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PREFACE

Barely a decade ago, a revolution commenced in the transportation industry—the revolution—intermodal movement of traffic in domestic and foreign commerce. From the beginning, it has been apparent that existing practices, policies, and regulations are not designed to meet the international, national, or even local implications of the revolution. Thus, new policies are being adopted by old agencies and new agencies are being created to bridge gaps caused by the changing climate. Further, in recent years there have been proposed many new laws on all levels which affect all types of carriers.

For these reasons, it no longer is possible to isolate the regulation of any mode within the aegis of a single agency. Rather, to maintain pace in the transportation industry, knowledge of the activities of the several governing bodies is a prerequisite to responsible operation and enlightened practice.

It was with the revolution—and its implications—in mind that The Transportation Law Journal was conceived and is dedicated. Through The Journal, we hope to bring to the carrier and the lawyer, the judge and the administrator, and the professor and the student a forum wherein the legal aspects of transportation can be considered not as a part but as a whole. It is our belief that such a forum will assist both in education of the interested and in resolution of the problems ahead.

David A. Sutherland
Chairman, Board of Governors

Daniel J. Baum
Editor-in-Chief
NEW DIMENSIONS IN TRANSPORTATION LAW

BY ALAN S. BOYD*
STANFORD G. ROSS**
AND
RICHARD L. TEBERG***

The law is a vital institution through which society achieves its goals. As society changes, as its values change, as its goals change, the law too must change, for the law is a reflection of society.

It is thus appropriate that a Journal devoted to transportation law be started now. For the legislation which created the new Department of Transportation was a reflection of a changing attitude about the role of transportation in our society.1 That legislation marked the beginning of the development of a new body of law reflecting new attitudes, new values and new goals for transportation. And perhaps most importantly for the practicing lawyer, the DOT Act gave new direction to existing areas of transportation law that should lead to major changes in the years ahead.

We can see only the first of these legal developments now. But the ones we see are dramatic. They reflect important underlying changes in society's concepts about transportation. As time goes on we will develop a comprehensive body of transportation law in areas where now there are only separate and distinct bodies of aviation law, motor carrier law, railroad law or other specialized and fragmented collections of differing legal rules applicable to fundamentally similar circumstances. These changes will be brought about by society's new approach toward our transportation system.

In the past we have dealt, by and large, with each form of

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transportation in isolation from all others. We have thought of transportation only in terms of ships, or railroads, or airplanes, or cars, or trucks or roads. Industry has concentrated on each mode as if it provided the only means to fulfill the transportation needs of America. Government has regulated and promoted each mode separately, sometimes giving preference to one, sometimes another.

Reflecting this concentration on individual modes the law has, to a large extent, developed its own set of principles and rules applicable to each mode. The amount a person may recover when injured while traveling may depend on whether he was on a boat, a train, or a plane. And it may even depend on where he was going. The method of financing goods shipped overseas may depend on whether they are sent by sea or air.

As a result of this concentrated attention we have the greatest system of airlines, railroads, pipelines, highways and waterways in the world. But we also have a great deal of discontent with our transportation system as a whole. The problem is not that we have done badly. Rather, it is that we can—and should—do better.

Too often we have built highways to move more and more cars into our cities without considering where to put the cars when they get there. We have built airline, railroad and shipping facilities without fully considering how to transfer passengers or goods conveniently and rapidly from one mode to another. The result has been costly delay, waste, frustration and mounting criticism.

We have too often overlooked the enormous economic and social impact of the system. Highways, railroads, airplanes, trucks, cars all affect the quality of life in America. Transportation not only moves people and cargo, it affects the air we breathe, the sounds we hear and the sights we see. It changes neighborhoods. It dislocates families and businesses.

Good private transportation has helped the affluent move to the suburbs. Inadequate public transportation has handicapped the man in the ghetto in his search for jobs, education, and recreation. This combination has drained our cities of too much of the human and financial resources needed to cope with their immense problems and have left the poor isolated and frustrated.

The nation needs a new way of reaching its transportation decisions; a way to emphasize the advantages of its transportation network and avoid its disadvantages; a way to make transportation conform to the needs of people rather than making people conform to the system.

By bringing together the Federal Government's major promotional
and safety responsibilities into one organization the new Department of Transportation now gives us an opportunity to take a new look at transportation. It gives us an opportunity to think of all modes of transportation in terms of what they really are—the interrelated parts of a single system, vast and complex as it may be. It gives us an opportunity to think of transportation not only as a carrier of passengers and goods but also as an integral part of society and our environment, capable of enhancing our lives or making them all but intolerable. It allows us to take a more balanced approach to our transportation decisions, to balance the need for both public and private transportation, to balance economic interests with social values. And it gives us a chance to recognize that a transportation decision is not simply a technical decision. It is also an economic decision, a social decision, and a political decision vitally affecting our lives, our cities and our countryside.

A major mission of the Department of Transportation then is to serve as a catalyst to cause others to look at transportation as a single system, with all elements working together to serve the total needs of our society.

We have been heartened by the developments since the establishment of the Department on April 1, 1967. We find, for example, an increasing awareness among American businessmen that transportation is a total system. The states of Florida and North Carolina have established new Departments of Transportation within the past year to provide a new institutional framework within which to evaluate their transportation policies.

With financial assistance from the Department the cities of Baltimore and Chicago are experimenting with a new institutional framework within which to evaluate the total impact of proposed sections of Interstate highway. A “Design Concept Team” representing all the disciplines involved in urban planning and design, and in transportation has been established in each of these cities to help use the urban Interstate Highway Program as a means for integrating broadly conceived development programs along the highway corridors. Architects, international, national, or even local implications of the revolution. Thus “sponsor group” composed of city, state, and Federal officials and local citizen organizations. In this way technicians planning and designing a highway are guided by the people of the city. With early planning consideration of the highway’s social, economic, historic and functional impact, the highway can be used to make a significant contribution to the city’s development goals.
The Federal Government has also taken additional steps to provide a better institutional framework for it to help deal with the transportation problems in our cities by transferring a substantial part of its urban mass transportation programs from the Department of Housing and Urban Development to the Department of Transportation. Acting through a new Urban Mass Transportation Administration the Department of Transportation can now provide national leadership in urban transportation research and assistance. It will work with the Department of Housing and Urban Development to assure that urban transportation develops as an integral part of the overall development of our growing urban areas. With approximately three out of every four Americans now living in our cities it is vital that all steps possible be taken to properly focus on the transportation problems of our cities and fully recognize transportation's social and environmental impact on their residents.

Lawyers too are beginning to take a new look at transportation and its social impact, as this new Transportation Law Journal demonstrates. A review of the topics covered in this first issue shows that lawyers are becoming increasingly interested and concerned with the legal and social problems of creating an integrated transportation system.

These are significant steps forward. Our answers in transportation, as in other fields, can be no better than the questions we ask. And the questions we ask are likely to be the result of the way in which we look at problems and how we think about them. If we think, for example, of how to build a better highway we can build a better highway. But if we think about how to integrate a better highway into a transportation system that improves the economic, social and esthetic aspects of a city, we can do that too.

A new approach to transportation, however, will create many novel and challenging problems for the transportation lawyer. It will require the development of new ideas, and new approaches to accomplish new goals for our transportation system. And it will raise many new legal-policy issues for which there is now little or no precedent.

We already know a great deal about the engineering, economic and efficiency aspects of transportation. But, we know every little about the social effects of transportation. The human implications of dislocation, noise, air pollution and destruction of the landscape and recreational areas resulting from transportation decisions are largely unexplored.

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The social effects of transportation have not played an important part in our transportation decisions in the past. Now they must if we are to create a satisfactory system.

As we learn more about the human implications of transportation we will need to balance the importance of competing goals. We have come to recognize, for example, that an attractive landscape and spacious parks are important values and under the DOT Act must be taken into consideration by the Department in reaching transportation decisions. But we have as yet few criteria for determining just how important these values are when measured against other competing values, such as economy, safety, preserving homes and businesses. It is difficult—indeed perhaps impossible—to measure the importance of natural beauty and recreational areas in terms of dollars and cents. Even if a monetary value were placed on these factors criteria must also be established for weighing their value against other considerations such as safety and efficiency. Can a potentially dangerous curve in a highway be justified on the grounds that without it a lovely park or popular recreational area would be destroyed? The answer to that question, as with others, depends on the relative values assigned to competing community goals. It depends on weighing the degree of potential danger presented by the necessary curve against the importance to the community of preserving the park and the costs of avoiding both. Determining these goals and community values will involve lawyers more and more in the details of the transportation decision-making process than has been true in the past.

The hallmark of the law is the application of abstract concepts to particular circumstances, and there is no concept more abstract than that of “community goals.” The relative community values must be articulated, weighed one against the other, and applied to real circumstances. Lawyers are accustomed to and specially trained for this process. The law has traditionally dealt with the problems of resolving in concrete cases issues that as matters of intellectual concept seem irreconcilable. While philosophers can argue in generalities, lawyers must apply facts and values to specific cases so that decisions can be made. The reasons for preserving a particular park, for example, must be competently presented if the community is to assign appropriate weight to this goal. The argument for economy, efficiency and safety in the particular case must also be articulately presented. Then, a decision can be reached. For in a democracy; the final choice from among competing values—like the trial of a case—results from an adversary

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3. See section 4(f) of the DOT Act (49 U.S.C. 1653(f)).
process where all views are well presented and carefully weighed one against the other.

Too often we find in the field of transportation that we have taken too narrow and limited a view of the factors that are important—indeed even critical—to developing a satisfactory transportation system. Our thoughts have been too concentrated on developing individual modes and too much on narrow and short range economic interests. We find, for example, in cases before the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Maritime Commission that there are often no well-spoken advocates of the general public's interest. Many regulatory cases are incomplete in their presentation. Most witnesses promote special interests. The broad public interest in better service, lower rates, noise abatement, and clean air too often goes unrepresented. The result is that the agencies frequently do not have sufficient facts to make proper judgments and cases are decided by default. It is not surprising then to find there are those who criticize our transportation regulations on the ground they are designed too often to protect competitors from each other rather than to protect the interest of the user of transportation and those who are affected by it.

As the Federal Department charged with developing and carrying out a national transportation policy, we are acting as a spokesman for the public interest. We will seek to amend the regulatory statutes where we feel it is necessary. And we will intervene, within the limits of our manpower, in important regulatory proceedings before the ICC, the CAB and the FMC which present significant transportation policy issues.

For example, in the Bermuda Service Investigation we asked the CAB to consider airport and airspace congestion in making its route awards.4 We have recently adopted a rule to limit flights at Chicago, New York and Washington (33 FR 17896). We are also participating in the multi-carrier discussions authorized by the CAB on how to meet those limitations.5 And, we are continually reviewing our total regulatory approach to the problems presented for the air traffic control system by congestion.

The relief of air congestion is a major national problem affecting many different interests. To name just a few: For the passenger, the airlines, and the airport operator it means delay, increased costs,

5.CAB Order Nos. 68-7-138; 68-8-30; 68-10-45-33 FR 11035; 11475; 15354 (1968).
poorer service, and greater flying hazards. For the residents of the surrounding area it means more noise, more air pollution and other inconveniences. For the city it means poorer, less convenient transportation service which could hinder its economic growth and development. Reaching viable transportation decisions to meet the crisis in our airways will require that all affected parties be adequately and vigorously represented.

We have also intervened in a number of other regulatory cases which involve major national transportation policy issues. For example, in Ex Parte MC-65 the Department urged the Interstate Commerce Commission to provide a simplified procedure for motor carriers wishing to use the Interstate highway system. It is our view that a national investment of upwards of $50 billion in this system justifies the development of procedures to permit its maximum utilization.

In response to petitions filed by air taxi associations seeking additional economic regulations by the CAB, we argued against such regulation on the ground that the carriers and the public have benefitted from a policy of relatively free entry and exit and open competition.  

In the Rent-A-Train case, before the ICC, we supported an innovative form of tariff filed by the Illinois Central Railroad which, by encouraging more efficient utilization of the rail system, promises to produce significant cost saving both to the carrier and the grain shipper.

In the Washington-Baltimore Helicopter case, we urged the CAB to consider both the needs for rapid transit in the area and the environmental impact—for example, noise—of the proposed helicopter service as elements in its determination of public convenience and necessity.

These cases illustrate our belief that social values can, and should, be important elements considered by the regulatory agencies in reaching their decisions. These values are as much as part of the "public interest" as are the economic factors usually at issue. The cases also illustrate our belief in promoting innovation and efficiency in utilizing our transportation system. Further, they show that we believe that competition can play a greater role in transportation regulation than it has in the past.

6. 107 M.C.C. 95 (1968).
The Department should not be alone in these cases. Private attorneys too should find that this expanded view of the public interest in our Nation's transportation system has application in their own arguments and briefs before the regulatory agencies.

The lawyer's role in society, however, is not limited to the presentation of cases. He also has a vital interest in assisting in legal reform. He is in an excellent position to spot deficiencies in our legal structure and to assist in its revision.

There are many areas in our legal and regulatory structure affecting transportation which require reexamination. For example, the roles of regulation and competition in transportation must be examined in the light of developing a new integrated transportation system.

Our private-government partnership in transportation makes some regulation of transportation essential. Private cars and trucks run on publicly financed highways. Private boats run on publicly maintained waterways. Private airplanes use public airways and airports. By its decisions the government can significantly help or hinder the competitive position of a particular mode of transportation. Monopolistic profits can be made by some and the competitive position of others eroded if the government's transportation decisions are not properly balanced or if it does not take steps to regulate transportation during periods of temporary imbalance.

On the other hand, our transportation system is too vast and too complex to develop regulations for every facet of its operation. The market place, however, is an automatic regulator. It rewards efficiency and punishes inefficiency; in a manner which can never be accomplished by government regulation. The market place demonstrates vividly the relative dollar values consumers place on such abstract concepts as speed, reliability, comfort and convenience, matters about which a government regulator can only guess.

In the years ahead, lawyers and others must consider the roles which greater competition could play in developing an integrated transportation system. What regulations can be eliminated? What regulations should be revised? We will need to reexamine our entire transportation regulatory structure to determine if we can promote competition instead of impeding it. It has been suggested, for example, that a system of maximum rate regulation might provide our nation with a better overall transportation system than minimum rate
regulation. What are the legal implications of such a change? How would it affect individual companies?

We will have to reexamine the institutional framework in which our regulatory decisions are made. For example, former ICC Chairman Tucker has suggested that the regulatory functions of the ICC, CAB and FMC might be combined into a single regulatory body. What would be the advantages and disadvantages to the carriers, to the shipper, to society? Are there other institutional rearrangements that can, or should, be made to improve our nation's transportation system? The arguments for and against change must be well presented and openly debated. Otherwise, important interests may be overlooked and decisions made by default. Private lawyers representing carriers, shippers, consumers, and others can play a vital role by articulating the pros and cons of proposals for change from many different points of view.

We must also examine the structure of regulation of the various modes to determine their similarities and dissimilarities. We must examine the dissimilarities and seeming inconsistencies to determine whether they are justified in the light of changing conditions. We must determine whether they result from real differences between the modes or whether they are only the result of past considerations arising from concentrated thought on a particular mode.

We need to examine every facet of our law affecting transportation and ask where the law itself may be impeding the development of intermodal transportation. The restrictions on common ownership of different types of carriers, for example, raise some important questions. The "Air-Truck-Railroad-Ship-Bus Company" could eagerly seek out ways to encourage maximum intermodal use of its own facilities. To be sure such a combination of transportation facilities under one corporate roof might create problems. But again we must not be afraid to reexamine the potential problems in a new light—the desirability of creating a truly integrated transportation system.

We must also look at transportation law as it affects the consumers of transportation, the shipper and the passenger. Past dissimilarities in the treatment of consumers generally appear to have arisen out of

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10. For a discussion of minimum and maximum rate regulation see Boies, *Experiment in Mercantilism: Minimum Rate Regulation by the Interstate Commerce Commission*, 68 Colum. L. Rev. 599 (1968).

concentrated attention on a particular mode rather than from fundamental differences in the mode or society's goals.

Take, for example, our national expenditure on safety. In the abstract, it would seem that society would be equally concerned about preventing death or injury regardless of the mode of transportation. That has not been the result of our political process. The United States Government today makes a direct investment of approximately $1 billion in safety programs for air travelers. Approximately 1,500 Americans die each year in aviation accidents. The Federal Government, however, spent only about $30 million last fiscal year on automobile safety programs, although over 50,000 Americans die each year in automobile accidents, and another 160,000 are left permanently crippled.

Obviously, the process by which safety decisions are made requires improvement. The Department of Transportation represents one step in the improvement of the process. For the first time, it provides a matrix for rational decisions about what mix of safety resources will most benefit society. We now have the resources for developing better techniques for relating programs to their consequences and for providing more balanced government involvement.

Traditionally, all fatal air and marine accidents have been fully investigated. This has not been true for automobile, motor carrier and rail accidents. We are putting increasing effort into the heretofore neglected modes. The Department's National Transportation Safety Board is already beginning to fill in gaps in the investigation of accidents and the determination of causes.

The Department now administers comprehensive statutes covering aviation, motor vehicle, highway and commercial marine safety. We have proposed legislation to improve our Nation's transportation safety programs to better protect the public from death and injury by railroads, recreational boats, and natural gas pipelines.

Reported train accidents increased 75% from 1961 to 1967. Approximately 95% of these accidents, however, resulted from factors not now subject to control by the Department's Federal Railroad Administration which is responsible for promoting railroad safety. To help assure the safety of both railroad employees and the public the Department has proposed the Federal Railroad Safety Act of 196812 to give it broad and flexible authority to establish safety standards for railroad equipment.

trackage, facilities and operations and to assist state railroad safety programs.

In 1966, 1,318 deaths occurred in recreational boating accidents, almost as many as occur in aviation accidents. Yet there has been no Federal assistance or incentive for the development of a meaningful recreational boat safety program. To provide a coordinated national safety program to reduce deaths and injuries from this activity we have proposed the Recreational Boat Safety Act of 1968.\textsuperscript{13} Under this proposal approximately $5,000,000 would be authorized to help states establish and improve existing state programs. The Department would also be authorized to establish safety standards for the design, construction and performance of recreational boats and associated equipment.

While relatively few people have been killed or injured by gas pipeline accidents, the over 800,000 mile network of gas pipelines in the United States is a source of potential danger. To prevent future accidents the Department proposed, and Congress adopted, the Natural Gas Pipeline Safety Act of 1968.\textsuperscript{14} Under this legislation the Department, working in cooperation with the states and the industry will be able to establish and enforce meaningful pipeline safety regulations.

We are also working toward developing a more uniform and more complete system for regulating the handling of hazardous materials in transit to better assure the safety of those who handle, or may be affected by, these materials.

In other areas we are attempting to eliminate legal and practical restrictions which affect the consumers choice of transportation. One example of this activity is our proposed bill which would authorize the publishing of joint intermodal rates for door-to-door international transportation and would enable international shipments to travel under a single bill of lading: The Trade Simplification Act of 1968.\textsuperscript{15}

The new technology of transportation—containers and more efficient carriers of all modes—has given us the opportunity to move cargo with greatly increased speed and economy. It is now technologically feasible to load a container at a manufacturing plant in Kansas City, Missouri, move the container by truck or rail to a seaport or airport, ship the container overseas, and then move it to a destination inland in Europe, without once breaking the seal. Eliminating the handling of the

\textsuperscript{13}H.R. 15223 and S. 3015, 90th Cong. 2d Sess. (1968).
\textsuperscript{14}Pub. L. 90-481, 82 Stat. 720.
\textsuperscript{15}H.R. 16023 and S. 3235, 90th Cong. 2d Sess. (1968).
contents of the container can reduce transit time for shippers and can reduce handling charges, pilferage, insurance costs and the cost of export packing.

Unfortunately, a structure of laws and regulations governing movements of international transportation, whose foundation is over a hundred years old, substantially impedes full utilization of this new technology. A prospective international shipper will find that he must obtain a separate rate and separate documentation for each mode of transportation handling his cargo. Tariffs for surface transportation are constructed on the basis of weight, while the maritime tariff is based on the size of the cargo. Moreover, there are nine different systems of commodity classification; 711 CAB tariffs, 100,000 ICC tariffs and 2,700 FMC tariffs in addition to a multitude of foreign rates and charges that must be determined to develop the total transportation cost. As a result transportation costs are difficult and expensive to compute.

Handling complex and voluminous bills of lading adds further to the cost of exporting and importing. It has been estimated that in 1967 the value of our total export-import trade was $58 billion dollars and that the paperwork and administrative costs associated with this traffic was $5 billion. The National Committee on International Trade Documentation has estimated that the documentation cost alone of a typical export shipment totals $163, whereas approximately twenty-five percent of shipments exported from this country are valued at less than $100.

In addition to these impediments, there are numerous domestic and foreign laws and international conventions relating to a carrier's liability for the carriage of goods. These different rules of liability retard the chances for single bills of lading and produce uncertain and variable relief for a shipper should his merchandise be lost, damaged or delayed.

The result of these laws and regulations is that too many American manufacturers, large and small, stay out of import and export trade simply because the complexities and cost of paperwork associated with international trade are too great.

The Trade Simplification bill is designed to reduce some of the impediments of foreign trade.

First, it would put to rest any reservations the regulatory agencies may have about their power to accept intermodal tariffs for filing. This should remove any obstacles to publication of through, single-factor
tariffs. Further, it should encourage the development of uniform commodity descriptions in tariffs.

Second, it would permit all carriers participating in a through movement to issue a single through bill of lading for the entire trip. In addition to reducing much paperwork this through bill of lading should satisfy the desire for paper whose negotiability is recognized by the banking community here and abroad. It should allow financing the shipment at the beginning of a shipment's inland movement rather than waiting for the issuance of the ocean carrier's bill of lading.

Third, the bill would provide the impetus for the initiating carriers to assume full responsibility for loss or damage and to reflect the costs in the joint rates.

Finally, to promote the maximum utilization of containers and related equipment the bill would permit carriers to interchange equipment. This is a prerequisite to an efficient intermodal transportation system.

The fundamental approach of the bill is voluntary and permissive. Carriers and shippers would be permitted to establish and use joint rates and to use simplified through bills of lading. They would not be required to do so. Care has been taken to avoid creating any new regulations under the bill. Each of the regulatory agencies would continue to perform its functions as before, only under the bill there would be more flexibility for the agencies and the various modes to work in cooperation.

The adoption of the Trade Simplification bill, however, would not eliminate the paperwork jungle now surrounding international trade. Many other changes in the law will be necessary to help eliminate this constraint on the free flow of international trade. It has been estimated that there are a minimum of 28 forms required for export shipments and 35 forms required for import shipments, with from 4 to 36 copies of each form being prepared. Since most, if not all, of these forms are the result of efforts to meet some legal requirement or avoid some legal problem, lawyers are in a position to help eliminate as much of the paperwork as possible by bringing to light new ways of achieving the purpose of this mountain of paperwork, making one document do the work of many, and eliminating requirements which serve no real objective.

No attempt was made in the Trade Simplification bill to unravel the numerous domestic and foreign laws and international conventions relating to a carrier's liability. A shipper's substantive rights vary so greatly under these laws that any attempt to have done so in the time
that was available might have only created more uncertainty. There is, however, a need to develop a simple and uniform system of liability applicable to all modes of transportation. The transportation consumer does not care where injury occurs; he is concerned only with prompt and fair recovery for his loss.

More and more the variations in liability among transportation modes is being called into question. Indeed, the entire fault liability system itself is being questioned. It seems obvious to some, for example, that when cargo is shipped in sealed containers by various transportation modes over land, sea or air, it will be difficult if not impossible to determine where the damage to cargo occurs. To attempt to determine the condition of the cargo at various stages of the shipment would militate against realizing the full value of being able to ship in sealed containers. Fault then might play no part in determining who must compensate the shipper.

In the field of international aviation the United States has requested all international air carriers to waive the limited liability limits of the Warsaw Convention ($8,300) and the Hague Protocol ($16,600) for damage to property and personal injury arising out of international air travel. Under the 1966 agreement secured by the United States, sometimes referred to as the “Montreal Agreement” the carriers have assumed absolute liability for damage of up to $75,000, including attorneys’ fees, for personal injury or death arising out of airplane accidents in international travel. Some have suggested that this principle of absolute liability should also be extended to domestic airline travel.

The Department of Transportation itself has sponsored a bill to provide for unlimited liability for damages suffered as a result of death or personal injury aboard a vessel. At present a plaintiff’s right to recovery is limited by statute (46 U.S.C. 183) to $60 per ton of the vessel’s tonnage unless the plaintiff can prove the owner had “privity or knowledge” of the matter leading to the loss. In the latter event the plaintiff can recover provable damages.

The automobile liability system is also under attack. Determining

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17. The United States has not become a party to the Hague Protocol.
liability is often blamed for crowding our court dockets and holding up the administration of justice. In automobile accidents alone, some have to wait as long as five or six years before the completion of trial and the receipt of compensation for their losses. Moreover, because negligence is a sine qua non to recovery many accident victims are not compensated at all, because neither, or both, plaintiff and defendant are at fault. Furthermore, it is said by some critics that the results of the adversary system may sometimes depend as much on one's ability to pay the costs of litigation as on the justness of the claim.20

In practice several studies have shown that victims suffering small losses usually receive more than their economic loss while the seriously injured often receive much less than their out-of-pocket expenses since they cannot await the outcome of time consuming litigation.21 The principal beneficiaries of the system, some urge, are the lawyers who receive an estimated $1.3 billion from automobile accident litigation.

Most critics of the automobile liability system suggest eliminating fault as the criteria for recovery of losses. The Basic Protection Plan proposed by Professors Keeton and O'Connell,22 for example, would replace the existing fault system in traffic accidents with a system to compensate all persons injured regardless of who was at fault where economic loss is less than $10,000. A person would go to court to recover economic losses in excess of $10,000 and losses from pain and suffering in excess of $5,000, the first $5,000 of such loss being unrecoverable.

The Basic Protection Plan would rely on a system of private insurance to cover losses.

Former Assistant Labor Secretary Daniel P. Moynihan has suggested that the auto insurance system be replaced by a wholly Federal program financed out of highway-user taxes.23 His proposal, patterned after the workman’s compensation system, would also make awards on the basis of loss rather than fault.

Puerto Rico has recently adopted a no-fault system—sometimes called the Aponte-Denenberg Plan—for economic losses of less than $2,500, which is administered by the government.\textsuperscript{24}

During the next two years the Department of Transportation will be studying the automobile compensation problem. We will be approaching the problem on a multi-disciplinary basis; however, since lawyers administer the liability system, they as much as any group should be a source of innovation and practical creativity in developing a system responsive to the changing needs of society.

The foregoing are only a few of the areas where lawyers can make a significant contribution in the development of a national transportation system responsive to all the needs of society. There are, of course, many others. Lawyers can encourage their clients to engage in the kind of long-range planning that will help them adapt to changing conditions. Lawyers can help their clients function as responsible and progressive members of the transportation community by urging them to do more than the law requires in areas such as safety and air pollution. Practitioners can encourage the agencies before which they practice to make their procedures more efficient. As citizens, lawyers can and should participate in the important civic work being done in their communities and in their states. Lawyers can encourage their bar associations to give full support to these efforts.

The task ahead for the transportation lawyer is enormous. By 1975, our population will climb from 200 million to 275 million. The Gross National Product will increase 50\% and will pass the trillion-dollar mark. By then we will be driving 100 million cars, trucks and buses, and auto traffic will be up 40\% over what it is today. By then, commercial air traffic will have tripled with nearly one-million people boarding an airliner in this country every day.

These advances will place great strain on our society and on our ability to cope with problems. New ideas, new approaches, perhaps even new institutions, will be required to deal with the problems. We have too long overlooked the inefficiencies of our past approaches to transportation problems. For too long we have ignored the immense social impact of our transportation decisions. In short, we have to adopt a new way of thinking about transportation if we are to be

capable of accommodating the vast growth in transportation needs that lies ahead.

Thinking of transportation as a total system with enormous social impact will present many new issues. Social values not easily expressed in monetary terms must be made a part of transportation decisions which in the past have generally been based on economic considerations alone. Legal rules and regulations that restrict the development of an efficient integrated transportation system must be analyzed and reevaluated in light of changing technology and a changing society. Inconsistency in the regulatory treatment of different modes of transportation and inconsistency in the treatment of consumers of transportation must be revisited to determine their necessity and desirability. The task of developing a simple and uniform method of compensating for losses resulting from transportation must be undertaken.

There is need to develop—and we will develop—a true transportation law, a law whose principles are applicable to all the modes of transportation. To serve their clients well, lawyers in the future will have to do much more than specialize in maritime law, air law, railroad law, or motor carrier law. They will have to become generalists in the field of transportation law, familiar with the problems of creating a single transportation system and its effects on society.

The immense task that lies ahead in developing a transportation law has already been started in the Department's General Counsel's Office. Working with the Department's attorneys who specialize in the law applicable to their particular modal administrations, the General Counsel's Office has been taking a new look at transportation law to determine ways to promote uniformity and consistency in the legal treatment of the various modes and the treatment of the consumers of transportation.25

To participate fully in the legal reform that will occur in the years ahead the private lawyer too must take a new look at our transportation law. As a member of the society in which he lives, he should step back from his daily practice and think about the laws he helps to administer and enforce. In surveying the laws he should question them and criticize them. He should originate ideas for improving them and oppose revision of those he believes desirable. By

25 The modal administrations are: The Federal Aviation Administration; the Federal Highway Administration; the Federal Railroad Administration; the Coast Guard; the St. Lawrence Seaway Development Corporation and the Urban Mass Transportation Administration.
what he says and writes the lawyer can help guide society in achieving its aims most efficiently and most effectively. For, after all, the law is not an immutable set of principles, but rather is a means of ordering society to accomplish society's goals. The law is not judged by its internal logic. Rather it is judged by its accomplishment of society's goals.

The development of transportation law will be an exciting and rewarding experience. It will give the transportation lawyer an opportunity to help create not only a better transportation system, but also a better society and a stronger nation. Few, if any, other fields of law will provide more challenges, more opportunities, or more satisfactions than those that lie ahead in transportation law.
THE EVOLUTION OF REGULATORY POLICIES
FOR TRANSPORT COORDINATION

by Paul J. Tierney*

The full development of new techniques, services and operations such as "piggyback" and containerization in the last decade, along with a more complete understanding of the critical role performed by transportation in the larger process of physical distribution, has stimulated an increasing awareness of the potential promise of a coordinated transportation system. Despite its popularity, coordination as a term has no well-established definition in transportation usage. For purposes of this article, transport coordination means the assignment of each element of the total transportation service to the carrier or agency which can perform most economically and efficiently. This growing awareness has also drawn attention to the impediments that frustrate the nation's ability to make the optimum use of each mode and to maximize the efficient use of the resources of the total transportation system. Alluding to these problems, President Johnson, in his message calling for the creation of the Department of Transportation, observed that:

As a result, America today lacks a coordinated transportation system that permits travelers and goods to move conveniently and efficiently from one means of transportation to another, using the best characteristics of each.

Among the impediments to a coordinated national transportation system indicated in the President's message were the historical random growth of each mode; unbalanced and often inconsistent governmental promotional activities; and economic, technological, institutional and

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1. The literature in this field is extensive. For a useful collection of articles, see Hale C. Bartlett, Readings in Physical Distribution (Danville: Interstate Printers, 1966).


3. Merrill J. Roberts et al., Intermodal Freight Transportation Coordination: Problems and Potential (Graduate School of Business, University of Pittsburgh 1967), p. 3.

political "barriers to adaptation and change." The mere listing of these sources of difficulty is suggestive of the broad and complex nature of the subject matter of coordination.

The scope of this article is limited to an examination of the development of certain aspects of Federal regulatory policy toward coordinated transportation between independent carriers or transport agencies and the extent to which existing policy, as expressed in either statutory form or agency decisions, requires revision or restatement in order to be fully responsive to present and anticipated economic, technological and institutional changes. While, for the most part, the principal emphasis in the discussion is within the context of the statutes administered by the Interstate Commerce Commission and their effect on domestic surface carriers subject to its jurisdiction, the concluding section looks briefly into the issues involved in coordinating the services and facilities of ICC-regulated carriers with those subject to the jurisdiction of the Federal Maritime Commission and the Civil Aeronautics Board. 6

Although the subject of coordination and its attendant problems are now attracting and receiving more concentrated attention, efforts to bring about some degree of concerted cooperative action among the carriers closely parallel the evolution of the transportation industry itself. Since present Federal regulatory policy itself is also the end product of this process, a brief summary 7 of the development of the present regulatory policy is useful to place the need for change in an appropriate setting.

As the industry has developed into its present configuration, efforts by the carriers and others to coordinate transportation services and facilities have proceeded along two distinct and essentially separate paths. The first, usually accomplished by outright merger or some other device of common control, involves the integration of the facilities, operations, or services under common management. The second involves accomplishing these same objectives through

7. A more detailed exposition of the applicable law, both as to Commission-regulated carriers and those regulated by other agencies, see Samuel P. Delisi, Legal and Regulatory Aspects of Coordinated Transportation Service (University of Pittsburgh 1966). This analysis was performed in conjunction with the "Roberts" study cited in footnote 3. An abbrevviated version of this monograph also appeared in Delisi, "Coordinated Freight Transportation Service: Legal and Regulatory Aspects," 34 I.C.C. Pract. J. 379 (1967)—Part I, and 34 I.C.C. Pract. J. 536 (1967)—Part II.
cooperative agreements among independent carriers. Integrated coordination—intramodal consolidations and the related controversial area of “common ownership” of one mode by another—is not considered in this discussion because it differs significantly from cooperative coordination with respect to legal, economic, and political policy considerations. For present purposes, it is sufficient to point out that, historically, public policy, in response to the desire for “enforced competition” to curb monopolistic abuses together with a strong reluctance to permit the concentration of economic power in transportation, has treated these two approaches to coordination in a sharply different fashion. In contrast to a liberal and permissive regulatory attitude toward coordination between individual independent carriers, integrated coordination is relatively difficult to accomplish, particularly with respect to intermodal ownership, which is hedged with many restrictions.

I. Development of Regulatory Policy

Prior to the inception of regulation by the Commission in 1887, Congress took the first steps toward the development of a national policy toward coordination with the enactment of a series of laws between 1862 and 1874 designed to secure the physical and economic connections of the then-developing railroads into a common system. The main purpose of some of these statutes was to facilitate the making of private agreements among the carriers. But other acts, such

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9. For example, the Act of June 15, 1866, 14 Stat. 66, 45 U.S.C. § 84 (1964), authorized every railroad to carry freight and passengers over its own lines from any state to another state and to connect with other railroads “so as to form continuous lines for the transportation of the same to the place of destination.” The purpose of this Act was to remove impediments to interstate commerce imposed by the states and prior Acts of Congress and to prevent such impediments from being created in the future rather than
as the Pacific Railroad Acts,\textsuperscript{10} imposed a specific prohibition against discriminatory, preferential, or prejudicial practices by the railroads against connecting carriers.\textsuperscript{11}

The policy expressed in these acts was made generally applicable to all railroads by the original Act to Regulate Commerce,\textsuperscript{12} most specifically in what is now section 3(4) of the Interstate Commerce Act, dealing with discrimination in rates, practices and facilities between connecting carriers.\textsuperscript{13} Very early in its history, the Commission noted that the Act was deficient in that it made no provision for requiring the establishment of through routes and joint rates or for the Commission to compel the establishment of such joint arrangements.\textsuperscript{14} Subsequent amendments to the Act strengthening and expanding the jurisdiction of the Commission remedied these defects through the enactment of what are now sections 1(4) and 15(3) of the Act.\textsuperscript{15} The general policy expressed in these three sections was summarized by the Commission in an early case as follows:\textsuperscript{16}

Our railroads are called upon [by these sections] to so unite themselves that they will constitute one national system; they

\textsuperscript{11} Section 15 of the 1864 Act specifically prohibited the Union Pacific and other railroads subject to its provisions from engaging in "discrimination of any kind in favor of the road or business of any or either of said companies or adverse to the road or business of any or either of the others. Although the enactment of the Interstate Commerce Act to a large extent superseded these Acts, the District Court's decision in the so-called Ogden Gateway case indicates their continued viability. Southern Pacific Co. and Union Pacific Co. v. United States, 277 F. Supp. 671 (D. Neb.) (1967), affirming Control of Central Pacific by the Southern Pacific, 328 I.C.C. 345 (1966).
\textsuperscript{12} Act of February 4, 1887, 24 Stat. 379 (1887).
\textsuperscript{13} 13, 24 Stat. 380 (1887), as amended, 49 U.S.C. § 3(4). In an early case, the Commission summarized the purpose of this section.
\textsuperscript{14} As a result of such discrimination [between connecting carriers], a shipper may be compelled to use a line that for good reasons may be less desirable and less beneficial to him than another competing line; and, as a result, a substantial monopoly of business may be established over one connecting line and serious loss inflicted on another. Either of these involves a public injury.
\textsuperscript{16} Missouri & Illinois Coal Co. v. I.C.R. Co., 22 I.C.C. 39, 47 (1911).
must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other.

With the later enactment of section 20(11)\(^7\) and the Esch Car Service Act,\(^8\) the framework of regulatory legislation as to coordinated transportation service among railroads\(^9\) was substantially completed by 1920.\(^\text{10}\) Subsequently, a number of minor perfecting amendments and one major addition, section 5a of the Act,\(^\text{11}\) were added.

With the development of the motor carrier and freight forwarding industries and the re-establishment of the inland water carrier industry, the regulation of these non-rail agencies was largely considered in the context of existing railroad regulation. Although a report of the Commission on the need for Federal regulation of motor carriers\(^\text{12}\) and the two reports of the Federal Coordinator of Transportation on motor

\(^{17}\)34 Stat. 593 (1906), as amended, 49 U.S.C. § 20(11) (1964). Although essentially codifying the common law as to common carrier liability for loss and damage, this section, as subsequently amended, altered the common law that a carrier was not liable beyond its own lines, thus permitting a shipper to file claims against the originating or terminating carriers participating in the through coordinated movement. On the basis of this section and section 1(6), the Commission also prescribed the form and content for single-line and through bills of lading. Cf. In re Bills of Lading, 52 I.C.C. 671 (1919).

\(^{18}\)40 Stat. 101 (1917), as amended, 49 U.S.C. § 1(10)-1(17), as amended, P. L. 89-430 (1966). As pertinent to the scope of this article, one purpose of this Act was to augment the Commission's authority to remove delays and other impediments that tended to frustrate the effective interchange of traffic between connecting carriers and thus impaired the viability of established through routes. See 30th Annual Report of the Interstate Commerce Commission (1916), pp. 68-74.

\(^{19}\)These provisions, with certain exceptions, also covered oil pipeline carriers, express companies, and water carriers. Intramodal coordination involving these modes has not as yet involved any significant policy issues.

\(^{20}\)The Transportation Act of 1920, 41 Stat. 474 (1920) made few changes in the substantive law dealing with coordination as discussed herein, although the Commission was given positive authority to set divisions. The added general philosophy of this Act to promote and protect the development of the carriers added a new dimension, however, to the Commission's handling of issues involving coordination. See Phillip H. Locklin, Economics of Transportation, 5th Ed. Homewood, Richard D. Irwin Inc. (1960), pp. 225-38, for a summary of the 1920 Act.


\(^{22}\)Coordination of Motor Transportation, 182 I.C.C. 263 (1932).
carrier\(^2\) and water carrier\(^2\) transportation alluded to the desirability and the need for regulation of coordinated transportation of these modes, these recommendations were largely directed toward *intermodal* coordination rather than coordination between carriers of the same mode.\(^3\)

Much of the impetus for regulation of intermodal coordination grew out of the economic characteristics of railroads and the effect of their operating practices on competing carriers. The state of the present law thus largely reflects a historical process of reaction against discrimination and other abuses by the then-dominant railroads against competing modes.

The development of legislative policy in this area began with a limited initial grant of jurisdiction to the Commission over joint railwater traffic in the Act to Regulate Commerce.\(^4\) As subsequently expanded by successive amendments to the Act, the Commission presently has much the same authority over coordinated rail-water service as over all-rail service,\(^5\) with several important differences, most of which reflect a strong Congressional policy to equalize the ability of the water carriers to compete with the railroads.\(^6\) As previously noted, the existing law simply left the establishment of joint arrangements for coordinated rail-motor or water-motor service to the carriers involved.

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\(^4\)Possibly because of the then-small size and limited range of motor carrier operations, all of the above-cited reports appeared to visualize the motor carrier (except motor buses) as a coordinative adjunct to existing rail service, the role of coordinated intramodal motor carrier service being treated very briefly. For the subsequent developments, see pp. infra and footnotes 33-37.

\(^5\)26 Stat. 379 (1877), as amended, 49 U.S.C. § 1(1)(a) (1964), as pertinent, gives the Commission jurisdiction over the interstate transportation "...partly by railroad and partly by water when both are used under common control, management, or arrangement for a continuous carriage or shipment...[in] so far as such transportation takes place within the United States." For discussion of the application of this section, see *In the Matter of Jurisdiction over Water Carriers*, 15 I.C.C. 205 (1912), and *United States v. Munson Steamship Lines*, 283 U.S. 43 (1931).

\(^6\)Cf. sections 1(4), 15(3), 15(4), and 907(d) of the Interstate Commerce Act, 49 U.S.C. § 1(4), 15(3), 15(4), and 907(d) (1964). Also see Delisi *op. cit., supra*, at footnote 7, pp. 18-19, for a summary of the case law developed under these provisions.

\(^7\)In particular, see sections 6(11)(a) and (b), 49 U.S.C. § 6(11)(a)(b) (1964) dealing with the Commission's power to compel physical connections between rail and water carrier operations and to establish proportional rates to and from ports; section 6(12), 49
A somewhat different situation controls in the case of freight forwarders, which were brought under regulation in 1942. By the very nature of their operations, freight forwarders provide a coordinated service to the shipping public. Although recognized as common carriers in dealing with their own customers, the forwarders are regarded as shippers by other modes. Except to the extent permitted by joint arrangements with common carriers subject to other parts of the Act.

Intramodal provisions for coordination were not totally absent from the laws expanding transportation regulation. The Coordinator’s bill to regulate motor carriers included a provision requiring motor carriers to establish “reasonable through routes” and “just and reasonable rates applicable thereto” on an intramodal basis similar to section 1(4). The resulting provisions in the Motor Carrier Act, subsequently re-enacted in the Transportation Act of 1940, retained this suggestion only as to

U.S.C. § 6(12) dealing with through water-rail arrangements to foreign countries; and section 307(a), 49 U.S.C. § 907(d) (1964) dealing with Commission establishment of differential rail-water through routes and rates.

31. Interstate Commerce Commission v. D. L. & W.R.R., 220 U.S. 235 (1911). Ironically, this result was sought initially by the forwarders themselves since the question resolved in this case turned on whether a railroad could treat a forwarders traffic differently from other shippers. Here, the Court held that since a forwarder was, as to a railroad, a large shipper it could not be charged a different rate on the same volume of traffic.
32. Section 409(a), 49 U.S.C. § 1009(a) (1964). Prior to the advent of motor carrier regulation, the forwarders dealt with motor carriers on a contract basis. Following the imposition of motor carrier regulation, the forwarders and the motor carriers established a network of joint rates and through routes, subsequently declared unlawful in Acme Fast Freight, Inc., Common Carrier Application, 17 M.C.C. 549 (1939) aff’d sub nom Acme Fast Freight, Inc. v. United States, 30 F. Supp. 968 (S. Dist. N.Y. 1940) affirmed per curiam 309 U.S. 638 (1940). For an extensive discussion of these matters, see Freight Forwarder—TOFC Contracts, Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 90th Cong. 2nd Sess. (1968) on H.R. 10831 esp. pp. 3-11 (Comments of the Commission).
33. H.R. 5262, 74th Cong. 1st Sess. (1936). This was in accord with the reports of the Commission and the Coordinator that motor carriers be subject to the same provisions of law as railroads, except for the authority of the Commission to compel such arrangements. See 182 I.C.C. at p. 387—recommendation number 8.
34. 49 Stat. 558 (1935).
intramodal arrangements between motor common carriers of passengers.\textsuperscript{36} By contrast, the 1940 Act, in providing for regulation of certain water carrier operations, imposed essentially the same intramodal requirements on these carriers in the establishment of interchange facilities, joint rates and through routes and other matters relating to coordination as had been imposed on the railroads.\textsuperscript{37}

II. \textbf{Regulatory Policy Toward Coordination}

The relevant provisions of the Interstate Commerce Act dealing with surface transportation have evolved in an incremental fashion over the years in response to particular problems rather than in fulfillment of some preconceived design. Although the revolutionary changes in transportation in the last decade have prompted many proposals for amending the existing law, only a few such changes have in fact been forthcoming. The Commission has, therefore, been left the task of accommodating statutory language developed in another age to present-day transportation problems. Fortunately, the key provisions of the Act are, for the most part, sufficiently broad and general so as to give the Commission considerable latitude in applying them to new situations in light of the directive of the National Transportation Policy that the ultimate aim of the Act is “developing, coordinating and preserving a national transportation system.”\textsuperscript{38}

A considerable degree of progress toward intramodal coordination for water carriers and railroads has been achieved. As noted in the summary of the statutory law, matters involving through routes, joint rates, interchange of traffic, and through bills of lading were initially left to the carriers as a matter of private contract.\textsuperscript{39} Following the imposition of regulation in this area, the Commission and the courts were at the outset called upon to resolve numerous controversies as to

\textsuperscript{36} 54 Stat. 924 (1940), 49 U.S.C. § 316(c) (1964). A critical factor in this decision appears to have been a fear that the railroads would dominate the making of joint rates and through routes. See 79th Cong., Rec. 5655 (Remarks of Senator Wheeler).

\textsuperscript{37} Specifically, sections 305(b) and 305(d), 54 Stat. 934 (1940), 49 U.S.C. § 907(b) and 907(d), impose a duty on common carriers by water to establish reasonable through routes and rates and provide for the interchange of traffic while section 307(d), 54 Stat. 937 (1940), 49 U.S.C. § 907(d) authorizes the Commission to require the establishment of joint rates and through routes between common carriers by water.

\textsuperscript{38} 54 Stat. 899 (1940), 49 U.S.C. preface.

\textsuperscript{39} See pp. supra and footnotes 9 and 10.
scope and application of these provisions. 40 While particular controversies still arise, the systematic and elaborate body of decisions developed in earlier years continues to provide the carriers involved with a workable set of principles for coordinating rates, practices, and equipment interchange with a minimum of Commission involvement.

Two impediments, both statutory, serve to prevent the shipping public from obtaining the full benefits of intramodal coordination. The first, section 15(4) of the Act, limits the Commission's authority to require the establishment of all-rail through routes which have the effect of "short-hauling" one of the participating carriers. 41 Because of the inhibiting effect of this provision on intramodal coordination, the Commission has sought to have this provision deleted. 42 In this context, it is appropriate to note that the Commission has recognized the value and importance of joint rates and through routes both to the shipping public and competing carriers in railroad mergers. It has required the establishment of new all-rail joint rates and through routes and the

40 Some of the more important cases dealing with intramodal coordination include: In the Matter of Through Rates and Through Routes, 12 I.C.C. 163 (1907); In the Matter of Jurisdiction over Water Carriers, 15 I.C.C. 205 (1909); In the Matter of Bills of Lading, 52 I.C.C. 671 (1919), 64 I.C.C. 347 (1921), 66 I.C.C. 63, 687 (1922); St. Louis S.W. Ry. Co. v. United States, 245 U.S. 136 (1924); United States v. Missouri Pacific R. Co., 278 U.S. 269 (1929) (limitations on Commission to establish all rail through routes under sections 15(3) and 15(4)). More recent cases construing the Commission's authority to compel the establishment of all-rail joint rates or through routes include Thompson v. United States 343 U.S. 549 (1951), United States v. Great Northern Ry. Co., 343 U.S. 562 (1951). As to the relationship between this section and section 3(4), see Akron, C. & Y.R. Routing or Overhead Traffic, 300 I.C.C. 163 (1956). Also see Doyle Report, op. cit. supra at footnote 8, pp. 148-49 for critical appraisal of both the existing statutory law and the Commission's decisions.

41 49 U.S.C. § 15(4) (1964). The thrust of this provision is to prohibit the Commission from establishing an all-rail through route which has the effect of depriving one of the participating carriers or an intermediate carrier under its management or control from a haul "substantially less than the entire length of its route" unless the Commission finds that preserving this right would result in: (a) discrimination under section 3, (b) create an unreasonably long route, or (c) that "short hauling" is required "to provide adequate and more efficient or economic transportation."

42 As a result of the highly restrictive decision in United States v. Missouri P. R. Co., supra, the Commission requested Congress to delete this section because of its adverse effect on rail coordination. Annual Report of the Interstate Commerce Commission (1929) p. 89. Although renewed in 1930, 1937, 1938 and in connection with the Transportation Act of 1940, except for the change summarized in footnote 41(c), supra, no changes were made. See H.R. 2016, 76th Cong. 3rd Sess. (1940), pp. 64-65 and Thompson v. United States, supra, at pp. 555-56. In the more recent context of joint intramodal motor carrier and intermodal rail-motor service, see Through Routes and Joint Rates, and Revocation of Motor Carrier Operating Authority. Hearing before the
opening of previously closed gateways as conditions to its approval of a number of large railroad mergers. Since these conditions are imposed under section 5(2), they can be, and are, imposed without being bound by the limitations of section 15(4), and thus provide a valuable and powerful regulatory tool with which to facilitate coordination between merger applicants and other carriers.

The second problem area concerns the Commission’s present lack of complete authority over coordinated rates and services provided by motor common carriers. Although motor carriers have established an extensive structure of joint rates, through routes and interchange arrangements since the inception of motor carrier regulation, these arrangements are purely voluntary and, therefore, subject to cancellation or change by the carriers. In the absence of a showing of discrimination against particular shippers or commodities, the Commission has held that it lacks jurisdiction to compel the establishment or re-establishment of such arrangements. As the

Subcommittee on Surface Transportation of the Committee on Commerce, United States Senate, 90th Cong. 1st Sess. on S. 751, S. 753, and S. 1768 (1967), esp. pp. 147-50 which outline the Commission’s objections to extending this principle as to motor carrier through routes.

43. For example in Great Northern Pac. & B. Lines Merger, 331 I.C.C. 228 (1967) reversing 328 I.C.C. 460 (1966), the Commission imposed such conditions to protect the competitive stance of the Milwaukee and the Northwestern railroads by, among other things, requiring the opening of a number of previously “closed gateways” and establishment of joint rates and through routes through a number of North Dakota and Montana gateways. 331 I.C.C. at pp. 279-83. In addition, by a grant of trackage rights over the Northern Pacific from Longview, Washington, to Portland, Oregon, to the Milwaukee road, the effect of the Commission’s decision in the Spokane Gateway case (Chicago M. St. P & P. R. v. Spokane P. & S. Ry. Co., 300 I.C.C. 453 (1957) was largely overcome. In that case, the Commission had, because of the strictures of section 15(4), declined to order the establishment of joint rates and through routes between the Northern Lines and the Milwaukee. More extensive and novel conditions of the same type were also imposed in the Penn Central merger (Pennsylvania R. Co.—Merger—New York Central R. Co., 328 I.C.C. 475, 561-65 (1966)—Appendices G, H, and I.)

44. 49 U.S.C. § 5(2) (1964)—section 5(2)(b) authorizes the Commission to approve carrier mergers, “[S]ubject to such terms and conditions and such modifications as it shall find to be just and reasonable.”

45. Cf. Atlantic Coast Line R. Co. v. United States, 284 U.S. 288, 295 (1932) approval of a lease under section 5(2) conditioned on lessee’s agreement to establish a through route short hauling itself.

46. See East South Joint Rates and Routes, Cancellation, 44 M.C.C. 747 (1945). Recently, in No. 34815, National Furniture Traffic Conference, Inc. v. Associated Truck Lines, Inc., designated as a proceeding involving issues of general transportation importance, the entire Commission is considering its prior holdings to this effect with a view to reappraising such in light of the provisions of the national transportation policy.
shipping public, particularly the small shipper, has come to rely more heavily on motor carrier transportation, this lack of authority has created some serious problems. While no definitive solution to this and related small shipments problems has evolved, the Commission has proposed that a number of steps be taken, including elimination of the present lack of statutory authority over motor carrier joint rates and through routes. Although opposed by the industry in the past, a modified version of the Commission’s recommended legislation was supported by the motor common carriers in the 90th Congress.

In contrast to the relatively steady growth of intramodal coordination, the history of intermodal coordination has been marked by frustration and controversy because it involves cooperation between competing modes having dissimilar economic characteristics and a history of competitive rivalry with one another. To a large extent, both the statutory and case law relating to intermodal transportation has developed against a background of the contrasting size and geographical scope of operations of most railroads and competing water and motor carriers.

The Commission undertook the establishment of an extensive system of joint rail-water routes48 pursuant to a Congressional mandate to foster and promote such coordination.49 The most difficult aspect of this task has been the prescription of appropriate differentials between

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48. Although Congressional concern over the lack of joint rail-water coordination had been expressed as early as 1887, much of this concern was directed toward the abuses of the railroads toward the water carriers. Positive concern dates from the re-establishment of water transportation during and after World War I and the subsequent enactment of the Dennison Act, 45 Stat. 978 (1928), which directed the Commission to grant certificates of public convenience and necessity to inland water carriers and to establish joint rates and through routes between such carriers and the railroads with appropriate differentials between all-rail and rail-water routes. Cf. Delisi, op. cit., supra at footnote 7 at pp. 18-19.

49. A fairly comprehensive set of coordinated rail-barge routes were established under the Dennison Act until its repeal by the Transportation Act of 1940, 54 Stat. 950 (1940), 49 U.S.C. § 920(e) (1964). The 1940 Act preserved this structure until it was reviewed.
all-rail routes and rail-water routes. Although this process has
continued, the end result has been the subject of much controversy.

In case of coordinated intermodal transportation involving motor
carriers, much of the development in the area of joint intermodal
through routes and rates has proceeded without direct involvement of
the Commission because of its limited powers to require such actions.
The most notable exception has been in the fast-growing area of TOFC
or "piggyback" transportation. The evolution of TOFC transportation
and the Commission's policy toward it, which culminated in the
comprehensive decision in Ex Parte 230, has prompted considerable
comment, and the details of this development need not be repeated
here. But certain aspects of this decision should be mentioned because
of their general relevance to the future role of conventional regulatory
techniques in transportation coordination.

In its deliberations on Ex Parte 230, the Commission was presented
with the problem of fashioning rules that would permit effective
regulation of coordinated rail-motor service, provide both the carriers
and shippers with reasonably clear standards for their conduct, and, at
the same time, not cramping the growth of this new form of
transportation at a critical stage in its development. The task was
further complicated by the necessity of fitting the prescribed rules into

by the Commission and revised in Rail and Barge Joint Rates, 270 I.C.C. 591 (1948)

50. Rail and Barge Joint Rates, supra. Additional facts in later years which have been
interwoven with the differential question include rail discrimination against connecting
water carriers and the issue of rail-water proportionals to and from the ports. As to the
connecting carrier question under section 3(4), see Interstate Commerce Commission v.
Mechling, 330 U.S. 567 (1947). As to the struggle over proportionals, see Chicago, R.I &
P.R. Co. v. United States, 223 F. Supp. 381 (E. Dist. Mo. 1964) affirmed per curiam 380

51. In essence, the railroads have resisted efforts to compel to establish joint rail-barge
rates and sought legislation to remove the differential provision for such rates from
section 307(d) while the water carriers have felt that the railroads are attempting to limit
them solely to carriage on the waterways (for the water carrier industry's position, see
The Chinese Wall, Washington: The Common Carrier Conference of Domestic Water
Carriers, undated); in addition, until recently there has existed a continuing dialogue
between the Commission and the Supreme Court in this area with the Court reversing
many Commission cases holding adversely to the water carriers. See Delisi, op. cit., supra
at footnote 7, pp. 25-32 for a summary of the cases.

52. Substituted Service—Charges and Practices of For-Hire Carriers and Freight
Forwarders, 322 U.S. 301 (1965) affirmed sub nom, American Trucking Associations v.
Artsion, T. & S.F. Ry., 387 U.S. 397 (1967). For an extensive discussion of this case,
see Eugene D. Anderson, Paul C. Borghesani, and William A. Towle, "Ex Parte 230:
The ICC 'Piggyback' Ratemaking Case," 35 I.C.C. Pract. J. 616 (1968). See also Doyle
Report, op. cit. at footnote 8, pp. 652-76.
a statutory framework which for the most part antedated the development of large-scale piggyback operations. 53

The principal question in this proceeding centered on the legality of the so-called "open tariff" 54 rules. In addition, a number of related issues such as shipment documentation, interchange and leasing of equipment, the status of exempt common carriers and freight forwarders, and tariff format were given consideration. While most of these related matters were essentially tangential to the main issues and were not contested in the ensuing litigation, they disclosed a number of problems which will require active consideration and resolution in the future. 55

III. COORDINATION AND THE ROLE OF REGULATORY POLICY

The same economic and technological forces that have advanced transportation coordination to its present state and made it attractive to carriers and shippers alike have also drawn the appropriate role of regulatory policy and its implementation into sharper focus. Although up to this point the scope of this article has been concerned with the regulation of carriers subject to the Interstate Commerce Act, in order to determine to what extent regulatory policy requires revision or restatement in order to be fully responsive to present and anticipated

53. The main issues in Ex Parte 230 turned on a construction of the antidiscrimination provisions of sections 2 and 3(1), 49 U.S.C. § 2 and 3(1) (1964) which in their original form were part of the 1887 Act to Regulate Commerce. Although originally construed to apply only to discriminatory practices by carriers against shippers, Ex Parte 230 was decided against a background in which discriminatory treatment of carriers by other carriers had received considerable attention, e.g., United States v. Pennsylvania R. Co., 323 U.S. 612 (1945). Also see Anderson et. al., op. cit., at footnote 52, pp. 619-24 and 322 I.C.C. at pp. 326-30.

54. The effect of these rules taken together requires the railroads to make TOFC plans previously available only to shippers also available to motor carriers on the same terms. Cf. 322 I.C.C. at pp. 336-37; 49 C.F.R. § 500.2 and 500.3 (1967).

55. In particular, this proceeding and the Commission's earlier decision in Movement of Highway Trailers by Rail, 293 I.C.C. 93, 111 (1954), have brought the appropriate role of the freight forwarder into sharp focus since, by virtue of their "shipper" status, they are precluded from using either of the "joint intermodal" TOFC plans, Plan I or II. The forwarders in the ensuing litigation sought unsuccessfully to set aside the "open tariff" rules, American Trucking v. A. T. & S.F. R. Co., supra, at pp. 420-22, and in a separate proceeding still pending in the District Court to set aside the Commission's approval of Plan I. Lone Star Packing Car Company v. United States, Civ. No. 4-355 (N. Dist Tex.). Legislation has also been sought, footnote 37, supra. By extension, the same question exists with regard to the future role of other transport intermediaries such as REA Express.
economic, technological and institutional changes, coordination must be placed in the wider setting of all transport carriers, including deep-sea and aviation transport regulation as administered by the Federal Maritime Commission and the Civil Aeronautics Board.

Recent developments among domestic land carriers have brought a considerable coalescence in the regulation of coordinated transport by the Commission despite the modal compartmentalization of the four parts of the Interstate Commerce Act. As the discussion in connection with Ex Parte 230 indicates, there still remain a number of difficulties in developing regulatory policies that will foster greater coordination. As transport coordination reaches across the lines of the Commission's jurisdiction and begins to include carriers subject to the jurisdiction of either of the two other agencies, these inconsistencies and disharmonies become more apparent, particularly in the rapidly growing area of international transportation. Although some degree of coordination has always existed between surface, ocean, and air carriers, the historical pattern of growth has been such so as to permit intermodal transportation to be viewed as a set of separate but interrelated steps rather than as a continuing seamless flow. Although this view has shaped and influenced a similarly segmented approach in the development of regulatory policy, the same economic and technological forces, in particular the all-modal container, that have made a shambles of the separation of modal operations, are also challenging and testing the once-tidy jurisdictional limits of each agency.

One basic area concerns the establishment of a network of interagency intermodal through routes, accompanied by the establishing of appropriate single-factor through rates, interchange patterns, and the like to make them viable. The development of such arrangements permits the user to ascertain his needs in terms of the transportation system as a whole rather than as a patchwork of arrangements with individual carriers. While identical considerations have influenced the development of statutory and regulatory policies for maritime and air carriers as previously described, with respect to domestic ICC-regulated surface carriers, at this point, there seems to be no pressing need to provide governmental authority to compel interagency intermodal joint arrangements. Rather, what seems to be called for at this time is the establishment of a regulatory framework that will permit the voluntary establishment of such joint arrangements by the carriers involved, provide for uniform tariffs and tariff filings, and provide for curbs against abuses. Certain portions of existing law, such as sections
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1(1)(a) and 216(c) of the Interstate Commerce Act and section 1003 of the Federal Aviation Act, already provide for the establishment of such arrangements between ICC-regulated carriers and carriers regulated by either FMC or CAB in domestic commerce, and perhaps foreign commerce as well.59

A needed addition to existing law is to provide for agency authority to approve agreements and conferences between carriers, thus immunizing them from the antitrust laws, subject to the jurisdiction of different agencies similar to that conferred by section 5a and the like provisions of the Shipping Act and the FAA Act.60 While legislation has been introduced in this Congress to authorize interagency approval

56.49 U.S.C. § 1(1)(a) (1964). As relevant, this section confers jurisdiction over rail and certain rail-water transportation "...from or to any place in the United States to or from a foreign country but only insofar as such transportation takes place within the United States.” This wording dates from the 1920 Act, 36 Stat. 544 (1920), the prior wording being “...from any place in the United States to an adjacent foreign country but only insofar as such transportation takes place within the United States.” [Emphasis added]

57.49 U.S.C. § 316(c) (1964). Although the relevant jurisdictional sections of Parts II and III, sections 203(a)(11), 49 U.S.C. § 303(a)(11) (1964) and 302(i)(3), 49 U.S.C. 902(i)(3) (1964), seem to clearly contemplate through routes and joint rates between ICC-regulated carriers and water carriers regulated by either the Commission or the Federal Maritime Commission, at least on domestic commerce, the Commission held, in Motor Carrier Operation in the State of Hawaii, 84 M.C.C. § 31 (1960), that joint motor-water rates with an FMC-regulated carrier were not within its jurisdiction. The so-called "Rivers Bill," 76 Stat. 397 (1962), was enacted in 1962, amending section 216(c) to cure this situation as to joint motor-water rates and routes to Hawaii and Alaska.

58.49 U.S.C. § 1483 (1964). Although the purpose of this section is to encourage air-surface joint rates and through routes, few such tariffs have been filed, possibly because of the vagueness of the procedures contemplated. Cf. Whitney Gilliland, “CAB Coordination of Unlike Modes,” Pub. Util. Fort., September 2, 1965, p. 23. The Commission and CAB have, however, developed dual regulations with respect to carriers operating under section 203(b)(a), 49 U.S.C. § 307(b)(a) (1964), which partially exempts motor carrier transportation incidental to air. See 14 C.F.R. § 222.1-222.3 (1964) (CAB); 49 C.F.R. § 1047.50 and 1047.45 (1968). Also see "Regulation of Air Freight Pickup,” 76 Yale L. J. 405 (1966).

59. In the case of joint rail rates to and from Canada and the United States, for example, tariffs containing such rates have been filed with the Commission for many years and jurisdiction exercised over their lawfulness to the extent of an American carrier’s participation in such rates. See Canada Packers, Ltd. v. United States, 385 U.S. 182 (1966). As to the jurisdiction of the Commission over joint arrangements between regulated and exempt carriers (which may or may not be analogous to a carrier regulated by another agency), see Ex Parte 230, 322 I.C.C. at pp. 352-54.

of equipment interchange arrangements and related matters, it has not been actively considered. 61

Closely related to the problem of establishing through single-factor routes, rates, and tariffs, is the challenge of the content of the tariffs themselves. Since the inception of regulation, both the agencies and the carriers have struggled to accomplish the worthy goal of tariff simplification in the interest of reducing the waste inherent in tariff complexity and to enable the carriers and shippers to determine the applicable charges with more certainty. For the most part, these efforts have been unsuccessful. The evolution of an essentially simple concept, such as the basic railroad class rate structure, into the complex and voluminous tariffs presently being filed results from intense competition between carriers and between competing users. In view of the great value placed on competition in transportation and in the economy generally, it makes little sense to approach this subject with a view toward a simplified and mathematically logical tariff structure that makes only a cursory allowance for this important variable. At the same time, if the several modes subject to the jurisdiction of the same or different agencies are to facilitate their services into a coordinated pattern, the traditionally disparate tariffs systems that have grown up will have to be rationalized. Where the separate tariffs requirements of the three regulatory agencies differ, some degree of integration must be achieved. To the extent that agency rules or practices permit or encourage such things as meaningless fragmentation in commodity classifications and needlessly complex rules and restrictions, they will require revision. Fortunately, much useful work in this area has been already accomplished and more is under way, stimulated by the development of the container and all-commodity container rates, streamlined carrier pricing policies, and the growing use of automatic data processing. 62 Against this background, the role of regulatory policy is one encouraging, facilitating and, where required, prodding, those involved to continue in this effort and insuring that its own procedures do not hinder this progress.

61. S. 3134 and H.R. 15934, 90th Cong. 2nd Sess. (1968). These bills purport to authorize the three regulatory agencies, through the medium of a joint ICC-CAB-FMC Board, to approve agreements for the interchange of equipment between carriers subject to the jurisdiction of more than one agency.

62. The literature is extensive and diverse. For a representative collection of articles on various aspects of this subject, see Automation Break-through, Papers from the Second National Conference on Tariff Computerization, Transportation Research Forum (Oxford: Richard B. Cross Co. 1965).
To these areas must be added the elimination of unneeded documentation, the development of at least the rudiments of a uniform bill of lading, and a critical examination of the separate and distinctly different legal doctrines that govern carrier liability for loss and damage.

Elimination of excessive documentation is largely outside the control of the regulatory process, since it involves requirements of general commercial law, inspection, and customs regulations and other legal requirements which are reinforced by the accretion of carrier and user practices that have evolved over the years.\textsuperscript{63} The other two areas are interconnected because of the historical dialogue between users and carriers over clauses in bills of lading purporting to limit or preclude entirely claims for loss and damage. The operational and economic differences between carriers regulated by the three agencies has resulted in the development of three essentially distinct bodies of law for land, water, and air dealing with this subject.\textsuperscript{64}

Recognition of these difficulties confronting coordination and efforts to alleviate them are reflected in current administrative and legislative action. The FMC has determined that tariffs containing through intermodal rates can be filed with it, even though all of the participating carriers are not subject to its jurisdiction.\textsuperscript{65} A similar type of arrangement is apparently contemplated by a number of ICC-

\textsuperscript{63}As an example of the paperwork jungle in import-export traffic, the President's Message noted that as many as 43 separate forms may be needed for one export shipment. House Doc. 399, \textit{op. cit., supra}, at footnote 4, p. 12.

\textsuperscript{64}Section 20(11), 49 U.S.C. § 20(11), restricts the freedom of common carriers by land to limit their liability whereas the Harter Act, 27 Stat. 445 (1893), 46 U.S.C. § 190-196 (1964), and the Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), 46 U.S.C. § 1300-1315 (1964), are far less stringent as to carrier liability. The situation with respect to air carrier liability is clouded by virtue of there being no statutory law or CAB regulations on the subject, leaving the law to develop through judicial decisions construing the effect of exculpatory clauses in air bills of lading. For a discussion of the cases, see Allen J. O'Brien, "Damage Claims Against Air Carriers," 35 I.C.C. Pract. J. 652 (1968). For recent action by the carriers and CAB on air carrier claim rules and practices, see \textit{Traffic World}, August 10, 1968, pp. 74-75.

\textsuperscript{65}FMC Docket No. 68-8, \textit{Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2}, FMC Nos. 10 and 11; ____FMC____, decided April 23, 1968, approving the filing of tariffs for through transportation from inland points in the United Kingdom and certain parts in the United States. A key condition in this decision is the requirement that the ocean carrier's portion of the through rate, subject to FMC jurisdiction, be broken out for ease in identification, thus eliminating the indivisible quality that characterizes a conventional joint rate. For a similar handling of such arrangements by the Commission, see Interstate Commerce Commission \textit{Tariff Circular 20}, Rule 67 (Washington: Government Printing Office 1928), pp. 94-95.
regulated carriers.\textsuperscript{66} The introduction of the Trade Simplification Act of 1968 in the present Congress,\textsuperscript{67} at the request of the Department of Transportation, represents an effort to bring about a degree of harmony among the laws and policies administered by the three agencies in international through transportation without at the same time making any organizational changes in the agencies themselves through either a merger of the agencies or the establishment of a joint interagency board of the type proposed in the past.\textsuperscript{68}

The Department's proposal incorporates many of the matters discussed previously to facilitate through transportation, the voluntary establishment of single-factor intermodal through routes and joint rates, uniform tariffs, and authority to develop a through bill of lading. Contemporaneously with this legislation, the Department has undertaken a cooperative effort with the three regulatory agencies, other interested Federal agencies, carriers, and users to identify and resolve technological, economic, documentation and regulatory impediments to facilitate coordination.

\section{IV. Conclusion}

Although the details of what revisions are required in either statutory law or administrative policies are debatable, it is reasonable to assume

\textsuperscript{66} Cf. Docket No. FF-96 (Sub-No. 2), \textit{New England Forwarding Co., Inc.--Extension--Import-Export}, Hearing Examiner's report and recommended order granting applicant forwarder authority to engage in import-export trade affirmed by decision and order of the Commission, Division 1, May 17, 1968. Now pending final decision before the entire Commission.

\textsuperscript{67} H.R. 16023 and S. 3235, 90th Cong. 2nd Sess. (1968).

\textsuperscript{68} The most recent attempts to establish a statutory joint ICC-CAB-FMC Board stem from a recommendation made in President Kennedy's Transportation Message, House Doc. No. 384, 87 Cong. 2nd Sess. (1962), p. 7. H.R. 11584 and S. 3242, 87th Cong. 2nd Sess. (1962) and H.R. 4701 and S. 1062, 88th Cong. 1st Sess. (1963), were subsequently introduced to implement this recommendation which applied only to domestic transportation. In commenting on the 1963 bills, the three agencies jointly proposed an alternative bill providing for greater detail in the joint board's procedures. See \textit{Transportation Act Amendments}, Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, United States Senate, 88th Cong. 1st Sess., on S. 1061 and S. 1062 (1963), pp. 26-27. For a later version, see H.R. 7793, 89th Cong. 1st Sess. (1965). Because of controversy over how this board would work, none of these bills ever progressed beyond the Committee stage; however, in the interim, the three agencies have developed closer informal working relationships on matters of mutual concern. On the question of merging the three regulatory agencies, see \textit{Doyle Report, op. cit., supra}, at footnote 8, pp. 11, 107-10, and William H. Tucker, "Renovating the Decisional Process in an Independent Regulatory Commission," 35 I.C.C. Pract. J. 207, 217 (1968).
that such revision will not involve any substantial reduction in the level of regulation embodied in the present statutory scheme. Even the most earnest advocates of this position do not extend it to encompass matters involving coordination. Nor does there appear to be any necessity for major additions to the regulatory laws which fundamentally alter the basic approach and philosophy of the existing structure (as distinguished from some of the recommended legislation, such as the Trade Simplification Act or other laws described earlier, which essentially fill out and perfect this approach). Rather, what seems to be called for is a careful evaluation of the relevant law with a view toward either eliminating obsolete barriers erected in another age or filling gaps which impede coordination. A necessary corollary is a similar evaluation of the accumulation of the decisions and rulings of the Commission and other regulatory agencies in terms of the same objective. Consistent with this approach, the future development of regulatory policies of these should be guided by the sweeping language in the Supreme Court's opinion in affirming Ex Parte 230 that:

Regulatory agencies do not establish rules of conduct forever; they are supposed, within the limits of the law and of fair and prudent administration to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.\(^69\)

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.

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1See 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.

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 1958⁴ 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

³Alexander Report (H.R. Doc. No. 805, 63d Cong. 2d Sess.).
⁴Antitrust Subcommittee of the Committee on the Judiciary, 87th Cong. 2d Sess., House Report No. 1419, "The Ocean Freight Industry (Celler Report)."
⁷See 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.
⁸See testimony before Bonner Committee, supra.
⁹See 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.C. 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). 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

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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-Ashdod 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-Ashdod 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.
THE NATIONAL LABOR RELATIONS ACT AND THE TRANSPORTATION INDUSTRY

BY FRANK W. MCCULLOCH*

AND

TIM BORNSTEIN**

I am aware of no other instance in the history of this country in which a statute of first rate importance has so completely fulfilled the objectives of those who promoted its enactment.

Judge J. Warren Madden

1. Introduction

Senator Robert Wagner’s famous bill, which in 1935 became the National Labor Relations Act, was born in controversy. The sober prophet Walter Lippmann forecast: “If the bill were passed, it could not be made to work. . . . It is preposterous to put such a burden upon mortal men.”

Some attacked the bill as “a new drive against the working class and its living standards, preparation for imperialist war, and a step toward fascism.” Others attacked it as an “inquisition”—“a condition of dread, terrorism and frightfulness” which would force employers to “flee the country.”

Thirty-three years and tens of thousands of N.L.R.B. decisions have intervened since these frenetic claims were made. While one still hears occasional, dissenting voices, the clear judgment of recent history is that the Labor Act, with its periodic amendments and its constantly refined administration, has neither brought American workers under

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the heel of fascism nor terrorized their employers. Most objective observers believe, on the contrary, that the policies of the law are both fair and workable; that the law has proven its lasting value to the industrial community by its rational response to major economic vicissitudes of more than three decades; and that the experience of this law is a dynamic and democratic example of social problem-solving which may be relevant to troublesome confrontations today in urban ghettos and on college campuses.

The importance of the transportation industry and of peaceful and stable labor-management relations there can hardly be exaggerated. Millions of employees and thousands of businesses are directly involved. In addition, breakdowns in this industry can have a damaging impact on urban consumers' access to food, on the supply lines of raw materials for manufacturing, on the delivery and distribution of finished goods and on the transit of people on all manner of business and personal missions.

As the transportation industry looms large in the economic life of the nation, it also furnishes a substantial part of the business of the National Labor Relations Board.


a. The Social Setting.

By the end of the Nineteenth Century the industrial revolution in America was transforming the outward face of the land as well as the internal makeup of society. Farm families began a gradual exodus to the cities where they joined an urban population of wage earners who increasingly found employment in corporate-owned mills, factories, stores and offices. Millions of foreign-born workers were entering the mainstream of American life, usually at the lowest occupational and wage levels.

This new urban-industrial environment was in many ways an impersonal and discontented one. The worker and his family no longer lived in the familiar, homogeneous community, which we romanticize in recalling small town life of the Nineteenth Century; they were now likely to live in a working class neighborhood or a foreign language ghetto in a big city. The employer was no longer an individual entrepreneur who knew and shared the daily work experience with his employees; the new employer was an impersonal business corporation whose affairs were directed by a hierarchy of professional managers, supervisors and foremen. The place of work was no longer a small
workshop which employed a few craftsmen and laborers, but a sprawling industrial enterprise with a number of factories employing hundreds or even thousands of workers.

The character of work itself was changing for the average employee, as the efficient technology of mass production made traditional craft skills obsolete in some industries; men “began to lose the pride of accomplishment which characterized the ancient artisanship.” It seemed to some that the modern worker had become an appendage of his machine, for refinements in the production process reduced the human contribution to simple, repetitive functions, a phenomenon parodied in Charlie Chaplin’s famous movie of the 1920’s, *Modern Times*.

In response to these emerging conditions workers sought protection, security and a measure of personal participation in shaping their working lives by organizing into labor unions. Labor organizations, which had come earlier to industrialized Europe, were not new to America, but with few exceptions they had not played a major role in the fast-growing mass production industries.

Fearing that unions would intrude on the traditional authority of management and would threaten production and profits, many employers resisted the demands for recognition and participation. The radical politics of some union leaders even induced fears of revolution. Both sides believed deeply that their views were morally and economically right; determination met determination. “Money and power were commonly at stake, but other things, too: a sense of self-respect, a feeling that life is less arbitrary, more generous or predictable.”

In the rail transportation industry, which had a long and bitter history of national labor disputes, Congress intervened in 1926 with the Railway Act, highly regarded when first enacted as a model for all industries. But in other industries the sharp conflict over basic interests and values remained; strikes, slowdowns, group discharges, lockouts, black-listing, and espionage, sometimes accompanied by violence, became increasingly commonplace.

The Great Depression of the early 1930’s, which brought unemployment, job competition and economic malaise to all industries, exacerbated these underlying tensions. The common law condemned the

7.45 U.S.C. § 151 et seq.
disruptive manifestations of labor conflict, but offered few remedies for its causes. Indeed, the frequent recourse to labor injunctions had become so discredited that in 1932 Congress passed the Norris-LaGuardia Act, limiting Federal court jurisdiction in such disputes. It was in this setting of growing antagonism and discord that Congress broadly legislated in the field of interstate labor relations to deal with the causes and consequences of unresolved and unregulated controversy over the basic right to organize.


The Labor Act was enacted in 1935 and amended in major respects in 1947 and 1959. The forerunner of this Act was Section 7(a) of the National Industrial Recovery Act of 1933, asserting the right of employees to organize and bargain collectively. It has not one but many policies.8 If this complex legislative scheme can be fairly reduced to an essential formula, it is this: Employees have the right to decide by majority rule whether they wish to be represented for purposes of collective bargaining; if they choose to be represented, their employer must recognize and bargain in good faith with their representative as the exclusive agent of all employees in an appropriate unit with respect to their wages, hours, and other terms and conditions of employment. The law contemplates that, through the give-and-take process of good faith collective bargaining, labor and management will rationally and fairly resolve their own problems, free from government dictation, and subject to the peaceful exercise of economic power by each side to achieve its own legitimate objectives.

These principles are embedded in Section 7, which is the heart of the statute. It declares:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Surrounding the conceptual core of the Act are a number of specific

8. 29 U.S.C. § 151 et seq.
rights, duties and restraints placed on both labor and management. Violations of employee rights are "unfair labor practices." Employee free choice is primarily implemented through secret ballot elections conducted in "appropriate bargaining units."

Unlike the Railway Labor Act, the National Labor Relations Act is essentially a remedial statute, and Congress entrusted to the National Labor Relations Board—which administers the Act—wide discretionary authority to fashion suitable remedies for violations.

The Board is a 5 member, quasi-judicial, independent agency. The statute separates the adjudicatory work of the Board from its investigative and prosecutive functions. The latter are performed by the Board's independent General Counsel, who supervises 31 N.L.R.B. regional offices throughout the Nation. The agency's present annual budget is $35 million; it employs approximately 2300 employees.

In recent years the Board has received over 30,000 election petitions and unfair labor practice charges annually. Each year it conducts over 8,000 secret ballot elections in which over half a million industrial voters choose whether or not they wish to be represented for purposes of collective bargaining. The agency also disposes annually of over 17,000 unfair labor practice charges, in 9 out of 10 cases without the necessity of litigation before the Board or in the courts.

3. Coverage of the Labor Act and Jurisdiction of the NLRB in the Transportation Industry

The constitutional source of the Labor Act is the Commerce Clause, and the law applies to all employers and labor organizations whose activities "affect commerce" with stated exceptions.

The Act applies to all sectors of the transportation industry, again with certain prominent exceptions. Indeed, the very first case decided by the Board after its creation in 1935 involved a garage operated by an interstate carrier, and one of the quintet of cases which established the constitutionality of the statute was also in the transportation industry.

"Carriers" which are subject to the Railway Labor Act are expressly excluded from coverage of the National Labor Relations Act. As a

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11. Section 1.
14. Section 2(2).
practical matter, this means that the railroad and airline industries are not subject to coverage of the Labor Act or the jurisdiction of the NLRB. For certain secondary boycott purposes, however, the Labor Act applies to them in limited respects,\textsuperscript{15} and from time to time the Board has decided a variety of issues regarding the coverage of the Act with respect to employers and employees in these industries. Recently, for example, the Board asserted jurisdiction over an intra-state, air passenger carrier over which the National Mediation Board had declined jurisdiction.\textsuperscript{16}

The Labor Act applies generally to the maritime industry, both to dock-side\textsuperscript{17} and ship-board employers. Decisional law has identified two prominent exceptions to the Act's coverage in this industry. The Supreme Court has held that the statute does not apply to the foreign seamen of a foreign-owned vessel temporarily docked in an American port.\textsuperscript{18} The Court has also held that the Act does not apply to the foreign crew of a foreign-registered vessel operated in American foreign commerce by a wholly owned subsidiary of an American corporation.\textsuperscript{19}

Section 2(2) of the Labor Act expressly excludes "any wholly owned Government corporation . . . or any State or political subdivision thereof." Accordingly, the Board has no jurisdiction over municipally-

\begin{itemize}
  
\item \textsuperscript{15}See, e.g., \textit{Electrical Workers (B.B. McCormick \& Sons)}, 150 NLRB 363 (1964), enforced 350 F.2d 791 (C.A. D.C. 1965), cert. denied 383 U.S. 943 (1966). For an example of intra-governmental comity between the NLRB and the National Mediation Board in this industry, see \textit{Flight Safety, Inc.}, 171 NLRB No. 30 (1968).
  
\item \textsuperscript{16}\textit{Air California}, 170 NLRB No. 1 (1968). Although the National Mediation Board would not assert jurisdiction over this air carrier, its activities were found by the N.L.R.B. to affect commerce within the meaning of the National Labor Relations Act. The Board applied to this carrier the jurisdictional standards which are normally applied to local passenger transit systems.
  
\item \textsuperscript{17}Each sector of the transportation industry has its own specialized labor relations practices and traditions. In the longshore industry, hiring halls are an established feature of the industry's labor relations structure, and a number of cases involving the operation of the hiring halls for longshoremen and stevedores have come before the Board. See \textit{Pacific Maritime Association}, 172 NLRB No. 234 (1968). See also \textit{Alaska Steerage Company}, 172 NLRB No. 124 (1968).
  
\item \textsuperscript{18}\textit{Benz v. Compania Naviera Hidalgo}, 353 U.S. 138 (1957).
  
\item \textsuperscript{19}\textit{McCulloch v. Sociedad Nacional de Marineros de Honduras}, 372 U.S. 10 (1963); \textit{Inres Steerage Co. v. International Maritime Workers Union}, 372 U.S. 24 (1963). Compare \textit{British Rail-International}, 163 NLRB No. 89 (1967), in which the Board declined to assert jurisdiction over an enterprise incorporated in New York which sold tickets for British railways and vouchers for rooms and meals in British hotels in connection with rail travel in Britian because, \textit{inter alia}, the enterprise was owned by an agency of the British Government.
\end{itemize}
owned transit systems, but it does assert jurisdiction over privately owned transit systems which operate under public regulation.\textsuperscript{20}

The Labor Act applies to the remaining sectors of the transportation industry which “affect commerce,” including privately-owned local transit systems, interstate passenger carriers, the maritime industry and the trucking industry.

Before the statute may be applied to a particular business, there must be a factual showing that the employer “affects commerce.” This is of course a jurisdictional requirement. Additionally, the N.L.R.B. has promulgated guidelines or “dollar yardsticks” which generally govern its assertion of jurisdiction with respect to different industries. These yardsticks vary from industry to industry. The Board asserts jurisdiction over most non-retail employers upon a factual showing that the employer “affects commerce” and that he has an annual $50,000 “inflow” or “outflow,” direct or indirect, across state lines.\textsuperscript{21}

The Board asserts jurisdiction over interstate passenger and freight transportation enterprises and all other enterprises which function “as essential links in the transportation of passengers or commodities in interstate commerce which derive at least $50,000 gross revenues per annum from such operations, or which perform services valued at $50,000 or more per annum for enterprises as to which the Board would assert jurisdiction under any of its jurisdictional standards.”\textsuperscript{22}

Privately owned transit systems are covered if their gross annual revenues exceed $250,000.\textsuperscript{23}

4. Statutory Problems of Special Concern to the Transportation Industry.

While the N.L.R.B.’s administration of the Labor Act is nationally uniform and preemptive of inconsistent State laws,\textsuperscript{24} the Board strives to be sensitive to the unique labor relations and economic

\textsuperscript{21}Siemons Mailing Service, 122 NLRB 81 (1958).
\textsuperscript{22}HPO Service, Inc., 122 NLRB 394, 395 (1958).
\textsuperscript{23}Charleston Transit Company, 123 NLRB 1296 (1959). See also Vaca Valley Bus Lines, 171 NLRB No. 179 (1968).

As a matter of discretion the Board does not assert jurisdiction over intra-state school bus operations which it regards as essentially local in character and in aid of the State in the field of education. See, e.g., S. & L. Lines, 164 NLRB No. 140 (1967); Community Interprises, 164 NLRB No. 141 (1967).

\textsuperscript{24}See Garner v. Teamsters, 346 U.S. 485 (1953).
characteristics of the various industries embraced by the policies of the Act. In the transportation industry, which is especially heterogeneous, a number of statutory issues are of recurring importance. The limitations of this brief essay permit a discussion of only a few prominent problems which affect this constantly changing industry, and because readers of this journal are primarily interested in the motor carrier field, the discussion which follows is devoted mainly to motor carrier labor relations.

a. The Status of Owner-Operators, Lease-Drivers and Driver-Salesmen

In a variety of contexts the Board and courts have dealt with legal and labor relations questions involving the status of owner-operators, lease-drivers and driver-salesmen. The factual and legal character of the relationship between such drivers and carriers is often litigated in representation cases which present the question whether they are "employees," who are entitled to vote in N.L.R.B. elections and who generally are protected by the provisions of the Labor Act, or "independent contractors," who may not vote and generally are not so protected. The Board's resolution of this question requires a factual determination in each case whether the carrier exercises the common law "right of control." 25

The Seventh Circuit on several occasions has disagreed with the Board's application of the "right of control" test. 26 The Supreme Court resolved the conflict between the Board and the Seventh Circuit this year, affirming the Board's finding of "employee" status in an insurance industry case. While acknowledging that these are frequently close questions, the Supreme Court held that the Board's finding of "employee" status "should not be set aside just because a court would, as an original matter, decide the case the other way." 27


Economic and legal arrangements between carriers and owner-operators have also been a fertile source of litigation. In \textit{Locat 24, Teamsters v. Oliver},\textsuperscript{29} the Ohio courts restrained the operation of provisions of the 1955 Central States Area Over-the-Road Motor Freight Agreement which regulated leases and rentals to be paid to owners-operators. The Ohio courts held that these collective bargaining provisions violated the state antitrust law because they unreasonably limited the owner-operator's use of his own property. Reversing, the Supreme Court held that the union's right to negotiate minimum rentals and other lease provisions for owner-operators, during periods when their equipment was leased in the service of a carrier, was protected by the Labor Act's policy of promoting collective bargaining over wages, hours and other conditions of employment. The Court reasoned that a driver's equipment rental payments are closely related to his hourly wages; therefore, the union could legitimately seek to protect employees' wage standards by bargaining about equipment rentals. The Ohio law, which interfered with this statutory right, was thus held to conflict with preeminent federal regulation.

Not infrequently litigation arises when an employer seeks to change the status of drivers from "employees" to "independent contractors." This was the issue in \textit{Shamrock Dairy}\textsuperscript{30} where an employer who had operated with driver-salesmen, who were employees, sought to convert their status to "independent contractors" and to negotiate individual contracts with them, without notifying or bargaining with their exclusive bargaining agent about the change. A majority of the Board held that this unilateral change was unlawful because the union was entitled to be notified about the change and to be given an opportunity to bargain about it. The implications of this issue were further delineated in the well-known \textit{Fibreboard}\textsuperscript{31} decision. There a unanimous Supreme Court upheld the Board's interpretation of the bargaining obligation under the statute that an employer must notify and bargain with an exclusive employee representative about changes in an employer's method of doing business which have a substantial impact on employee contract rights and employment security.

\begin{itemize}
\item[b.] \textit{Secondary Boycotts.}
\end{itemize}

Another persistent and difficult statutory issue in the motor carrier field involves secondary boycotts and "hot cargo" agreements under

\textsuperscript{29} 358 U.S. 283 (1959).
Sections 8(b)(4) and 8(e). These sections have an elaborate legislative and decisional history, for they seek to regulate an extremely complex aspect of industrial relations.

The first federal prohibition of secondary boycotts was enacted in 1947. Its purpose, said Senator Taft, was to make it unlawful "to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." By this prohibition Congress sought to preserve the traditional right of employees to strike against their own employer, but to insulate truly neutral employers from disputes not their own. This fundamental distinction between primary and secondary conduct has been difficult for Congress to explicate in legislation and no less difficult for the Board and courts to interpret and apply.

The famous cases known as the Sand Door trio, one of which involved a motor carrier, illustrates this historical difficulty. The Supreme Court held under the Taft-Hartley secondary boycott provisions that a "hot cargo" contract, in which a carrier agreed that his employees would "not be allowed to handle or haul freight to or from an unfair company," was a lawful contract which the carrier could lawfully comply with voluntarily; but the contract, nevertheless, was not a defense to a union's inducement of its members to refuse to handle the goods of a neutral employer with whom the carrier's employees had no dispute.

In 1959 Congress enacted amendments to strengthen the secondary boycott provisions of Section 8(b)(4), and at the same time it enacted Section 8(e) expressly to prohibit entering into or enforcing "hot cargo" agreements. Again Congress was careful not to impinge on the right of employees to engage in protected primary activity. The leading Supreme Court decision interpreting Section 8(e), upheld the Board's finding that a labor organization did not violate this prohibition by refusing to install pre-cut and pre-fitted doors pursuant to a contract clause that employees would not handle material coming from a mill at which doors had been pre-cut and pre-fitted. It was the Board's view, with which a majority of the Supreme Court agreed, that the union's

32. 2 Legis. Hist. of L.M.R.A. 1106.
contract and its related conduct were lawful because the union was
endeavoring to protect traditional work of employees in the bargaining
unit, not to put pressure on secondary employers. In other words
Section 8(e) acknowledges the right of unions to protect and preserve
the traditional work of employees, while prohibiting work protection
agreements which are essentially directed against neutral, secondary
employers.

Another recent case in the motor carrier industry reflects the
difficulty of applying Section 8(e). S. & E. McCormick\(^{37}\) involved the
validity of an owner-operator contract clause by which carriers agreed
to engage only “employees” to operate leased-equipment and further
agreed to exercise a “right of control” over all such drivers.\(^{38}\) The
application of this contract required certain owner-operators and fleet-
operators, stipulated to be “independent contractors,” to become
“employees” of the carriers and also to become members of the union:
if owner-operators refused to become employees of the carriers and to
join the union, the contract, in effect, required the carriers to cease
doing business with them.

After weighing the facts and contentions of the parties, including the
history of bargaining and the character of the work involved, the Board
concluded that this clause did not violate Section 8(e). It was the
Board’s view that this clause was lawful because it sought to protect
the work which had traditionally been performed by unit employees
from erosion by subcontracting to owner-operators, who performed
virtually the same hauling work under virtually identical circumstances.
Additionally, this clause protected wage standards for unit employees
from erosion through lease agreements which might undermine
negotiated standards. While acknowledging that the owner-operator
clause might require owner-operators to become employees of the
carriers and to join the union, this consequence was not illegal, in the
Board’s opinion, for it was a natural incidence of expansion of the
bargaining unit resulting from the lawful prohibition against
subcontracting.

The Third Circuit disagreed. It saw the owner-operator clause not as

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37. Teamsters, Local 107 (S. & E. McCormick, Inc.), 159 NLRB 84 (1966), enforced in
part 383 F.2d 772 (C.A. 3 1967).
38. 159 NLRB at 92: “In all cases hired or leased equipment shall be operated by an
employee of the . . . carrier and such employee shall be paid pursuant to the terms
of this Agreement. The Employer expressly reserves the right to control the manner, means
and details of, and by which the owner-operator performs his services, as well as the ends
to be accomplished.”
a valid work-protection agreement, necessary to protect bargaining unit work and standards from erosion, but as a measure calculated to require owner-operators and fleet-operators to join the union. The court believed that other clauses of the contract adequately protected the union against the threat of subcontracting of unit work, and this, the court believed, diminished the validity of the union’s claim that the owner-operator clause was needed for such purpose.

The Board held in another recent case that the Teamsters violated Section 8(b)(4)(ii)(B) by threatening to fine an independent owner-operator, who was a union member, because he had violated the union’s constitutional prohibition against doing business with an employer with whom the union had a dispute. The Board believed that the union’s threat transgressed the law, notwithstanding that the owner-operator was a union member. 39

In speeches, articles and Congressional testimony, one often hears management and union lawyers assert that they clearly understand the words and intention of Congress in enacting Sections 8(b)(4) and 8(c); and on the basis of their authoritative understanding they appear to have little difficulty in applying Congress’ words and intention to particular cases. However, these same lawyers authoritatively disagree with each other in most cases; they also frequently disagree with the Board and the courts, including the Supreme Court. From this contrariety of opinion, what is clear is that this is a many-sided and complex problem area in which generalizations are hazardous and definitive answers should be viewed with skepticism.


Collective bargaining in the trucking industry is “characterized by multiemployer bargaining of almost every conceivable size, shape, and character,” 40 reaching a pinnacle with the execution of the National Trucking Agreement in 1964. It reportedly applies to 16,000 employers and nearly half a million employees. 41

Multiemployer bargaining has deservedly received much attention

39. Local 209, Teamsters (East Bay Counties Dry Cleaners Association), 167 NLRB No. 6 (1967).


from many writers, including a tongue-in-cheek carrier representative who said: "the greatest advantage of multi-employer bargaining is the fact that it makes it possible for a number of carriers to be second class s.o.b.'s instead of one carrier to be a first class s.o.b. negotiating a ridiculous [sic] contract."42

There are two main problems with respect to multiemployer bargaining: Those relating to its creation and termination, and those relating to strikes and lockouts.

Multiemployer bargaining is "based on the consent of the parties to treat with one another through the agreed units."43 Thus, cases often involve the threshold question whether the parties intended to create a multiemployer unit.44 Having consented to embark on multiemployer bargaining, they are free to withdraw their consent in appropriate and timely ways.45 The Board has held, with judicial approval, that the rules which govern employer withdrawal from multiemployer bargaining apply in the same way to union withdrawal.46 In the transportation industry, where multiemployer bargaining is so prevalent, many kinds of questions involving entry into and withdrawal from such units have been litigated.47

The law governing multiemployer strikes and lockouts is not entirely settled, for new issues continuously emerge. In the leading Buffalo Linen case the Supreme Court, affirming the Board, held that non-

42. Buck, Multi-Employer Bargaining Staff Viewpoints, Seventh Annual National Forum on Trucking Industrial Relations 135-136 (1956).
44. See Western States Regional Council No. 3, Woodworkers v. N.L.R.B. (Weyerhaeuser Company), 365 F.2d 934 (C.A. D.C. 1966), on remand 166 N LR B No. 7 (1967).
45. See Santa Barbara Distributing Co., 172 NLRB No. 190 (1968).
struck members of a multiemployer association may temporarily 
lockout their employees in response to a strike against one member 
which has "imperiled the employers' common interest in bargaining on 
a group basis." More recently, in American Ship Building," the 
Supreme Court, reversing the Board in a single employer lockout case, 
held that economically motivated, offensive lockouts are lawful unless 
they are "inherently . . . prejudicial to union interests and . . . devoid 
of significant economic justification."

Several recent cases involved the lockout of employees outside a 
bargaining unit in which a strike occurred. In Acme Markets a union 
struck Acme, a food chain, but did not strike the remaining members 
of a multiemployer unit. Other employers in the unit then defensively 
locked out their employees. Acme, the struck employer, thereafter also 
locked out employees in 28 other stores, even though these employees 
were not represented for purposes of collective bargaining and were not 
in the multiemployer unit. Acme's reason for locking out its employees 
in the 28 stores was to preserve the multiemployer unit, for these stores 
were in competition with stores of other members of the multiemployer 
unit which had engaged in the defensive lockout. The Board concluded 
that Acme's lockout of non-unit employees was lawful because it was 
calculated to "serve the legitimate business end of preserving the 
integrity" of the multiemployer unit. This conclusion was buttressed by 
evidence that Acme took steps to protect locked-out employees from 
economic loss.

In still another case, the Board held that it was lawful for one 
employer to lockout its employees defensively in support of a second 
employer which had been struck. The two employers—while bargaining 
separately—faced virtually identical demands from the union at the 
same time, and, therefore, their interests were joined in a single 
dispute. On the other hand, where a member of a multiemployer unit 
locked out its employees who were represented by a union which had 
called a strike in another area against employers which were not 
covered by the first employer's multiemployer agreement, the Board 
held that the first employer's lockout was unlawfully motivated.

51 Evening News Association, 166 NLRB No. 6 (1967), on remand from 382 U.S. 374 
(1966), vacating 346 F.2d 527 (C.A. 6 1965). See Weyerhaeuser Company, 166 NLRB 
No. 7 (1967), on remand from 365 F.2d 934 (C.A. D.C. 1966).
52 Friedland Painting Co., 158 NLRB 571 (1966), enforced 377 F.2d 983 (C.A. 3 
1967).
This, too, is a challenging problem area of the law in which constant refinements result from the innovative practices of labor and management.

d. Unit Problems Affecting Motor Carriers.

The Board conducts elections only in “appropriate bargaining units.” It must “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the appropriate unit . . . shall be the employer unit, craft unit, plant unit, or subdivision thereof.”

Many unit issues in the transportation industry are indistinguishable from those in other industries. “Supervisors,” for example, are excluded from the Act’s coverage and are not permitted to vote in N.L.R.B. elections, nor are they protected generally by Sections 7 and 8. The Board thus regularly decides whether dispatchers in the motor carrier industry possess the indicia of supervisory authority. Another unit problem common to all industries concerns the status of business entities which have economic interrelationships. In a recent motor carrier case, the Board held that four freight forwarders and a freight handler constituted a single employer because they were wholly owned subsidiaries of another corporation, were located on the same premises, had interlocking officers, intermingled their employees at the same location under the same supervision, and in many instances did each other’s work.

Should the unit include only one or a number of terminals or warehouses operated by the same employer? The Board makes such determinations in the light of a number of criteria, among them geographic separation, autonomy, lines of supervision, interchange of employees and historical practices of the parties. Recently the Board examined whether a single warehouse might be an appropriate unit when an employer operates several warehouses as part of a single

53. Section 9(b).
54. See, e.g., C. & A. Froedge Delivery and Trucking Service, Inc., 172 NLRB No. 8 (1968), where the Board found that a dispatcher was a supervisor who possessed the authority to exercise independent judgment in making assignments to truck drivers, to grant time off, and to require truck drivers to “punch out.” See also R.M.E., Inc., 171 NLRB No. 32 (1968), where the Board recently held that a common carrier’s president, secretary-treasurer, sales and traffic administrator, and dispatch supervisors were “supervisors.”
55. Western Freight Association, 172 NLRB No. 46 (1968).
56. See, e.g., Bowman Transportation, Inc., 166 NLRB No. 111 (1967).
warehouse enterprise. The Board concluded that one warehouse was an appropriate unit because, *inter alia*, employees of each warehouse were under separate immediate supervision, interchange and transfer of employees between warehouses was very limited, and the three warehouses were geographically separated.

The unit placement of truckdrivers is an issue which the Board has considered in many proceedings. In the leading *Koester Bakery* case the Board recognized that the work of truckdrivers sometimes is so integrated with that of other employees in a production enterprise that the drivers would enjoy "fullest freedom" if they were included with non-drivers. But in other instances drivers have distinct employment interests which warrant their being represented in units limited to drivers alone. *Koester* explains:

[The] complexity of modern industry, with its many variables, precludes, for the most part, the application of fixed rules for the unit placement of truckdrivers. For case experience has demonstrated that a wide variation in conditions of employment governing mutuality of interests exists both with respect to local and over-the-road drivers of a given employer, and as between the various industries and from plant to plant within a given industry. Thus, in a particular set of circumstances, the truckdrivers' interests could be sufficiently separate and distinct from those of other employees as not to require their inclusion in a broader unit, whereas in other circumstances such interests could be . . . so closely related to those of production employees as to warrant denial of their severance from an overall unit.

In *Kalamazoo Paper Box* the Board faced the reverse situation. Drivers historically had been represented in a unit with non-drivers, and a union sought to sever them for separate representation in a unit limited to drivers. As in *Koester*, the Board rejected a mechanical approach:

Where [relevant] factors support a conclusion that the community of interest shared by truckdrivers with other plant employees

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59. 136 NLRB at 1010.
outweigh those which would be the basis for severance from an existing production and maintenance unit, we shall deny severance to truckdrivers. . . . and we hold the view that this determination must be based upon the factual situation existing in each case and not upon title, tradition, or practice.\textsuperscript{61}

In making unit determinations the Board tries to weigh sensitively the relevant factors which the parties bring to its attention. While maintaining flexibility in terms of deciding each case on its own special facts, the Board also strives—we believe with demonstrable success—to provide meaningful guidance to the parties in their understanding of the essential ingredients of unit appropriateness.

\textit{Conclusion}

This brief essay has sketched only a few of the statutory, labor relations issues in the transportation industry. Several others must at least be noted.

A problem of understandable concern to the motor carrier in commerce has been the potential area of conflict between his duties under the common law and the Interstate Commerce Act and his duties under the Labor Act and under collective bargaining agreements.\textsuperscript{62}

Various kinds of secondary boycotts, not fully discussed here, have been a major source of litigation before the Board and the courts.\textsuperscript{63}

Organizational and recognitional picketing, regulated in many respects by Section 8(b)(7), have given rise to a whole jurisprudence of Board and court decisions.\textsuperscript{64}

Although the N.L.R.B. has a very limited statutory role to play in national emergency disputes, this, too, is a subject of deep concern in

\textsuperscript{61}Kalamazoo Paper Box Corporation, supra, at 138-139.


the transportation industry, as it is in other industries which vitally affect the health and welfare of the Nation. 65

Under Section 301 of the Taft-Hartley Act, labor contracts are enforceable in the federal courts. Many important problems concerning arbitration have been resolved; others remain. 66

Statistics help to illustrate the importance of the Labor Act's role in protecting the interests of labor, management and the public in the transportation field. In Fiscal Year 1967 the N.L.R.B. processed 2743 representation and unfair labor practices cases in this industry, the bulk of which (2089 cases) involved motor freight, warehousing and transportation services. 67 Approximately two-thirds were unfair labor practice cases, one-third, representation cases. The Teamsters Union alone participated in nearly one-third of all elections conducted by the Board during this year. 68

As these statistics suggest, the peaceful procedures of the Labor Act have aided labor and management to solve literally hundreds of representation and unfair labor practice disputes each year under rules of law and fairness embodied in Congressional policy. Year after year and in industry after industry, the little known, often under-appreciated operation of the statute has been a major stabilizing factor in American industrial life, for the law offers rational, orderly and peaceful procedures to resolve many problems of deep and immediate concern to employers and employees. Problems remain; some problems are inherent in a society which prizes free choice and freedom of contract. But the basic ground rules for industrial behavior have been defined in the law, and disputes over the rules of behavior have been replaced by fair legal standards and fair procedures.

Recent proposals have emerged for revising or even discarding the policies of the Labor Act and its familiar and tested procedures, proposals sometimes based on broad distortions of the present law and


67. 32nd Annual Report of N.L.R.B., p. 225, Table 5.

68. Ibid., p. 238, Table 13.
its administration. These proposals should be carefully weighed against the proof of the historical workability of the present law. For this is an area of American life in which violence and strife, once so prevalent, have diminished sharply, have become the disturbing exception rather than the intolerable rule.

In relationship to these recent proposals, one also hears occasionally sharp criticism of the agency entrusted by Congress with its present labor policies. Honest criticism helps the Board and the Congress and thereby serves the public interest; distorted criticism does not.

Senator Dirksen recently counseled businessmen to "Cooperate with executive departments and regulatory agencies. . . . These agencies are not the ogres that some businessmen seem to think they are; they're just doing the job that the statutes require of them." 69

FOR PENNSYLVANIA—A DEPARTMENT OF TRANSPORTATION
BY: RAYMOND P. SHAFER*

Pennsylvania today is criss-crossed by a variety of excellent transportation systems, modes and services, provided by both public and private enterprise. Yet, this splendid network of land, water and air transportation has serious shortcomings. For example, while there is healthy competition between elements of this “system” in many instances, there is uneconomic duplication of services and facilities in others. There are also serious transportation deficiencies in some areas, causing congestion and threatening economic vitality and growth. In the larger view, we need not only to adapt better to the transport systems and needs of the states and the world around us, but more important, because of our strategic location, Pennsylvania’s network should become an international pace-setter in new and improved transportation technology. In short, our overall system requires continual improvement, and better “balance” and coordination.

Looking to the future, we in Pennsylvania already have highway plans, rail and transit plans, airport plans, waterway plans. We have local plans, regional plans and state plans involving transportation, and we have numerous research and development efforts by public and private enterprise for future transportation needs and new technology. What we lack and therefore need, however, is a state-wide comprehensive transportation plan that brings together all these separate, yet highly essential, plans so they make sense for Pennsylvania’s future. Perhaps, the most serious shortcoming in this complex situation is the lack of unified direction of statewide transportation planning that would utilize this potent tool intelligently to guide and shape the kind of Commonwealth we want and need for the future.

Hence, it became clear to us in State government that we must take the leadership to direct a whole new, total approach to transportation in our Commonwealth. Stated simply, what we did not have, and needed desperately, was a Master Plan for transportation in Pennsylvania, and a means at the State government level for developing, guiding and implementing it.

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Today, transportation responsibilities are vested in several Commonwealth departments, bureaus and agencies. After considerable study by two committees\(^1\) appointed by me of the steps taken in other states and the Federal Government who had faced a similar problem, and the results of their efforts, we drafted legislation which defines and would create a Pennsylvania Department of Transportation.\(^2\) Following public hearings and appropriate revisions, the Penn DOT bill, as it is called, is expected to be considered by the Pennsylvania General Assembly during its 1969 session.

Penn DOT would, in essence, gather together under one roof most of the varied agencies, commissions, bureaus and Departments now in State government which are associated with transportation in Pennsylvania. It would provide a suitable base for planning and implementing a transportation network on a sound, rational and business-like basis. It is the logical step to be taken in order to give direction to an industry which has grown like Topsy and needs stabilization to its policies and procedures.

The primary objectives we are seeking in creating a single department to deal with transportation matters at the State level are:

—To provide a focal point in State government for the development and implementation of a comprehensive and integrated Commonwealth transportation policy and program.

(1) Governor's Committee for Transportation and Interdepartmental Transportation Committee.

(2) Senate Bill No. 1740 introduced July 17, 1968 and referred to Senate Committee on State Government.

—To bring greater safety in the movement of all persons and goods within the Commonwealth regardless of transportation mode.

—To develop and apply the best of an expanding technology to each mode of transportation.

—To strengthen the Commonwealth's partnership with private enterprise and with Federal and local governments in meeting the Commonwealth's urgent transportation needs.

—To develop an even closer working relationship with other State agencies and local planning groups on all transportation matters, with particular emphasis on urban transportation.

—To improve Pennsylvania's transportation links with the rest of the Nation.

1. Governor's Committee for Transportation and Interdepartmental Transportation Committee.
2. Senate Bill No. 1740 introduced July 17, 1968 and referred to Senate Committee on State Government.
Since highways play such a large role in the Commonwealth's involvement in transportation, we visualize our existing Department of Highways as the nucleus around which Penn DOT would be organized. The legislation as drafted would transfer all of the Highway Department's present functions and personnel to the new department. It would also transfer motor vehicle, traffic safety and other transportation-related functions and personnel, now in the Department of Revenue, to Penn DOT. The State's mass transportation and high-speed ground transportation programs, now in the Departments of Community Affairs and Commerce, respectively, would be transferred to the new department.

Likewise, the functions of the Pennsylvania Aeronautics Commission, the Hazardous Substances Transportation Board, and the Navigation Commission of the Delaware River would be transferred to Penn DOT. However, the Pennsylvania Turnpike Commission, State Police and Public Utility Commission—each with substantial transportation responsibilities—would not be directly affected.

How will the Highway Department fare in this new organization? Basically, there would be very little change in the duties of the present highway organization. The establishment of Penn DOT will not alter the fact that of all the transportation modes included in it, highway, rail, air, water and pipe line, only highway is public owned and operated. The design, construction and maintenance of the highway network will continue to be entirely controlled by the public agency. The vast organization now existing for this purpose will continue to function in its present fashion. The main difference, the overwhelming benefit obtainable from Penn DOT, is that every penny spent on new construction, every decision made to improve a highway, will be spent or made knowing that the expenditure has been made, the decision reached, with just a little more certainty that the step taken is the right one insofar as the total future of Pennsylvania is involved.

Will the Highway Department lose its identity inside a Penn DOT? Perhaps, but it may be hard to lose entirely over 23,000 highway oriented employees in a Department whose total personnel is envisioned originally to be only 25,500. Nor is it easy to imagine that a Department having a fiscal year budget of around $877 million would soon forget that some $844 million of that amount are dedicated highway funds. The vital role that highways play on our Commonwealth's transportation system would not be ignored.

There has been some comment on the size of the new Department. Would it be too large, too unwieldy? Not likely. In fact it would be
neither the largest in number of employees nor in budget. The proposed Department of Health and Public Welfare would contain almost 38,000 employees and the present Department of Public Instruction has a budget of over a billion dollars. There should be no problem with size.

It is interesting to note that most of the units to be brought into Penn DOT are already funded from the Motor License Fund. Two units from the Department of Revenue comprise the bulk of the personnel involved. The Bureau of Motor Vehicles, with 1,481 employees, and the Bureau of Traffic Safety, with 684 employees make up almost 90% of the people involved. Another unit which is presently funded from restricted receipts from the Motor License Fund and which would be absorbed by Penn DOT is the Pennsylvania Aeronautics Commission.

Is there a possibility that some of the dedicated Motor License Funds might be siphoned off to a new use within Penn DOT? There is no argument about the immensity of the existing need for more and improved highways. The proposed projects brought to the Highway Commission yearly, far exceed available funds. There is no attempt made by any one, pro or anti-highway, to refute this well documented demand. Funds could not be re-distributed then on the basis of lack of need. In addition the Motor License Fund is dedicated, not through a policy decision within the Department of Highways or by an executive order by the Governor, but by the Constitution. It is dedicated, not by policy, but by law, and it would take a constitutional amendment to change the status. If the public demand for such an amendment was evident, it could be accomplished just as easily if there was a separate Department of Highways or if it was only a part of Penn DOT. The fund allocation does not rest with a Department head, but rather with the people, through their constitution. As long as such action is not taken, as long as the Legislature continues to support the Highway program in the way it did when the first six-year highway program was formulated, there need be no fear of any reduction of emphasis in the highway field.

On the other hand, the increased awareness of the total transportation problem, made possible through the coordinated efforts of all the elements of Penn DOT, may well point out deficiencies existing in the other modes of transportation. Hopefully it will provide, along with awareness, the methods by which these deficiencies can be eliminated. In many cases solutions may be obtained, not through public funding, but through the lifting of archaic regulations and by
coordination of efforts by the various modes, rather than the interdisciplinary in-fighting which now exists.

It is highly improbable, then, that the Highway Department, or perhaps we should say the highway program, will suffer from a decrease in personnel, funds or emphasis. What can the Highway Department offer Penn DOT? Certainly it has available a well-structured organization which can easily be expanded, to accommodate the additional duties of a Penn DOT. Those administrative units now in support of the Highway Department, such as personnel, fiscal, data processing, management information systems and public information, could adapt themselves to the extra and varied workload. Likewise the District organizations, without too much trouble, can be altered to include elements of planning and programming which will insure that the total transportation picture is constantly in focus and being considered.

Among the many advantages we see accruing to the Commonwealth and its taxpayers through creation of Penn DOT are:

—A single department in State government would recommend decisions to the Governor involving the overall priority of transportation work and the emphasis to be placed on each project, irrespective of mode.

—There would be more logical, total planning for the overall transportation requirements of the Commonwealth. To implement this, for example, present Highway Department district offices would expand their horizons for total transportation development.

—Penn DOT would permit better consideration of the proper site locations for all types of transportation facilities and place emphasis on facilities complementary to one another, presently somewhat difficult to achieve under numerous jurisdictional responsibilities.

—Creation of Penn DOT would permit the Commonwealth to become more deeply involved in total systems analysis, thus recognizing all factors concerned with transportation.

Further advantages of the creation of Penn DOT could be:

—Since Penn DOT would function parallel to the U.S. Department of Transportation, relationships with Federal programs should be enhanced.

—Improved corridors for the movement of people and goods could be developed and accomplished. One right-of-way might be utilized to serve various types of transportation resulting in better service and economy.

—Urban transportation would receive a major thrust in such a department.
—Penn DOT would greatly simplify, accelerate and improve the statewide transportation safety program.

—By placing the control of a major revenue source, motor vehicle and operator licensing, within the using agency, a much better flow of information for planning, forecasting and development of future sources of revenue would result.

—More efficient use of personnel should result through eliminating duplication of functions, e.g. mail, payrolls, personnel functions.

However, in proposing a Master Plan and Department of Transportation for Pennsylvania, we are not expecting to benefit just from consolidating many transportation functions into a single coordinated effort. The principal benefit we anticipate is that this unified approach will make it possible for us, for the first time, to incorporate a computerized strategy for the input and feedback of every development in transportation needs, techniques, and funding; every change in population, employment, and other demographic data; every new requirement of Pennsylvania citizens and industry as the years go by; to provide a continuous, systematically updated sheaf of facts and information for use by our transportation planners and decision-makers.

We in Pennsylvania believe that the approach we are taking is not only unique, but that it is mandatory if we are to be fully prepared to meet the complex transportation needs and challenges facing us. This is not only an era of innovation in transportation technology, but also in the techniques of transportation planning. There have been rapid advances both in the concepts of analysis and in the computational techniques for dealing with large and complex quantities of data. Pennsylvania can become one of the first states to utilize these advances in planning methodology, but it can do so effectively only if there is a single agency at state level charged with the overall responsibility for collecting and using the necessary information and for producing and implementing a Master Plan.

Transportation has, from time immemorial, been the catalyst that changed a forest outpost to a booming steel center, an Indian village to the greatest city in the world; and the lack of it has withered many a grandiose dream on the vine, has kept at status quo many a sleepy country town. Good transportation, like a good name, is more to be desired than great riches. And the obtaining of it has become increasingly complex, too complex and too important not to be given every chance to succeed. Pennsylvania is strategically located as the hub State in the center of 93,000,000 people and the Nation's major
industries. We cannot afford to hold onto the old methods of determining priorities. We must become even more comprehensive in our planning; more efficient in our organization and methods; more certain that the way we move, the decision we make, is the proper one. Penn DOT is the vehicle by which we can achieve this goal.

Thus, the two major recommendations of the Governor's Committee for Transportation—the design for Penn DOT, and a Master Plan for the guidance of Pennsylvania's planners and legislators—go hand in hand, toward the solution of one of society's most pressing problems: Mobility.
CANADA'S NATIONAL TRANSPORT POLICY

By J.W. Pickersgill*

A new national transportation policy is being implemented in Canada and a new unified regulatory approach for all modes under federal jurisdiction has been coming into effect in stages since the National Transportation Act received Royal Assent on February 9, 1967.

The object, stated in Section 1 of the Act, is "an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost." This is declared to be "essential to protect the interests of the users of transportation and to maintain the economic well-being and growth of Canada."

How are these objectives to be achieved? The Act states that they "are most likely to be achieved when all modes of transport are able to compete." Competition between the modes is the essential ingredient of the national transportation policy.

The responsibilities of the Canadian Transport Commission are regulation and research. The major regulatory responsibility is to prevent unduly high rates in conditions of monopoly or, in conditions of competition, unprofitable rates that may throw an unfair burden on other traffic or undermine a more efficient mode. The research responsibility is to uncover better solutions to national transportation problems and to keep the development of transportation policy abreast of constant technological change in all branches of the industry.

Bringing into effect a new national transportation policy, particularly under a unified regulatory structure embracing all modes, is not a simple task. Acceptance of the new policy, when the legislation was before Parliament, might well have been impeded by the fact that one of the two transcontinental railways in Canada is publicly-owned. For many years, the trucking industry was suspicious that the federal Government, even with the best of intentions, would not regulate impartially because it might be expected to have paternalistic feelings, and perhaps discriminatory policies, favouring the publicly-owned railway. This suspicion was understandable, if we consider the experience of the trucking industry in some countries where government ownership of railroads exists. However, the very first section of the new Act, from which I have already quoted, contains a statement of the

*President National Transport Commission of Canada.
national transportation policy of Canada, including the provision that "regulation of all modes of transport will not be of such a nature as to restrict the ability of any one mode of transport to compete freely with any other modes of transport." This direction by Parliament binds the Government and the Commission so as to ensure fair treatment of all modes. It evidently reassured the trucking industry; in its submission to the Standing Committee on Transport and Communications of the House Standing Committee on Transport and Communications of the House of Commons on November 3, 1966, the industry stated that it supported in principle the Bill which has led to the present Act.

To carry out the national transportation policy, the Act created a Canadian Transport Commission. The Act applies to federal undertakings in the rail, air, water, commodity pipeline and motor vehicle transport fields—a federal undertaking being one that connects a province with any other or others of the provinces or extends beyond the limits of a province.

To carry out its responsibilities, the Canadian Transport Commission is divided into functional Committees for each mode of transport—rail, air, water, motor vehicle transport and commodity pipeline transport. The Railway Transport Committee of the new Commission is the functional successor of the Board of Transport Commissioners, which had regulated railways in Canada since the early 1900's. The Air Transport Committee and the Water Transport Committee are the functional successors respectively, of the former Air Transport Board and the Canadian Maritime Commission.

Although all committees are in existence, as required by the Act, the Commission does not, as yet, regulate extra-provincial 'for hire' truck and bus transportation nor commodity pipeline transport. These parts of the Act can be proclaimed in force by the Governor in Council (federal Cabinet) when considered desirable.

There has never been in Canada a federal regulatory board for extra-provincial truck and bus operations, although the federal Parliament's jurisdiction in this field was confirmed in a decision of the Judicial Committee of the Privy Council in 1954. Under the Motor Vehicle Transport Act, passed by Parliament in 1954, the existing provincial regulatory boards have been carrying on as the regulatory agents of the federal Government. The provincial boards are directed in the Motor Vehicle Transport Act to issue an extra-provincial operating license "upon the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking." The provincial boards have performed a valuable service
in a field of federal responsibility but the growth of the extra-provincial truck and bus industries has reached a point where the existence of ten different systems of provincial control, all drawing authority from one federal statute, is causing serious problems for the industry. The Motor Vehicle Transport Committee of the Commission has been carrying on discussions with representatives of the provincial governments regarding this problem. The object is to find a format for the implementation of the Commission's extra-provincial regulatory powers, hopefully in a way that will meet the needs of shippers and carriers and, at the same time, recognize the continuing interest of provincial governments in the one mode of transport whose regulation all along has been by a provincial agency.

The commodity pipeline transport provisions of the National Transportation Act have not been proclaimed because there is no commodity pipeline transport as defined under the Act in existence in Canada. This picture is likely to change in the next year or so.

Most of the 17 Commissioners of the Canadian Transport Commission have been assigned to more than one Committee, although all have one Committee which is their main responsibility. It must be remembered that each Commissioner shares with his colleagues a responsibility for administration of a national transportation policy involving all modes. Rather than allow their Committee responsibilities to act as blinkers and to restrict their approach intermodally, they are, on the contrary, required constantly to exercise their talents regarding the most effective implementation of the national policy.

Thus, while there are within the Commission problems peculiar to each mode of transport—problems which are constantly under review by the Commissioners assigned Committee responsibilities in these areas—the Commission as a whole is developing, as it must, an intermodal outlook to the performance of its regulatory responsibilities.

This outlook is of great importance to the success of the Commission's performance of its second major responsibility—research. For the Canadian Transport Commission, in addition to being a regulatory body, is a research body as well. It has broad powers for investigating transportation development and policy and rendering its reports on these matters to the Minister of Transport. Its term of reference is that the Commission "shall" do these things. The role of a permanent inquiry into all facets of Canadian transport development and policy is so far ranging under the Act that a large expert research staff is required and is now being organized under a
Commissioner charged with the research responsibility and acting “under the general directions of the Commission.”

In seeking to promote the best possible transportation system through competition among the modes of transport, the National Transportation Act recognizes the competitive facts of life to which public policy in Canada has been slow to respond. Our enormous land mass, and relatively small population, only now nudging 21 million, made the railway essential to national birth and survival. Technologically, no other mode of transport in 1867, the year of Confederation, could link the scattered provinces and enable the movement of our people and the commodities they produced. For this reason, our first transcontinental railway, the Canadian Pacific, was as much a part of Confederation as the Act which brought Confederation into being.

At the beginning of the 1920’s other privately-owned railways and certain publicly-owned lines, were, of necessity, brought together in a huge conglomerate, Canadian National Railways, one of the largest railway systems in the world. Thus, in effect, we had two transcontinental railways competing in Canada, one privately-owned, the other publicly-owned, with all that implied in maintaining the delicate balance that would enable the publicly-owned system to progress but not put the privately-owned system under.

Even in the early 1920’s, the technology of transport was such that national survival still depended on the main on our railway system. Although major competition of alternate modes was in the offering, its effects were barely perceptible at this stage and its consequences, from the standpoint of public policy, unforeseen.

Water transport had always been a factor of great importance in certain parts of Canada. It became more so, with significant impact on the economies of both Eastern and Western Canada, with the development of the St. Lawrence Seaway. But the all-embracing impact on the economy was that of the railways. It was natural, therefore, that railways, and problems of railways, should dominate the transportation policy of Canada for many decades.

One Canadian politician of an earlier day ringingly declared: “Railways are my politics!” Not unnaturally the solitude of the Canadian Pacific, as the only transcontinental line, was broken in time by the new transcontinental ventures to which the Canadian National fell heir. Indeed, the atmosphere of railway building became obsessive to a point where the nation had more railway mileage than it could economically sustain, a problem that has come home to roost on the
doorstep of the Canadian Transport Commission in applications for abandonment of several thousands of miles of branch lines.

The sputtering of the early automotive vehicles along the dirt roads of Canada was transformed in time to a pulsating roar of traffic on improved paved highways built by the provinces, including a transcontinental highway to which the federal Government, by March, 1968, had contributed some $714 million. The formation of truck and bus associations was a sign that the growing number of operators serving this field had begun to think and act as an industry.

By their very characteristics these new transport industries did not and could not assume the 'global' obligations of law and public policy imposed upon the railways and carrying over from the monopoly era. For a time the new truck and bus industries had to bear the stigma of "unfair competition". A deeper perception would have revealed that these modes, with the parallel development of air transport, were quietly revolutionizing the transportation scene in Canada. Services of a kind never before available, and, of great benefit to industry and the travelling public, established a momentum of new transport development. A public policy dilemma was in the making. Monopoly regulation of railways—the latter now only a part of a transport system comprising, as well, air, water and motor vehicle transport, with commodity pipeline transport in the offing—no longer made sense.

Although such regulation was impeding the competitive potential of the railways, the problem was still that the railways remained the dominant economic power. Their economic strength far exceeds that of their competitors, particularly when one measures it against the multiplicity of individual operators that make up the other transport modes. As Minister of Transport I stated on more than one occasion my strong aversion to the use of non-compensatory rates to put out of business a more efficient transport service rendered by a mode that was economically weaker. This was a major problem faced in the drafting of the National Transportation Act. Could we allow full play to the competitive potential of all modes and, at the same time, set the rules of the game so as to prevent unwise or destructive use of the economic power of any one of the modes?

In this respect, the report of the MacPherson Royal Commission on Transportation was most helpful to the Government. That Commission, composed of six Commissioners, held hearings for 134 days throughout Canada in 1959-60. The Commission made recommendations to the Government of the day founded on the concept that transport efficiency would be promoted by giving full rein to
competition between the modes. This was qualified by the recommendation that there be protection against non-compensatory tariffs and also protection for the public in any remaining areas of significant transport monopoly.

It is true, of course, that the movement of certain important commodities remains a monopoly of Canadian railways and that the technology of mass transportation is likely to perpetuate this situation for the foreseeable future. For this reason, rates on the movement of these commodities, lacking the control exerted by competitive forces, required a system of maximum rate control with the right of complaint by the shipper to the regulatory body. This protection for 'captive' shippers is to be found in the National Transportation Act.

The MacPherson Commission did not recommend the establishment of a national transportation authority that would integrate federal regulatory functions, let alone the federal responsibility for transportation research. These additional steps were considered desirable by the Government which, in 1966, during a nation-wide railway strike, introduced Bill C-231 (the National Transportation Act) in the House of Commons.

The Bill was generally well received by the shipping public and the transportation industry. Shippers and the railway benefit in the Act by the removal of archaic restrictions—for example the provision that rail rates must be charged at the rate of so many cents per hundred pounds per carload—thus opening the door to multiple car and trainload rates. But it is specified that a freight rate must be compensatory and 'compensatory' means exceeding the variable cost of the movement of the traffic as determined by the Commission. Moreover, the right of appeal against a railway rate alleged to be non-compensatory is extended, for the first time, to truck operators, whether under provincial or federal jurisdiction. Part III, which, in the event of proclamation by the Cabinet, will extend the control of the Canadian Transport Commission to licensing and rate filing of extra-provincial trucking firms.

Intermodal relationships and common ownership of transportation facilities are not prohibited by the Act but they are subject to regulatory provisions for the protection of the public. For example, the proposed acquisition of a transport undertaking by a mode of transport under the jurisdiction of Parliament may be objected to on the grounds that "it will unduly restrict competition or otherwise be prejudicial to the public interest". If, upon investigation, the Commission finds grounds to sustain the objection it may disallow the acquisition.

The protection afforded in regard to the provision of piggyback
facilities, while I do not cite it as one of the most significant provisions, does typify the approach taken in the Act. It requires that a railway company providing facilities for the movement of trailers shall offer to all trucking companies—whether rail-owned or independently-owned—similar facilities at the same rates and on the same terms and conditions.

One measure of the extent to which the Government succeeded in presenting a Bill that treated fairly all modes of transport can be seen, I believe, in the reaction of the trucking industry to it. Canadian Trucking Associations in its submission of November 3, 1966, to the Standing Committee on Transport and Communications of the House of Commons, stated:

"... There can be no fear that national transportation policy can be maneuvered in a direction oriented to the interests of any one form of transport. On the contrary, after years of strife and controversy in the transportation field, we now see a Bill under which all forms of transport, competing freely with each other, can concentrate fully on the achievement of the best possible transportation service at the lowest overall cost for the people of Canada."

"The trucking industry supports Bill C-231 in principle. The industry and its Associations will co-operate to the best of their ability in the successful achievement of the national transportation policy."

The National Transportation Act began a reversal of the mounting subsidization of the Canadian railways which had taken place in the years 1959-1964. The procedure was to roll back non-competitive rates of the railways pending the implementation of legislation stemming from recommendations of the MacPherson Royal Commission on Transportation. The pressure on the non-competitive rates had begun with an across-the-board increase in freight rates—what was described as a "horizontal" increase in freight rates—authorized by the Board of Transport Commissioners in 1959 in order to meet increased wage costs. The rate roll-back occurred in 1959, under authority of the Freight Rates Reduction Act and the amount allocated initially to compensate the railways was $20 million. To mitigate the increased pressure of two further wage increases, the payments to the railways had risen to in excess of $100 million per year at the time Bill C-231 was brought before the House of Commons on the 29th of August, 1966. This process could not continue indefinitely. The increasing
subsidies would have reached astronomical proportions and would have imposed unfairly on the taxpayers of Canada and on competing modes of transport whose own cost pressures on rates were not relieved by Parliamentary subsidies.

With the new rate regulatory provisions in the National Transportation Act, permitting the interplay of the competitive forces in transportation and providing maximum rate protection for shippers 'captive' to one mode, the time for a roll-back of the subsidies was at hand. The National Transportation Act provides for consecutive annual reductions of $14 million per year with a final payment of $12 million, over an 8-year period, in order to eliminate this type of subsidy. The only new payments that will be made will be those for railway services determined by the Commission to be uneconomic but which the Commission decides should not be discontinued.

We have attempted in the National Transportation Act to bring our whole approach to transport development in Canada up to date: to regulate when necessary but only when necessary. Otherwise the interplay of competitive forces will fashion the variety and standard of the services offered and the level of rates of the competing modes.

The research function of the Commission will, we are confident, assist in the solution of pressing transport problems and do so in a way that will increase the efficiency of our transport system. This is of particular importance in Canada, where our capital investment in transport serves a relatively small market, especially when compared with the United States. It has been estimated that more than 20 percent of our total annual expenditures for goods and services or our gross national product are made either directly or indirectly for transportation of one kind or another.

It is a matter of prime importance to Canadians that we do all that is within our power to keep our investment in transport at a reasonable level, consistent with the most efficient system that can be devised. Whether we are on the right road in the way we are now approaching the problem, experience will tell. It is my belief that we are aimed in a direction that will give us better value for our transportation dollar. Certainly our experience as we proceed should be of interest and assistance to all concerned with "an economic, efficient and adequate transportation system".
THE INCIDENTAL-TO-AIR EXEMPTION: CONFLICT AND CONFUSION

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Among the modern problems involving coordination and cooperation between different modes of transportation, few present such a clear example of conflict between the involved regulatory agencies and confusion in the governing law as does the so-called "incidental-to-air" exemption relating to coordinated air-motor transportation of air freight.

I. BACKGROUND

The Interstate Commerce Commission has jurisdiction, under Part II of the Interstate Commerce Act of 1935, to economically regulate the activities of motor carriers engaged in interstate commerce,¹ unless specifically excepted from regulation. Among the exceptions is that contained in §203(b)(7a) of the Act, which partially exempts from the ICC’s regulatory authority motor transportation of property and passengers which is “incidental to transportation by aircraft.”²

The Civil Aeronautics Board has jurisdiction, under the Federal Aviation Act of 1958, to economically regulate air transportation, which, by definition, includes movements partly by other transportation modes.³ Insofar as is pertinent here, the CAB’s jurisdiction embraces the acceptance or rejection of tariffs which are filed with it by direct

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1. “Interstate commerce” is defined as commerce between states “whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water”. Interstate Commerce Act §203(a)(10), 49 U.S.C. §303(a)(10) [hereinafter cited as ICA].

2. The partial exemption provides: “Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include . . . the transportation of persons or property by motor vehicle when incidental to transportation by aircraft.” ICA §203 (b)(7a), 49 U.S.C. §303(b)(7a).

3. “Air transportation” is defined as, inter alia, interstate air transportation which includes transportation “wholly by aircraft or partly by aircraft and partly by other
and indirect air carriers to cover their services performed "in connection with . . . air transportation".5

The similarity of the language appearing in the respective statutes is immediately apparent. While the primary focus of this article is upon the meaning of the incidental-to-air exemption in the Interstate Commerce Act, it will be seen that the CAB's jurisdiction and actions with respect to air carriers' tariffs is directly relevant to the problem at hand. Indeed, the very nub of the problem relates to the degree of harmony—or inharmony—between the interpretations by the ICC and the CAB of what motor transportation services may be regarded as "incidental to" or "in connection with" air transportation.

The incidental-to-air exemption was enacted in 1938 as §1107(j) of the Civil Aeronautics Act.6 The original bill, in the form passed by both the House and Senate, did not contain §1107(j) or any comparable provision. Rather, that section was added by the House and Senate Conference Committee, and the only mention of it by the Committee provides no clue as to what the conferees intended by it.7 Thus, the legislative history behind the partial exemption is of no assistance in its interpretation.

Quite naturally, interpretative problems concerning the incidental-to-air exemption have arisen only in relatively recent years, after air cargo transportation came into substantial use. The growth in the utilization of domestic air freight transportation is a matter of common knowledge, e.g., the airlines operated 304 million ton-miles in 1953 as compared with 2.8 billion ton-miles in 1968.8 As air cargo transportation continues to grow, the use of integrated air-surface modes of transportation necessarily will increase. Accordingly, the importance of intermodal coordination in this area will become much greater.

Interagency cooperation would appear to be the order of the day.

forms of transportation." Federal Aviation Act §101(10) & (21), 49 U.S.C. §1301(10) & (21) [hereinafter cited as FAA]. Similar definitions were contained in the earlier Air Commerce Act of 1926 and in the Civil Aeronautics Act of 1938.

4. A "direct" air carrier is an airline, directly engaged in the operation of aircraft. See 14 C.F.R. 296.1(b). An "indirect" air carrier, as used here, is an air freight forwarder. See Air Freight Case, 9 C.A.B. 473 (1948); see also 14 C.F.R. 296.2(a).

5. FAA §403(a), 49 U.S.C. §1373(a), provides: "Every air carrier . . . shall file with the Board . . . tariffs showing all rates, fares, and charges for air transportation . . . and services in connection with such air transportation."

6. 52 Stat. 1029 (1938).

7. See 83 Cong. Rec. 8843, 8865 (June 11, 1938).

However, it must be recognized at the outset that certain ingredients for interagency conflict are inherent in the regulatory framework. The ICC, on the one hand, is committed to the fundamental task of developing, coordinating, and preserving "a national transportation system" by the various transportation modes adequate to meet the needs of commerce, national defense, and the postal service. By contrast, the narrow focus of the CAB is in developing and encouraging "an air-transportation system" adapted to the needs of commerce, national defense, and the postal service. Additionally, it should be noted that the ICC must concern itself with a statutory exemption from its jurisdiction, while the CAB is concerned with an affirmative grant of jurisdiction. Traditionally, statutory exemptions have been strictly construed; while grants of jurisdiction have been construed in conformity with the dominating general purpose behind the statute (in this case, the furtherance of air transportation).

II. The Early ICC Decisions: Creation of the Potential for Interagency Conflict

The ICC's earliest appraisals of the incidental-to-air exemption, prior to United States entry into World War II, did not consider the scope of the exemption in any detail. Two of those decisions simply concluded that motor transportation of air express shipments over distances of 12 and 15 miles, respectively, constituted "a line-haul operation", and, therefore, was not within the partial exemption.

The first extensive discussions of the exemption came at a time, in 1947, when commercial aviation was only recovering from the effect of the War. In the Sky Freight case, the exemption was analogized to the terminal service exemption provided under §202(c) of the Interstate Commerce Act. The ICC found that the purpose of the

10. FAA §102(a), 49 U.S.C. §1302(a) [emphasis added].
14. ICA §202(c), 49 U.S.C. §302(c), provides a partial exemption from regulation for "the performance within terminal areas of transfer, collection, or delivery service" by
incidental-to-air exemption, with respect to property, was to allow air carriers a terminal area for the provision of *bona fide* collection, delivery, and transfer service on shipments having an immediately prior or subsequent movement by air. While the ICC declined to prescribe a precise geographical limitation for the exemption, it did hint that, because of the nature of air line-haul operations, a more extensive terminal area might be warranted for air carriers than for other transportation modes. Accordingly, as with §202(c), the partial exemption was interpreted as embracing "a reasonable terminal area" for air carriers. Within such an area, motor transportation of property would be considered subordinate to, an adjunct of, or "incidental" to any prior or subsequent transportation by aircraft. Specifically, in the *Sky Freight* case itself, the ICC found that operations in the nature of air freight collection and delivery services up to 45 miles from airports in the New York City area were within the exemption.

In the *Teterboro* case,\(^\text{15}\) decided the same day as *Sky Freight*, the ICC for the first time interpreted the exemption as it relates to air passengers. In holding that the involved transportation of passengers to points located within 25 miles of the airport was exempt from regulation, the ICC again declined to prescribe territorial limits for exempt operation generally. The ICC followed *Sky Freight* in finding that, while the length of the motor movement was not alone the determining factor, the exemption did not apply to all transportation of passengers having an immediately prior or subsequent movement by air.\(^\text{16}\)

The next year, the ICC engrafted an exception on the applicability of the partial exemption only to terminal-area collection, delivery, and transfer services. In the *Graff* case,\(^\text{17}\) it was held that line-haul motor transportation may be within the exemption when the involved services are "emergency" in character, i.e., when they are irregular and sporadic, and serve merely as a substitute for impossible or impracticable line-haul air transportation.\(^\text{18}\) The Commission

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\(^\text{16}\) See also, *Picknelly Extension of Operations—Bradley Field*, 47 M.C.C. 401 (1947), involving a surface movement of 13 miles.

\(^\text{17}\) *Graff Common Carrier Applic.*, 48 M.C.C. 310 (1948).

\(^\text{18}\) The *Graff* case involved motor transportation of passengers. The principles enunciated in that case were applied, some 10 years later, to motor transportation of
emphasized that surface operations in emergency circumstances clearly are subordinate to regular air services. Thus, the Graff decision—finding a motor haul in excess of 200 miles to be within the exemption—was regarded as "no real departure" from previous interpretations of §203(b)(7a).\textsuperscript{19}

Also in 1948, the ICC decided two cases which, like Sky Freight, above, involved transportation in the vicinity of New York City. In the first case,\textsuperscript{20} the Commission deemed significant, though not controlling, such considerations as air-carrier billing and responsibility for the entire air-surface movement and door-to-door rates published by the airline in deciding that operations to points within 40 miles of the airport were within the partial exemption. In the second case,\textsuperscript{21} involving distances of over 130 miles, the presence of the same considerations was held not to bring the operations within the exemption. As the operations would have extended into areas located closer to, and served primarily by, other airports, the ICC regarded them as clearly interterminal in character, exceeding a reasonable terminal area for the airport served. As in earlier cases, however, the Commission did not determine the precise extent to which the proposed operations were beyond the exemption.

Five years later, in response to the post-War growth of domestic air freight, the ICC examined in more detail the incidental-to-air exemption in the landmark Kenny case.\textsuperscript{22} That proceeding involved an application to transport air freight between two airports located in the commercial zone of Pittsburgh and the surrounding area within 50 miles of either airport. In its initial report, the Commission concluded that the application, which was unopposed, should be dismissed, as the entire operation proposed was within the exemption. Subsequently, after hearings on a reopened record, that report was modified.

In its second Kenny report,\textsuperscript{23} the ICC found that motor transportation of property, to be exempt, must be

confined to the transportation in bona fide collection, delivery or

\textsuperscript{19} Graff, supra note 17, at 316.
\textsuperscript{20} Golembiewsky Common Carrier Appl., 48 M.C.C. 1 (1948).
\textsuperscript{21} Peoples Express Co. Extension of Operation—Air Freight, 48 M.C.C. 393 (1948).
\textsuperscript{22} Kenny Extension—Air Freight, 49 M.C.C. 182 (1949), modified, 61 M.C.C. 587 (1953).
\textsuperscript{23} Kenny Extension—Air Freight, 61 M.C.C. 587, 595 (1953).
transfer service of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through air bill of lading covering in addition to the line-haul movement by air the collection, delivery, or transfer service performed by motor carrier.

Thus, the report re-affirmed and amplified the "bona fide collection, delivery, or transfer service" test which had been applied since the Sky Freight decision. The Commission again considered that any determination of a precise territorial zone for the application of the exemption would be "most difficult and impractical"; however, it concluded that the above-quoted test, with its requirement for a through air bill of lading and a continuous movement from point of pickup to point of delivery, was "self-limiting".24

The Kenny decision suggested that a "reasonable" terminal area for direct air carriers might be reflected in the tariff filings which those carriers make with the CAB covering the particular points to and from which they hold themselves out to the public to perform pickup and delivery service on air freight.25 This interpretation of the exemption was considered desirable for the reason that it readily distinguished between motor operations within and without the scope of the exemption. Further, the interpretation was regarded as flexible, as future enlargements or curtailments of air terminal areas could be effected simply by changing the pickup and delivery tariffs on file with the CAB. Nonetheless, a potentially serious drawback with the interpretation was its premise that direct air carriers in fact would limit their tariff holding-out of pickup and delivery service to "reasonable" terminal areas. The ICC recognized this weakness when it stated:26

The air carriers now establish their own terminal area limits by the filing of tariffs with the C.A.B., and our interpretation of the exemption of section 203(b)(7a) is based on the assumption that that agency would not hesitate to reject any publication which would result in an unreasonable enlargement of such an area.

24. Ibid.
25. Although, at the time of Kenny, there was very little pickup and delivery service performed for air carriers beyond the commercial zones of the cities served [Id. at 589-92], the ICC stated "that the modus operandi of air carriers is sufficiently different from that of land carriers as to justify special considerations in the matter of terminal area limits which may or may not be somewhat larger than those of land carriers." [Id. at 595].
26. Id. at 596 [emphasis added].
THE INCIDENTAL-TO-AIR EXEMPTION

Inherent in the principles set forth in Kenny lurks the real possibility of interagency conflict.

For about eight years following Kenny, the ICC applied the principles therein in deciding, on an ad hoc basis, whether or not particular motor operations were "incidental" to air transportation. Motor operations were found partially exempt from ICC regulation in cases involving bona fide collection and delivery service performed under through airline bills of lading to points named in terminal area tariffs published by the air carriers; conversely, operations not meeting those requirements were held to be outside the scope of the exemption. In 1961, in the Panther decision, the Kenny principles were extended to air freight forwarders. That case held that exempt motor transportation of property on behalf of air freight forwarders must be confined to bona fide collection, delivery, and transfer service on shipments having an immediately prior or subsequent movement by air as part of a continuous movement under air freight forwarder bills of lading to and from points specifically named in both the direct and indirect air carriers' terminal area tariffs on file with the CAB.

The Kenny case had no bearing on the scope of the incidental-to-air exemption with respect to passengers. The ICC imposed no requirement that motor transportation of passengers be arranged or paid for by air carriers or be provided under through air tickets covering the entire air-surface movement. Instead, while continuing to state that distances were not necessarily controlling, the Commission apparently was persuaded largely by distances in holding that movements of from 45 to 100 miles were not covered by the exemption.

27. Fischer Common Carrier Appl'c., 83 M.C.C. 229 (1960); Scari Extension—Airports, 76 M.C.C. 319 (1958); Commodity Haulage Corp. Common Carrier Appl'c., 69 M.C.C. 527 (1957).
28. Nickerson Common Carrier Appl'c., 88 M.C.C. 186 (1961); Fischer, supra note 27; Scari, supra note 27; Southern Pacific Transport Co.—Air Freight, 73 M.C.C. 345 (1957); Gromand Common Carrier Appl'c., 72 M.C.C. 257 (1957).
30. The ICC further held in Panther that, to the extent motor operations performed for an air freight forwarder are not exempt, the forwarder is functioning as a surface freight forwarder for which Commission authority must be obtained. See 49 C.F.R. 404.1.
III. INSTITUTION OF ICC AND CAB RULEMAKING PROCEEDINGS

With the continuing development and growth of air freight, the ICC experienced increasing pressure to avoid a case-by-case approach to the partial exemption. Thus, late in 1961, it instituted on its own motion a rule-making proceeding for the stated purpose of determining and prescribing by regulation "the circumstances under which and the areas or distances within which motor transportation of property ... is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a)". The Order initiating and proceeding called for participation by motor carriers, air carriers, and any other interested parties.

The ICC's action followed by little more than a week the institution by the CAB of its own rule-making proceeding related to the determination of permissible limits of zones for air freight pickup and delivery service pursuant to appropriate tariffs filed by air carriers. The CAB explained that, in the past, it had used distance as the criterion for deciding whether tariff filings would be accepted or rejected. Specifically, the CAB utilized a 25-mile "rule of thumb"; that is, with the exception of the New York and Chicago metropolitan areas where greater distances were allowed, tariff proposals for pickup and delivery service beyond 25 miles either from the airport or the corporate limits of the airport city were administratively rejected. In its Notice, the CAB announced that it tentatively had decided to expand air terminal areas to include points within 50 miles from the center of airport cities, except for New York and Chicago which would be considerably larger.

In instituting its proceeding, the CAB referred to the incidental-to-air exemption in the Interstate Commerce Act. In this connection, it stated:

In administering the exemption provision, the Interstate Commerce Commission has given weight to the fact that the air cargo pick-up and delivery service is described in tariffs on file

32. ICC Docket No. MC-C-3437, Motor Transportation of Property Incidental to, Transportation by Aircraft, Order of Division 1 (October 4, 1961).
34. For a graphic illustration of the progressive expansion of the New York City air terminal zone, as allowed by the CAB, see ICC Bur. of Econ. Staff Report, Air-Truck Coordination and Competition, p. 24 (Statement No. 67-1, February 1967).
with the Civil Aeronautics Board and, to that extent, what the Board accepts may have a bearing upon whether regulation will be applied by the Commission. Obviously, both the Board and the Commission should strive to administer the respective acts so that there is no undue conflict between what the Board considers “service in connection with * * * air transportation” and what the Commission considers as service “incidental to transportation by aircraft.”

Thus, in 1961, the CAB expressly recognized the potential conflict of administrative functions and purposes between itself and the ICC under the respective enabling statutes—the same conflict to which the Commission had alluded in 1953 in the *Kenny* case.

During the pendancy of the two rule-making proceedings, the ICC continued to regard *Kenny* as governing authority.36 Additionally, with regard to passengers, the ICC deemed it advisable to institute a similar proceeding.37 Accordingly, in late 1962, the Commission on its own motion instituted a rule-making proceeding looking to the determination of the scope of the exemption for the motor transportation of passengers.38

IV. ADOPTION OF ICC AND CAB REGULATIONS

The CAB was first to conclude its rule-making proceeding. In 1964, it adopted regulations39 which re-affirmed the previous 25-mile “rule of thumb” and, thereby, rejected the tentative 50-mile rule. The CAB’s disposition was based largely on the fact that in most communities air freight pickup and delivery service extends only to the corporate limits or slightly beyond; in relatively few communities—the major air cargo generating points—does such service extend farther than 25 miles.40 The

36. *Convoyair Air Freight Service, Inc., Common Carrier Appl.,* 92 M.C.C. 526 (1963); but see *Al Renk & Sons, Inc.—Alaska “Grandfather” Appl.,* 89 M.C.C. 91, 96 n.6 (1962), wherein the Commission merely noted that the considered operations “may or may not” be within the exemption.

37. *Hatom Corporation, Common Carrier Appl.,* 91 M.C.C. 725 (1962), in which operations ranging from 26 to 65 miles from the airport were held not exempt from regulation. The ICC in an earlier report had held that motor transportation of passengers were exempt regardless of distance, so long as there was an immediately prior or subsequent movement by air [88 M.C.C. 653 (1962)].


40. CAB Docket 12951, Part 222—*Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File, Preamble to Regulations* (April 28, 1964).
Board’s regulations, however, established an application procedure for air carriers which desire to file tariffs for pickup and delivery service beyond a radius of 25 miles from the airport or the corporate limits of the airport city. The CAB stated that, in passing upon applications, it would determine whether the proposed service is “truly” pickup and delivery, as distinguished from line-haul, surface transportation. While assuring that this determination would not impinge on the ICC’s freedom to determine whether the involved surface transportation was exempt from motor carrier regulation, the CAB stated that it “anticipates, however, that the ICC will give due and appropriate weight to the Board’s finding that the contemplated services are truly air cargo pickup and delivery in nature, as it does today.”

Only one week after the CAB’s action, the ICC issued its *Incidental to Air (Property)* decision and, concurrently therewith, adopted regulations which largely preserved the principles earlier established in the *Kenny* case. In again declining to fix geographical limits for the incidental-to-air exemption with respect to property, the Commission considered that the *Kenny* standard had served to encourage the development of air freight; moreover, it took note of the CAB’s actions since *Kenny* and attached considerable weight to “that agency’s reluctance to sanction any wholesale expansion of air-carrier terminal areas beyond the 25-mile rule of thumb which it has used for many years.”

The regulations promulgated by the ICC altered the *Kenny* precedent in one significant respect. Under *Kenny*, the territorial limits of the exemption at a particular point would enlarge automatically through the CAB’s acceptance of tariff filings for extended terminal area services. In *Incidental to Air (Property)*, the ICC decided that only by “retaining some control” over air terminal expansion could it properly discharge its statutory responsibility concerning the scope of the exemption. For this reason, it adopted regulations which reflect the *Kenny* definition of exempt operations, but which further provide a procedure for defining, either on petition or on the Commission’s own

41. Ibid.
43. 49 C.F.R. 210.40.
44. *Incidental to Air (Property)*, supra note 42, at 85. The ICC also continued to assume, as it had in *Kenny*, that the Board “would not hesitate to reject a publication which would result in an unreasonably large exempt area.” Ibid.
motion, the geographical limits of the partial exemption at a particular point. The Commission made clear that, in defining territorial limits under the new procedure, “prior action of the C.A.B. allowing air carriers to publish extended terminal service tariffs would be considered, but would not be determinative.”

Some two months after its Property decision, the ICC issued the Incidental to Air (Passengers) report and prescribed regulations governing exempt motor transportation of passengers. Departing from its previous refusal to set a definite mileage limitation for the exemption, the Commission concluded that only operations within a radius of 25 miles from the airport, as well as within the entire commercial zone of any city the boundary of which intersects the 25-mile radius, would be considered as “incidental” to air transportation. However, a procedure also was prescribed for individually determining, either on petition or on the Commission’s own motion, the exempt area at a particular airport.

In both its Passenger and Property reports, the ICC approved and continued the approach taken in the Graff decision concerning line-haul motor transportation which is “emergency” in character. The Commission emphasized that the emergency must be caused by conditions beyond the control of the air carrier, such as bad weather or equipment failure, and must be regarded as an emergency by the officials of the direct air carrier.

With respect to surface transportation of property on behalf of air freight forwarders, the ICC modified its holding in the Panther decision that the exempt zone includes only points which are named in both the direct and indirect air carriers’ tariffs on file with the CAB. To be within the exempt zone, the points are required to be named in the indirect air carrier’s tariff, rather than in both.

The jurisdiction of the ICC to define, and to prescribe rules of

45. 49 C.F.R. 210.40(c).
46. Incidental to Air (Property), supra note 42, at 87.
47. Motor Transportation of Passengers Incidental to Transportation by Aircraft, 95 M.C.C. 526 (1964).
49. Graff, supra note 17, and accompanying text.
50. Incidental to Air (Property), supra note 42, at 87-88; Incidental to Air (Passengers), supra note 47, at 537-38. The ICC’s special treatment of emergency transportation for purposes of the partial exemption was upheld in National Bus Traffic Ass’n v. United States, 249 F.Supp. 869 (N.D.Ill. 1965), aff’d per curiam, 382 U.S. 369 (1966).
51. Panther, supra note 29.
general applicability relating to, the incidental-to-air partial exemption was affirmed by the courts.52

V. Air Terminal Area Expansion Under the Regulations

To date, the respective regulations adopted by the ICC and the CAB concerning proposals to extend air terminal areas beyond existing limits have been utilized to very different degrees.

The procedure established by the ICC for individually determining the scope of the exemption for air freight collection and delivery services at a particular airport has been invoked on few occasions, and in no case has a decision yet been issued.53 In only one case has the procedure for defining the exempt zone for the transportation of passengers been employed; there the ICC merely held that motor transportation of passengers between two airports serving the same metropolitan area is within the exemption.54

By contrast, the CAB's application procedure for authority to file pickup and delivery tariffs for points beyond 25 miles has given rise to a number of decisions. Since the regulations were adopted, the CAB has granted 14 applications to extend air terminal zones for ten different metropolitan areas: Atlanta, Boston, Charlotte, Cleveland, Dallas, Detroit, Indianapolis, Kansas City, Newark, and Wichita.55 The extensions in those cases encompass 277 specifically named points which are located beyond the 25-mile limit, up to a distance of approximately 80 air miles from the airports or city limits involved. Actually, the number of points to which extensions have been allowed is far greater than 277, as the CAB has indicated that any and all intermediate points will be considered to be, prima facie, within permissible limits.56 The CAB's orders allowing the extensions, while granting applications


53. In ICC Docket No. MC-C-3437 (Sub-No. 1), Cleveland-Hopkins Airports Exempt Zone, Order of Division 1 (July 17, 1967), the petition was allowed to be withdrawn without a decision on the merits. Two other cases presently are pending before the ICC. See note 87, infra.

54. Exempt Zone—Dulles and Friendship Airports, 100 M.C.C. 58 (1965).

55. CAB Dockets 20036, 20009, 19778, 19586, 17972, 17927, 16344, 15740, 15665, 15664, 15582, 15581, 15327, 15325, Orders Authorizing Filing of Pick-up and Delivery Tariffs. See also Docket 19725, where the CAB included the entire island of Puerto Rico within the pickup and delivery zone for San Juan.

56. E.g., CAB Dockets 17927 and 16344, supra note 55.
by particular air freight forwarders, are in the nature of general rulemaking orders; therefore, the extensions are available to the entire air industry.57 Some of the extensions have included points which, though relatively lesser air freight generating points, are served by their own airports. In fact, only one case has been found in which an application for an enlarged pickup and delivery zone has been denied by the CAB, involving a distance of 179 miles for the purpose of serving a single air freight shipper.58

The CAB uniformly has considered applications on the basis of what economic data and representations are contained in the proposals themselves, and has not deemed hearings to be necessary.59 The extensions granted by the CAB have been based primarily on the following factual findings.60

1) the distances involved are “no more extensive” than those authorized in the New York, Chicago, and Los Angeles areas, and would permit extended pickup and delivery service to be offered as “part of the basic air transportation service” available at the concerned points;

2) extended pickup and delivery service would be “coordinated” with the schedules of the direct air carriers;

3) the motor vehicle equipment to be used is limited in capacity and consists of small vans or straight trucks “traditionally used” for pickup and delivery operations, i.e., the limited size, weight, capacity, and operating range of the trucks would pose “effective economic barriers” to their use in line-haul operations;

4) the rates for extended service would be “closely related” to the “usual” charges for pickup and delivery service within the 25-mile zone; and

5) only an integrated air-surface movement under single carrier responsibility would provide the full advantages of air freight service available at major airports to the present and potential users of air freight at smaller, outlying points.


59. The courts have held that hearings are not required. *Law Motor Freight, supra* note 57, at 144-45; *National Motor Freight Traffic Ass’n v. C.A.B.*, 374 F.2d 266 (D.C. Cir. 1966), cert. denied, 387 U.S. 905 (1967).

60. The CAB’s standards obviously are not designed to identify a reasonably limited air terminal area for the performance of *bona fide* motor collection, delivery, and transfer service within the meaning of the Interstate Commerce Act. The CAB does not consider any geographical, political, economic, or commercial factors of the type which govern the determination of “terminal areas” for purposes of ICC regulation.
On a number of occasions, the CAB has rejected contentions by
objecting parties that the points involved were outside the scope of the
incidental-to-air exemption applicable to motor carriers under the
Interstate Commerce Act. The CAB has stated simply that its action
“is not intended to reflect any views on whether applicant requires
authority from the ICC or other regulatory agencies.”61 Further, the
CAB has held in several cases that such matters as public need for
extended pickup and delivery service and the adequacy of existing
pickup and delivery service are “not germane” to the issues;62 and
recently the CAB has declined to consider the contention that granting
the application would have an adverse effect upon existing motor
carriers through the diversion of traffic presently being handled by
them.63

The general approach of the CAB to the application procedure
provided by its regulations has been judicially approved. In the Law
Motor Freight case,64 the United States Court of Appeals for the First
Circuit held that, despite the “scant” economic data and “thin” record
upon which the CAB’s determination was based, the criteria utilized
and the rationale therefor were “not unreasonable for an agency
mandated to develop air transportation.”65 More importantly, the court
held that the CAB was not required to apply the same definition of
“terminal area” which has been applied by the ICC to surface carriers
under §202(c) of the Interstate Commerce Act. The court noted that
the CAB’s new criteria serve to identify “reasonably close
communities” for purposes of that agency’s jurisdiction over pickup
and delivery service tariffs, as opposed to the criteria employed by the
ICC to identify “a single homogeneous community” for purposes of
the exemption for surface collection, delivery, and transfer service.66
The court considered that of paramount importance were the efforts by
the ICC and the CAB to achieve “continuing accommodation” in their
purposes and “to minimize the potential conflict” arising from their
power to interpret, respectively, what is “incidental to” or “in
connection with” air transportation.

61. Note 55, supra, for citations.
62. CAB Dockets 17972, 16344, 15740, 15582, and 15581, supra note 55.
63. CAB Docket 19586, supra note 55.
64. Law Motor Freight, supra note 57.
65. Id. at 145.
66. See, e.g., Central Truck Lines, Inc. v. Pan-Atlantic Steamship Corp., 82 M.C.C.
558 (D.Del. 1963).
The system, devised to avoid interagency conflict while preserving agency sovereignty, is to give the Board the first judgment, which shall be given non-conclusive respect by I.C.C. 67

Thus, the court made clear that, were the ICC subsequently requested to determine the exempt or nonexempt status of the identical motor operations beyond 25 miles, the CAB's order would not have any binding effect.

VI. THE EXEMPTION TODAY: HEREIN OF CONFLICT AND CONFUSION

While the ICC has not yet determined the limits of a particular terminal area for air freight in a proceeding instituted for that purpose under its new regulations, the Commission has dealt with the exemption in a number of other contexts. For example, in investigation proceedings, surface movements of air freight in excess of 57 miles have been held to be outside the exemption; 68 and, in application proceedings, the ICC has further explained the permissible types of arrangements by which exempt operations may be conducted; 69 and has refined the meaning of "air bill of lading". 70 Also, the Commission has held that unauthorized operations conducted in the past in the mistaken belief that they were within the exemption should not bar a grant of authority; 71 and that an application which partially embraces exempt operations will be granted in its entirety if the evidence does not permit the exempt portion to be precisely defined. 72

67. Law Motor Freight, supra note 57, at 145.
Unfortunately, the cases suggest conflicting standards regarding the limits of the exempt zone. There are indications that the ICC regards all points located within 25 miles to be within the exempt air terminal area, even though all of the points are not specifically named in tariffs on file with the CAB. These indications appear to be at odds with the requirement in the regulations that the air terminal area be “described” in an effective tariff.

The ICC never has finally decided—either in the Incidental to Air (Property) or subsequent cases—the nature of the criteria which bear upon the individual determination of the exempt zone at a particular point, pursuant to the regulations. The ICC generally has indicated that the inquiry would be “somewhat similar” to that involved in determining the commercial zone for a municipality; that economic and geographical considerations, trade practices, industrial dispersion, population density, and political factors may be pertinent. The Commission might decide that, as in commercial zone determinations, it will not consider traditional notions of public convenience and necessity; however, the ICC already has demonstrated its awareness of the overriding influence which the mandate of the national transportation policy exerts in this sensitive field. Thus, the Commission has made clear that it will avoid any approach to the exemption “which would greatly increase the scope of exempt transportation at the expense of those motor carriers which are subject to the economic regulation of the Interstate Commerce Act.”

At the very least, the CAB’s continuing expansion of pickup and delivery zones in a number of metropolitan areas, upon meager evidentiary justification, casts in doubt the premise upon which the ICC’s approach in Incidental to Air (Property) was based. The CAB no longer appears “reluctant” to permit enlargement of air terminal areas beyond 25 miles; at the same time, the ICC expressly has stated that it is “reluctant” to do so. Moreover, the CAB’s repeated statements to the effect that its determinations have no bearing upon whether the expanded surface operations are subject to ICC regulations


74. 49 C.F.R. 210.40(a). See also White, supra note 69, at 620-621.

75. See Exempt Zone, supra note 54, at 61; Zantop, supra note 68, at 22-23.

76. Incidental to Air (Property), supra note 42, at 86.

77. Zantop, supra note 68, at 22-23.
manifest a sovereign, rather than an accommodating, approach to the problem.\textsuperscript{78}

In order to discharge its responsibilities under the national transportation policy, the ICC should accord particular weight to the impact of a steadily encroaching exempt zone upon the regulated motor industry, especially now that it has become apparent that its policies and those of the CAB are in conflict. A procedure premised upon interagency accommodation can not long survive when action by one agency undercuts the statutory functions of the other.

It is plain that the concern of the CAB is not the concern of the ICC. The Board, quite naturally, is concerned with ensuring that the potential for air cargo transportation will be fully realized. There are many outlying communities, beyond the "immediate environs" of the airport cities,\textsuperscript{79} which legitimately require integrated air-surface transportation of air freight under single carrier responsibility. However, as early as 1947, in the Sky Freight case,\textsuperscript{80} the ICC, in assuring motor carriers that the incidental-to-air exemption "will not open the door to any large field of unregulated motor operations", pointed to § 1003 of the Federal Aviation Act\textsuperscript{81} which expressly authorizes air carriers to engage in interline service with other carriers. Plainly, exempt motor operations are not the \textit{sine qua non} to development of air cargo in outlying areas. In recent proceedings, therefore, the ICC has adopted a somewhat liberalized standard of public convenience and necessity in granting operating authority to carriers which propose to offer a specialized and expedited service in the motor transportation of air freight.\textsuperscript{82} In this manner, present and potential shippers by air freight are able to obtain through air-surface

\textsuperscript{78} The CAB's approach \textit{vis-a-vis} the ICC is indistinguishable from that expressed in \textit{The Flying Tiger Line, Inc., Air-Truck Service, 30 C.A.B. 242, 245 (1959), aff'd sub nom., City of Philadelphia v. C.A.B., 289 F.2d 770 (D.C.Cir. 1961); see also CAB Docket 17472, The Flying Tiger Line, Inc., Order dated July 20, 1966.}\textsuperscript{79} It should be emphasized that the CAB's 25-mile "rule-of-thumb" applies as a radius not only from the airport which the air carrier is authorized to serve but also from the \textit{corporate limits} (not the municipal center) of the city if that is the certificated point. The 25-mile rule in itself creates an expansive area for nonregulated activity. In fact, the ICC has recognized that "the 25-mile zone generally permits pickup and delivery throughout each city and its immediate environs." \textit{Zantop, supra} note 73, at 461.\textsuperscript{80} Sky Freight, supra note 13, at 242.\textsuperscript{81} 49 U.S.C. §1483.\textsuperscript{82} E.g., Kato Express, Inc., Extension—Stendford Field, 108 M.C.C. 222 (1968); T.J. Smith Common Carrier Applic., 107 M.C.C. 307 (1968); Commodity Haulage Corp. Common Carrier Applic., 106 M.C.C. 135 (1968); \textit{Film Transit, supra} note 71.
transportation under single-carrier responsibility, though the transportation is regulated by the ICC and the CAB.\textsuperscript{83} Thus, one of the ICC's prime regulatory concerns—\textit{i.e.}, the future of intermodal coordination\textsuperscript{84)—can be advanced in an effective and workable fashion. Illustrative of the Commission's current thinking in this area is its recent grant of a certificate to an air freight forwarder authorizing motor transportation of air freight, which it regarded as "a step towards achieving intermodal coordination."\textsuperscript{85}

To complicate matters, however, the CAB recently has approved applications by three long-haul motor carriers for air freight forwarding authority throughout the United States. In granting those applications, the CAB stated:\textsuperscript{86}

The Board has every intention to continue processing forwarders' requests to expand the pick-up and delivery services beyond presently defined terminal areas. The Board has granted many of those requests . . .

Moreover, the CAB also has pending before it a multitude of other applications for similar authority, of which many have been filed by regulated motor and rail carriers. If those applications ultimately are granted, and if the current expansion of air terminal areas continues unabated, surface carriers will be permitted to extend their operations considerably beyond the boundaries prescribed for them by the ICC.

Thus, the potential conflict between the ICC and the CAB has come to fruition; and, with the continuing development of air freight transportation, that conflict can become only greater. Inevitably, the ICC will have to re-examine the incidental-to-air exemption, in order to ensure that exempt transportation truly is and will be "incidental to transportation by aircraft." It appears that light soon will be shed upon these problems by the ICC, either in two pending proceedings which involve the determination of exempt zones at particular airport

\textsuperscript{83} This type of coordinated, intermodal transportation has been available since 1961 through the "air-truck" program of Air Cargo, Inc. That program has been so successful that the number of shipments handled has increased from 15,351 in 1961 to 451,665 in 1968. Additionally, individual air and motor carriers have entered into joint through rate agreements in several areas.


\textsuperscript{85} \textit{Direct Air Freight Corp. Common Carrier Applic.}, 106 M.C.C. 785, 791 (1968).

\textsuperscript{86} CAB Docket 16857, \textit{Motor Carrier-Air Freight Forwarder Investigation}, p. 33 (decided April 21, 1969).
cities\textsuperscript{87} or in response to a petition which has been filed requesting that the Commission reopen the \textit{Incidental to Air (Property)} rulemaking proceeding.\textsuperscript{88}

\textsuperscript{87} ICC Docket No. MC-C-3437 (Sub-No. 2), \textit{Weir Cook Municipal Airport, Indianapolis, Ind.—Exempt Zone}; ICC Docket No. MC-C-3437 (Sub-No. 3), \textit{Atlanta Airport, Atlanta, Ga.—Exempt Zone}. The records in the two proceedings were closed on November 13, 1968, and February 12, 1969, respectively.

\textsuperscript{88} ICC Docket No. MC-C-3437, \textit{Motor Transportation of Property Incidental to Transportation by Aircraft}, Petition to Reopen Rulemaking Proceeding filed September 25, 1968.
ILLEGAL LEASE OF OPERATING RIGHTS OR BONA FIDE LEASE OR INTERCHANGE OF EQUIPMENT—A QUESTION OF CONTROL

Clayte Binion*

PRELIMINARY

The scope of the inquiry herein is confined to a discussion of the elements and factors that must exist when a motor carrier, as defined by Section 203(a) (16) of the Interstate Commerce Act, seeks to conduct operations under its certificate utilizing equipment owned and operated by (a) another motor carrier, or (b) persons other than motor carriers. If the requisite criteria are met, the transaction may be a bona fide lease or interchange of equipment, and the motor carrier may legally perform service under its certificate, notwithstanding the fact that the equipment is actually owned and operated by another party. On the other hand, if certain factors are not present, then the purported lease or interchange of equipment becomes an illegal lease of the lessee's or interlining carrier's operating rights. The Commission has promulgated rules and regulations governing the leasing and interchanging of equipment and these rules set forth a minimum standard that must be adhered to by the parties to the transaction. However, these rules do not affect the basic proposition that a motor carrier receiving traffic from another through the interchange of equipment with drivers or conducting its operations in equipment owned and operated by another, must have and exercise control over such operations while in its possession.

The question of whether a motor carrier has violated the Commission's lease and interchange regulations and/or whether a lessee motor carrier has exercised sufficient control over the leased equipment and driver frequently arises in proceedings under Section 5 [finance], 204(c) [complaints], 206 and 209 [extensions] and 212(a) [revocations] of the Interstate Commerce Act. As examples: (1) in a finance application, the vendor and the vendee have been performing a through service between points on their respective routes by interchange of equipment with drivers. Is this operation a bona fide interchange or

*Partner, Rawlings, Sayers & Scurlock, Fort Worth, Texas; B.B.A., Agricultural & Mechanical College of Texas (1960); L.L. B., University of Texas (1963).
2. 49 U.S.C. §§ 5, 304(c), 306, 309, and 312(a) respectively.

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an illegal lease of operating rights? (2) In an extension application, the applicant has been performing service to a point sought to be served by interchange with another carrier. Is this past service a bona fide interchange or an illegal lease of operating rights? (3) In an extension application, the applicant proposes to use owner-operators to conduct the motor carrier service proposed. Does the applicant bring himself with the definition of a common carrier by proposing to use non-owned equipment operated by non-employees? (4) In a complaint proceeding, defendants are handling traffic by interchange moving between points on the equipment lessor's routes and points on the equipment lessee's routes by interchange of equipment and drivers at a certain service point. Is the operation a bona fide lease of equipment or an illegal lease of operating rights? (5) In an investigation and revocation proceeding, the respondent is conducting operations by use of owner-operators. Is the respondent performing an adequate and continuous service by virtue of such operation? The above questions can be answered by resolving the control issue, which entails (a) an examination of the involved operation to determine if the Commission's lease and interchange rules and regulations are met; and (b) more importantly, an examination of the mechanics of the operation to determine if the lessor's equipment and drivers operating under the lessee's authority are such an integral part of the service performed by lessee as to be considered mere aids in carrying out the lessee's undertaking to transport.

The element of control exercised by a motor carrier over the operations conducted for it by others, also has implications in the fields of labor, rates, taxes, insurance, workmen's compensation, and social security. However, the requirements of the Social Security Act, the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, and the National Labor Relations Act, and the decisions thereunder are not applicable to a motor carrier's status under the Interstate Commerce Act where the question is one of control vel non. Accordingly, this treatise will not treat with the labor, tax, insurance or rate consequences which arise when a motor carrier seeks to use the facilities and employees of another in providing service. The consideration herein is limited to the control required to be exercised so that the motor carrier performing service in non-owned equipment operated by non-employees is responsible to the Commission, the shipper, and the public generally.

3. 42 USCA § 301 et seq., 26 USCA § 3301 et seq., 26 USCA § 3101 et seq., and 29 USCA § 151 et seq., respectively.
A QUESTION OF CONTROL

HISTORICAL

Leasing practices of motor carriers created problems from the inception of regulation, particularly in determining those entitled to certificates and permits under the "grandfather" clauses of the Act.1 Early in its administration, the Bureau of Motor Carriers informally issued Administrative Ruling No. 4, dated August 19, 1936:

"Question: Under what circumstances may a carrier add to its equipment by leasing a vehicle and obtaining the service of its owner-driver?

"Answer: The lease or other arrangement by which the equipment of an authorized operator is augmented, must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such way as to be good against all the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; and that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

In a few early applications, operating authorities were issued to applicants whose practices apparently met the requirements of Administrative Ruling No. 4. Thereafter, the Commission and the courts considered many aspects of the question of motor carrier operations conducted in vehicles not owned by the carriers, and determined the conditions upon which certificates or permits under the "grandfather" clauses of the Act could be granted, based upon such operations. General principles were derived from these proceedings which have been applied in others.2 Such cases generally held that when a certificate or permit holder furnished service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and the Commission for transportation. If such tests were met, then the vehicle operated in the service of the one holding out the service to the public could be provided by independent contractors so far as authority under the "grandfather" clauses was concerned. However, where operating

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1. Section 206(a), 49 USC § 306(a), and Section 209(a), 49 USC § 309(a).
2. See, e.g., Acme Fast Freight and Dixie Ohio Express, infra.
authority was “farmed out” principally to noncarriers, and the
elements of direct control over the movement of the freight, and the full
responsibility to the shipper were lacking, it was held that the operator
was not a common or contract carrier as defined in the Act and thus
not entitled to “grandfather” authority.

A leading decision denying a “grandfather” application for lack of
proper control is *Acme Fast Freight, Inc., Common Carrier
Application*, 8 MCC 211 (1938). Therein, applicant collected,
consolidated, shipped, and distributed less-than-truckload shipments of
freight and express throughout the entire United States, utilizing the
services of carriers by motor vehicle, rail, and water. Applicant
assumed full responsibility for the shipment from the time it left the
consignor to the time it was delivered to the consignee, undertook to
provide a complete service and charged the shipper therefor. The
shipper had no contractual relations with any carrier whose services
applicant might utilize, but only with applicant, and usually was not
informed as to the means of conveyance which were employed. The
applicant contended that it was a common carrier at common law, and
would have that status even if it did not operate or own a single vehicle.
Applicant argued that it was unnecessary, in order to be a common
carrier by motor vehicle, to actually physically operate the vehicle or
control the management and conduct of those who conduct the
operation. In addition, applicant provided a direct operation in which
the carriage was performed by vehicles under its immediate ownership
or control without utilization of the services of any other carriers. In a
MCC 415 (1937), Division 5 found that applicant was a common
carrier by motor vehicle only with respect to its direct operations, and
not with respect to its indirect operations wherein the services of other
carriers were utilized. In affirming Division 5’s holding, the entire
Commission held (8 MCC 218-219):

“The question is whether the definition of ‘common carrier by
motor vehicle’ in the act can properly be construed, in the light of
the provisions and purposes of the act as a whole, to include such
indirect operations. The undertaking of applicant as a common
carrier, so far as these indirect operations are concerned, strictly
speaking, is not to transport property but to see that it is
transported. The words of the definition are ‘undertakes . . . to

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affirmed per curiam 309 U.S. 638 (1940).
transport.' It is true that 'undertakes' is followed by the words 'whether directly or by a lease or any other arrangement,' but the word 'lease' clearly refers to the use so commonly made of vehicles which are not owned but held under lease, and the words 'any other arrangement,' which significantly are conjoined with the word 'lease', can and should, we believe, be interpreted to cover any similar means, compatible with an undertaking 'to transport', which permit the use by the carrier of the property of others under its own domination and control.'

A leading decision granting a "grandfather" application wherein proper control was exercised is Dixie Ohio Exp. Co. Common Carrier Application, 17 MCC 735 (1939). In performing its past operations, applicant utilized equipment owned by it as well as equipment owned by owner-operators. The owner-operator equipment was operated under a form of a written "lease," and specified the particular trip in which the operator was to employ his vehicle and the compensation to be paid to him. Although the lease purportedly gave applicant possession and control of the vehicle and provided for the maintenance of public liability, property damage, and cargo insurance by applicant, it also provided for a payment by the owner-driver of a certain amount on any cargo loss or shortage, and any additional charges occasioned by loss through negligence of the owner-operator. Generally, these leases could be cancelled by either party upon 10 days' notice. Division 5, in finding that applicant was entitled to continue operations as a common carrier by motor vehicle held, as is here pertinent (17 MCC 740-741):

"...If the vehicles of the owner-operators, while being used by applicant, were operated under its direction and control, and under its responsibility to the general public as well as to the shipper, then its operations, in which such vehicles were employed, come within the phrase 'or by a lease or any other arrangement' of section 203(a)(14), and applicant, as to such operations, was a common carrier by motor vehicle. The traffic transported in the vehicles of the owner-operators moved under bills of lading issued by applicant. The vehicles, while in applicant's service, were registered under applicant's operating authority and had applicant's name painted, or otherwise shown, thereon. Insurance covering them was arranged and paid for by applicant. Applicant's dispatchers or other employees directed the time and manner of the loading and unloading of the vehicles and also directed their movement over applicant's routes. We conclude that
they were operated under applicant's direction and control and under its responsibility to the general public as well as to the shipper, and that applicant, as to its operations in which such vehicles were employed, was a common carrier by motor vehicle as defined in section 203(a)(14)." (Emphasis added.)

For other cases involving the same question as Acme and Dixie Ohio, supra, see Boston & Maine Transp Co. Common Carrier Application, 34 MCC 599 (1942); Thomson v. United States, 321 U.S. 19 (1943); Railway Exp. Agency, Inc. Extension-Waggoner, Ill., 44 MCC 1 (1944), 44 MCC 771 (1945); and Allied Van Lines, Inc., Common Carrier Application, 46 MCC 159 (1946).

As a result of the aforementioned cases, there was considerable evolution in the concept of the extent of control over non-owned vehicles necessary on the part of one seeking thereby to conduct operations as a motor carrier under Part II of the Act. Administrative Ruling No. 4, referred to above, was in effect overruled by the Commission and the courts, and is no longer followed.

In Lease and Interchange of Vehicles by Motor Carriers, 51 MCC 461 (1950) the Commission on its own motion, instituted an investigation respecting the lawfulness of the practices of motor common and contract carriers of property in interstate or foreign commerce, throughout the United States, in the leasing and interchange of vehicles. All such carriers were made respondents to the proceeding. In preparation for the proceeding, an informal investigation was conducted by the members of the Bureau of Motor Carriers' field staff throughout the United States. The members of the staff reported specific instances of leasing practices they discovered which were considered unlawful or undesirable as contrary to the public interest. A brief consideration of the abuses and illegal activities uncovered by the Commission will be helpful at this point, in order to bring focus on the practices the regulations were designed to prohibit:

(1) The control, direction, and domination which carriers exercised over the performance of transportation service in which leased vehicles

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8. The report by the field staff of the Bureau of Motor Carriers, based on an informal investigation early in 1948, is fully set forth in Appendix C to the report of the Commission (51 MCC 540-543).
were used was generally less than that exercised over company-owned vehicles. This condition was brought about as a result of the informality of the hiring arrangements, insufficiency of control over the operation of the vehicles and of the operators, the loss of contacts with shippers, and the attempts of authorized carriers to avoid or shift their responsibilities to others.

(2) Arrangements for the use of equipment were frequently made over the telephone, without any inspection of the vehicle by the lessee to insure compliance with safety regulation requirements or any check as to whether the driver was qualified to operate the vehicle. Lease arrangements were not always concluded before the transportation took place. Sometimes the owner-operator picked up the load first and then shopped around for a carrier who would issue billing under the most desirable arrangement. These owner-operators frequently transported on a carrier’s billing without the carrier’s knowledge and kept all of the revenue. Some carriers made a regular practice of supplying other carriers and operators of equipment with lease forms signed in blank, pads of bills of lading, freight bills, and placards, to be used in transporting property for their account with the result that frequently other shipments were solicited, transported, and collected for in the carrier’s name without the carrier’s knowledge or specific authorization. Sometimes no arrangements were made for the removal of the placards upon termination of the lease and the lessors used those placards to secure other loads without the knowledge of the carriers involved and, without notifying those carriers, kept the entire revenue. Because of the informality of the arrangements for the use of equipment, questions frequently arose as to the liability for accidents resulting in injuries to the public and as to whether the insurer of the authorized carrier or the insurer of the owner-operator was liable, and when the liability of one ends and that of the other begins. The fact that leases frequently were not in writing created an obstacle to enforcement of the provisions of the Act. Proof of unauthorized operations was hampered when, upon investigation, the parties stated that an oral lease was in existence. Gypsy operators realized that almost anything could be done under a so-called oral lease and, if they knew the name of a carrier having operating rights, would transport a shipment in its name and, if caught in a road check, state that they were under lease to that carrier.

(3) It was a frequent practice among some equipment lessors to lease only part of the carrying capacity of a vehicle, and/or to lease the same vehicle to several carriers for use at the same time. In the latter instance, formal leases might be executed which provided that each
lessee would have full dominion and control over the vehicle and that the driver would be the employee of such lessee. In practice, however, it was usually the lessor which retained the control. Sometimes vehicles were leased to carriers which were under lease to private carriers at the same time. Intrastate carriers transported shipments on their own authority and interstate shipments allegedly under a lease of their vehicles to an authorized interstate carrier at the same time. In case of accident, it was difficult to determine which carrier was liable. In trip leasing, difficulties arose in establishing responsibility for accidents which occurred after the owner-driver completed delivery.

(4) Carriers did not have sufficient control over the operations of leased vehicles to make the owner-operators comply with the hours-of-service rules. Gypsies would roam over a wide territory, hauling for carrier after carrier, no one of which had control over or knowledge of the time element affecting compliance with the hours-of-service requirements. Complaints most frequently made against owner-operators were that they took the most direct route to destination, regardless of the carrier's operating authority, drove while drunk, carried liquor in the cab, transported unauthorized persons (particularly women), operated unsafe equipment, and charged gasoline and tires to the carriers without authorization.

(5) In leases between carriers in connection with through routes, the parties frequently bypassed the common service point on their respective rights. The point of theoretical interchange would be far removed from any terminal of either carrier. Where both carriers had rights over part of the through route, drivers were checked who were not certain which of the two carriers they represented. Some carriers did not keep account of the transportation in accordance with the requirements of the Commission. Accidents occurred to leased vehicles as to which no reports were made because the carrier did not know of them or, by the time it learned of them, the owner-drivers involved could not be located. The reports of carriers which operated leased vehicles did not show a clear picture as to expenses incurred in license fees, gasoline, tires, drivers' wages, repairs, maintenance, and other items which go into reports covering company-owned equipment. The practice of hiring equipment for a percentage of the revenue made operating statistics of motor carriers worthless.

(6) The practices of leasing and interchanging vehicles were used as devices to circumvent the provisions of the Act. Equipment arrangements were often merely subterfuges to enable carriers to engage in transportation without appropriate authority, to extend the scope of
their operations unlawfully, or to gain an unfair advantage over competitors. Under the guise of leases of equipment, carriers which had no facilities with which to operate and which were not willing to render the service, collected a percentage of the revenue for the use of their rights by others, who did have the facilities and who were willing to provide the service. These carriers protested applications of others for authority to furnish the service on the ground that they had the facilities to furnish the service needed. The facilities to which they referred were those of the ones applying for authority. Abuses of the practices of leasing and interchanging vehicles resulted in motor carriers usurping functions of the Commission. The so-called lessee of the vehicle frequently in effect was giving his operating authority to the lessor and charging a percentage of the revenue for allowing the lessor the right to operate thereunder.

After considering the views and arguments presented by the parties affected by the proceeding, the Commission promulgated rules and regulations governing the lease and interchange of motor vehicle equipment. The Commission pointed out that evasions and violations of the provisions of Part II of the Act occur “in the present practices of motor common and contract carriers of property subject to such provisions, in augmenting their equipment otherwise than by purchase, and in interchanging equipment,” and to properly administer the provisions of Part II of the Act reasonable rules and regulations were required.9

Present Lease and Interchange Regulations

Title 49, Part 1057,10 Code of Federal Regulations, as reprinted and redesignated in the Federal Register, Vol. 32, No. 245, pgs. 20056-20059, Wednesday, December 20, 1967, sets forth the present rules and regulations applying to the augmenting of equipment by motor carriers

9. The initial rules were set forth in Appendix H to the Commission’s report (51 MCC 546-550). These rules were divided into four sections—Rule 1 pertaining to definitions; Rule 2 pertaining to the augmenting of equipment; Rule 3 relating to the interchange of equipment between common carriers of property; and Rule 4 pertaining to the rental of equipment to private carriers and shippers. Since the Commission’s initial pronouncement of these rules, there have been modifications reported in 52 MCC 675 (1951); 66 MCC 361 (1955); 68 MCC 553 (1956); 79 MCC 65 (1959); 79 MCC 251 (1959); 84 MCC 247 (1961); 86 MCC 525 (1961); 89 MCC 683 (1962); 91 MCC 877 (1963) all styled Lease and Interchange of Vehicles by Motor Carriers.

10. The regulations originally were designated as Part 207 and the old designation appears in several of the cases cited herein.
of property and to the interchange of equipment between common carrier motor carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers. For the purpose of the inquiry made herein, only those sections relative to definitions (49 CER 1057.2), augmenting of equipment (49 CFR 1057.4), and interchange of equipment (40 CFR 1057.5) will be considered in detail.\footnote{49 CFR 1057.3 related to exemptions and 49 CFR 1057.6 relates to rental of equipment to private carriers and shippers. Subsection (a) of the exemptions provide that the augmentation regulations do not apply to equipment owned or held under a lease of 30 days or more by an authorized carrier and is regularly used by that carrier in its authorized service, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve, provided that the two carriers meet certain requirements designed to insure that control and responsibility for the operation of the equipment is that of the lessee.}

**Definitions**

Part 1057.2 of the leasing regulations defines eight terms and all definitions for leasing and interchange are found in this section. Other terms not defined in the regulations have the same meaning of the terms as defined in the Interstate Commerce Act.

The term “authorized carrier” is any person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of the Interstate Commerce Act.

The definition of “equipment” is all-inclusive and covers a motor vehicle, straight truck, tractor, semi trailer, full trailer, combination tractor-and trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

“Interchange of equipment” is defined as the physical interchange of equipment between motor common carriers or the receipt by one carrier of equipment from another carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

A “regular employee” is a person not merely an agent but regularly in exclusive full-time employment.

An “agent” is a person duly authorized to act for and on behalf of an authorized carrier.

The term “owner” is defined as a person falling within any one of three classifications: (1) to whom title to equipment has been issued, or (2) who as lessee, has the right to exclusive use of equipment for a
period longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any state or states or the District of Columbia in his or its name.

"Private carrier" is the same as defined in Section 203(a) (17) of the Act.

A "shipper" is any one who consigns or receives property which is transported in interstate or foreign commerce.

Augmenting Equipment

Part 1057.4 of the regulations authorize carriers to perform transportation in or with equipment which they do not own, only under certain conditions. This section authorizes the use of owner-operators by authorized carriers. There are six requirements or conditions which govern the leasing of equipment:

(1) **Contract requirements.** The contract, lease, or other arrangement for the use of the equipment shall be between the authorized carrier and the owner of the equipment; shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them; shall specify the period for which it applies, which shall not be less than 30 days when the equipment is to be operated for the authorized carrier by the owner or the employee of the owner; [12] shall provide for the exclusive possession, control, and use

[12] The 30 day minimum rule does not apply to equipment leased without drivers, nor does it apply to equipment with drivers, of a farmer, agricultural cooperative or a private carrier of "exempt" commodities, provided that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to act for him, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased is regularly used in the transportation of "exempt" commodities and specifying the origin, destination, and the time of the beginning and ending of the last movement of "exempt" commodities. This exemption refers to and comports with the language of Section 204 (i) (I) and (2) of the Act (49 USC 304 (I) (1) and (2)). Equipment owned by an automobile carrier or tank truck carrier or held by such authorized carriers under lawful leases and used in the transportation of motor vehicles or commodities in bulk, respectively, may be leased or subleased to other such authorized carriers for less than 30 days. The 30 day minimum period does not apply to dump equipment leased or subleased for use in snow control purposes. The 30 day minimum requirement is probably the most controversial provision contained in the regulations. The 30 day rule was intended to control the trip leasing of equipment with drivers and the purpose of the rule was to preclude the one way or trip lease. The 30 day rule was modified to exclude vehicles utilized to transport "exempt" commodities for the reason that after the completion of a one way haul of "exempt" commodities, the exempt hauler was not always able to
of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of the lease and provision may be made therein for considering the lessee as the owner for the purpose of subleasing the equipment to other authorized carriers; shall specify the compensation to be paid by the lessee for the rental of the equipment; shall specify the date and time or the circumstances on which the lease begins, and the time or the circumstances on which it ends; shall be executed in triplicate, the original retained by the authorized carrier in whose service the equipment is to be operated, one copy retained by the owner of the equipment, and one copy carried on the equipment during the entire period of the contract.

(2) Receipt for equipment to be specific. When possession of equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, a receipt shall be given to the owner of the equipment, or the owner's employee or agent specifically identifying the equipment and stating the date and time of day possession is taken, and when the possession by the authorized carrier ends, it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating thereon the date and the time of day possession is retaken by the owner.

(3) Safety inspection of equipment by the authorized carrier. It is the duty of the authorized carrier, before taking possession of the equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and who has been duly authorized by such carrier to make the inspection as a representative of the carrier. The person making the inspection shall certify the results thereof on a report on a form specified in the regulations, which report is retained and preserved by the authorized carrier. In the event the inspection discloses that the equipment does not meet the requirements of the safety regulations, possession thereof shall not be taken. Where an inspection is required to be made, the

obtain a return movement of other "exempt" commodities, and thus the practice developed of such haulers of leasing their equipment for return movement to authorized carriers. The rule was likewise relaxed with respect to automobile carriers and tank truck carriers, in the light of their highly specialized operations and the fact that they have almost entirely one-way revenue hauls. The purpose of the 30 day rule is to insure responsibility for, and control over, leased equipment by the lessee carrier, when the equipment is operated by the owner or employees of the owner. Lease and Interchange of Vehicles By Motor Carriers, 64 MCC 361, 364-365, 381-383 (1955). In subsequent reports dealing with the lease and interchange regulations, the Commission has refused to further expand the 30 day rule.
A QUESTION OF CONTROL

authorized carrier, if an individual, or a member of a partnership, or one of the officials thereof if the authorized carrier is a corporation, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of such authorized carrier.13

(4) Identification of equipment. The authorized carrier acquiring the use of the equipment shall properly and correctly identify such carrier during the period of the lease contract in accordance with the Commission's identification of vehicle requirements set forth in 49 CFR 1058, which requires the name and certificate, permit, or docket number of the authorized carrier leasing the equipment to be displayed on both sides of each power unit operated. The identification of authorized carriers name and certificate number shall be removed before relinquishing possession of the equipment.

(5) Driver of equipment to be in compliance with safety regulations. It is the duty of the authorized carrier to make certain that drivers, other than a regular employee of the authorized carrier, are familiar with, and that employment as a driver will not result in violation of any motor carrier safety regulations.14

(6) Record of equipment to be maintained and shipping documents to identify the authorized carrier. Authorized carriers leasing equipment for periods of less than 30 days must keep and prepare a manifest covering each trip for which the equipment is used, containing the name and address of the owner of the equipment, point of origin, time and date of departure, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time of operation of the leased equipment, there shall be carried bills of lading, waybills freight bills, manifest, or other papers identifying the lading, which shall clearly indicate that the transportation of the property is under the responsibility of the authorized carrier. These requirements also apply with respect to vehicles leased for 30 days or more unless this information is kept at a terminal or office as a part of the records of the authorized carrier.

13 49 CFR 396 et. seq., sets forth the regulations of the Department of Transportation respecting the inspection and maintenance of equipment.
14 49 CFR 391 et. seq., 392 et. seq. and 395 et. seq. set forth the regulations of the Department of Transportation respecting the qualifications of drivers, driving and hours of service, respectively.
Interchange of Equipment

Part 1057.5 of the regulations authorized common carriers by contract, lease, or other arrangement, to interchange equipment with one or more other such common carriers, or to receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following six conditions:

1. Interchange agreement to be specific. The contract providing for interchange shall specifically describe the equipment to be interchanged; the specific points of interchange; the use to be made of the equipment, and the consideration for the use; and shall be signed by the parties to the contract, or their regular employees or agents duly authorized to act for them.

2. Operating authority of carriers participating in interchange. The certificates of public convenience and necessity of the carriers participating in the interchange must authorize the transportation of the commodities proposed to be transported and service from and to the points where the physical interchange occurs.

3. Through bills of lading required. The traffic transported in interchange must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

4. Safety inspection of equipment. It is the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or have it inspected in the same manner as provided in the regulations dealing with augmentation of equipment.\(^\text{15}\) Carriers under common control and jointly maintaining a uniform safety program may dispense with the vehicle inspection, provided the equipment has been inspected prior to the start of the movement in which the interchange occurs and found to meet the requirements. Equipment which does not meet the requirements of the safety regulations cannot be operated in the service of the carrier receiving the equipment until the defects have been corrected.

5. Identification of equipment as that of the operating carrier. Authorized carriers operating power units in interchange service shall

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15. See footnote 14, supra.
identify such equipment in the same method and manner as specified in the regulations relating to augmentation of equipment. Authorized carriers operating equipment in interchange service shall carry with each vehicle so operated, except trailers and semi-trailers, a copy of the lease contract. This requirement may be dispensed with if a certification that the equipment is being operated by the authorized carrier and identifying the equipment by company or state registration number, showing the specific point of interchange, the date and time of resumption of responsibility for the equipment, and the use to be made thereof is carried in the vehicle. Such certification shall be signed by the parties to the contract or their employees or agents.

(6) Through movement involving more than two carriers. The lessee of equipment on a through movement involving more than two carriers is considered the owner of the equipment for the purpose of leasing the equipment for movement to destination or for return to the originating carrier.

The above rules and regulations set forth the minimum standards which must be met by motor carriers in conducting operations in equipment owned and operated by others. However, compliance with such regulations does not insure that the lease or interchange is bona fide and the transaction may nevertheless be held to be an illegal lease of operating rights. Control by the lessee over the vehicle and driver is an indispensable element, the absence of which renders the operation illegal. The rules were designed to assure that the proper degree of control is exercised by the lessee, but the Commission has frequently stated that technical compliance with the lease and interchange regulations will not suffice in all cases.

In order to better understand the Commission's philosophy with respect to the "control" issue, analysis of the Commission's decisions passing on this question is required. As pointed out, supra, the question of control of leased equipment becomes important in finance and extension applications, and complaint and investigation proceedings. Cases involving each of these types of proceedings are considered and discussed, infra. In most instances, the considered decisions demonstrate what not to do in a lease or interchange arrangement.

16. See page 15, supra, paragraph (4) Identification of equipment.

17. In each of the cases analyzed, the details of the lease and/or interchange are set forth for the purpose of demonstrating the acts and/or omissions contributing to the lack of proper control.
Finance Applications

Strict adherence to the Commission's lease and interchange rules is a necessity in finance proceedings if evidence of shipments handled by interchange between the vendee and the vendor is to be relied upon. In many instances, the vendor and the vendee have been rendering a through service by virtue of an interchange arrangement wherein the same unit of equipment with the same driver moves from origin to destination, and the parties argue that as such through service has been performed in the past, the approval of the transaction by the Commission will not create any new service but will merely authorize a single-line service in lieu of the prior joint-line service. If the parties to the transaction have followed the Commission's lease and interchange regulations and the lessee controls the movement of the shipment, then the argument presented is sound. On the other hand, if the Commission's lease and interchange regulations have not been followed and/or if actual control over the driver and equipment of the lessor is not vested in the lessee, the Commission has consistently held that such operation is in effect an illegal lease of operating rights and the operations performed thereunder are entitled to no consideration, and/or denied the application on grounds of fitness.

In Vance Trucking Co., Inc.-Pur.-Northern Neck Transfer, 87 MCC 545 (1961), the vendor and the vendee were handling shipments by interchange in the equipment of vendee, operated by its drivers. Northbound shipments were transported from vendee's territory in vendee's equipment to a given point at which vendee's driver attached vendor's placard. The equipment then proceeded to another point, approximately 140 miles north, where the equipment was inspected. In this respect, applicants pointed out that this method of inspection was made necessary because the territory at which the actual interchange was made did not have any garage facilities providing 24-hour service, and inspection could not be made at that point during the night. At the northern destination, vendee's driver would call vendor's "representative" in Philadelphia, who was also vendee's representative. The representative would direct the driver to a point for the loading of a shipment to be transported southbound. The southbound shipments would then be transported in vendee's equipment to the inspection point for interchange. Subsequently, the shipment would be transported to destination in vendee's territory or interchanged with a third carrier. On prepaid northbound shipments, vendee collected the revenue and paid 5 percent to the vendor. On prepaid southbound shipments, the
mutual representative in Philadelphia sent out bills to the shipper and received payment which was transmitted to vendor. Vendor recorded the payments on its books and transmitted 95 percent of the revenue to vendee. The vendor did not pay for any of the inspections, and the inspection tickets, driver’s tickets, and driver’s logs were transmitted to it from the vendee. Division 3 held that the interchange or purported lease of equipment was merely a device used to lease operating rights in violation of Section 5(4) of the Act, finding as follows (87 MCC 548-549):

"As affects the operations in which one authorized carrier interchanges and leases equipment with and to another authorized carrier, section 207.5 of the leasing rules provides, among other things (1) that it shall be the duty of the carrier acquiring the use of equipment in interchange to have it inspected in accordance with rule 207.4(c) (before taking possession of equipment) by a qualified representative, (2) that the lessee shall identify the equipment as his own, and (3) that charges for the use of equipment shall be kept separate and distinct from the division of joint rates. Such requirements are designed to protect the public and to insure that lessee or the acquiring carrier has adequate control over the leased vehicles and, in this respect, they are not merely technical requirements which may be met at the convenience of the carriers. Although applicants in connection with their joint operations have attempted to go through some of the motions of complying with the rules, they have completely failed to meet and achieve the fundamental requirements and purposes for which the rules were expressly promulgated. The transfer of control of equipment by one carrier to another under contract, lease, or other arrangement must be preceded by an inspection of the equipment or for our purposes, at least, control is not transferred. The fact that inspection of the vehicle is difficult to accomplish at the point of interchange, a fact which we cannot conclude in the instant proceeding, is of no consequence. Until the inspection has been made, control has not been transferred.

"Furthermore, as indicated by the other factors surrounding the considered arrangements, such as the failure to inform vendor in advance of any northbound shipments, the lack of any financial arrangement between vendor and the person making the inspection at Bauer, and the fact that drivers send all shipping documents and their logs to vendee who transmits them to
vendor, it is apparent that vendor does not exercise any effective control over the equipment. It is our opinion that the interchange or purported lease of equipment is merely a device used to lease operating rights in violation of section 5(4) of the act."

Division 3 concluded that the interchange practices of the vendor and the vendee and the shipments presented by the vendor in support of the application were handled in an unlawful manner, that no weight could be given to the traffic exhibit submitted, and that there was no other evidence of record which would support applicant's burden of proving that the transaction would be consistent with the public interest. The conclusion as to the illegality of the interchange arrangement was predicated primarily upon the failure to conduct a proper inspection of equipment. It is essential that the inspection take place at a common point of service at the time the possession of the equipment passes from one carrier to the other, and the acquiring carrier control the details of the inspection.\(^\text{18}\)

The fact that the parties technically comply with the lease and interchange regulations and in addition thereto conduct a proper inspection in some cases is not enough to insure that proper control has passed. The authorized carrier acquiring the equipment must take an active part in the direction, operation and control thereof. In *Burns Motor Freight, Marlinton, W. Va., Transferee*, 93 MCC 629 (1964) following the execution of the purchase agreement, the transferor's bulk operations were almost entirely conducted by means of trip leases of transferee's equipment under an arrangement whereby transferee retained 94 percent of the revenues realized from the transportation.

\(^{18}\) See also *American Red Ball Transit Co., Inc.-Pur.-Fallon*, 87 MCC 391 (1961) wherein the parties were transporting shipments in interline service, such transportation being performed wholly in vehicles owned by the vendee and operated by its employees. The interline was effected at a service station, at which point the service station operator performed an inspection and attached the vendee's placards to the vehicles. The vendor did not arrange for the inspection service, nor had any representatives of the vendor been to the inspection point or communicated with the so-called "agent" in any manner. The service of inspection was engaged by and the cost paid for by the vendee, and the vendee provided all the paper work and payments in connection with the purported interline, including driver's salaries, insurance, taxes, inspection fees, and otherwise control the movement throughout. Division 3 concluded that the leasing arrangement was not in accordance with the leasing rules, was unlawful, and no consideration would be given to any traffic handled by virtue of the interline arrangement. To the same effect *Liquid Transporters, Inc.-Purchase-Black*, 93 MCC 423 (1963) wherein past interline operations were given no consideration for the failure of the party acquiring the equipment to participate in and pay for the inspections.
The drivers were employed by and were under the sole control and responsibility of transferee, who also paid all expenses incurred in connection with the physical operation. On return movements, the equipment was used by, or reverted to the control of the transferee. Transferee, according to his testimony, made out the trip leases and had appropriate equipment inspections made by an independent third party, but otherwise took no active part in the operation. Division 3 concluded that this arrangement was nothing more nor less than a leasing of transferee's operating rights to transferee (93 MCC 633.634):

"We are satisfied from the foregoing that the parties, while maintaining paper compliance with the Commission's Lease and Interchange of Vehicles by Motor Carriers regulations, 49 CFR 207, have in fact used the vehicle arrangement as a means of leasing transferee's operating rights to transferee without appropriate authority in violation of sections 206(a) (1) and 212(b) of the Act and Section 179.5(f) of the transfer rules. Transferee, which has never established its fitness to operate under the rights of transferee, has performed the physical operations, and unlike Monsen-Purchase Devries and Paekel, 63 MCC 631, it would be improper in the circumstances presented to find a genuine agency relationship between transferee and those conducting the actual operations. In the event that applicants desire to continue such operations under a bona fide vehicle lease arrangement, transferee must establish and maintain a degree of direction and control compatible with his status as a certificate holder. Stated differently, transferee must operate as a carrier""

If the parties rely upon traffic handled in interchange service, it is their burden to establish by detailed and competent testimony the

19. In the Monsen case cited above, the vendee employed an agent to act as representative of the vendor whose responsibilities were to secure traffic, lease equipment to transport the shipments under the vendor's authority, provide the drivers with a delivery receipt for the consignee's signature, execute the trip lease form, the driver's physical certificate, and freight bill covering the shipments. The vendor collected the freight charges from the shipper, paid the agent for each load secured and paid the vehicle owner a percentage of the total freight charges. The vendor complied with respect to tariff publications, public liability, property damage and cargo insurance, and paid all transportation taxes. The vendee did some solicitation for the vendor, suggested certain changes in its tariff, had the vendor advertise in a motor carrier guide, received greater compensation than other carriers on equipment leased to vendor, was paid travel and solicitation expenses by vendor, and received a share of the vendor's profits. Division 5 concluded that the vendor's use of the agent was lawful, that all necessary functions in
nature and legality of that service. In Dealer’s Transit, Inc.—Control and Merger, 93 MCC 611 (1964) the vendor leased its equipment and drivers from origin to destination to the vendee, who performed the pickup and deliveries, and the billings and collection of charges. The vendor received 10 percent of the revenues developed from each shipment as a result of miles traveled under its authority, unless such mileage resulted in revenues of less than $100.00, in which event it received a minimum payment of $10.00. The witness for the vendor presented on its behalf to stand cross-examination on its operations, had no knowledge of the location of the inspection station utilized to inspect the equipment interchanged, nor of the identity of the person relied upon to inspect and placard the equipment. When questioned as to shipments moving on government bills of lading in the interchange service, the witness was unable to state whether the vendor had any section 22 quotations on file with the United States Government. When questioned as to who actually obtained the traffic originated in the vendor’s territory and handled by interchange, the witness replied that the vendee’s terminal manager handled all the details and called the vendor’s office concerning the shipment and later sent some papers to the vendor. Based upon this testimony, Division 3 concluded that the applicants failed to show that the interline operations were lawful and thus failed to sustain their burden of proof as to the vendee’s fitness, citing Liquid Transporters, Inc.—Purchase-Black, 93 MCC 423 (1963).

The rules and regulations pertaining to the augmenting of equipment are designed primarily for the purpose of enabling the leasing carrier to handle additional traffic generated by it and for which it, otherwise, would not have available equipment. If the augmentation is primarily for the purpose of enabling the lessor to solicit additional traffic for its equipment which, otherwise, would have to be moving empty or not at all there is a violation of the regulations. In Tank Lines, Inc.—Pur.-S &

connection with the motor carrier activities were performed by the vendor or its agent, including responsibility and compliance with respect to the filing of tariffs and the maintenance of proper insurance. The Momsen case and the Burns case can be distinguished on the grounds that in Momsen the vendor conducted and controlled its physical operations although they were supervised by the vendee, whereas in Burns the vendee supervised, controlled and physically conducted the vendor’s operations.

20. See also Cooper Motor Lines, Inc.—Pur.-Tank Lines, Inc., 101 MCC 586 (1966), affirmed Cooper Motor Lines, Inc. v. United States, 284 F. Supp. 754 (D.C.D. S. C. 1968) wherein Division 3 held that the interline arrangement between the vendor and the vendee was unlawful; the witnesses for the vendor were unfamiliar with and somewhat confused in describing the nature and extent of the operations.
N Freight Line, Inc., 90 MCC 381 (1962)\textsuperscript{1} the vendor was leasing equipment to augment its fleet from the vendee. The vendee was a common carrier, primarily of bulk commodities, operating in a number of states located adjacent to or north of Virginia. The vendor was a general commodity carrier, including bulk commodities, operating in Virginia, Georgia, Maryland, Delaware, New York, Pennsylvania, North Carolina and South Carolina. Under an agreement, the applicants proposed to split off from the vendor's general commodity rights, the authority to transport liquid commodities and transfer the same to the vendee. The vendee had been leasing tank truck equipment to the vendor for several years. The person in control of the vendee solicited bulk traffic for the account of the vendor. Placarding and inspection of the vendee's equipment prior to its use for transporting traffic under the vendor's rights was effected at three New Jersey points. After transportation had been performed, the placards were returned to the vendor by mail, along with the delivery receipts and vendor billed the shippers and collected the revenue, which for the most part was prorated on a percentage basis, with 85 percent going to the vendee. The Finance Board found that even assuming that there had been full compliance with equipment leasing regulations, the arrangement between the applicants resulted in the lease by the vendee of a portion of vendor's operating rights, in violation of the provisions of Section 5(4), and that, in the absence of a lawfully effective lease of those operating rights, the vendee was conducting operations as a common carrier, for compensation, without a certificate in violation of Section 206(a) of the Act. The most damaging evidence was that establishing that the traffic generated under the vendor's operating rights to be transported in equipment leased by the vendor from the vendee was generated by the vendee, and the primary purpose of the lease of equipment from the vendee to the vendor was not to enable the vendor to augment its fleet of equipment, but to enable the vendee to solicit additional traffic for its tank truck equipment which was unloading in the vendor's territory, and available for return movement.\textsuperscript{22}


\textsuperscript{22} The same result was reached in Ohio Fast Freight, Inc.—Control and Merger, 101 MCC 171 (1965) wherein Division I affirmed and adopted the hearing examiner's finding that the lease of equipment from the vendee to the vendor was for the sole purpose of
A fairly recent case involving an illegal vendor-vendee interchange, which demonstrates the strict view of the Commission regarding such operation, is *Strickland Transp. Co., Inc.-Pur.-England Transp. Co.*, 104 MCC 297 (1967).\(^2\) Therein the vendor and the vendee were purporting to handle traffic by interchange under the following arrangement: the vendee transferred loaded and sealed trailers to the vendor at Shreveport for transportation to New Orleans and at the latter point for transport in the opposite direction; the vendee notified the vendor of how many trailers it would have on any given day at each end of the line and the vendor sent tractors to the vendee’s terminals at New Orleans or Shreveport to pick up the trailers; at the opposite end the trailer was delivered intact and still sealed to the vendee’s terminal; in New Orleans the vendee broke bulk for distribution to other points; at Shreveport it was presumed that the trailer was shifted to a tractor of the vendee for movement to cities in the upper midwest and east; the vendor cut no freight bills on the individual shipments nor was it shown as a connecting carrier on the vendee’s freight bill, except that some of the bills issued by the vendee on shipments transported in this manner bore a rubber stamp to show the routing; the vendor did not pick up, deliver, nor participate in billing or claims as to the shipments; the vendor’s president testified that, in order to prepare the abstract of shipments as to traffic transported under this arrangement, it was necessary for him to secure the freight bills from the vendee at its New Orleans terminal; the vendor did not share in a pro rata division on each shipment, but received a flat sum for hauling a trailer, full or empty, between New Orleans and Shreveport; most of the trailers used were the vendee’s, a few were the vendor’s, but in neither case did there appear to have been any lease arrangement as to any particular trailer. Based upon this set of facts, the entire Commission (Chairman Tucker, Commissioners Brown, Deason and Stafford dissenting) denied the application, finding

the purported interchange operations to be unlawful, not in accordance with the Commission rules and regulations, and gave no consideration to the traffic handled thereunder pertinently holding (104 MCC 316):

"This does not constitute interchange within the meaning of our rulings, nor is it any form of interlining as we define it. Interlining is the practice whereby a carrier transfers a shipment to another carrier at a point of joint service for delivery or for further movement and later interline with another carrier. Interchange is a kind of interline which involves the exchange of equipment, here trailers but often tractors and trailers with or without drivers. Compare Gilbertsville Trucking Co. v. United States, 371 U.S. 115,121. Usually interchange involves loaded vehicles, but in any form it is governed by the Lease and Interchange of Vehicle Rules, 49 CFR 307. England and Strickland have not offered lease agreements covering such of Strickland's trailers as were used, and the flat charge for their movement was the same no matter whose equipment was used. If for no reason than failure to comply with section 307.5(c) of these rules, the arrangement between applicants here was not a lawful interchange. That section requires an arrangement under which: . . . the rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates . . . England (La.) had no liability to the actual shippers nor is there anything to suggest that England (La.) exercised control or responsibility over the traffic or that it functioned as an independent interchange carrier, as required by law. Because there was no lawful interchange, there was no lawful use of the rights of England (La.). Because the operations were really under the management and control of Strickland, insofar as the relationship with and liability to shippers was concerned, they constitute operations by Strickland without possession of a certificate."

This case particularly points out the dire consequences that will result for the failure of the vendor and the vendee to perform a legal interchange service. Here, the vendee was granted temporary authority to operate the rights sought to be acquired and commenced such temporary operations on October 28, 1964. These operations continued
until approximately June of 1969, when they were terminated pursuant to the Commission’s Order of Denial becoming final. The economic and operational problems resulting from the discontinuance of a service provided for some four and a half years under temporary authority are obvious. This case demonstrates that the Commission is in no way reluctant to deny an application where it is demonstrated that the parties have engaged in an illegal lease and/or interchange arrangement, even though denial of the application requires the vendee to discontinue long standing operations performed under temporary authority.

**Extension Applications**

As opposed to the strict approach utilized by the Commission in finance cases wherein illegal lease or interchange of equipment is equated to an unlawful lease of operating rights and the operations conducted by the parties by lease or interchange of equipment given no consideration, the Commission in extension proceedings has not utilized such a strict approach. In several cases, illegal lease or interchange arrangements were pointed out in proceedings wherein an applicant was seeking permanent authority, and notwithstanding such violations the Commission held applicant fit to provide the proposed service.24

There are some cases wherein the Commission considered an application for operating authority in which the need alleged to exist was predicated on past unauthorized transportation performed under an illegal lease arrangement, and under those circumstances denied the application. In *Tischler Extension—Canned Goods*, 82 MCC 179 (1960), applicant sought authority to operate as a common carrier in the transportation of canned goods from specified points in New Jersey to specified points in New Jersey, New York, and Pennsylvania. Applicant had performed transportation of the involved commodities from and to the considered points without the necessary operating authority by “leasing” equipment to an authorized carrier. Under this so-called oral lease, applicant transported in his own equipment using his own drivers under authority of an authorized carrier, shipments of canned goods. The authorized carrier retained 5 percent of the freight revenue and applicant received the remainder. Division 1 denied the application for several reasons, one of which was that the public need

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said to exist was predicated upon unauthorized transportation under the so-called ‘lease arrangement’ (82 MCC 181-182):

‘The so-called lease arrangement, in our opinion, is not a bona fide one as contemplated by our regulations promulgated in Lease and Interchange of Vehicles by Motor Carriers, 68 M.C.C. 553. Rather, it appears to be an unauthorized lease of operating rights. We note here that no written agreement exists, that the ‘lessor’ accepts and delivers the shipment, pays the drivers, retains responsibility for the freight, and prepares the billing. The equipment leased to Lerner is loaded for movement before applicant ‘leases’ the vehicle to Lerner. Therefore, the equipment is unavailable to lessee to augment its fleet as contemplated by the leasing portion of the regulations. Lerner pays nothing for the privilege of leasing the equipment, and, in fact, he receives a portion of the revenue from applicant. We conclude that no lease of equipment actually exists, and that the ostensible lessee-carrier, Lerner, merely accepts a percentage of the revenues as consideration for permitting the ostensible lessor, applicant, to operate under the former’s authority. We have repeatedly held that such arrangements are unlawful. Compare No. MC-79695 (Sub No. 18), Steel Transp. Co., Inc., Extension-Nonferrous Metals, 81 M.C.C. 637 (decided September 23, 1959) and No. MC-C-2275, Campbell Sixty-Six Exp., Inc. v. Frisco Transp. Co., 81 M.C.C. 53 decided June 24, 1959). Applicant and Lerner are hereby admonished to refrain from entering into such arrangements in the future with one another or other carriers.’

There have been some decisions involving extension applications wherein the application was denied, not on the basis of applicant’s being unfit to provide the service proposed due to its illegal lease and interchange operations, but for the reason that applicant failed to exercise the requisite degree of control over the vehicles operated and proposed to be operated on its behalf, and thus failed to establish that it was a common or contract carrier by motor vehicle within the meaning of the Act. In Truckway Corp. Extension-Florida, 54 MCC 676 (1952) applicant sought to operate as a contract carrier by motor vehicle, transporting specified commodities between points in 20 states and the District of Columbia. Applicant did not have any drivers or other employees on its payroll, nor did it own any motor vehicle equipment or other operating facilities except one trailer. Its operations were performed with tractor and trailers leased from its president who
was also the owner and operator of a truck rental company. Applicant leased 10 tractors and 13 trailers under a long-term written contract from the leasing company. Under the terms of the lease, the leasing company furnished oil, gas, repairs, garage facilities and drivers for the leased vehicles and received 80 percent of the freight charges as rental for the equipment with drivers. Public liability and property damage insurance was carried by the leasing company and applicant jointly, their proportionate share of the premiums paid therefor being based on the volume of traffic handled by each. The proposed operation, if authorized, would be carried on in the same manner as that heretofore described. Division 5, after considering the lease arrangement, concluded that “Inasmuch as applicant owns no equipment, it has the burden of establishing that it so controls and directs, and that it assumes the responsibility for, the operations performed through the use of equipment owned by its president as to warrant the conclusion that its status is that of a carrier by motor vehicle, under the act.” Division 5 held that such burden has not been met (54 MCC 679, 680):

“Except for an extremely limited responsibility to the shipper, applicant appears to have none of the attributes of a carrier for hire within the meaning of the act. Clearly it does not have exclusive control and possession of the leased equipment during the entire term of the lease. The facts of record suggest that applicant may be a broker or a mere aid in furthering the present activities of Rahl, but do not provide a sufficient basis upon which to make a definite determination of applicant’s exact status. We conclude that applicant has failed to sustain its primary burden of establishing that the proposed operation will be that of a carrier by motor vehicle within the meaning of the act and accordingly we are not justified in granting the authority sought. In view of this conclusion, it is unnecessary to discuss the evidence relative to the question of whether the operation proposed will be consistent with the public interest and the national transportation policy, or whether applicant is fit and able to perform such service.

“As indicated above, applicant now holds permits authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle. In the event it is operating thereunder in a manner similar to that proposed herein, it should immediately take steps to reform the operation so as to insure that its future operations will be those of a bona fide contract carrier. Should it
fail to do so it may become necessary for us to enter an appropriate order.

"We find that applicant has failed to establish that the proposed operation would be that of a carrier by motor vehicle within the meaning of the Interstate Commerce Act, and that the application should be denied."25

COMPLAINT AND INVESTIGATION PROCEEDINGS

One of the most important requirements of the Commission's rules and regulations is that pertaining to the inspection of equipment. One of the reasons for establishing the leasing rules was to make certain that authorized carriers leased only equipment meeting safety standards set down by the Commission. The most important part of the inspection regulations is that of placing the duty of the authorized carrier, before taking possession of leased equipment, to inspect the equipment in order to insure that the equipment complies with the Commission's safety regulations. If there is a failure to properly inspect the equipment, then in effect control has not passed from one carrier to another.

In Bowling Green Exp., Inc., Interchange Practices, 74 MCC 167 (1958), the Commission instituted an investigation for the purpose of determining whether certain interchange arrangements and agreements entered into by respondent Bowling Green Express and several other carriers were in violation of the Interstate Commerce Act and the Commission's rules and regulations governing the lease and interchange of motor vehicles. Under the interchange arrangement, respondent, in connection with its interline carriers, was performing a through service in the handling of traffic moving from origin to destination in the same unit of equipment with the same drivers. Part of the service was performed under the authority of Bowling Green Express and the other performed under the authorities of its connecting line carriers. The

25. An application for common carrier authority was denied for the same reasons as stated above in Coldway Food Exp. Inc. Extension-Eastern Pennsylvania, 79 MCC 171 (1959). These cases do not stand for the proposition that an applicant and/or authorized carrier cannot propose to conduct operations or actually conduct operations in leased equipment. That authorized motor carriers lawfully may conduct operations with the use of leased equipment when leasing arrangements are in conformity with the Commission's rules and regulations is not in dispute and the principal is well established that an applicant may not be found unfit because it makes use of leased equipment provided the leasing arrangements and operations thereunder are lawful and proper. Point Transfer, Inc., Extension-Pa. and Ohio Origins, 105 MCC 634, 658 (1957).
An interchange arrangement complied with the Commission’s lease and interchange regulations for the most part, and the only question was the propriety of the method utilized for the inspection of equipment. One of the connecting-line carriers would originate a shipment in its own equipment with its own driver and transport the same to its Nashville, Tenn. facility, at which point the drivers and equipment of the connecting carrier would be turned over to Bowling Green Express and operated to destination under the latter carrier’s operating rights. The question to be determined was whether or not in serving as employees of Bowling Green Express the drivers may inspect the equipment of the employer whose service they have just left, even though authorized by Bowling Green Express and competent to do so. Division I pointed out that 49 CFR § 207.5(d) requires the authorized carrier, before taking possession of the equipment, to inspect the same or to have it inspected, by a person who is qualified to do so and has been duly authorized by the carrier to make such inspection as a representative of the carrier and held that the drivers of the carrier originating the shipment may not act as the authorized inspector of such equipment for Bowling Green Express and the involved inspection of equipment violated the Commission’s rules. In so ruling, Division I considered and approved Administrative Ruling 103 dated January 24, 1957, issued by the Bureau of Motor Carriers (74 MCC 173):

"‘Question 16. Section 207.4 (c) requires that an inspection of the vehicle be made by a person who is competent and qualified to make such inspection and has been duly authorized by the carrier to make such inspection as a representative of the carrier. May the carrier appoint as its representative to make such inspection a driver or other employee of the person owning the equipment? [Note. Rule 207.5 (d) makes it the duty of the carrier acquiring equipment in interchange to inspect such equipment or have it inspected in the manner provided in rule 207.4 (c) of the rules.]

‘‘Answer: No. The person making the inspection must make it as a representative of the carrier under whose rights the transportation will be performed, and the carrier may not employ as its representative a person who has an adverse interest, such as the driver or an employee of the owner. [Note. An exception is noted in the answer for situations where the authorized carrier has appointed a person as its exclusive agent under a long-term contract to handle all of its affairs and such person is also the owner of equipment used by the carrier in interchange service but this situation is not present here.]"
"A somewhat similar question and answer were contained in a previous administrative ruling (No. 97 issued September 1, 1953) interpreting the 'old rule' which was in existence prior to the effective date of the present rules.

"We believe that this ruling is sound. The purpose of the rule, of course, is to insure that equipment turned over to the authorized carrier by the connecting carrier is in compliance with our safety regulations. This being so it seems to us that the person making the inspection at the interline point should not be in any material way connected with, or owe allegiance to, the owner of the equipment. We do not believe that drivers who have just left the employment of the owner of the equipment and who will return to such employment as soon as their service for the authorized carrier is completed, can be expected to be as diligent and strict in making such inspection as they would be if unconnected in any way with the equipment owner. In the circumstances we cannot approve the arrangement between Bowling Green and TCT insofar as it concerns the inspection of equipment, and an appropriate order will be entered requiring the discontinuance of this practice."

A bona fide interchange of equipment and drivers between authorized carriers contemplates that the parties thereto will each perform actual operations under their respective operating authorities and assume full responsibility to the shipper, to the public, and to the Commission for the transportation performed by virtue of interchange. In *Stewart—Investigation of Control*, 87 MCC 681 (1961), the Commission considered an interchange arrangement between Speedway Transports, Inc. and Auto Haulers Co., hereinafter referred to by their short titles. Speedway held authority to transport certain commodities from Kenosha, Wis., to points in Missouri. Auto Haulers held authority to transport certain commodities between points in Oklahoma and points in Missouri. Speedway and Auto Haulers entered into an agreement whereby Speedway would originate a shipment in Kenosha, Wis., transport the same to St. Louis, Mo., and at that point interchange the equipment and driver to Auto Haulers who would make delivery at Tulsa, Okla. Under the arrangements, Speedway paid all costs and expenses incurred in operating the 'interchange' equipment; assumed complete responsibility for compensating drivers for their services from origin to destination and return; maintained payroll and other driver's records; obtained all licenses and paid all taxes in connection with the operation of such equipment; agreed to
defend Auto Haulers and to indemnify and hold the latter harmless against all claims, damages, and liability for injury to persons or property arising out of the operation of such equipment; and assumed responsibility for keeping all interested persons advised as to the location and progress over the entire movement from origin to destination. Division I held that although this leasing operation was in technical compliance with the Commission's regulations, it was nonetheless unlawful (87 MCC 696):

"Technical compliance with the leasing and interchange regulations does not necessarily imply a lawful operation. For example the leasing arrangements of the two codefendants in *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, supra, [81 MCC 53] although unequivocally categorized as unlawful, were specifically found to be in conformity with the leasing and interchange regulations. These regulations affect in no way the basic proposition that a motor carrier receiving traffic from another through the interchange of equipment with drivers must have and exercise control over the operation of such equipment while it is in its possession. A mere paper agreement saying that control is vested in the connecting carrier is not enough; the carrier under whose rights the interchanged equipment is operated must in fact control the service to the same degree as it would if it were the owner of the vehicles, and must control the vehicles to the extent necessary to assume full responsibility to the shipper, to the public, and to this Commission for transportation performed in such vehicles. While the interchange arrangements between Speedway and Haulers appear not to contravene the applicable interchange rules, it is apparent that Haulers does not exercise full and effective control over the transportation performed from St. Louis to Tulsa under color of its operating rights. Purported interchange arrangements similar to those which have been entered into between Speedway and Haulers were found to be illegal in *D.T. & Co., Inc.* v. *Extension-Willow Run, Mich.*, 49 M.C.C. 231, 239, *Gregory Heavy Haulers, Inc.* v. *Ext.-Highway Const. Equip.*, 74 M.C.C. 623, 625, and *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, supra."[26]

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26. A like result is reached if the transaction involves the augmenting of equipment, as opposed to interchange between authorized carriers. In *Coastal Tank Lines, Inc.* v. *Pioneer Trucking Corp.*, 79 MCC 101 (1959) the lease between the lessor and the lessee recited that the equipment shall be operated under the lessee's direction and control;
The leading decision and the one most cited by the Commission relating to the issue of "control" is *Performance of Motor Com. Car. by Riss & Co., Inc.*, 48 MCC 327 (1948). Riss & Co., Inc. hereinafter referred to by its short title, was authorized to operate as a common carrier by motor vehicle, in interstate or foreign commerce, of general and specified commodities, principally over regular routes between points in various states. The Commission instituted an investigation proceeding into and concerning the performance of service under certificates issued to Riss in order to determine whether the services were performed in accordance with the provisions of Part II of the Act and the rules and regulations of the Commission promulgated thereunder. Riss operated under a so-called "provider plan of operation," which was the subject matter of the investigation proceedings. Operations were conducted pursuant to the provider plan and by virtue of oral agreements entered into between Riss and the so-called providers or owner-operators. The provider plan was essentially a contract or arrangement for the furnishing of motor vehicle equipment and other facilities for use by Riss over the routes and between the termini Riss was authorized to serve under its certificates. In general, the agreement specified that the provider would furnish adequate equipment and facilities such as trucks, trailers, garages, terminals, and offices, together with the personnel necessary to fully maintain and perform all transportation service for Riss under its operating authorities and that Riss did not grant, lease, or invest in the provider any of its operating rights or certificates. The providers were paid on a percentage of the gross revenues collected from freight handled on the Riss bills of lading. The provider agreed to bear all maintenance costs however, the lessor supplied the drivers for the vehicles so leased, paid social security and workmen's compensation payments, provided public liability, property damage, and cargo insurance on all vehicles (such insurance naming the lessee as the insured), furnished gas and oil, provided all maintenance for the leased vehicles, and was responsible for keeping the vehicles in a safe condition; paid all necessary taxes and fees, accepted responsibility for the preparation and filing of all documents required by state and federal regulatory bodies, including driver's logs and doctor's certificates. The lessor received 70 percent of the revenue obtained through the use of the leased tractors, and 90 percent when it provided both tractor and trailer. A bill of lading form in the lessee's name was issued which was usually filled in by the driver of the equipment; the original bills were sent to the shipper along with the freight bill which was made out by the employees of the lessor. Taking all these factors as a whole, Division I concluded that the lessee did not exercise the degree of control over the motor vehicle operations or that degree of responsibility to shippers which a motor common carrier must exercise in order to actually hold itself out to the public.
and expenses of every character, except that Riss was to carry at its expense all insurance and was not relieved of its responsibility to the public, even though the provider was required to reimburse Riss for any amount paid by its arising out of cargo, public liability, property damage, and workmen’s compensation, not covered by insurance. The provider agreed to advertise service and solicit freight in the name of Riss, to handle all freight on the shipping of documents of Riss, to use the tariff rate published by Riss, and to display plainly the name of Riss on its equipment. The agreement gave Riss the right of direction and complete control of the movement and handling of the freight by the provider, and for this purpose Riss had its representative or representatives present at the provider’s place of business. Riss maintained that the provider plan was an arrangement between it and the individual providers for the furnishing of equipment and facilities, to wit, a common carrier by motor vehicle, under which the responsibility to the shipper and the obligation to the general public were effectively and conclusively maintained by Riss as the carrier. Division 5 held that Riss lacked direct or any effective control of the movement and handling of the traffic transported, and did not retain full responsibility to shippers or alone hold out the service to the public. Division 5 set forth certain guidelines and suggested changes in the Riss operation to bring it within the definition of “common carrier by motor vehicle” (48 MCC 363, 364):

“In order to operate as a motor common carrier, Riss should both offer to the public and be actually engaged in the motor service, with its own bona fide employees having and exercising direct, full, and complete control over the movement and handling of the freight, so that any persons furnishing drivers and equipment to haul freight on Riss’ billing are such an integral part of the service offered by Riss as to be considered mere aids in carrying out Riss’ undertaking to transport. To this end, changes should be made to insure that Riss alone holds itself out to provide the service for the public and that it alone is responsible to the shippers for the freight. Riss also should provide, pay for, and maintain all necessary insurance; and with and through its own employees it should be responsible for, maintain, and file all necessary records and reports required by the Commission’s rules and regulations.

“All solicitation of traffic should be in the name of Riss and should be accomplished by Riss through its bona fide employees.
A QUESTION OF CONTROL

or agents, but this is not to say that Riss may not use the services of an authorized broker of transportation. The control of the movement and handling of the freight transported should be directly in Riss. Its own employees should fix the schedules for the movement of the freight and should dispatch all vehicles utilized. They should bill the freight and specify the routes to be used by the drivers of the vehicles carrying the freight, designate for them the amount and particular shipments to be moved, specify for them the places for loading and unloading the traffic, and give them any special instructions incidental to the movement thereof.

"Riss should establish facilities by which its own employees may make necessary checks of the drivers and vehicles used in performing the transportation in order to insure that the Commission's rules and regulations pertaining to safety of operations are observed, and that Riss' instructions and directions as to the movement and handling of the freight are obeyed. Riss should make, and should be solely responsible for, all necessary arrangements for pick-up and delivery service, except where the tariffs permit the shipper or receiver of the freight to perform the service. Interline arrangements, if any, also should be directly between Riss and the connecting carriers. If Riss deems it necessary, in the exercise of its managerial discretion, to maintain terminal facilities, such terminal facilities should be arranged for, and maintained by, Riss at its own expense.

"In the event Riss desires to use vehicles of others to transport any of its traffic, all arrangements for the use of such vehicles should be made directly between Riss and the owners of the vehicles, and such other persons should be solely responsible to Riss for their service for the duration of the arrangement. Moreover, the mere fact that the arrangements, written or otherwise, between Riss and the owners of the vehicles may require certain performance is not enough; Riss should see to it that the actual practices meet the requirements set forth above."

A recent case reaching a result contrary to that in Riss, supra, is Murphy Motor Freight Lines, Inc.—Investigation. 99 MCC 707 (1965). Therein the Commission instituted an investigation into and concerning the practices of Murphy Motor Freight Lines, Inc. herein referred to by its short title for the purpose of determining as here pertinent: (1) whether Murphy, in concert with other respondents, failed
to render reasonably continuous and adequate service to the public; (2) whether the named respondents, in concert with Murphy, were engaging in for-hire transportation, in interstate or foreign commerce, as common carriers by motor vehicle without a certificate of public convenience and necessity. The controversy involved the utilization by Murphy of so-called cartage operators whereby each of the cartage operators rented equipment to Murphy for use in providing service under Murphy's certificates. Under a so-called "Vehicle Lease Agreement" between the parties the lessor (cartage operator) agreed to the following: (1) to lease specific vehicles to Murphy, the compensation for which was the revenue agreed to in a cartage operator's agreement; (2) to maintain, service, and keep the vehicles in good repair, according to federal and state laws and regulations, and provide all gasoline, tires, and other necessary equipment, and pay driver's salaries, (3) to furnish competent and qualified drivers, and (4) to indemnify Murphy against any loss resulting from injury or death of driver, or damage resulting from the driver's negligence, incompetence, or dishonesty. Murphy, the lessee, agreed to assume full common carrier responsibility for loss or damage to cargo, and for the operation of the vehicle which was solely and exclusively under its direction and control. This lease agreement was subject to cancellation upon 30 days notice by either party. Additionally, Murphy maintained on file for each cartage operator and his driver: (1) a signed statement that the cartage operator and/or drivers had read and were familiar with the provisions of the Commission's motor carrier safety regulations; (2) a record of physical examination and doctor's certificate; (3) employment application; (4) accident record; and (5) daily time sheet and equipment check sheet. Murphy employed two supervisors who inspected each cartage operator's facilities and equipment at least once or twice each month. Murphy's director of safety made inspections of the various cartage operation facilities at regular intervals. Shipments were transported under Murphy's bill of lading and in Murphy's line haul vehicles to the break bulk points. At those points, the shipments were transferred to the cartage operators for ultimate delivery over Murphy's authorized routes to consignees located at small nearby communities less than 50 miles from the break bulk point. Shipments in the reverse direction moved under bills of lading prepared by the shippers and signed by the cartage operators for Murphy. The shippers call the cartage operators directly in requesting pickup service. All revenues collected were remitted direct to Murphy. Murphy compensated the cartage operators on the amount of traffic handled.
Murphy reimbursed the cartage operators for settlement of liability claims not over $5.00. Claims in excess of that amount were forwarded directly to Murphy for settlement. The cartage operators hired and discharged their drivers. The cartage operator’s name was affixed to the cab doors, and the sides and rear of the van displayed Murphy’s name. The cartage operators supervised the loading and unloading of the leased equipment; scheduled the pickups and deliveries; and paid all expenses incurred in the operation and maintenance of the leased vehicles, including driver’s salaries, social security taxes, and workmen’s compensation. The Bureau of Enforcement claimed that the above described operation was devised to evade any responsibility by Murphy for the transportation service performed, relying upon Riss. supra. Division 1 disagreed,27 concluded that Murphy exercised proper direction and control and discontinued the investigation (99 MCC 713):

“Responsibility to the shipper, consignee or any other member of the shipping public rests with Murphy. Nordby is only liable to Murphy. Delivery receipts are sent to Murphy’s central office at St. Paul. All claims are forwarded to Murphy. In short, the operation involves one bill of lading, only one carrier signatory to the bill of lading and one carrier paying claims—Murphy. Murphy has the direct, primary, and continuing responsibility to the public from origin to destination. Cf. Riss, 49 M.C.C. 111, 118. We conclude, therefore, that there is no indication on this record of unsatisfactory transportation services to the public.

The Bureau’s claims that Murphy’s operation was devised “to evade any responsibility” for the transportation service is unfounded. There is no evidence to indicate how Murphy’s operation would prohibit the Commission from having immediate, direct control over safety, hours of service of employees, and other matters pertaining to safe, adequate, and efficient service and the safe operation of vehicles on the highways. Murphy has assumed these responsibilities. In Riss, 48 M.C.C. 327, 360, the Commission, division 5, held that—

* * * it is of the utmost importance to regulation that * * * [a

27. Division 1 stated: “It is important to emphasize, at the outset, that in Riss the overriding consideration behind the assailed operation was the avoidance by the carrier of financial losses. Riss, supra, 359,360. And it was primarily for that reason that the Commission condemned the operation. This is not the case here.” (99 MCC 712). However, the most important distinction between the two cases is the fact that Murphy strictly controlled all elements of driver and vehicle safety compliance, whereas Riss did not.
person claiming to be a motor carrier through the use of vehicles of others] have and exercise direction and control of the operations * * *.

This Murphy does."

It is obvious that the result reached by Division I was predicated primarily upon operational efficiency and economy considerations, as well as the fact that the members of the public utilizing the service of Murphy were satisfied therewith, and no competing carriers nor shippers indicated any deficiency in the quality or the quantity of the service provided. The territory in which the cartage operations were performed was comprised of many small communities, and the representative of Murphy testified that the only way his company could efficiently and economically service many of those communities was by the cartage arrangement, otherwise many of the points would be without service. Unless a comparable factual situation is presented, it would be dangerous to rely on the Murphy case and pattern the details of a lease arrangement thereafter.

CONCLUSION

The cases considered here in some detail represent only a handful of the Commission's decisions relating to the issue of lease, interchange and control, but these cases are the leading decisions of the questions considered. No hard and fast rule can be devised respecting the factors that must be present to insure that proper control is assumed over the leased or interchanged vehicles. Each factual situation will present different problems and a lease arrangement designed to fit one set of circumstances may not be sufficient to legalize a transaction under a different set of circumstances.28 However, the above cases do establish certain general principles which should be followed to insure a legal operation:

(1) Strict adherence to all requirements of the Commission's lease and interchange rules and regulations;

28. This is borne out by the Commission's liberal view as expressed in the Murphy case supra, wherein the carrier was obviously given the benefit of the doubt due primarily to the fact that the lease arrangement under which operations were conducted was the only method that service to smaller communities could be provided on a regular, satisfactory, and economical basis. On the other hand, where there are no such extenuating circumstances involved, the Commission has applied a very strict approach as evidenced in the Strickland case, supra, which involved operations between major service points and no economic considerations involving the public interest were involved.
(2) The authorized carrier augmenting its fleet of equipment by lease or receiving a piece of equipment by interchange must control the details of the inspection of the equipment and should bear all expenses incurred in connection with the inspection. The person making the inspection on behalf of the acquiring carrier, in addition to being qualified under the rules and regulations, should not in any material way be connected with, or owe allegiance to, the owner of the equipment.

(3) When an authorized carrier leases equipment to augment its fleet it must be for the purpose of enabling the carrier to handle additional traffic generated by it and for which it, otherwise, would not have available equipment. The lessee carrier must solicit and generate the traffic transported in the leased equipment, prepare the freight bills covering the transportation, and bill and collect the revenues derived from the transportation free of control of lessor.

(4) In an interchange arrangement, the origin carrier must be responsible for the pickup and billing of the freight and the destination carrier responsible for delivery. In other words, each carrier party to an interline movement must function as such carrier and perform all services commensurate therewith.

(5) In an interchange arrangement, the charges for the use of equipment must be kept separate and distinct from the divisions of the joint rates or the proportion thereof accruing to the carriers, and the compensation agreed to between the carriers for the use of equipment should bear some relationship to the transportation performed by each.

(6) The primary responsibility for the payment of expenses incurred in operating the equipment, payment of insurance premiums and taxes should be that of the lessee. However, provision can be made for the reimbursement of these expenses by the lessor.

(7) In no event should the contract contain a hold harmless agreement, whereby the lessor agrees to hold the lessee harmless for any loss or damage incurred by virtue of the operation of the equipment. Such an agreement is an indication that the lessee does not have full dominion and control over the equipment operated under its authority and although this fact standing alone is not controlling, if coupled with other factors reflecting lack of control by lessee, an illegal lease of operating rights could be found to exist.

(8) The authorized carrier leasing equipment with drivers or receiving equipment with drivers through interchange must accept the responsibility and expense of determining that the drivers are fully qualified with respect to all applicable safety rules and regulations.
(9) The agreement covering the lease or interchange should embody all terms and conditions of the transaction, and any oral or written side agreement could have the effect of negating the written contract in the eyes of the Commission.

Considering the serious consequences which flow from a violation of the lease and interchange regulations and/or failing to maintain proper control over equipment operated, the additional time and expense incurred in assuring compliance and proper control is insignificant. The rules and regulations are clear and carriers augmenting their fleet by leasing equipment and/or operating equipment owned by other carriers in interchange service should have no problem in setting up appropriate procedures to insure compliance therewith. The key element in the ultimate is that of control.
CONVERSION OF CERTIFICATES OF REGISTRATION TO
CERTIFICATES OF PUBLIC CONVENIENCE AND
NECESSITY AND RELATED SECTION 5 FINANCE
PROCEEDINGS

BY: JAMES R. STIVERSON*

The subject matter of the instant discussion deals with the problems
inherent in the acquisition by a multi-state, interstate operator of a
Certificate of Registration held by a single-state operator holding a
Certificate of Registration from the Interstate Commerce Commission,
which registration is, in turn, coextensively tied into a single-state
intrastate operating certificate.

I.

BACKGROUND

A certain amount of historical background is essential for a proper
perspective of the issue as it exists today. Prior to October, 1962, single-
state operators conducted such interstate operations as they desired by
virtue of the former Second Proviso.1 This was, in effect, an exemption
from the provisions of the Motor Carrier Act. It was accomplished by
the simple expedient of mailing to the Commission a copy of one’s
intrastate certificate, accompanied by a simple form (BMC 75) which
provided for a certain minimal amount of information concerning the
intrastate operator. Except in rather rare instances, an acknowledgment
of registration, in letter form, was forthcoming automatically. This put
the single-state operator in business, with the legal right to handle
interstate commerce, commensurate with its intrastate certificate. For
the most part, these were relatively limited operations, wherein the
intrastate and interstate traffic could readily be handled, oft times on
the same vehicle at the same time. There were, of course, a few notable
exceptions where Second Proviso carriers became rather significant
operations.

In October of 1962, by virtue of the amendment to Section 206 (a)
(7) of the Motor Carrier Act, Certificates of Registration became
necessary in order to conduct interstate commerce tied into an
intrastate certificate. There was, of course, a Grandfather provision
protecting the existing Second Proviso carriers, and also a provision for

* A.B., Denison University (1952); J.D., Ohio State University (1954).
1. Statutes involved abstracted in Appendix A.

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future interstate and intrastate joint applications. It appears that this second factor has been sparsely pursued.

The net effect of filings under amended 206 was to create something more than an exemption, and somewhat less than a full-scale Certificate of Public Convenience and Necessity. This Certificate of Registration became a definite grant of single-state operating authority in interstate commerce, but still keyed to an underlying intrastate certificate.

II

THE BASIC GOVERNING LEGAL PRINCIPLE

For many years, a multi-state operator was ineligible for the exemption provisions of former 206. In fact, the law specifically precluded holding a Second Proviso filing, or from acquiring, at least directly, the authority or operations of a Second Proviso carrier. This precept was basically sound and not particularly difficult to cope with historically, until the multi-state operator desired, for any of numerous reasons, to acquire a single-state Second Proviso or Certificate of Registration carrier. The problem has become more acute with the recent developments in the motor carrier industry, wherein there appears to be a pronounced trend to consolidation and combination of operations. The potential and consequent value of a Certificate of Registration carrier to a multi-state operator can thereby become most substantial.

III

VALUE POTENTIAL OF A SINGLE-STATE CERTIFICATE OF REGISTRATION CARRIER TO A MULTI-STATE OPERATOR

Historically, the single-state registered carrier has served as a feeder carrier, both on inbound and outbound traffic for the long-haul carrier. In Ohio there are innumerable certificates that have been granted in the distant past on a base point of operations theory, permitting movement from and to the base point; or, if you will, between the base point on the one hand, and, on the other, points throughout the State of Ohio. This has resulted essentially in every small town in the State of Ohio being connected to all of the major gateway points in Ohio for interstate traffic. This situation undoubtedly applies in numerous other states. The geography of Ohio is such that it is a natural bridge state—first, on transcontinental east-west traffic, particularly the
northern half of the State; and, second, as a northbound terminus on a
great portion of north-south traffic.

This, in effect, makes every major city in Ohio a natural gateway for
interstate traffic moving into or out of the State of Ohio. Ohio, further
is a relatively compact State in area, and no two points in the State are
more distant than the normal hours of service permitted by the
Interstate Commerce Commission. The natural gateways of Cleveland,
Akron, Canton, Toledo, Columbus, Dayton, and Cincinnati, are
obvious; but the many relatively smaller, middle-sized cities in Ohio are
just as effective a natural gateway as these larger cities. Further, any
small town is potentially such a gateway, particularly by virtue of the
type of operating authority issued by the Ohio Commission which
permits movements from that small town to any major gateway, or the
reverse direction.

For illustration, while the amount of interstate traffic moving
between a town such as Orrville, Ohio, and other points in Ohio was
undoubtedly relatively minimal, and probably limited to connections at
Akron, perhaps Cleveland, and to a lesser extent Mansfield and
Columbus, the potential for a Certificate of Registration at Orrville in
the control of a multi-state operator is tremendous. Orrville
(population, approximately 7,000) is located roughly five miles north of
U.S. Highway 30, a major east-west route from coast to coast, and
within two hours drive by truck to any of the aforementioned gateways.
The traffic moved under the Certificate of Registration from Cleveland
and Akron primarily into this small town, or in the reverse direction,
can now become traffic to the entire State of Ohio, moving in from any
direction or out to any direction so long as, of course, the Orrville
gateway is observed. As stated earlier, the number of such certificates
in Ohio approaches the hundreds. This, in effect, makes every small
town with such a Certificate a potential gateway to the entire State of
Ohio. Query—what is the value to a large multi-state operator of
operating authority for the entire State of Ohio? Obviously, it
approaches a most substantial figure.

IV

Procedural Aspects

The procedure in handling a Sec. 5(a) Proceeding\(^2\) or a finance case of
this sort involves several problems. First, the usual Section 5 finance

\(^2\) Title 49, United States Code Annotated, Section 5.
application must be prepared and filed; and, secondly, at the same time, it must be accompanied by an operating rights application seeking authority between the base point of the Ohio certificate on the one hand, and, on the other, points in the State of Ohio. At the time of hearing, assuming said case goes to hearing, there are two aspects of the proceeding—an Interstate Examiner hearing the finance section proceeding, and a Joint Board member, as provided in Sec. 205 (a), hearing the operating rights portion. This, obviously, creates complications and differing standards. The finance aspects of such a proceeding are relatively conventional finance case matters, although frequently the contracts and agreements between the parties can become rather complex because of the underlying intrastate transfer proceedings, which are equally essential. The crux of the case arises from the operating rights portion of such a proceeding. The idea of conversion of a Certificate of Registration into a full-scale Certificate of Public Convenience and Necessity, has become a stopgap solution to an otherwise legally barred process. One of the prime underlying problems is precisely what is the standard of proof necessary to warrant a grant of a full-scale certificate which, in turn, can then be acquired by the multi-state operator. Unfortunately, the case law to date is of little help.

It would seem that this should not create that large a problem, as certainly there have been some operations. This is certainly true, but the question then becomes how much operations. It must be remembered that many of these Certificate of Registration operators were relatively small-scaled, and were based at a single point wherein the traffic automatically involved movements between the base point and some few natural gateway points. The size of the base point city basically determined the amount of extraneous traffic that was handled.

A further complicating factor is that many of the Certificate of Registration operators also hold certificates from the Interstate Commerce Commission overriding a portion of their intrastate operations. From a practical standpoint, it is virtually impossible to determine which certificate was utilized on any given movement. Consequently, abstracts of shipments tend to become complex, if not outright confusing. A further complicating factor arises out of the type of traffic handled. In many instances, particularly with the smaller base point cities, traffic tends to fall into a relatively limited category. Yet, in almost every instance, the application under Section 206 was for general commodities.

One further complicating factor is worthy of note. Again, the
geography of Ohio is such that a conversion application can involve, inadvertently, a multi-state Joint Board, i.e., Cincinnati (Kentucky); Toledo (Michigan); Youngstown-Warren-Niles (Pennsylvania), because of the Commercial Zone problem inherent therein. Yet, by the same token, there can be no showing of any lawful prior operations in the extra-state portion of the Zone.

The operating rights portion of such a proceeding is doubly complicated by the fact of the total absence at the present time of an intelligible standard. Conventional operating rights procedures at the present status of the art have definite procedural criteria, as to what it takes to make or defeat an operating rights proceeding. Finance cases are considerably more liberal in terms of what constitutes past operations. Therefore, at the outset, a conversion proceeding is faced with a dual standard—whether as an opponent or proponent.

The factor of an absence of a definite criteria has undoubtedly created more prolonged proceedings than any other comparative case would generate. For example, in many proceedings the number of protestants has approached half a hundred. At first blush, this situation is disturbing to the Commission and the parties as well. Yet, in view of the stakes involved, this is probably a minimal number.

V

REPRESENTATIVE CASES

Perhaps the leading representative case arose out of the pre-1962 October amendment era, that of C & D Motor Delivery Co.—Purchase-Elliott, 38 M.C.C. 547, wherein the essence of the Commission’s decision was the concept of a Section 5 application in conjunction with a related 206 application with a joint hearing. The net result of this case was to establish a method wherein a multi-state carrier could acquire and merge the operations of a single-state, registered Second Provisio carrier. The principles set forth in the Elliott case have been reaffirmed on numerous occasions. For instance, T.I.M.E. Freight, Inc., Merger, 97 M.C.C. 310, which was affirmed on appeal by the Federal Court in Navajo Freight Lines, Inc., et al. vs. U. S., 263 Fed. Sup. 438.

Without belaboring the factual details of the above two landmark cases, each vendor carrier had conducted full-scale operations within the scope of its Second Provisio registration, and likewise was of little if any value to the vendee multi-state carrier without the benefit of the interstate authority.
Later, the Commission took a completely reverse approach in the case of *Ohio Fast Freight, Inc.—Control and Merger—Lee, Inc.*, MC-F-8832, and related MC-14702 Sub No. 5. This proceeding involved, in summary, multi-state authority in Ohio Fast Freight between numerous eastern points and the Youngstown-Warren, Ohio, area. Lee, Inc. held a Certificate of Registration between Niles, Ohio and points in the State of Ohio—Niles being a point within the Warren-Niles-Youngstown Commercial Zone. This case was turned down in its entirety by the Commission; and, on appeal to the Federal Court, the decision of the Commission was affirmed. The second section of this case cropped up at a later date in *Youngstown Cartage Co.—Purchase—Lee, Inc.*, MC-F-9529, and related Extension—Niles, Ohio, MC-8958 Sub No. 20, wherein the Examiner ultimately recommended a limited grant of authority to the extent of contractors' equipment, metal and metal products, machinery and iron and steel articles, between Niles, Ohio, on the one hand, and, on the other, points in Ohio. This order has become effective by operation of law, and is undoubtedly a reasonable solution to this case.

This proceeding cites *Spade Continental Express, Inc.—Purchase—B & R Truck Lines, Inc.*, MC-F-9353, and related MC-98210 Sub No. 3, as a precedent for the decision. In B & R/Spade, the basic issue before the Commission involved the holder of an intrastate registered certificate from and to Cincinnati, Ohio. B & R was a small local carrier between Cincinnati, Ohio and Covington and Newport, Kentucky, and a few farther south, northern Kentucky cities. In effect, an operator in the Kentucky portion of the Cincinnati Commercial Zone. The Commission in this proceeding ultimately granted authority for Spade to acquire B & R; and, as a necessity thereof, had to convert Spade's Certificate of Public Convenience and Necessity. It is interesting to note that Spade, in terms of over-all operations, was probably fifty times larger than B & R. This approaches the tail wagging the dog.

An equally pertinent case, and of more recent impression insofar as Ohio Certificates of Registration are concerned, is that of *R.W. Express, Inc.—Control and Merger—Great Lakes & Southern Express, Inc.*, MC-F-9369, and related proceeding MC-55896 Sub No. 25, R.W. Express, Inc., Extension—Ohio. The Commission in this proceeding affirmed the Examiner and the Joint Board recommending a grant of authority on general commodities from and to Toledo, Ohio, to points in the State of Ohio. By granting a certificate to R.W., the multi-state carrier, it in effect opened the entire State of Ohio for R.W. through the Toledo gateway.
The complete reverse situation has occurred in that of Lyons Transportation Lines, Inc.—Control and Purchase (Portion)—The Beiter Line Corp., Lehman Cartage, Inc.—Purchase (Portion)—The Beiter Line Corp., MC-F-9690, and related MC-109564 Sub 9 Lyons Transportation Lines, Inc., Extension—Ohio; and MC-7573 Sub No. 4 Lehman Cartage, Inc., Extension—Ohio. The examiner sitting in the finance proceeding and also sitting in the extension proceeding by virtue of the waiver of the Ohio Joint Board to participate in a Washington, D.C. hearing, recommended a total denial of the proceedings. In simplified form, Lyons and Lehman seek to divide The Beiter Line Corp. certificate in order to create two gateways—Cleveland, Ohio, and Elyria, Ohio. The ultimate outcome of this proceeding, of course, is still pending and open to discussion; but nonetheless, so far a complete reverse approach to that of R.W. cited hereinbefore.

In all fairness, certain subsidiary cases should be reviewed in this light, i.e., E.A. Schlairet Transfer Co.—Purchase—Conrad Trucking, Inc., MC-F-9226, and related operating rights docket, wherein the Commission, in complete reverse of the aforesaid Spade/B & R proceeding, denied the applications in their entirety.

A similar case entitled to note is Budig Trucking Co.—Purchase (Portion)—Robert Henning, MC-F-9684, and related operating rights case, wherein the grant of authority was precisely tailored and restricted to the geographical scope of past operations.

One further case is worthy of note, that of Ohio Southern Express, Inc.—Purchase—Vermillion Truck Line, Inc., MC-F-7919, wherein the Ohio registered certificate of Vermillion was permitted to be acquired by Ohio Southern; and, in turn, by virtue of the conversion proceeding and operating rights case, an application and grant of authority was made to Ohio Southern for a Certificate of Public Convenience and Necessity embracing the Vermillion rights. This case was appealed to Federal Court, and resulted in affirmation of the Commission approval. The noteworthy aspect of this case from a historical survey, is undoubtedly the unique feature of the tremendous tax problem with the Federal Government, Department of Internal Revenue, which Vermillion was experiencing.

VI:

THE POLICY CONSIDERATIONS

The exemption provisions of former 206 has created a specter which
we must all be prepared to cope with. The amendment in October of 1962, which made provisions for something more than an exemption in the form of a Certificate of Registration, is now the law. That law still precludes a multi-state operator in interstate commerce from holding a Certificate of Registration. The concept of converting the Certificate of Registration to a Certificate of Public Convenience and Necessity in conjunction with a finance proceeding under Section 5 of the Act, is the present mode for accomplishing this. Without taking a position as to the merits of this procedure, it would seem a reasonable approach to contain such conversions to that which has been done in the past. In other words, the conversion should be limited to that which the vendor has been performing in the past under its exemption under the old Second Privo, or by virtue of its Certificate of Registration under the amended Act. This certainly is in keeping with the concept of not creating new competitive services out of the whole cloth by virtue of some accident of law or of fact.

VII.

CONCLUSION

The amendment of Section 206 in October of 1962, without question solved many problems by creating a specific type of certificate as opposed to what was formerly merely an exemption. At the same time, it created new problems. The same problem of a multi-state carrier vendee acquiring a single-state vendor, still exists as it did before the amendment.

The Commission has handled the procedure in as practical a way as is probably possible under the present status of the law. Yet, by the same token, the case-by-case approach has developed some rather opposed results, based undoubtedly on the facts surrounding the individual case at hand. Perhaps part of the difficulty lies in the two separate standards that are historical in Section 5 proceedings, as opposed to operating rights proceedings. The burdens of proof are simply different. A hybrid proceeding, perforce, must be a compromise between the two standards. The ultimate question to be answered by counsel in this type of proceeding, must be the quantum of operations—both by territory and by commodity.

These are but a few of the problems inherent in the acquisition by a multi-state carrier of a single-state operator holding a Certificate of Registration under the present status of the law; however, they are some of the more essential questions to be resolved in developing this type of proceeding.
CONVERSION OF CERTIFICATES OF REGISTRATION

APPENDIX A

PERTINENT SECTIONS OF PART II OF THE INTERSTATE COMMERCE ACT:

§ 206(a)(6) On and after October 15, 1962 no certificate of public convenience and necessity under this chapter shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control with any carrier engaged in operations outside such State, if such carrier has obtained from the Commission of such state authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that reasonable opportunity was afforded interested persons to be heard, that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted. Such operations in interstate and foreign commerce shall, however, be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Such rights to engage in operations in interstate or foreign commerce shall be evidenced by appropriate certificates of registration issued by the Commission which shall be valid only so long as the holder is a carrier engaged in operations solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operations outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. * * *

§ 206(a)(7)(A) In the case of any person who or which on October 15, 1962 was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons
controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962, or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. Such certificate of registration shall not exceed in scope the services authorized by the State certificate to be conducted in intrastate commerce, and shall be subject to the same terms, conditions, and limitations as are contained in or attached to the State certificate except to the extent that such terms, conditions, or limitations are inconsistent with the requirements established by or under this Act. If the effectiveness of the State certificate is limited to a specified period of time, the certificate of registration issued under this paragraph (7) shall be similarly limited. Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or
the restrictions removed within said one hundred and eighty-day period. Such certificates of registration shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates of public convenience and necessity issued by the Commission.

Section 206(a)(1), Interstate Commerce Act. 49 U.S.C. Sec. 306, Prior to its Amendment on October 15, 1962:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State
having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.
A CASE FOR ELIMINATING PENALTIES FROM FEDERAL HIGHWAY SAFETY AID PROVISIONS*

JOSEPH W. LITTLE**

President Johnson set the need for standardizing and federalizing national transportation policies and programs in proposing the cabinet level Department of Transportation, saying, "Our transportation system has not emerged from a single drawing board, on which the needs and capacities of our economy were chartered . . . . As a result, American today lacks a coordinated transportation system that permits travelers and goods to move conveniently and efficiently from one means of transportation to another, using the best characteristics of each."

Soon after making that statement the President sent three bills to the Congress that through enactment have aggressively asserted federal leadership in transportation with particular emphasis upon the highways. The Department of Transportation Act\(^2\) concentrated all major federal transportation programs under common administrative control; the National Traffic and Motor Vehicle Safety Act of 1966\(^3\) introduced federal protection of consumer safety in automobile design and manufacture; and the Highway Safety Act of 1966\(^4\) supplanted virtual state autonomy in highway safety regulations with a federal-state partnership. Three years have elapsed since the programs created by this legislation began business, and they are due for appraisals. This paper limits its coverage to the Highway Safety Act (HSA) and focuses upon the legislative glue binding the federal-state partnership\(^5\) together.

* This article is being published concurrently in the Administrative Law Review.
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1. Message from the President of the United States transmitting a proposal for a cabinet level Department of Transportation consolidating various existing transportation agencies, 89th Congress, 2d Session, H.R. Doc. No. 399, p. 3.
5. This term is used deliberately since a recent congressional report endorsed it as properly describing the federal-state relationship under the Federal-aid Highways program. See Federal-State Highway Management Practices and Procedures, H.R. Rep. No. 1506, 90th Cong. 2d Session (1968). That report criticized the management practices—both state and federal—in the program and argued that the relationship being contractual in nature justifies federal standards which require the states to manage the
Rationale for Compliance

The self-proclaimed purpose of the HSA is "to provide for a coordinated national highway safety program through financial assistance to the States to accelerate highway traffic safety programs..." developed by the states "in accordance with uniform standards" issued by the Secretary of Transportation. The Secretary is authorized to bear up to 50% of the costs of approved state programs and up to 100% of the costs of special projects. On the other hand, he is granted authority to withhold funds from and impose penalties on non-conforming states.

The federal highway safety program is administered by the National Highway Safety Bureau (NHSB) of the Department of Transportation (DOT). The NHSB began working vigorously as soon as created in the fall of 1966 and produced a set of proposed safety program standards within six months. After consulting with the states, the DOT officially issued the first thirteen standards in June of 1967 but because of the Vietnam cutback in appropriations, little further progress was made in forming programs around the 13 cryptic standards (a few hundred words at most) until the spring of 1968. Then in May under pressure from above, the NHSB began a crash effort to prepare manuals as guidelines for the states in developing approvable programs before the first penalty deadline: December 31, 1968. Using the manpower of Booz, Allen and Hamilton and their consultants, the NHSB produced first drafts on May 31 with plans to issue final versions in August. The states were to be given the "opportunity" of review during the intervening period. In the meantime, the Congress slipped the penalty deadlines by one year* and raised the 1969 appropriations to $50 million* from $25 million* of the year before, (far less than $100 million for each year as originally authorized*). Apparently these measures relieved the pressure for immediate issuance of the manuals since they were not out in September of 1968.10

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10. In the meantime NHSB has ranked the 13 issued standards plus 3 contemplated standards according to priority. See Status Report, Federal Role in Traffic Safety,
Assuming the Congress is now serious about supporting its highway safety program, what motivations do the states have for going along with it? The basic rationale for compliance is the ultimate good sense of the program. The fearful highway crash toll paid in the coin of wasted human and economic resources makes its own best brief. Moreover, the sheer magnitude and the innate complexities of the highway traffic system make improving safety so difficult that reducing the terrible losses seems possible, if at all, only through a directed program coordinating the activities of the most capable workers in the field. Since the toughest problems are more or less common to the fifty states, an alliance for pooling their resources into common strength, rather than squandering them in individual weakness, seems particularly sensible. But efforts of that kind proved barren, possibly for lack of effective leadership,\textsuperscript{11} so the Congress stepped in with the HSA to provide both a coordinated effort and central leadership. The anticipated benefits of the approach provide the altruistic rationale for compliance. The goal is a safer, happier society.

From a more practical standpoint, the prospect for federal aid carries its own peculiar motivation for compliance. Even though the federal share must be matched by the states, the program brings the opportunity of injecting new money into state and local economies. Moreover, the states aren't necessarily required to increase their spending, although in fact none are expected to be able to comply with all of the required safety programs without some new costs.

Avoiding the statutory penalty—a 10% reduction in Federal-aid highway funds—is a second very practical reason for complying, since such a cut would be a severe loss in most states. For example, the Congress appropriated more than $4 billion\textsuperscript{12} for the Federal-aid highways program in fiscal 1969: losing 10% of one-fiftieth of that—$8 million—would be a blow to an "average" state. (Notwithstanding that, some have said that suffering the cut would be cheaper than the costs of complying.)

\textsuperscript{11} For example, the Vehicle Equipment Safety Commission, a compact among the states for promoting uniform vehicle equipment standards, apparently accomplished little in its short life between its beginning in 1962 up until the federal pre-emption of its business in 1966. Moreover, the Uniform Vehicle Code, produced by the National Committee on Uniform Traffic Laws and Ordinances since 1926, has not resulted in uniformity in traffic laws throughout the country, although it has widely influenced them.

In sum, coupling the basic goal of safer highways with the double purposes of obtaining federal funds while avoiding Federal-aid highways penalties makes a persuasive case for complying.

Rationale for Dissent

Despite the rationale for compliance, the DOT's efforts have not yet vibrantly reinvigorated the states' highway safety programs. Congress's parsimony in appropriations, fundamental difficulties in creating meaningful new programs, and inertia in the process have all contributed to the lag. Even so, the accomplishments so far have received less than enthusiastic endorsement from the states, and universal compliance seems far off.

In view of the worthy purpose (and aside from the broken promise of federal funds), what is the rationale for dissent? A review of the program's short history suggests two related reasons for reluctance. The first is basic and springs from the substance of the HSA itself: Do the enforcement powers given DOT by the statute diminish both the quality of programs developed and the enthusiasm of the states in receiving them by placing an artificial tension on the federal-state partnership? The second is practical and has to do with implementation under these strained conditions: How "honest" are the safety requirements being imposed on the states?

Tensions Created by Enforcement Provisions

The more fundamental objections are those raised by the nature of the penalty and its effects upon the form and substance of the standards. The statute requires that: "(T)he Secretary shall not apportion any funds under this (legislation) to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section. Federal aid highway funds . . . shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State . . . ."\(^{13}\) Under this provision avoidance of the penalty is completely at the discretion of DOT in "approving" the states' safety programs. Although the statute requires certain designated program elements, it gives no guidelines for judging whether a given proposal meets the standard. Thus, a State could develop a complete program which it believes to be sound, and

\(^{13}\) 23 USC § 402(e).
yet see it rejected by DOT. If the HSA is enforced as written, DOT’s disapproval would require mandatory imposition of the penalty. Neither administrative nor judicial review for a state aggrieved in a case like that is provided in the statute.\(^\text{14}\) (This kind of situation could arise. Would Michigan stand to suffer the penalty for failing to enforce a motorcycle helmet law even though the Michigan courts have held the requirement to be unconstitutional?)\(^\text{15}\)

Moreover, the extent of the penalty is in no way proportional to the degree of failure. The Congress’s direction to DOT is clear and straightforward: apply the penalty if a state’s program isn’t approved. Thus a conscientious state lacking approval on one small element of a single standard area would perforce be treated exactly as would a state defaulting totally. As between private parties, that sort of contractual arrangement was long ago ruled unenforceable by our civil courts. If civil justice precludes disproportionate penalties, what is the legislative justification for them in joint federal-state endeavors?

To DOT’s credit, the states have been assured that such inequitable consequences won’t befall those making reasonable efforts to comply.\(^\text{16}\) However, administrative grace cannot excuse legislative arbitrariness so long as the threat exists. At best, another situation of winking at the letter of the law is encouraged.

The Congress showed its step-child attitude toward the states by a second aspect of the penalty provision. Not only does it deny all apportionments under the HSA, but it also reduces Federal-aid

\(^{14}\) Despite the lack of relief in the statute, the Supreme Court decided as long ago as 1947 that the Federal-aid Highway Act creates in states “a legal right to receive federal highway funds by virtue of certain congressional enactments and under the terms therein prescribed. Violation of such a statutory right normally creates a justiciable cause of action even without a specific statutory authorization for review.” Oklahoma v. U.S. Civil Serv. Com’n, 330 U.S. 127, 67 S. Ct. 544, at 136. Even so, significant questions remain as to what is reviewable and how to raise the questions. The Administrative Procedure Act (5 USC § 701 et. seq.) covers part of the ground, but not the whole as pointed out by a recent article saying, “Perhaps because of the uncertainties as to the precise scope of A.P.A. coverage, it is becoming increasingly common for aid statutes to require formal review procedures for any decision of the granting authority which terminates aid for failure to comply with programs requisites.” Skoler, D., Lynch, R., and Axilbund, M., “Legal and Quasi-Legal Considerations in New Federal Aid Programs,” 56 Geo. L. J. 114 (1968), at 1163.


\(^{16}\) The H.S.A. authorizes the Secretary to suspend the application of the Federal-aid highway penalty when it is in “the public interest” to do so. 23 USC § 402(c).
highways funds by 10%. The Federal-aid highway program is antecedent to the safety program and serves a different purpose: aid in building a coordinated highway system throughout the United States. Federal-aid highway funds pay 90% and more of the costs of our magnificent Interstate Highway System and bear a major share of the costs of our fine primary and secondary road systems. But none of the Federal-aid highway money goes unguarded to the states; DOT issues standards and approves projects in advance. What then is the reason for imposing the new standards of an entirely different program in order to continue receiving full support for this important task? Is it any more than an added leverage to help the states in understanding that what the federal government says is good for them, is indeed good for them? Isn’t it possible that a state of limited resources, which in its best efforts could afford to qualify under only one of the programs, could be doubly penalized by failing to satisfy the other—if the penalty is to be applied as written? Despite the sorry record compiled by some state governments in providing needed programs for their citizens, shouldn’t the federal government eschew grade school methods for inducing performance in areas where it cannot or does not choose to act directly? The hickory stick may be recompense for delinquent pupils; but argument with merit can be made that the ballot box should be retained as the source of retribution for delinquent public servants.

As a practical matter, DOT is very self-conscious about the penalty clause and this self-consciousness shows in the draft safety program manuals that have been issued. When the Secretary prescribes programs dealing with traffic courts or codes and laws, he would understandably be uneasy about the wording; he might be going beyond the limits of his jurisdiction. As a result, DOT’s draft manuals issued to guide the states fall far short of the mark. Safety advocate Jeffrey O’Connell has judged them a “waste of time” and he is not grossly in error. Part of

17. 23 USC Chap. 1.
18. The Supreme Court has recognized that the Congress has the power to make the right to receive funds under one statute contingent upon meeting the standards of another, at least where the second fixes “the terms upon which its money allotments to the states shall be disbursed.” Therefore, when a state fails to comply with the Hatch Act, Federal-aid highway funds may be docked because “The end sought by the Congress through the Hatch Act is better public service, by requiring those who administer the funds for national needs to abstain from active political partisanship.” Oklahoma v. U.S. Civil Svc. Com’n, supra note 14, at 143. No such reasoning supports the penalty provisions in the H.S.A.
the fault is attributable to the unrealistic scheduling forced upon DOT by Congress and to the compounding handicap of under-staffing. But a large measure of the blame resides with the timid approach forced by the penalty clause. The terms "recommended" and "suggested" and "should consider" recur time and again throughout the manuals, piecing together a patchwork of program elements often times neither clearly required nor clearly optional. Consequently, the documents fail to provide what is really needed: solid and complete model programs which by their quality would encourage adoption.

A specific example well illustrates the point. The May 31 draft of the "Alcohol in Relation to Highway Safety" manual contained sections for treating problem drinkers and for educating the public about drinking drivers. Even though DOT officials would surely view these as crucial areas in solving the drunk driver problem, those sections were deleted from the August draft of the manual. The unstated explanation may be that those program elements went beyond the wording of the standard itself, which could raise cries of "too much" from hard pressed states. Objections to recommending programs of more substance than required by the standards need not be raised if the penalty clause were not a threat. Clearly, the punitive potential can constrain the Secretary to be less thorough and less creative than he wants to be and this constraint may be the strongest argument against retaining it.

Honesty in Standards

The more practical matter of honesty in standards is largely a by-product of the penalty provision although not entirely dependent upon it. So long as the penalty exists, the federal-state relationship will be forced into an adversary rather than a cooperative posture. So long as there is bargaining, the motivation for and the legitimacy of proposed standards will be questioned. Some of the issues which have already come up illustrate this point, and although removing the coercive penalty would not necessarily prevent their arising, it could change the tone of the debate.

20. Highway Safety Program Standard 4.4.8. The others of the original 13 were: Periodic Motor Vehicle Inspection; Motor Vehicle Registration; Motorcycle Safety; Driver Education; Driver Licensing; Codes and Laws; Traffic Courts; Identification and Surveillance of Accident Locations; Traffic Records; Emergency Medical Services; Highway Design, Construction and Maintenance; and, Traffic Control Devices.

To what extent should general agreement that the social benefits of a given program are worth is costs be prerequisite to its issuance as a mandatory standard? The acrimony over periodic motor vehicle inspection raised this issue very early. Despite a history of dispute about the merits of inspections, despite the public's dislike of it, and despite the lack of convincing scientific evidence of its efficacy, inspection has been given special emphasis from the beginning of the program and DOT has defended and reasserted its standard in the face of significant challenge and dissatisfaction.

Moreover, the hard-headed approach on inspection seems to ignore even the degree of administrative flexibility available under the Act. DOT has the authority temporarily to "amend or waive standards . . . for the purpose of evaluating new or different highway safety programs . . . on an experimental, pilot or demonstration basis . . . where the public interest would be served. . . ." Both California and Michigan planned random inspecting programs well before the federal standard was issued. Although the random programs process only a small proportion of a state's vehicles in a given year, California and Michigan authorities believe the constant threat of being inspected can create a public safety consciousness fully as beneficial as that created by periodic inspection, and at far less cost. Wisconsin has gone one step further in combining a statewide random system with an experimental periodic system in selected counties.

All three states argue that their programs ought to meet the inspecting standard, or, at least, should be approved temporarily under the experimental waiver. Yet, at the moment they are in the dark as to

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22. See, for example, "Highway Safety Programs and the Public Trust," Traffic Quarterly, October 1968, at 469.
23. The Highway Safety Act directed DOT to issue a standard for vehicle inspection. 23 USC § 402(a). However, the statute did not limit the standard to mandatory periodic inspections.
24. See DOT news release of July 2, 1968 citing the Secretary of Transportation's report to Congress, "Safety for Motor Vehicles in Use."
25. As of the end of May 1969 only 31 states had provided for periodic inspection; of these 19 were pre-HSA programs and compliance of some of the remaining 12 was on paper only. California raised the most persuasive objections in its 1967 comments to the proposed standard. State Highway Safety Program Standards, Vehicle Inspection, State of California, California Highway Patrol, Sacramento.
26. 23 USC § 402(a). In Jan. 1969, DOT issued guidelines (FHWA Order 7-3) for approving experimental, pilot or demonstration inspection programs so long as the "purpose and intent is to improve the safety quality of the total vehicle population during the trial period."
whether their programs comply. Moreover, officials in those states view DOT as being antagonistic to their operations. For example, DOT summarily brushed aside a Michigan proposal for evaluating the random operations and, according to a research consultant, refused even to discuss the proposal by telephone. In the meantime California is going ahead with an evaluation which it hopes will provide unimpeachable data supporting the random inspecting concept.

DOT’s apparent attitude toward inspection opens sores of contention in its dealings with the states. Under pain of the penalty some state authorities are forced to promote programs which they neither have faith in nor believe the public wants. In addition, there have been recent complaints that the whole federal grant program is bogging down in red tape.27

A whisper of a different concern has been heard recently. It suggests DOT is using the standards as a means for generating huge quantities of research data to help measure the efficacy of various programs. A pinned down DOT worker practically admitted research to be behind the hard line toward inspection, according to a west coast authority. The same theme recurs in the alcohol-safety program. The latest draft manual outlines a program, (which the states “should establish by statute”) for making tests for alcohol on the remains of virtually all fatally injured crash victims and for making tests for intoxication on virtually all drivers’ surviving crashes in which someone else is killed.28

The unstated reason for requiring every community in all fifty states to equip itself for making those tests is that local communities need to know just how much drunk drivers are costing locally and they need a warning system to alert them of changes in trends. In view of the reliability of sampling procedures and of the validity of extrapolations among similar communities, one may wonder if the states should not be given some alternative to requiring “by statute” that practically all cases be processed. The purpose of the requirement is not questioned: what is questioned is whether it has been formulated as a research rather than as an operational project. DOT has definite research missions29 mandated by the Congress apart from state highway safety program. However, no matter how commendable the hoped-for ends, the standards should not be used for treating the states as guinea pigs

29. 23 USC § 403.
for research, at least so long as the penalty remains available to enforce participation.

No-one should be surprised that pure "state's rights" objections have been made to the HSA, since it clearly opens up a path to federal footprints where the states have traditionally trod alone. Therefore, it is legitimate to ask how far DOT should go in issuing highway safety standards which affect internal state functions.30 Putting the question slightly differently: what relationship must programs required of the states under the HSA bear to highway safety, per se?

Let it first be granted by way of demurrer that the DOT could directly regulate the use of highways bearing interstate commerce. Then attention may be concentrated on programs related only peripherally to highway safety. The "Traffic Courts" program provides a good example. Finding a meaningful link between changes in traffic court operations alone and significant improvements in highway safety would be extremely difficult. And yet the May 31 draft of the Traffic Courts manual stated that "the following program elements should be considered as inherent parts of any proposed state plan": a requirement that all persons charged with hazardous moving traffic violations appear in court; that the fee system for financing traffic courts be dropped; that traffic court services be expanded for "better administration of justice"; that business practices in traffic courts be made uniform; that uniform rules of procedure in traffic cases be adopted; and, that administration, procedures and accounting manuals be distributed to all traffic courts.31 It may be acceptable for the federal bureaucracy to recommend court reform to the states (and certainly better administration of justice seems desirable whatever the benefits for safety): but it seems indefensible to coerce the reorganization of the courts within a state, or any element of them, under the guise of highway safety buttressed with threats of reprisals, no matter how veiled and no matter how beneficial the changes. Similar requirements touching matters tenuously associated with highway safety appear in other programs.

30. Of course, the Supreme Court has long held that the mere fact that meeting the requirements for federal aid has an effect upon internal activities in a state does not invalidate the statutes or the requirements. See, for example, Stewart Machine Co. v. Davis, 301 U.S. 548, 57 S. Ct. 883. Nevertheless, it would seem that such an arrangement could be invalid if there were no rationale link between the goals of the aid program and the substance of the standard imposed.

In fairness to DOT, the draft manuals were frequently, but not always, posed permissively by using terms like "recommended" or "suggested" as if the drafters were unsure of their ground (which, of course, resulted in the poor quality charge discussed earlier). But there was no clear separation of requirements from recommendations, and so far as the states are concerned, the manuals must be treated as mandatory until the issuing agency delineates what is "standard" and what is not.

The process of drafting the alcohol safety manual demonstrates how well-meaning overextensions of highway safety jurisdiction can occur. The May 31 draft required the states to "establish by statute . . . that no person having custody of the body (of certain traffic crash victims) shall perform any internal embalming procedures" until authorized to do so by "authorities charged with performing postmortem examinations."

The ostensible purpose was to assure making tests for alcohol, discussed earlier, before the specimen are spoiled by embalming. But upon close analysis, it is clear that even a large percentage of the eligible bodies could be missed without denying the purposes of the program. The real reason for the provision's appearing as it did was that some of DOT's scientific consultants were fed up with outdated and inept coroner systems which too often allowed evidence to be spoiled by premature embalming. In their minds the alcohol program could force states to modernize their procedures for examining the dead; highway safety per se was ancillary. Although modernizing coroner systems would be a commendable public health goal, it bears little relation to making highways safer and the undertaking profession might be more concerned about new regulations than highway safety benefits alone could justify. In response to arguments like these, the redrafted manual "encourages" such provisions. Nevertheless, the point was made. If left unrestrained, the bureaucratic process is likely to be overreaching of its jurisdiction, so long as the requirements are enforceable by penalty.

**Rationale for Change**

The Highway Safety Act of 1966 potentially provides one of the most salutary federal-state programs ever to come out of Washington.

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32. Supra note 21, at 19.
33. Supra note 28, at 9.
Virtually every citizen could benefit from it. Not only does it provide a lens for focusing national resources in creating solutions for a continuing cause of national tragedy, but it also provides help for the states in developing and paying for safety operations. Regrettably, however, the program seems unlikely to reach prime strength so long as the shadow of a bureaucratic whip falls over the states. Already the governors' representatives, who coordinate the programs within the states, have planned an organization to aggrandize their power in dealing with DOT. The weight of their numbers may balance off the threat of penalties in bargaining; but the very process of bargaining is sure to detract from the creative and leadership potential of DOT.

Considerable pressure was brought to eliminate the penalty clause in the last Congress, and, indeed, its application was delayed for a year. Moreover, a reliable Washington observer recently reported that a House Public Works Subcommittee is "fairly certain" to investigate the administration of the HSA in 1969.33

I would urge that there be a reappraisal and that it consider whether the matters discussed here have affected the benefits accruing from the HSA. And, I would further urge that the Act be amended to produce the following changes.

1. Delete the Federal-aid highway penalty entirely.
2. Qualify the withholding of matching funds (and grants) under the Highway Safety Act by making each standard area individually eligible for support on its own merits.
3. Provide or direct the Secretary to provide a set of uniform performance criteria against which compliance is to be measured.
4. Direct the Secretary to develop and continually bring up to date model safety programs representing the best knowledge and latest technology available. Direct him to delimit the threshold eligibility requirements for receiving matching funds while encouraging the states to conform with the total packages.

Finally, the annual appropriations should be enough to allow the states to develop their programs as fast as they are able to, and to allow the Secretary fully to support purely experimental and demonstration programs in a limited number of states or localities.

No doubt some hardened state watchers will view these notions as

33. Status Report, supra note 19, No. 63, August 22, 1968. Later information suggests that the organization has not yet grown as anticipated.
bunk—the end of the highway safety program. I contend the opposite; it could bring an era of vigorous progress. Most state authorities want help in making their highways safer, and the public deserves it. Removing the penalty would take with it nagging concerns of the states about being forced to do something that is none of DOT’s business and doubts by DOT about whether its programs outstrip its jurisdiction. It would allow the DOT to assume real leadership in recommending the best available programs, and it would allow the states to use independent judgement in treating their most urgent needs. It would remove the ugly spectre of the Congress’s officially brandishing a bludgeon before the states while the federal bureaucracy unofficially whispers that it really isn’t dangerous. And most satisfying of all, it would puncture the irony in the Congress’s saying to the states, “Highway safety is so important that the federal government will punish you if you don’t comply”, while failing itself to provide the promised support. 36 In short, the amended highway safety program could become a model for leadership of the kind the federal government should find itself assuming as our society ever increases in complexity; that is, leadership on the merits.

36. Similar treatment should be given the Highway Beautification Act of 1965 (Pub. L. 89-285; 79 Stat. 1028). That Act has two separate 10% Federal-aid penalty clauses, enough theoretically to cut $800 million from Federal-aid highways in fiscal 1969 if all 50 states fail to comply. Yet the maximum combined aid possible to the states for beautification in fiscal 1969 is $1 million (the 1969 appropriation, supra, note 12). This ludicrous situation is reason enough for dropping the penalties.
AUTOMOBILE INSURANCE BREAKTHROUGH IN CANADA

By Allen M. Linden*

1. INTRODUCTION

The reform of automobile accident insurance is a topic of heated controversy throughout most of the Western World. Dissatisfaction with the delays, ineffectiveness, and high cost of the present system is expressed everywhere, including the United States. For this reason, the Department of Transportation in Washington has recently undertaken a massive review of the present system in America, which could have far-reaching repercussions on the entire automobile insurance industry as well as on the transportation industry. Major change appears imminent. Because of this, the recent Canadian experience in this area may perhaps be of some help to those in the United States charged with the power to decide and to influence the destiny of the present auto accident reparation system.

On January 1, 1969, seven of the ten Canadian provinces introduced a new system of "limited accident benefits" insurance or a plan of "peaceful coexistence", as it has been called.¹ This new scheme is somewhat of a breakthrough. It appears to be supported by governmental officials, the bar, the insurance industry, many from the academic profession and much of the public. Such broad support is understandable because the plan will make available compensation on a non-fault basis to many victims of automobile accidents that were precluded from recovering in the past. The new insurance will be underwritten by the private insurance industry, so that the bogey-man of "socialism" is avoided. No new board is to be established, for the regular court system is left to resolve any disputes that might arise. Moreover, compensation for pain and suffering will survive because the tort suit is not interfered with in the least. This does look like a miracle has transpired. Without doubt, the plan merits much praise, but is far from perfect.

In this paper, I shall first outline the tort system in Canada and

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compare it with the American one. Next I shall tell the story of how this scheme came to be enacted. After that, I shall describe some of the details of the new limited accident benefits plan. Finally, I shall offer some criticisms of the scheme and make some proposals for the future.

2. The Tort System in Canada

In each of the Canadian provinces (except Quebec, where the civil law system is in force) the law regulating motor vehicle accident compensation resembles closely that in existence in the United States. An injured person may recover damages in tort from someone who negligently injures him. As in other common-law jurisdictions, the onus is generally on the plaintiff to show that the defendant in his driving departed from the objective standard of the reasonable man. Assisting in the resolution of the negligence issue are the rules of the road set out in the various highway traffic codes, the breach of which amounts to prima facie evidence of negligence. If a pedestrian is injured by an automobile, on the other hand, the onus of proof is shifted by legislation to the defendant, who must then disprove negligence in order to escape responsibility. By statute the owner as well as the driver is civilly responsible to anyone injured by his automobile as long as it was not taken without his consent. A guest passenger labours under a disability in most of the Canadian provinces as he does in most of the American states. In order to recover from his host in tort, a passenger must establish either gross negligence or recklessness or wilful and wanton misconduct on the part of his host. Until recently, there was an absolute bar against guest passenger claims in the province of Ontario, but, happily, this iniquitous provision has now been amended. As in the United States, the Canadian courts have fashioned a number of techniques whereby they could circumvent the harshness of these provisions, and apply the common law standard of negligence.

One way in which Canadian law differs markedly from that in most American states and mirrors the law in other jurisdictions is in its treatment of contributory negligence. By virtue of comparative negligence legislation, a plaintiff guilty of contributory negligence is not barred from recovering in tort; his damages are merely reduced in proportion to the degree that his negligence contributed to the accident. Consequently, if it is found that the plaintiff was fifty per cent to blame for the accident the damages he recovers will be cut in half. If there is

evidence that the negligence of both the plaintiff and the defendant contributed to the accident, but the court is unable to decide on the degree of fault, the parties are deemed to be equally at fault. The effect of this is that both parties in a counterclaim situation are usually entitled to recover one-half of their damages from the other’s insurer, without any set-off.

The civil jury is often used in Canada, but it is not nearly as all-pervasive as it is in the United States. Only Ontario and British Columbia have a large volume of jury cases, its use being rare in the other provinces. Often the jury is a truncated one with only 6 or 8 members. The special verdict is generally utilized, whereby the jury is asked questions about the negligence of the defendant and the particulars thereof, the contributory negligence of the plaintiff and the extent thereof, and about the assessment of damages. An appeal is possible on a question of law but only rarely is one successful in overturning a jury verdict based on evidence.

Well over 90 per cent of all the motor vehicles in Canada carry liability insurance to minimum limits of $35,000 inclusive; those that are not so covered are backstopped to the same extent by Unsatisfied Judgment Funds, both public and private. In theory, this broad incidence of insurance coverage has been attained without the necessity of enacting compulsory insurance legislation (except in Saskatchewan). The device used is that any person who applies for a motor vehicle license without proof of liability insurance coverage must pay a $20 “uninsured motor vehicle fee” which is credited to the fund. These funds protect the injured third person by satisfying unpaid judgments, but it actually gives nothing to the uninsured individual who pays the fee, since the fund is entitled to claim reimbursement from any uninsured driver for amounts paid to injured third persons as a result of his negligence. The insurance industry has created “the facility” that provides insurance to those individuals who would normally be unable to secure insurance through normal channels.

3. What’s Wrong With the Present System

In operation, the Canadian tort system was riddled with inadequacies, but it was not nearly as badly infected as the American one. A study done in Ontario by the Osgoode Hall Law School\(^3\)

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demonstrated that the tort system by itself falls far short of providing full economic reimbursement for all the injury victims. In fact, 57 per cent failed to recover anything via the tort route alone and the situation was worse in more serious cases than in minor ones. In part this poor result was due to the former Ontario guest passenger legislation, as a consequence of which 66 per cent of all passengers recovered nothing. This recovery pattern was, nevertheless, still better than that disclosed in some of the American studies where, for example, 63 per cent of those injured in Michigan were denied tort recovery.\(^4\) It was not as good as the ratio of bodily injury claims paid in British Columbia, where 63 per cent were paid.\(^5\) The pattern of payment in British Columbia is better than Ontario largely because the guest passenger laws in that Province are more civilized than was Ontario’s.

The spotty recovery pattern in Canada is in no way due to lack of insurance coverage, for, as pointed out above, if a Canadian is negligently struck by either an uninsured or hit-and-run driver in any of the ten provinces, he is still able to recover from some type of “unsatisfied judgment fund”. Manitoba, New Brunswick, Ontario, Saskatchewan and Alberta have government-operated schemes, whereas Newfoundland, Prince Edward Island, Nova Scotia, Quebec and British Columbia adopted systems operated collectively by the private insurance industry.

The brighter situation in Canada is partially due the greater willingness of insurers to offer a fair settlement. While one reason for this may be the less aggressive nature of Canadian and British insurance companies, there are other reasons why this would be so. Comparative negligence legislation makes the ultimate outcome of lawsuits appear more favourable to claimants and less so to insurers. Moreover, the losing party in Canadian litigation must normally pay the “party and party costs” of the winning party. These amounts, unlike in the United States, can be substantial. The device of “payment into court” is often used by insurers to convince a greedy plaintiff to accept a settlement. A defendant may pay into court an amount of money as an offer of settlement. If the plaintiff refuses to accept this amount and later receives a judgment for an amount less than the amount paid in, the plaintiff must pay to the defendant all of his legal costs. This is an effective weapon, one that might well be considered in the United States.

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This lack of tort recovery does not pose as great a financial hardship as might appear at first blush since there are in existence certain social welfare schemes which may assist the car crash victim.6 State-run hospital insurance covers nearly every citizen of Canada. Medical care, both government and private, is now available to around 80 per cent of all Canadians. These programmes, and others like Workmen’s Compensation, yield 40 per cent of all the money actually received by those injured in crashes. In fact, 86 per cent of those injured received something from a non-tort source and the losses of 18 per cent of the victims were completely covered by these regimes. The cost of hospital care is almost eliminated as a problem, since 95 per cent of all these costs are recompensed. If one adds tort and the non-tort compensation together, 54 per cent of those suffering economic losses are fully reimbursed and in only seven per cent of the cases do the out-of-pocket losses exceed $500.

Another fault of the fault system in Canada is the problem of delay. Even where a victim of an automobile crash has a meritorious claim, he must wait too long for his award. This is a problem primarily of mass societies and large cities. In the United States there is an average delay of 31 months between the commencement of the action and the trial in the various metropolitan areas. It is even worse in the great cities, for example, the delay is 70 months in Chicago and 51 months in Philadelphia.7 In Canada the length of time it takes to get a trial is less than in the United States, but it is still too long to wait for more than 2 years in Toronto or for an average of even one year, as is the case in Vancouver, British Columbia.8 Nor would the addition of more judges and more courtrooms cut the waiting period appreciably. The delay is long when there is injury, and still longer if it is severe, because it is necessary, when a lump sum award is being determined, to have a reliable medical prognosis prior to trial and this is seldom available until after several months. We should not forget, however, that the vast bulk of the claims, most of which are small, of course, are speedily settled without trial. A recent study in British Columbia9 disclosed that 73 per cent of all insurance claims were settled within 60 days of the time the insurer first learned of them. The bodily injury claims took

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6. For a detailed description, see the Report of the Osgoode Hall Study, supra, footnote 3, chapter VI.
7. See Keeton and O’Connell, Basic Protection for the Traffic Victim, (1965) at p. 13.
9. See The Processing of Automobile Claims, supra, footnote 5.
longer, but even here 55 per cent were cleaned up within 90 days and 73 per cent within 6 months. The Michigan study also showed that 58 per cent of their injury cases were concluded in less than a year.\textsuperscript{10} The cases that linger for longer periods of time are the difficult ones that require litigation for resolution, where the evaluation of the injury is uncertain or where liability is in doubt. Fortunately, these cases are in the minority, but there is still too long a waiting period for payment and this period is longest where the need for payment is most pressing.

The cost of administering the tort system is too high. In the United States it takes $2.20 in insurance premiums to put $1.00 into the pocket of an injured person. This is so because American wages (and consequently administration costs) are generally higher. Moreover, there is more inclination to litigate and less incentive to settle in America because virtually no costs are awarded. The contingent fee system, which is outlawed in Canada (except in Manitoba), eats up one-third of the payments to the injured. In Canada, it is calculated that $1.60 in premiums yields $1.00 in claims,\textsuperscript{11} a much better figure, although still less than the various welfare plans distribute.

4. How Reform Came to Pass

Criticism of the way in which automobile accident costs were allocated in Canada began decades ago. Naturally, the law professors, notably the late Dean Cecil A. Wright, the Father of Canadian Tort Law, attacked the tort system whenever they could.\textsuperscript{12} Judges often bemoaned the fact that their courts were clogged by scraped fender cases. The former Chief Justice of the High Court of Ontario, J.C. McRuer, complained frequently about the unreality and inefficiency of the tort action and urged its replacement by a more rational scheme of loss distribution.\textsuperscript{13} The Canadian labour party, the New Democratic Party (formerly the Co-operative Commonwealth Federation), which was formed in the 1930's, eventually adopted as one of its planks, the nationalization of the insurance industry and the establishment of a no-fault plan for auto accident claims. When the C.C.F. succeeded in

\textsuperscript{10} See Conard, \textit{op. cit. supra}, footnote 4.

\textsuperscript{11} See the \textit{Report of the British Columbia Royal Commission on Automobile Insurance} (1968), and Bill 74 and 75 1969 enacting a mandatory peaceful coexistence plan.


being elected in Saskatchewan, it actually instituted a government-operated non-fault plan, although it did not abolish the tort suit altogether. This party became and still is a powerful force in some of the other provinces like Ontario and British Columbia, and the pronouncements of its leaders on automobile insurance received wide publicity. There was some public support for the solution they offered, for very few people were contented with the tort system as it was operating. Although insurance coverage became more common (and more expensive), many were still going uncompensated and under-compensated. The unsatisfied judgment funds made their appearance, but although helpful, they alone could not fill the reparation gap. It gradually became apparent that reform was needed.

On April 5, 1960, the Legislative Assembly of Ontario assembled a Select Committee to "examine, investigate, inquire into, study and report on all matters relating to persons who suffer financial loss of injury as a result of motor vehicle accidents. . . ." The Select Committee was fortunate to have as its chairman the Honourable James N. Allan, a man of wisdom and compassion, and someone who was widely respected. Luckily, perhaps, the committee had only one lawyer on it, Vernon M. Singer, Q.C., an opposition member from the Liberal Party and a former student of Cecil A. Wright. Mr. Singer, was able to supply the committee members with copies of Ehrenzweig's *Full Aid Insurance* and Green's *Traffic Victims*, both of which appear to have had an enormous influence. An excellent group of civil servants, notably Morris Earl, the then Registrar of Motor Vehicles and T.M. Eberlee, who acted as Secretary, assisted the committee in its work.

The Select Committee had the good fortune of receiving two influential briefs during its deliberations, one by a Special Committee of the Law Society of Upper Canada (the governing body of the legal profession in Ontario) and the other by the All Canada Insurance Federation (a Trade Association representing the bulk of the insurance companies in Canada). The Law Society brief of September 1962 was largely the work of Edson L. Haines, Q.C., who is now a judge of the High Court of Ontario. Mr. Haines was at the time one of Canada's foremost civil jury lawyers. A former Dean of the International Academy of Trial Lawyers, Mr. Haines lectured on civil procedure at Dean Cecil A. Wright's law school. A former law partner of Mr. Haines, Leslie Rowntree, was Ontario's Minister of Transport at the time and was responsible for this area. With Mr. Haines on the Law Society Committee were Terence Sheard, Q.C., (chairman), W. S.
Martin, Q.C., (now a County Court Judge), Brendan O’Brien, Q.C., a trial lawyer who later became Treasurer of the Law Society), Ralph Steele, Q.C., and R. F. Wilson, Q.C., a distinguished insurance lawyer, now counsel to the Insurance Bureau of Canada. Although it contained a powerful defence of the tort system, the Law Society brief recognized its shortcomings and urged several reforms, the most important one being the establishment of a non-fault system to supplement the tort system. The solution was admitted to be akin to the Saskatchewan plan, except that it would be privately operated, rather than state-run, and the benefits would be somewhat more generous.

The All Canada Insurance Federation brief also defended the fault system. Nevertheless, led by its General Counsel, E.H.S. Piper, Q.C., it sought permission to include “limited accident benefits” coverage in its automobile policies, something that insurance companies were not permitted to do at that time. All Canada was not prepared to recommend the mandatory inclusion of this coverage “which will increase the cost to the public” for that, it suggested, “must come from the committee”. It did, however, outline a possible plan and included some cost estimates. There had been several earlier approaches made to the Association of Superintendents of Insurance of the Provinces of Canada seeking this amendment, but they had been unsuccessful.

It is difficult to explain why such an enlightened approach was taken by the bar and the insurance industry. Perhaps, we were fortunate in having some uniquely honest and dedicated men at the helm of these organizations at the time. Perhaps, because of the mutual friendship of some of the key actors in the drama, there was less mistrust than one normally encounters in such situations. Perhaps, there existed a real fear of a socialist takeover of the province and later of the entire insurance industry. Perhaps, we were just lucky in having conditions that were bad (but not too bad) and decent, practical men that were able to arrive at a workable compromise solution.

5. The Select Committee Report and Its Aftermath

The Select Committee was convinced and in March, 1963, it published its final report (it had released 2 interim reports in 1961 that dealt largely with improvements to the unsatisfied judgment fund). The Committee came to the following conclusions:

“The Committee is, of course, concerned that some form of remedy should be available to all persons injured in automobile
accidents. This, after all, must be the ultimate objective of any automobile insurance system.
The Committee sees wisdom in the views of certain eminent persons who believe that the traditional fault-liability system sometimes falls short of providing justice to those involved in or affected by automobile accidents. To put the problem in its simplest terms, society can no longer be entirely satisfied with the idea that fault in every accident rests with an individual or individuals and the financial consequences, whatever they may be, should therefore rest with an individual or individuals. In this automobile age, society as a whole is perhaps responsible for traffic accidents and their consequences to a greater extent than we have thus far realized or admitted. It may also be, as was suggested in the first interim report, that the task of establishing responsibility amid all the complexities of today is, quite frequently, an almost impossible burden on those who adjudicate cases. It is no longer good enough for us to say that all those who are not entitled to indemnification under the traditional fault-liability system—the surviving dependents of the negligent party, the negligent party himself who may be disabled for life, or the small child who dashes in front of an automobile and is permanently crippled do not deserve a remedy of some kind for damages. The fact of the matter is that they need a remedy.

The remedy recommended by the Select Committee was in accordance with the principle of "peaceful coexistence." It urged the expansion of "accident insurance" or the present "medical payments coverage" so that all standard automobile policies sold in the province would include such coverage. The Motor Vehicle Accident Claims Fund (formerly the unsatisfied judgment fund) would provide similar coverage for those injured by uninsured drivers or hit-and-run victims. In other words, the implementation of this recommendation would provide limited accident benefits for bodily injury or death to all occupants of an automobile and to any pedestrian struck by that automobile, regardless of proof of fault. Certain set amounts would be paid to the estates of persons killed and to persons dismembered or who lost the sight of one or both eyes. For example, for the death of a married male between 18 and 59 years $5,000 would be paid plus $1,000 for each additional dependant. The death of a married female of the same age would yield $2,500 plus $1,000 for each additional dependant. Loss of two hands or feet would bring $5,000, loss of sight $5,000, loss of one hand, foot or the entire sight of one eye $2,500.
In addition to these specific sums, indemnity of up to $2,000 would be provided for reasonable expenses incurred for necessary medical, surgical, dental, ambulance and professional nursing expenses. Hospital expenses over and above the coverage of the Ontario Hospital Services Commission would also be reimbursed within the $2,000 composite limit. Funeral expenses of up to $350 for each person would be provided where necessary on top of the $2,000. Weekly benefits of $35 would be paid to an employed person when totally disabled to a limit of 104 weeks, subject to an extension for an additional 104 weeks in the case of total and permanent disability. In the case of a totally disabled housewife $25 weekly would be paid for up to 12 weeks. In neither case would payment be made for the first seven days. Only where a motorist is driving while unlicensed, while intoxicated or while in violation of the Criminal Code would he be precluded from recovery, but if such driver is killed, his family would not be deprived of compensation. There would be no interference with the injured person's right to sue the person who was at fault for his injury, except that any benefits received under the proposed new plan would be offset against any tort recovery. The estimated cost of this coverage would be about 12.6 per cent of the current premium. For the Ontario minimum $35,000 liability insurance policy the base rate in Toronto was at that time $62, which would make the cost of this new coverage something like $7.81 annually. Of course, depending on driving record and geographical location, this figure could range from a low in rural areas of about $2.40 to a high in urban areas of $19.50. One representative of the insurance industry told the committee that for 60 per cent of the drivers in Ontario the cost would be about $4.00.

Following this report the Ontario Department of Transport undertook further studies. A technical committee of civil servants revised the cost estimates of the plan to 20 per cent of the premium or about $10 per vehicle. It financed the Osgoode Hall Study, which in 1965 issued its report indicating that there were compensation gaps and substantial delays. Finally on May 31, 1966, the Minister of Transport of Ontario (now Irwin Haskett) announced in the Legislature that the mandatory plan would not be implemented at present since, in his view, "the chief areas of need are being met," "the main beneficiaries (of the proposal) would be the insurance companies," and the plan would discriminate against individuals "stricken by illness or disease." He concluded that "the matter will be kept under advisement, of course, but the present trends indicate that the points against the proposal will become still more significant as time goes by." Instead, the Insurance
Act of Ontario was amended to permit limited accident benefits coverage to be written on a voluntary basis. It is this legislation and similar enactments in most of the provinces that came into force on January 1, 1969, making possible the breakthrough in the Canadian automobile insurance system.

6. LIMITED ACCIDENT BENEFITS

The amendments to the Insurance Act of Ontario added several new sections under the title "Limited Accident Benefits". Empowered under similar provisions passed in the other provinces, the Association of Superintendents of Insurance of the Provinces of Canada prepared, in co-operation with representatives of the insurance industry, a new standard automobile policy.

On the new application form, in addition to the usual liability, collision and comprehensive cover, there is space for three types of coverage under Section 3, "Accident Benefits":

1. "Medical Payments,"
2. "Death, Dismemberment and Total Disability,"
3. "Uninsured Motorist."

Under Death, Dismemberment and Total Disability, there is space to insert different principal sums and different weekly benefits, which will be sold for different premiums.

The insuring agreement sets out the governing provisions under Section B—"Accident Benefits". Subsection 1 deals with "Medical Payments" and is not dissimilar to the earlier coverage; payment will be made to each insured person "who sustains bodily injury or death directly and independently of all other causes by an accident arising out of the use or operation of an automobile, all reasonable expenses incurred within two years from the date of the accident, as a result of such injury for necessary medical, surgical, dental, ambulance, hospital, professional nursing and funeral services" (up to $500).

Subsection 3 deals with the "Uninsured Motorist Cover" and resembles this type of coverage in the United States. The company agrees to pay "all sums which every insured person shall be entitled to recover as damages for bodily injury, and all sums which any other person shall be legally entitled to recover as damages because of the

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15. See the new approved Standard Form Policy of the Association of Superintendents of Insurance.
death of any insured person, from the owner or driver of an uninsured or unidentified automobile . . .'' (up to minimum limits).

The most important change is in subsection 2, "Death, Dismemberment and Total Disability". Under Part I, "Death Benefits", reimbursement is provided for "death which ensues within 90 days of the accident . . . based on the age, sex and marital status of (the) person". For the loss of a married male between 10-60 years, his family gets 100% of the principal sum, but for the loss of a married female only 50% is paid. For younger and older people and unmarried persons, the amounts are reduced and may range as low as 5% of the principal sum.

Under Part II, "Dismemberment or Loss of Sight", various percentages of the principle sum are also payable depending on whether both feet, both hands or the sight of both eyes are lost (100%) or only one such loss is suffered (50%).

Under Part III, "Total Disability", an employed person who, as a result of an injury that "wholly and continuously disable(s) such person", so as to "prevent him from performing any and every duty pertaining to his occupation or employment" is entitled to a weekly benefit. No benefit is payable for the first 7 days or for any period in excess of 104 weeks, unless the injury as "permanently and totally disabled such person from engaging in any occupation or employment for wages or profit", in which case the benefits will be paid for an additional 104 weeks. Married women who do not work are deemed to be employed at $12.50 per week.

This new coverage is being sold for a flat rate of $7.00 per year for a $5,000 principal sum and a $35.00 weekly benefit. A few companies are selling double indemnity, $10,000 and $70 a week for a $14 annual premium.

One of the difficulties with the plan was its voluntary nature. There was a real danger that not enough people would choose to buy this coverage for an extra $7. The ingenuity of the industry was challenged and it is responding. A large-scale advertising campaign was launched to inform the public about the new coverage. Many companies are automatically supplying the new cover to all their clients free of charge as of January 1, 1969 and are billing them for it as their renewals fall due. One clever mailing device that is being used permits an insured to opt out, by giving the company instructions in writing. He will be covered if he does not respond; few do. Some companies are less imaginative, notably All-State Insurance Company, which sent out forms to its insureds to the effect that if they agree to pay for the new
coverage on renewal they will be covered forthwith. This is not working well. Nevertheless, it appears that, as a result of this legislation and imaginative merchandising, the substantial majority of car crash victims in Canada will now secure at least some compensation regardless of fault.

7. Conclusion

But Utopia is not yet at hand. There are defects in the new limited accident benefits coverage. First, it is voluntary and not mandatory, as urged by the Ontario Select Committee (and more recently by a Legislative Committee in British Columbia). This means that some people will not be covered, no matter how skillfully it is marketed. Moreover, the unsatisfied judgment funds will not provide this coverage for uninsured and hit-and-run drivers, as they would have if the coverage had been made mandatory. Let us hope that, in a few years, as it becomes more widespread, the new coverage will be included on all policies.

Not all of the companies are providing compensation on a non-fault basis to pedestrians hit by the insured vehicle; many limit their coverage to occupants of the vehicle and members of the insured’s family while pedestrians. All pedestrians must be covered if this plan is to succeed in eradicating the problem of non-compensation.

The benefits are far from generous. It has been demonstrated that the need for reform is most pressing where the economic losses are great. Thus, it would be preferable if the maximum amount of coverage were eliminated or at least raised. By introducing a deductible feature of, say, $100, the high administrative cost of small claims might be reduced and additional funds might be freed to compensate larger losses. Since the average cost of funerals is about double the amount provided, this figure could be increased. One might also question the adequacy of the amount of the weekly benefit, which is lower than the weekly minimum wage required by some provinces and by the federal government. At least $50 per week should be provided. Moreover, the duration of these payments should not be limited to four years, since the need for assistance is greatest in the long-term cases. Nor should payments be limited only to cases of total disability; they should be available on a scaled-down basis for partial disability. Naturally, this would entail additional expense that may be felt unwarranted at present. The details of the dovetailing with social welfare schemes and the
problems of subrogation remain to be worked out as do many other important items.

In any event, this plan is somewhat of a breakthrough. At last a non-fault plan is in operation, as deficient as it may be. At last it has been recognized that tort law can co-exist with an automobile plan. At last the insurance industry has recognized its obligation to society and has assisted in reforming the system. At last it has been demonstrated that the nationalization of the insurance industry is not necessary in order to reform it. At last a group of lawyers has recognized its responsibility to all automobile injury victims. The Canadian plan is by no means perfect and, undoubtedly, many improvements are needed. But at least we have begun.
BOOK REVIEW


Mr. Whyte of Organization Man fame has written a lucid and entertaining account of the dimensions and dynamics of urban sprawl and of the difficulties of channeling it into more desirable and aesthetic patterns of development. More specifically, The Last Landscape is concerned about the realities and usefulness of preserving and maintaining open space not only in the center city but on the urban fringe as well.

While Whyte views the urban scene as a conservationist, finding his inspiration in unspoiled nature, he does not advocate the maintenance of open space simply for its own sake. Throughout the book, he reminds the reader that the location and the configuration of land is often more important than sheer size. For example, a compact parcel one mile square on the outskirts of a city will usually be far less relevant to the inhabitants of the city than a strip eight miles long and 1/8 of a mile wide meandering through heavily populated areas.

Whyte also reminds us that high population densities have their virtues as well as disadvantages. Such densities provide wide and varied markets that support specialization and maximize the variety of services that makes a city attractive and exciting. Of course, propinquity also has its drawbacks: pollution, noise, slums, poverty and disease, to name a few. Although Whyte’s emphasis upon open space preservation fails to focus on many of these obvious problems, he does advocate a useful methodology for approaching most urban problems: concentrate on minimizing the disadvantages of high population densities and not on the difficult, if not impossible, task of lessening them.

For these reasons he is sharply critical of the overly ambitious and utopian approaches towards land use planning, such as the “New Town” movement and the “Year 2000” plans, which rely on reserving

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Messrs. Bruton and Day wish to state that the views expressed herein do not necessarily reflect those of the Department of Transportation or the Osgoode Hall Law School.
large wedges of open space to "channel" development. These efforts are characterized as "clean-slate" approaches that "vault over the messy present and the near future." Whyte rightly questions these solutions since there is no practical way to "freeze" the large blocks of required land or to limit development to certain corridors, particularly in view of the sharply rising demand for land. Existing legal controls and political machinery are clearly inadequate. Is it realistic to expect one municipality to resist exploitive development with its promise of a larger tax base, while its neighbor reaps the immediate economic rewards of a more "pragmatic" policy? Will the "right" landowners "elect" to keep their land open while neighbors exploit their land at high profits? This list is endless: developers, speculators, public utilities and highway builders will ignore the lines on the planner's map as they pursue their own interests. The remaining alternative—outright acquisition—is simply too expensive given the other demands of the public purse.

The utopian plans are also criticized for lulling us into a false sense of security that something useful is being done. These plans also divert our attention from the less ambitious and more feasible goal of salvaging what can be salvaged while there is still time.

As the foregoing suggests, the main theme of the book is to "use land or lose it." Urban land is becoming increasingly scarce, particularly where urbanization is advanced. This land can be put to many useful purposes. Some are compatible with undeveloped open space; others are not. Whyte graphically points out that the main thrust of planning should allocate these different uses so as to achieve the desired quality of urban development. Any attempt to maintain open space solely for the purpose of channeling development is doomed to failure. If land is to be kept open it must be regularly used by the population in a manner compatible with the preservation of open space, which requires that city residents have ready and frequent access to it. If this is not achieved, social and economic pressures will compel its use for less aesthetic purposes.

Despite Whyte's frequent warnings that it is almost too late to do anything constructive, he seems to be optimistic about what can be done. While he talks about far reaching reforms, particularly with respect to changes in the political structure (such as regional government) his emphasis is on a "here and now" approach. His solution calls for a "new" look at open space and population density, a realistic appraisal of existing social and economic forces and a more imaginative and flexible use of existing legal machinery for land use.
control. Whyte is at his best in describing the legal intricacies and limitations of the various land acquisition techniques. He illustrates how government policies can work at cross purposes and how legislative programs aimed at land use control often do more damage than good. Whyte continually highlights the need to periodically reexamine how our laws actually operate.

For example, large lot zoning often assures rather than prevents haphazard and inefficient land use. The expanding city merely vaults over the “protected” area. As this area becomes surrounded by development, pressures for the use of the “protected” land increase, particularly along the main transportation arteries. Land values and taxes increase. Eventually the lots along the major highways are subdivided and sold to smaller developers with little regard for efficient land use. Once this partial disintegration takes place it is usually too late for corrective action. Unsightly strip development removes any incentive to keep the remaining land open. The extensive areas of zoned land behind the strip development is effectively sealed-off to large scale and high density cluster development. Low density sprawl eventually fills up the remaining area as the land is sold on a piecemeal basis to smaller residential and commercial developers.

Similar results have accompanied preferential property tax legislation designed to ease the farmer’s tax burden. In theory such legislation will prevent the development of farmland on the metropolitan fringe. In actual practice it merely permits him to stay on the land until prices are sufficiently inflated to ensure its profitable sale. Or, it is used by the speculator to ease his burden of holding land until it is ripe for development. The speculator simply maintains “token” farming operations or leases the land to the farmer at moderate rents.

As Whyte points out, the major obstacle to effective land use control is lack of money. Many of the more effective controls involve a taking of property that requires compensation. If, on the other hand, a restriction on land use can qualify as an exercise of the police power, compensation is not required. Whyte rightly believes that the police power has not been used to maximum advantage. For example, he argues that the existing police power can be used to create the skeleton of “a comprehensive open space” system based on the natural drainage network that permeates our metropolitan areas. This drainage network (which frequently contains the more scenic portions of our metropolitan landscape) has important uses intimately related to the public welfare, such as drainage and flood and water quality control. Realization of these functions requires that this land be left
undevoloped or at least limited to land uses compatible with the
planner's traditional concept of scenic open-spaces, such as farming or
golf courses. This overlay of benefits to the public at large thus permits
the indirect use of the police power to control development in such
areas. The drainage network, in turn, winds through the metropolitan
region providing linkage to other open space networks and maximizing
effective exposure with the community. This skeleton can then be
fleshed out by land whose acquisition cost can be made more palatable
through the increased use of the easement, sale and leaseback, and
installment plan buying.

The general failure to use these legal tools seems to partially stem
from a propensity to view them as separate and distinct entities rather
than as a system of land use controls. Another, and perhaps, even more
important influence is the attitude of many government officials. For
example, the very legislators that regularly reprimand federal and state
agencies for using antiquated and costly land acquisition techniques are
reluctant if not adamantly opposed to the creation of revolving funds
or to the appropriation of advance funds essential for advanced
acquisition or installment buying. Attitudes within the executive branch
are also important. On the one hand, fish and game personnel, who
have had long experience working closely with landowners, are more
receptive to the easement approach. Highway officials, on the other
hand, will traditionally prefer to have it done with once and for all and
will usually insist upon a fee simple. Whyte persuasively argues for
greater flexibility: "The point is combination. Alone, any single device
is limited; together they strengthen each other. If we zone flood plains,
for example, it will be much easier to buy open space in them later and
the price will be more reasonable when we do; if we buy land in fee
simple, it will be easier to buy easements on land that buffers them.
Each step makes another easier."

This flexible use of existing land control techniques fits hand in glove
with Whyte's admonition not to value open space for its own sake with
the emphasis upon land size rather than configuration. We often forget
that our cities abound with abandoned rights-of-way, vacant lots and
gullies, forgotten waterways and derelict waterfronts. Out in suburbia
there remain many odd-shaped pieces of open land. A little imagination,
some creative landscaping efforts and modest investments in small
parcels for land linkage could turn these remaining open spaces into
readily accessible hiking trails and recreation areas within rather than
outside existing metropolitan areas.

*The Last Landscape*, though it is clearly valuable for its descriptions
of the political, legal and economic factors in urban development and for Whyte’s insights and philosophy on what can and ought to be done about open space preservation, is not without some fundamental shortcomings. Most important, is the isolation of open space concepts from other urban problems such as poverty, pollution, congestion, and center city decay. No one can deny land use planning has a substantial impact upon these problems. While Whyte should have dwelt more on these inter-relationships, it is equally evident that a more balanced treatment might have seriously detracted from his message regarding open space preservation. Nonetheless, one must remember that a broader consideration of urban problems might lead one to a somewhat different perspective of what is needed in urban land planning.

A second deficiency arises from Whyte’s political analysis. With few exceptions his politics consists of rigidly categorized groups espousing some purest doctrine. There are the developers, the gentry, the simon-pure conservationists, the farmers, the townspeople, the engineers and the planners. Although, in fact, the rigidity of these classifications softens as his discussion develops, the damage has already been done in the first chapter. After reading it, anyone who has had even peripheral contact with the problems of urban land development will find himself almost irrevocably placed in one of Whyte’s categories—a position from which it is difficult to read the remainder of the book with a sense of objectivity.

Even more damaging is the fact that Whyte uses these political categorizations as gimmicks to develop his substantive arguments. In place of analyzing and evaluating the substance of the various theories and attitudes toward urban land development, he tends to set up straw men holding extreme positions which he can cut down with ease. In this fashion the reader is led to the inevitable truth and practically of Whyte’s own beliefs. This technique, while entertaining, gives Whyte’s arguments an air of contrivance. This is particularly unfortunate because many of his arguments are intrinsically sound.

In this book, Whyte has placed himself in the middle of the long standing controversy between those who view modern urban size and density as basically harmful and those who view it as inevitable and in many respects beneficial. Many believe that a humane society is impossible in the context of dense urban living. Others, including Whyte, believe that while existing cities may be in many respects inhumane, they can be made civilized and hopefully flowering seats of human culture. As increasing population densities appear inevitable, he argues that improvement of the human environment must come from a
reshaping of the existing city and not through attempts to develop some smaller and less dense alternative. The fact that Whyte—a conservationist whose primary inspiration comes from nature—should side with those who favor the dense urban center makes *The Last Landscape* an important book in the history and evolution of urban planning philosophy.

*The Last Landscape* is a book for everyone. For those that know little or nothing about urban land planning, Whyte has written a superb introduction to the subject. The book includes a basic reading bibliography of planning literature for those who want to explore it further. Legislators, lawyers, and law professors and students are reminded again of the many discrepancies between the law in theory and practice. Planners will benefit from having many of their hallowed principles and theories called into question and critically examined. Government officials are given a "bird's-eye" view of the many federal, state and municipal activities that influence development and are shown how their individual best intentions often work at cross purposes. For the politician Whyte provides a useful though somewhat simplistic description of the "politics" of open-space preservation. He catalogue the many "gimmicks" and tactics of developers, speculators and the "bug and bunny" people that are the bane of public highway and other government officials. And for all of the above who must make speeches, the book is full of quotable quotes—a refreshing characteristic not common to planning literature.