffs setting forth joint rates authorized by the Act. For this purpose the necessity for joint agency hearings is apparent. Although the standards applied by the separate agencies may differ due to different regulatory statutes, the advantages of joint hearings are clear. The matters to be considered would be so inter-related that a single record could be developed to permit appropriate findings. The compilation of a common record would enable the various agencies to expedite and synchronize their decisions so that carriers would be promptly notified of the determinations of all agencies. Were separate hearings conducted, decisions in all probability would be issued over more extended intervals, thus compelling carriers to wait unnecessarily before effectuating their joint rates. Further, joint hearings would enable the agencies to resolve jurisdictional problems.

If S.3235 may be said to be inadequate, it is not in the area of joint rate procedures but rather in the area of uniform liability of participating carriers under a through bill of lading.

THROUGH BILLS OF LADING

Section 9 of S.3235 would permit carriers participating (rail or water) in a joint rate to issue a through bill of lading from place of origin to place of destination. Under present law a through bill of lading assuming responsibility from or to points in the United States for cargo moving in our foreign commerce can be issued only by a carrier operating under ICC authority.

The carrier offering a through bill of lading assuming full responsibility for through transportation of cargo from points in the United States to points abroad would himself have to contend with three different limitations of liability. If damage occurred inland in the United States, absent a released rate order from the ICC, liability could not be limited by a rail carrier or a motor carrier (49 U.S.C. 22, par. 11). If the damage occurred while the goods were in ocean transit, the ocean carrier could limit liability to $500 per package, or customary freight unit, under the provisions of the Carriage of Goods by Sea Act (46 U.S.C. 1300 *et seq.*). If the damage occurred on a railroad in a foreign country, liability in nations governed by the Convention for International Carriage of Goods by Rail (CIM) could be limited to $7.50 per lb. and if it occurred on a truck to an interior point abroad the Convention on International Carriage of Goods by Road (CMR) would allow the trucker to limit liability to $3.70 per lb. In any of these cases, the recovery could not exceed the value of the goods.

Thus, on a door-to-door intermodal movement the shipper is faced with one of three different limitations of liability depending on where the goods were lost or damaged. S.3235 if enacted as presently proposed would not alter these relationships.

While the participating carriers in a joint rate agreement may agree voluntarily to assume greater liability or to prorate the liability notwithstanding the situs of the damage or loss to the goods, they would not be required to do so by S.3235. To offer the shipping public a bill for the facilitation of commerce, absent language that would offer uniformity in the limitation of liability, impairs the anticipated effect of the legislation.

Unlike our domestic limitation laws, however, limitation of liability of ocean carriers in our foreign commerce affects all major maritime nations. Since the limitation of liability for ocean shipments was originally determined by international treaty (Hague Rules) it may be best to resolve the problem by amending that treaty, rather than by unilateral statutory action.

New Transportation System

The international steamship trade today is often plagued by political problems regarding navigation through waterways and canals in territories and countries that are not always friendly or disposed towards the navigation power. Although, the concept of a "land bridge" would have sounded like utter nonsense five years ago, it is a fact supported by clear logic today. The great continents, Asia, Europe, North America, might yet serve as a bridge between two great oceans. The three possibilities that loom as natural land bridges are (1) the United States or Canada, (2) the Eilat-Ashdad land bridge across Israel to the Mediterranean, and last but very significant (3) the Europe/Siberia land bridge using the Trans-Siberian Railway. The natural land carrier, for the obvious reasons of speed and durability of equipment, would be the railroads (use of the Eilat-Ashdad land bridge was limited due to the utilization of trucks).

Commented one British rail official:

> "The opening of Siberia to container movements between Europe and the Far East will enable the British exporter to remain competitive in the Japanese market against his American rivals, who, until now, had the advantage of shipping containerized freight to Japan from the West Coast of the United States."

Despite the obstacles of different gauges of track, extremes in weather conditions, long distances, and political problems, the Trans-Siberian Railroad has been used in a limited way as a land bridge;

Steamship lines, railroads, and entrepreneurs in this country are forging ahead with their own plans to establish a U.S. Land bridge.

(1) The Santa Fe Railroad has established a Super-C train rate of $144,000 per train round trip, coast to coast, minimum of 80 lease carriers per train and 25 trips per year.

(2) The New York, Norfolk, and Western Railroad and the Union Pacific Railroad have established a land bridge system across the United States at $1,320 per carload for one to ten carloads on a coast to coast movement. A normal freight car would haul two to four containers depending on the size (and the rate would scale down to $1,020 per car for 31 or more carloads of containers). The Railroad would furnish the cars and the steamship companies would furnish the containers.

(3) Penn Central Railroad has proposed a plan that would connect it with the Santa Fe Railroad for a land bridge service.

(4) The Northern Pacific Railroad Company, Chicago-Burlington and Quincy Railroad, and the Great Northern Railroad have established a Tokyo office to solicit Freight for a land bridge system.

(5) United Cargo Corporation, a non-vessel owning common carrier by water, has announced its plans to initiate a land bridge system of 100 containers moving east and west every ten days to take advantage of the volume rates offered by the railroads. Its advertisements indicate that it plans to use the Norfolk and Western and Union Pacific Railroads.

Although the Steamship lines have not as yet proposed similar plans, it is understood that certain carriers are interested in these proposals.

CONCLUSION

Intermodal transportation, initiated perhaps when the first truck body or wagon was placed aboard a rail freight car or on board ship, has now become a big business. Different systems and methods of operation have developed over the years into viable and competitive systems. The regulatory statutes and transportation policies applied during the first half of this century, however, are not completely compatible with these new systems. The Trade Simplification Act of 1968 is a significant step toward meeting the needs of the new methods of moving cargo. The regulatory agencies are now faced with many complex questions and must provide answers that encourage the growth of intermodal transportation while not overburdening the industries with intricate rules and requirements. The question of how to achieve these goals without upsetting the delicate balance that exists between competing modes of transportation is critical. With continued cooperation between Government and industry, it is hoped that these goals can be reached without years of unnecessary debate and hearings.