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THE TRANSPORTATION LAW JOURNAL

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PREFACE

With this issue, The Transportation Law Journal enters into its second year of publication. While the Boards of Governors and Editors are quite proud of the many compliments received, we are ever mindful of the problems encountered and of the needs to be accomplished if The Journal is to become a significant legal periodical.

In the coming year, we hope to give new dimensions to The Journal both in form and in substance. The current issue, we trust, will give an indication of that which our subscribers may anticipate in the future. We earnestly solicit your comments on the articles published and on The Journal generally. For in this manner, we will be able to better develop a dialogue meaningful to transportation regulation.

David A. Sutherlun
Chairman, Board of Governors
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Editor in Chief
THE COMMON OWNERSHIP ISSUE FROM POLITICAL IDEOLOGY TO A PRACTICAL CONSIDERATION OF BENEFITS AND GOALS FOR PUBLIC SERVICE

PAUL W. CHERINGTON* and DAVID M. SCHWARTZ**

Control through ownership of carriers of two or more transport modes is a rather unusual business arrangement, at least in the United States. Those arrangements that are in existence are either looked upon as something special or extraordinary, or are limited activities bounded severely by regulatory constraints.

And yet it is operationally possible to create and manage multi-mode transport firms, and it has been possible to do so for many years. The policy implications of such an operation from the standpoint of efficiency and the economics of the services to be rendered, both from the standpoint of demand and of competition with other transport services—single as well as multi-mode—are open questions. After all, a fair judgment about the operational advantages and economics of multi-mode ownership cannot be made until it is really tried.

So little thought has been given to the possibilities of common ownership that there is even lacking a clear understanding of what kind of economic objectives are attainable. Much of the issue is debated in terms of phraseology and issues that are more than half a century old. No research piece has outlined the conditions under which such an enterprise might succeed or fail. There is little empirical study of even the limited areas where it has been tried. There are few objective thought-pieces which go into the logic of the economic issues presented.1

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The views expressed herein are those of the authors.

1 Two such papers have appeared in the ICC Practitioners Journal: Byron Nupp, “Regulatory Standards in Common Ownership in Transportation,” (November-December 1966); and Peter S. Douglas, “The Economic Irrelevance of ‘Common Ownership’,” (July-August 1969). The former reviews the sporadic legislative history of present regulatory statutes bearing on the subject and abstracts from them a set of general principles that might be used to guide a more consistent pattern of regulation, while the latter points to the absence of obvious economic benefits from ownership of two or more transport services in coordinated service and outlines some alternative approaches to better coordination of transport service.
Exploring first the reasons why this severe taboo on a transport operation easily feasible has persisted to the present time one finds that the basic reasons today lie not in operations nor in economics but in political factors—often expressed in the most ideological language. This political ideology rests on the historic circumstance that the first truly modern form of transportation was railroading, and this form for a while dominated the entire transport scene.

Railroads were early discovered to require exclusive control of the entire operation by a single management including control of the use of the traveled way. This was in contrast to road and water transport where a multiple control system could operate on a common way. Railroads thus became inherently a common carrier service, not easily dominated by any shipper or receiver of goods. This was because of the need for common operational control, plus the enormous capital requirements for a threshold into the business. In most countries only governments could provide this control and capital. In a few countries, such as England and the United States, private capital succeeded in the railroad business but only with public aid and promotion—and later, regulation.

Newer forms of modern transportation by water, pipeline, highway, and air lived in fear of the already established behemoth railroad industry. The railroad industry itself tended to look with disdain upon its newer and more puny rivals and either ignored the opportunities to get into the new transport enterprises or, if they did get in, took a rather restrictionist point of view, usually with the aim of limiting competition with the railroad.

In this way a political situation was created—the railroad and its supporters versus its newer competitors and their supporters. This conflict became rather ideological in countries where the railroad was owned by the government. A new trucking or bus company might be a private enterprise in competition with a public railroad. Friends of enterprise would seek to limit the expansion of public ownership and could justify their policy by pointing to the vigorous growth of private companies in the newer transport industries. Advocates with a more social purpose in mind would point to the great public benefits of the railroad system and the threats to it from private exploiters using the newer forms of transport as levers.

Resolution of these conflicts has not been sought in rational operational terms, capitalizing on the economic advantages of coordinated services, but for the most part through restrictive regulatory ends. Private enterprise truck and water services have been restricted
through some form of entry control, and railroads have been often confined to their traditional service obligations. In most countries this has led to a marginal trucking and water industry, and irrational assignment of all kinds of unnecessary public obligations to the State-owned railroads. Such countries have been faced with a primitive system of nonrail transport, on one hand, and a deficit ridden rail system on the other. It has only been in the past 15 years that some advanced countries, such as Britain, have sought a way out of this impasse by eliminating many artificial restraints on railroad service and eliminating many of their obsolete public service obligations.

In the early 20th century, United States railroads operated many domestic water transport services. These were severely restricted in the 1912 legislation known as the Panama Canal Act, which not only forbade railroad operation of intercoastal service through the Canal, but also restricted other rail-owned water operations. In the strategic Lake Lines case in 1915, the Interstate Commerce Commission eliminated rail ownership of water services on the Great Lakes, which had grown extensively. This decision is written in the form of a political diatribe. It abounds in rhetorical statements that have been quoted ever since, but lacks the most elementary judicial analysis of the problem presented. Obviously, no economic analysis is present.

In Lake Lines, the Commission made no distinction between the use of Great Lakes shipping to destroy competition and the constructive use of it to improve transportation service. The end-to-end service of small railroads, such as the Lehigh Valley, was wiped out along with the parallel routes of other lines. The constructive work of the Pennsylvania in transforming an old obsolescent fleet into first class water service was eliminated, along with the most blatant anti-competitive “fighting ship” outfits. Lake Lines was in reality a necktie party motivated by political rhetoric and nothing more. It not only eliminated rail control of Great Lakes shipping, it was probably the most important single event in the elimination of common carrier service on the Lakes. Certainly, the liberated forces of independent water lines did not respond after their unleashing by the ICC rhetoricians. By the 1930’s the last common carrier on the Lakes of general cargo had disappeared.

Political fear of railroads also motivated regulatory restrictions on common ownership of truck and bus lines and aviation services in the 1930’s. Statutory limitations make this clear.²

². Lake Lines Applications 33 ICC 700 (1915).
³. Motor carrier acquisitions are governed by Section 5(2)(b) of Part I of the Interstate Commerce Act, and aviation acquisitions are governed by Section 408(b) of the Federal Aviation Act.
Modern consideration of the common ownership issue should be dominated by two economic considerations:

1. The extent to which transport development has made common ownership interesting to nonrail forms of transportation, thus bypassing the old railroad political issue.
2. The economic results to be expected from common ownership.

While most of the specific legislative provisions applying to common ownership in Federal regulation stem from the fear of the railroad devil, the present state of development in air and motor carriers places them in the forefront of transport industries for whom common ownership might well be appropriate. At the same time, the railroads have become more interested in diversified investment in nontransportation activities—the so-called conglomerate phenomenon. This outlet for their cash flow, tax loss, and other aspects of capital transfer may have made the ownership of other transport forms less attractive to the railroads, on the basis of higher alternative earnings in nontransport investment opportunities.

In the motor transportation field there has been considerable interest in getting into the air freight field through motor ownership of air freight forwarders, an indirect form of air carriage. Motor carriers have also shown increased interest in integrating into water transportation: in the McLean case involving the joint motor-water movement of highway containers in coastwise and noncontiguous trades under a single management; and in the proceeding before the ICC involving the combination of a truck line and the American Commercial Bargé Lines on the Mississippi River System.

Both aviation and trucking companies are becoming associated with conglomerate enterprises. This association should cause many managements to become familiar with conditions and opportunities in trucking and aviation and in the advantages from a combined transportation service. The growth potential in separate air and truck enterprises will be assessed against the growth and other economic advantages of combined service, and again against the growth possibilities of other forms of business investment. Common ownership may emerge as a result of improved investment management.

Our basic concern with common ownership is, or should be, the

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4. Docket 16857 is a case before the Civil Aeronautics Board involving numerous motor carriers seeking authority of air freight forwarders.

economic motives for it. Common ownership should provide a smoother and more effective process of finding resources to develop new transportation markets. It should do this by providing a direct channel for the assignment of investment funds to new growth opportunities, whether these investment funds are derived from new capital issues or from the surplus of other, more slowly growing, or obsolete forms of investment, including those in some modes of transportation.

This direction of investment and the assignment of resources on the basis of comparative returns should be accompanied by the retention of the basic market skills in existing enterprises both in and out of transportation. In other words, the growth of management ability to deal with new growth should be in a direct line of evolution from the management experience of present firms. In the past, newer forms of transportation have sometimes suffered from capital famine due to their isolation and from management starvation as inexperienced people entered transportation fields from which other transportation managements were excluded.

The marginal status of other types of carrier service, particularly highway and inland water carriers, in countries where the government owns the railroads has already been mentioned. In the United States, a very high price has been paid for the growing pains of nonrail transportation. Aviation grew on government subsidy. Inland water transportation also depended on government promotion for its start, following the development of the rivers and the perfection of towing technology. Its growth was slow and uncertain in the earlier years and did not come into its own until about 1950. A high price has also been paid for the exclusively independent growth of trucking. The undercapitalized trucking firms characteristic of the 1920's and 1930's needed regulatory protection in order to grow. A restrictionist pattern of rates and services, based on excessively detailed certificate restrictions, has led to a high rate scale for some truck traffic, to the political demand for regulatory exemption for other truck traffic, chiefly agricultural commodities, and to the escape of other large amounts of truck traffic from common carrier service as shippers rebelled against high rates and restrictive service.6

In contrast to the agonized growth of trucking in its formative period, the motor bus industry in the United States experienced early fast growth and market stability under the guidance of competent

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6. Complete exemption from rate, entry and other economic regulation is provided for unmanufactured agricultural commodities and private transportation. The various motor carrier exemptions are set forth in Section 203 of the Interstate Commerce Act.
managements. Much of the credit for the early smooth sailing of the motor bus industry is due to the active participation of railroad capital in the bus companies. The usual pattern was a 50 percent railroad ownership of the stock in a regional bus company, providing a stability in the capital structure unique among developing forms of transportation in the United States.

While the United States is still paying the price of ideology in terms of restrictive service and high rates in some of the newer modes of transportation, it is also paying in terms of loss of markets to common carrier service and the incentive to develop new services. The present balkanized transportation system is unable to compete effectively with private carriage, either in rates or service. Two-thirds of the capacity in U.S. inland waterways and highways is dominated by private shippers along with practically all of the oil pipeline network. The impact of this fact upon the organization of American business has never been calculated.

Obviously, the ability to invest in one's own transportation is a sign of business size, and the ability to use this control of transportation to seize and hold markets is a mark of business dominance. This issue has come to a head only in pipelines, and no one can say that the negotiated solution is a completely satisfactory one from the point of view of the competitive growth of American business.7 Instead of a common carrier service capable of serving the major shipping needs of a competitive industry, there is a fragmented one at the mercy of a relatively noncompetitive business system in control of many of the principal arteries of trade and transportation through its ownership of private carriage by all principal modes. Through common ownership of its own private transport facilities, business is dominant in transportation, even as common carrier transportation fights its own civil war among the modes.

Fragmented common carrier services, fighting the battle of the modes, have lagged behind in the development of new services; witness the long, uncertain, and slow growth of container freight service, a true hostage of separate control of transportation services. There is much made of the great growth of TOFC service on the railroads since a favorable ICC decision in 19548—from practically nothing to a million and a half

7. In the early 1940's the U.S. Department of Justice negotiated an antitrust consent decree with the petroleum companies owning pipelines stipulating specific returns on investment to limit pipeline rates and other matters. The background and significance of this action is discussed by Arthur M. Johnson: Petroleum Pipelines and Public Policy. (Cambridge, Harvard University Press, 1967).
carloads. There is, however, a tendency to forget that this service struggled for recognition for more than 20 years as the modes fought for control. The present system still protects the vested interests of motor carriers, railroads, and shippers respectively in the various plans that have been prescribed. This has undoubtedly limited the growth of container service, particularly the use of piggyback by trucking companies. It has indeed favored the private shipper, who again has his own favored plan on better terms than his rail or truck competitors who must use their own, often outmoded rate structures to participate.

Supporters and critics have overlooked the primary purposes of common ownership in transportation: the best possible means of using the mature economic position of existing transportation to provide assured investment and management for newer developments in the field and to use the marketing experience of a mature industry to promote new transportation services on a wide scale. This function has been abandoned to the shippers themselves, who have developed their own multimode transportation systems and have used them often as a means of market dominance.

Instead of concentrating on the principal goal of a coordinated transportation service, supporters and critics of common ownership have concentrated on what is really the secondary goal—the mechanical integration and coordination of specific transport operations.8

This concentration on the secondary aims of coordinated service can be illustrated by the history of rail ownership of motor vehicles. The "key point" doctrine, guaranteeing that railroads use motor vehicles only to provide end-to-end service to actual rail movements has a long regulatory history,9 so has the idea of substituted service, where small, non-profitable movements over lightly traveled rail lines can move over the highway under direct railroad control once the line has been abandoned. In recent years the rigors of the key point doctrine have been alleviated by a limited liberalization of the use of motor vehicles in substituted service. In the most recent cases, earlier key point restrictions have been lifted to recognize the discontinuance of trains with head-end

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8 Substituted Service—Piggyback, the Commission in its decision (322 ICC 301 (1964)) did achieve a greater degree of simplification and equality in piggyback plans and operations.
9 In its 40th Annual Meeting, the ICC Practitioners Association held a panel discussion on common ownership. The report of the discussion seems fairly evenly divided between attention to ideological aspects and the secondary aspects dealing with mechanical coordination. (ICC Practitioners Journal, September-October 1969).
10 The key case is Pennsylvania Truck Lines Incorporation, Acquisition, and Control of Barker Motor Freight, Inc. (1 M.C.C. 1936).
freight, the falling off of less—carload traffic, and other railroad vicissitudes which now lead to a wider use of motor vehicles. But the emphasis is still static and mechanical rather than in terms of service innovation.

Common ownership is thus caught between the mediocrity of a few dozen minor cases involving secondary transport operations and the high flown ideological language of the modal apologists. It is difficult to speculate about its true potential or even the true dangers which it may present to the public interest in certain areas of abuse.

It can be postulated, however, that there are certain areas where common ownership is not an appropriate form of transport organization. One would not, under present conditions, expect a joint control of transportation enterprises under two or more modes where the combination would contribute nothing positive to transport development not attainable under separate ownership. Common ownership should contribute some public advantage, either in terms of new service or a more effective organization of existing ones. This public advantage should be made demonstrable as a condition of approval.

There should also be an assurance that firms are not engaging in common ownership merely to thwart development or to provide cross-subsidy for inefficient or outmoded services. This was the besetting fear of the early pioneers in aviation: that the railroads would get a hold on the nascent technical development of the airplane and use it for the advantage of the established railroad enterprise. One cannot tell the extent to which this is a justified fear and where it may be an imaginary evil. Certainly, the early association of the Boston and Maine and the Maine Central Railroad with Northeast Airlines did not thwart its development. On the contrary, the Civil Aeronautics Board took special pains to see that the railroads did not extend Northeast's development beyond its grandfather rights. Here, the fear of common ownership may have thwarted aviation development as much or more than a full exercise of common rail and air management in a new transport market.

A true common carrier service based on common ownership of many transport modes under a single management will be a product of regulation designed to capitalize the business incentives of carriers to improve transport service. Some advanced thinking and some imagination are needed for the design of such a regulatory system. Such a system would, however, be founded on forms of analyses in widespread use both in industry and government. Some of the ingredients would be as follows:
a. Investment analysis of alternative opportunities for the use of funds in transport enterprises: in the existing transportation industry, in conglomerate activity in nontransport industry, and common ownership as a genuine investment alternative.

b. Market and technology forecasts to outline the need for new transport service and investment opportunities which may exist regardless of the present artificial modal boundaries of common carrier service.

c. Benefit-cost analysis to test the effectiveness of alternative coordination patterns for many types of services, such as small shipments, geographically dispersed locations, and relief of congestion. Common ownership of transport modes should be assessed against joint service of separate transport modes, single carrier service either unsubsidized or under some kind of subsidy, either internal or publicly provided.

It is probably too much to expect such a group of regulatory studies to be generated by the present agencies, or even by carriers in the present regulatory environment. In view of the present statutory restrictions, what carrier would seriously consider an elaborate common ownership proposal?

This field is an appropriate one for initial development by independent scholars, perhaps sponsored by one of the independent research institutes. Such scholarship, however, cannot be the real foundation of improved performance in the transportation industry through common ownership. As pointed out earlier, the initiative will come from carriers outside the railroad field, very likely air and motor carriers seeking to find improved service in a common ownership of their two services. At this stage, the common ownership discussion will move off the ideological plane toward a consideration of basic economic factors and alternatives.

Regulation, of course, deals with the public interest in the final analysis. Business efficiency is compatible with the public interest; in fact, it is the public interest so long as the benefits are passed along to the public. The future regulatory pattern of common ownership will reconcile business incentives with public interest factors. Regulatory standards will be derived from the economic analyses already outlined and will include:

a. Estimates in specific or even quantitative terms of the public benefits of common ownership proposals.

b. Appraisal of the competitive environment of transportation
operating in a regime of common ownership, and the design of regulatory features to preserve competition.

C. Design and promulgation of negative safeguards to prevent capricious common ownership proposals not promising public benefits, and proposals designed to thwart or hamper development.

Under such a regime, the true public advantages of common ownership would become apparent in provision for the continuity of transport service in line with technological development and the use of business incentives to provide continuing improvement in the services of common carriers to competitive business.
INTERMODAL ACQUISITIONS UNDER THE INTERSTATE COMMERCE ACT

JOHN GUANDOLO*

Congressional policy favoring healthy competition in transportation finds expression in Section 5 and other provisions of the Interstate Commerce Act. The applicable provisions of Section 5(2) are clear and unambiguous. Subdivision (2)(a) authorizes specified forms of unification, acquisition or lease arrangement by two or more carriers, and subdivision (2)(b) provides for Commission approval and authorization if "the proposed transaction" is within the scope subdivision (2)(a) "and will be consistent with the public interest." The proviso portion of subdivision (2)(b), however, requires that if the applicant is a carrier by railroad or is controlled by or affiliated with a carrier by railroad within the meaning of Section 5(6), and the transaction involves a motor carrier, then the Commission shall not enter the order of approval and authorization "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

In addition to the showing which Section 5 requires of all carriers, Congress saw fit to impose upon railroads the further burden of showing that the transaction will benefit the public that it will promote or advance the interest of the public.

Referring to the Motor Carrier Act of 1935, we find that Section 213 thereof,* as originally framed, provided for approval and authorization by the Commission of acquisitions of control of motor carriers when such transactions were shown to be consistent with the public interest. A proviso to that section, however, required that in the case of an applicant who was "a carrier other than a motor carrier", the Commission was precluded from approving the transaction unless it found that it would: (a) "promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations," and (b) "not unduly restrain competition." Under this proviso, therefore, neither railroads nor water carriers were permitted to acquire a motor carrier without a finding by the Commission that the public interest would be promoted by enabling

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1. 49 Stat. 555.
such rail or water carrier to use service by motor vehicle to public advantage in their operations and would not unduly restrain competition.

Section 213 of the Motor Carrier Act was substantially re-enacted into Section 5(2)(b) of the Interstate Commerce Act when the Transportation Act of 1940 was enacted. In the substantial re-enactment of Section 213 into Section 5(2)(b) only the railroads continue to have the added burden of showing in a transaction to acquire a motor carrier that the public interest will be promoted and that competition will not be unduly restrained. Water carriers, under Section 5(2)(b), are required only to show that the transaction to acquire a motor carrier will be consistent with the public interest. They are relieved of the requirements of Section 213.

Under Section 202 of the Motor Carrier Act of 1935, the policy of Congress was expressed to require the regulation of transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest. This policy was not changed by the enactment of the Transportation Act of 1940. The Commission has followed this Congressional policy consistently through the years beginning with Pennsylvania Truck Lines Inc.—Control—Barker Motor Freight, Inc. In 1938, the Commission concluded in Kansas City S. Transport Co., Inc. Comm. Car. Application that the standards contained in Section 213 (later Section 5(2)(b)) should be followed as a general rule in other situations particularly in applications for certificates of public convenience and necessity under Section 207 of the Act.

In Section 207 proceedings, the Commission as a rule will impose restrictions in certificates issued to railroads. These restrictions are imposed to insure that the service rendered under the certificate will be no more than that which is auxiliary to or supplemental of rail services. Not only the administrative, but also the judicial, current has run in favor of auxiliary and supplemental restrictions. The Supreme Court in Interstate Commerce Commission v. Parker, revealed its understanding of the Commission's obligation to consider railroad applications under Section 207 as limited to service "truly supplementary or auxiliary to the rail traffic." Also, in reversing a grant of contract carrier authority

3. 1 M.C.C. 101.
4. 10 M.C.C. 221.
5. 326 U.S. 60.
to a subsidiary of Southern Pacific, the Supreme Court made clear that the "auxiliary and supplementary" limitations are applicable to new contract carrier authority as well.6

The Interstate Commerce Act contains no special requirements which water carriers must satisfy in order to acquire a motor carrier. The Commission has ruled that the ordinary standards of Section 5(2) will apply. This is made clear from *TTC Corp.—Purchase—Terminal Transport Co., Inc.*,7 where the Commission and the reviewing court determined, upon the basis of a literal reading of Section 5(2) and after giving consideration to Congressional policy, that a water carrier acquiring a motor carrier is not required by the Interstate Commerce Act to make affirmative proof that the proposed transaction will promote, further, or advance the public interest. All that is required is that the water carrier show that the transaction is consistent with the public interest—compatible and not contradictory or hostile to the public interest.

The basic statutory provisions relating to railroad-water carrier common ownership are set forth in Sections 5(14)-(16) of the Interstate Commerce Act.8 Section 5(16) provides:

> Notwithstanding the provisions of paragraph (14), the Commission shall have authority, upon application of any carrier, as defined in section 1(3), and after hearing, by order to authorize such carrier to own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water or vessel, not operated through the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and

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7. 97 M.C.C. 380 (see also order of November 12, 1965); sustained sub nom. Atlantic Coast Line R. Co. v. United States, 265 F. Supp. 549 (N.D. Ill. 1966).

commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration: Provided, That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2)(a), the provisions of paragraph (2) shall be applicable thereto in addition to the provisions of this paragraph***

Section 5(15) confers jurisdiction on the Commission over applications filed for the purpose of determining whether existing service is in violation of Section 5(14), for the continuance of service, or for authorization under Section 5(16) of ownership, lease, operation, or control. 9

The Commission may authorize a railroad interest in a water carrier upon two statutory findings. The first is that railroad control will not prevent the water carrier or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people. The second required findings is that railroad control will not exclude, prevent, or reduce competition on the route by water under consideration. In addition to these two findings, a railroad must satisfy all of the ordinary requirements of Section 5(2).

An analysis of the cases interpreting the statutory provisions establishes that the mere interest of a rail carrier in a water carrier, or the fact that some competition exists between the rail and water carrier, particularly where the water carrier routes are, in effect, an extension of the rail lines, do not, in and of themselves, warrant a denial of an application by a rail carrier to acquire control of a competing water carrier. Also, a conclusion that some reduction in competition might result would not necessarily justify an adverse finding. It would depend on the effect of a denial. The important considerations are whether the proposed acquisition would prevent the water carrier in the future from being operated in the advantage of, and for the convenience of the people, and whether such control by the rail carrier would prevent, exclude, or reduce competition on the water routes involved. As is evident from cases, the provisos of Section 5(16), including the construction of the phrase “will not exclude, prevent, or reduce competition on the route by water under consideration” must be strictly interpreted and applied. The evidence presented must be specific in showing that the transaction would comply with the provisions of the Act.

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9. The statutory provisions covering railroad-water carrier common ownership stem from the Panama Canal Act of 1912.
A railroad applicant to acquire a water carrier thus has a heavy burden in securing Commission approval. This was made apparent by the decision of the Commission in Illinois Central R. Co.—Control—John I. Hay Co. The Commission denied the authority sought by two railroads under Section 5(2) of the Act to acquire control of Hay, a water carrier, and also to acquire control of that carrier under Section 5(16). Although the railroads represented that the water carrier would be operated independently, the Commission found not only that Hay would be controlled by the railroads, but also that Hay’s all-water service would be managed in such a way as to serve the interests of the controlling railroads and to enhance the movement of traffic on all-trail routes. The Commission thus could not make the statutory findings under Section 5(16) that the proposed acquisition of control would not prevent the water carrier from being operated in the interest of the public and with advantage to the convenience and commerce of the people. The special burden imposed by Section 5(16) is applicable only to railroads.

In the Hay case, the Commission found that the competitive advantage accruing to the water carrier because of railroad backing would be substantial, and foresaw possible complete elimination of competition on the water routes involved. It also found that the fears of protestants that Hay’s acquired advantages would be so great as to jeopardize their competitive position, and the continuance of independent water operations, were well-founded. It, therefore, concluded that it could not find that the transaction proposed, if approved, would not exclude, prevent, or reduce competition on the water routes under consideration, or that it would be consistent with the public interest.

There have not been any contested applications subsequent to the Hay case, where one or more railroads has sought to acquire a water carrier, and the law, insofar as the Commission is concerned, now seems settled that opposing water carriers may successfully block an acquisition by a railroad if there would be a substantial reduction in the competitive position of such competing water carriers.

Congressional policy of promoting the development of different modes of transportation independent of conflicting interests has been carried forward into Part IV of the Interstate Commerce Act. The pertinent provisions in Part IV are:

Section 410(c). The Commission shall issue a permit to any qualified applicant therefor . . . No such (freight forwarder) permit shall be issued to any common carrier subject to part I, II.

or III of this Act: but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to part I, II or III of this Act, shall be denied because of the relationship between such corporation and such common carrier.

Section 411(a)(1). It shall be unlawful for a freight forwarder, or any person controlling, controlled by, or under common control with a freight forwarder, to acquire control of a carrier subject to part I, II, or III of this Act: except that this subsection shall not limit the right of any carrier subject to part I, II, or III of this Act to acquire control of any other carrier subject to part I, II, or III of this Act in accordance with the provisions of section 5 of part I of this Act.

Section 411(c). After the expiration of six months from the date of the enactment of this part it shall be unlawful for any director, officer, employee, or agent of any common carrier subject to part I, II, or III of this Act or of any person controlling, controlled by, or under common control with such a common carrier, in his or their own personal pecuniary interest, to own, lease, control, or hold stock in, any freight forwarder, directly or indirectly; but this subsection shall not forbid or preclude the holding of a director's qualifying shares of stock from which no personal pecuniary benefit is derived by the holder.

Section 411(g). Nothing in this Act shall be construed to make it unlawful for any common carrier subject to part I, II, or III of this Act, or any person controlling such a common carrier, to have or acquire control of a freight forwarder or freight forwarders; and in any case where such control exists, no rate, charge, classification, rule, regulation, or practice of the common carrier or of any freight forwarder controlled by such common carrier or under common control with such common carrier, shall be held unlawful under any provision of this Act because of the relationship between such common carrier and such freight forwarder.

Under Section 410(c) no freight forwarder permit “shall be issued to any common carrier subject to part I, II, or III” of the Act. However, if an application is made under Section 410(c) “by a corporation controlled by, or under common control with, a common carrier subject to part I, II, or III” it shall not be denied “because of the relationship between such corporation and such common carrier.”

Section 411(g) has been construed as allowing a person to directly
control both freight forwarders and a carrier or carriers under parts I, II, and III of the Act, notwithstanding the prohibition in Section 411(c). This construction implies that the controlling person's interest in a freight forwarder or forwarders would not be adverse to the other carriers within the apparent intent of Section 411(c).

In Ownership of Stock in Freight Forwarders,\(^\text{11}\) Sections 411(c) and 411(g) were said to have been intended to allow a carrier to conduct forwarder operations through a subsidiary but that the carrier's control of the forwarder must be direct rather than indirect through common officers. In Ownership of Stock in Freight Forwarders, the proceeding was dismissed against respondent Bacon, who had control of two motor carriers and a minority stock interest in a freight forwarder, after he acquired a controlling interest in the freight forwarder. Bacon's acquisition of the controlling interest in the freight forwarder was considered to have rectified what had previously been an unlawful situation. In considering the provisions in Part IV of the Act, the Commission stated:

In the case of seeming conflict in the provisions of a statute, the construction should be such that both provisions, if possible, may stand. United States v. Moore, 95 U.S. 760, 763. Repugnancy in a statute should, if practicable, be avoided, and if the natural import of the words contained in the respective provisions tends to establish such a result, resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the lawmaker. Lamp Chimney Co. v. Brass & Copper Co., 91 U.S. 656, 663. And in United States v. Louisville & N.R. Co., 235 U.S. 314, the Court, at page 326, recognized "the rule which requires that a practice which is permitted by one section should not be prohibited on the theory that it is forbidden by another."

It is to be noted that section 411(g) provides a rule of construction with respect to provisions of the act concerning certain forwarder relations. Where in an act it is declared that it shall receive a certain construction, the courts are bound by that construction, though otherwise the language would have been held to mean a different thing. Smith v. State, 28 Ind. 321, 325. See also United States v. Gilmore, 75 U.S. (8 Wall.) 330, wherein the Court impliedly considered as binding upon it a provision in an act

\(^{11}\) 265 I.C.C. 75.
of Congress that said act should not be construed in a certain
designated manner.***

From the foregoing it follows that section 411(g) is to be
observed as the controlling rule of construction in ascertaining the
meaning of section 411(c), and in the event the conflict between
these paragraphs is irreconcilable, the provisions of section 411(c)
must yield to those of section 411(g). Farmer's Bank v. Hale, 59
N.Y. (14 Sickels) 53.

An examination of the first clause of the language found in Section
411(a)(1) shows that it constitutes an absolute prohibition against "a
freight forwarder, or any person controlling, controlled by, or under
common control with a freight forwarder" acquiring control of a
carrier subject to Part I, II, or III of the Act. The second clause,
however, constitutes an exception to the absolute prohibition. The
language states that Section 411(a)(1) "shall not limit the right to any
carrier subject to part I, II, or III" of the Act "to acquire control of
any other carrier subject to part I, II, or III" under provisions of
Section 5.

Section 411, according to its legislative history, was drafted to guard
against freight forwarder direct domination of other carriers. The
exception to 411(a)(1), however, which is similar to that adopted in the
passage of the Panama Canal Act, appears to be intended to make
inapplicable the prohibition in the first part of 411(a)(1), where the
transaction falls within the limits provided therein. In construing this
statutory language, the Commission has used the same construction
applied by it in determining the meaning of Section 411(c). While
bearing in mind that a freight forwarder may not acquire control of a
carrier, it has construed Section 411(g) and the exception in Section
411(a)(1) together and observed the former section as the controlling rule
of construction in ascertaining the meaning of what would appear to be
conflicting sections. Under this construction it has determined that a
Part I, II, or III carrier, which is under common control with a freight
forwarder, may properly acquire control of a Part I, II, or III carrier.

The Commission gave consideration to the language of Section
411(a)(1) in Howard Term.—Control—El Dorado Motor Transp. Co.,12
where it is stated that the exception in Section 411(a)(1) is a saving
clause. There the vendee, which was a freight forwarder and motor
carrier, was authorized to purchase the operating rights of another
motor carrier after the vendee had transferred its freight forwarder

12. 70 M.C.C. 494.
authority to a subsidiary corporation newly created to receive such authority, and the stockholders of the vendee authorized to assume control of the vendor, another motor carrier. In a subsequent proceeding the merger of the vendor and vendee motor carrier was authorized. It was the view in that proceeding that, although authority might not be given to a freight forwarder to acquire direct control of a motor carrier because of the prohibition in Section 411(a)(1), the Commission was free to authorize a motor carrier which controls a freight forwarder to acquire control of another motor carrier and to authorize the controlling stockholders of the parent company to gain control of the acquired motor carrier. This same approach was followed in Calore Exp. Co., Inc.—Control and Merger.13 There it is stated, “Since Calore (R.I.) already controls Calore (Mass.) and Joseph C. Calore already controls both motor carriers and a freight forwarder, and since all three carriers are the alter ego of Joseph C. Calore, we do not believe the interest of Joseph C. Calore in the freight forwarder is or will be adverse to that of the motor carriers as contemplated by the statute.”

13. 87 M.C.C. 379.
CONTROL OF AIR CARRIERS

ROBERT N. KHARASCH* AND OLGA BOIKESS**

Introduction

Under the Federal Aviation Act of 1958, 49 U.S.C. 1301 et seq., the Civil Aeronautics Board has broad powers to regulate consolidations, mergers and acquisitions of control of air carriers. The statutory provisions are extensive in scope and intensive in application. Both intra-modal and inter-modal common ownership and control are subject to the Board's approval, and, with the latest amendment, the Board's jurisdiction now extends to approval of a non-carrier acquisition of control of an air carrier.

This paper cannot, of course, deal with all the Board's operations within this statutory framework. We can, however, describe the outlines of Board regulation, and trace some of the major current developments which illustrate the Board's struggles to work with its unusually complete kit of statutory tools.

Issues of carrier control are issues of competition. In common with all American regulatory statutes, the Federal Aviation Act embodies conflicting Congressional directives. Reduced to its lowest terms, the standard Congressional formula is: (1) competition is good and (2) competition is bad. A regulatory agency is then created to apply these two clear legislative directives in the light of the public interest. The Civil Aeronautics Board is the agency charged with this task in the field of air commerce.¹

The Board's regulatory task is more than usually sensitive because it

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¹ "However, the Board, at one and the same time, has to so regulate the carriers that competition is both encouraged and limited. It is encouraged to the extent that it is economically feasible and in the public interest. It is limited to the extent that it is neither economically feasible nor in the public interest." Acquisition of Control of Air Carriers, House Report No. 91-261, 91st Cong., 1st Sess., p.3.

¹ "The doctrine of controlled competition, which seemed to emerge as the theory of the Motor Carrier Act, can also be recognized as the basis of the Civil Aeronautics Act; its contradictory elements are stated in paragraphs (c) and (d) of the policy declaration and recur in the legislative history." Fulda, Competition in the Regulated Industries: Transportation (1961), p. 16.
deals with a rapidly growing industry. One of the Board’s principal jobs is to promote and encourage the growth of its industry. In contrast, Interstate Commerce Commission regulation of railroads, for example, does not have as a major goal the building of new railroads.

The Board’s promotional aims have a profound influence on its resolution of issues of control. Particularly when surface carriers seek to acquire or control air carriers, the fear that the growth of air commerce may be stunted becomes a principal matter for discussion. The Board’s very recent dealings with proposals by motor carriers to enter the business of air forwarding offer an excellent example both of the traditional clash between doctrines of competition and non-competition, and of the influence of promotional aims on the Board’s decisions. Thus, after describing the statutory framework and some of the Board’s past interpretations and methods, we will consider the Motor Carrier-Air Forwarder controversy as the best current example of the Board’s regulation of air carrier control.

1. **The Statutory Framework**

The Declaration of Policy of the Federal Aviation Act of 1958 appears in Section 102, 49 U.S.C. 1302, which reads:

“...In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust...

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2. “When Congress enacted the Civil Aeronautics Act of 1938, it intended to prevent the control of the struggling airlines by those engaged in a competing form of transportation.”—Motor Carrier—Air Freight Forwarder Investigation, Opinion on Remand, April 21, 1969 (Order 69-4-100).
discriminations, undue preferences or advantages, or unfair or destructive competitive practices:
(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense:
(e) The promotion of safety in air commerce; and
(f) The promotion, encouragement, and development of civil aeronautics."

Some of these Congressional directives—such as the preservation of inherent advantages of air transportation—are familiar from other transportation statutes. Others—such as "competition to the extent necessary to assure . . . sound development"—are unusually explicit enunciations of conflicting instructions. It is interesting to note that of the six sub-paragraphs of Section 102, five refer explicitly either to "encouragement and development" or to "promotion".

Section 408 of the Act gives to the Board its plenary powers over acquisitions of control of air carriers. As Section 408(a) now stands, it reads (49 U.S.C. 1378(a)):

"(a) It shall be unlawful unless approved by order of the Board as provided in this section—
(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;
(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;
(3) For any air carrier or person controlling an air carrier to

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3. For example, the National Transportation Policy, 49 U.S.C.A. note preceding Section 1, begins: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each . . . ."

4. The Board deals with "interstate air transportation", "overseas air transportation", and "foreign air transportation"; and with trunk carriers, local service carriers, supplemental carriers, all-cargo carriers, foreign air carriers, indirect air carriers and so on. We make no pretense here of complete treatment of regulation of all types of air carriers.
purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier:

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics:

(5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: Provided. That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest:

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection."

Section 408(a)(5) is new matter, changed in 1969 by P.L. 91-62, discussed below. Also added at the same time were: (i) a requirement that any person owning more than five per cent of an air carrier report such ownership to the Board (Section 407(b), 49 U.S.C. 1377(b)); and (ii) a new subsection 408(f), 49 U.S.C. 1378(f), creating a presumption that the ability to vote ten per cent of the outstanding voting securities of an air carrier is control of the air carrier.

Section 408(a) differs in several important respects from the less stringent provisions of other transportation statutes. Thus:

(i) Section 408(a) covers not only control relationships among air carriers, but also (a) relationships between air carriers and common carriers by other modes, and (b) relationships between air carriers and any person engaged "in any other phase of aeronautics." "Aeronautics" in turn is defined (Section 101(2), 49 U.S.C. 1301(2)) as "the science and art of flight." Thus, relationships between a motor carrier and an air carrier are covered, as are relationships between an aircraft manufacturer and an air carrier.

(ii) As amended in 1969, Section 408(a)(5) extends to any person acquiring control of an air carrier, whether or not such person has any other surface carrier links.
Since Section 408(a) requires prior Board approval, the Board has developed a "Sherman doctrine" calling for disapproval of any relationship consummated prior to submission to the Board. 5

While Section 408(a) is broad in scope, the Board's powers to approve are limited by Section 408(b) and its three provisos. 6

"(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: Provided further, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public

5. "An application under 408 or 409 will not be considered by the Board for approval so long as the action or relationship exists in apparent violation of the Act, whether or not the action or relationship in question would ultimately be found to be consistent with the public interest." Sherman, Control and Interlocking Relationships, 15 C.A.B. 876, 881 (1952).

6. Section 408(b) traces back to Section 5(2) of the Interstate Commerce Act, 49 U.S.C., 5(2), and its antecedents. Apparently the oldest similar statute is the Panama Canal Act of 1912, 37 Stat. 560, 566, 567, now appearing as Sections 5(14), (15) and (16) of the Interstate Commerce Act, 49 U.S.C. 5(14), (15), (16).
interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: Provided further. That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction."

In addition to the Section 408 restrictions on control, Section 409 of the Act, 49 U.S.C. 1379, extends the Board's powers to supervision of any interlocking relationships—that is to officers and directors common to two air carriers, or an air carrier and a surface carrier, or an air carrier and a person engaged in any phase of aeronautics.

The two major control sections (408 and 409) are supplemented in the Act by section 412 (49 U.S.C. 1382) dealing with agreements among air carriers, and by section 414 (49 U.S.C. 1384) conferring anti-trust immunity. Other sections give the Board extensive powers to require reports (Section 407, 49 U.S.C. 1377). Also under section 416(b) (49 U.S.C. 1386(b)) the Board may exempt air carriers from regulation and under section 101(3) (49 U.S.C. 1301(3)) may exempt indirect air carriers—e.g., air freight forwarders—from the provisions of the Act.

Naturally, these statutory provisions have given rise to extensive Board regulations, appearing in the Board's Economic Regulations as:

— Part 245 and 246 (reports of stock ownership);
— Part 251 (approval under section 409);
— Part 261 (agreements under section 412);
— Part 287 (exemption of certain interlocking relationships);
— Part 299 (exemptions from Section 408).
II. Extension and Limitation of Section 408

A. New Applications

While section 408 is extremely explicit in dealing with control of existing air carriers, there is at least one surprising omission. That is the omission to cover new applications for air carrier authority by those who are already surface carriers. Plainly, the purchase of American Airlines by the Illinois Central Railroad is covered, but a railroad application for a certificate to operate on American’s routes at least appears to be omitted.

In 1940, in *American Export Airlines—Certificate*, 2 C.A.B. 16, the Board had before it an application of a subsidiary of a steamship line for operating authority, and granted it in part. One of the issues was the application of section 408, and the Board held section 408 applicable “only when the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier.” Pan American appealed the Board’s decision, and in *Pan American Airlines v. Civil Aeronautics Board*, 121 F.2d 810 (C.A. 2, 1941), the Court held that the Board had been too literal in its reading of 408(a)(5), remanding for a 408 decision.

On remand, the Board then disapproved the steamship-airline relationship, interpreting the Court’s decision to mean that Congress intended section 408 to apply to new applicants: *American Export Lines, Control-American Export Airlines*, 3 C.A.B. 619 (1942). Following a petition for rehearing, the Board issued a supplemental opinion reaffirming its decision: *American Export Lines, Control-American Export Airlines*, 4 C.A.B. 104 (1943). This decision was followed in *Latin American Air Service*, 6 C.A.B. 875 (1946).

Upon petition of nine steamship lines seeking Board reconsideration of its interpretation of section 408, the Board reconsidered, and held in *American President Lines et al.; Petition*, 7 C.A.B. 799 (1947):

(1) That after further study “we no longer hold” that compliance with section 408 “can be considered a legal condition to the grant of a certificate”, but

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(2) That "the Board must consider the standards set forth in . . . Section 408(b) in determining the question of public convenience and necessity."

More recently, the Board has reaffirmed and followed this interpretation: *Southeastern Area Local Services*, 30 C.A.B. 1318 (1959). Thus, as matters now stand, the Board will apply the section 408(b) standards in certificate proceedings.

B. Air Carrier Control of Other Carriers

On its face, section 408(a) appears to read only in one direction: control of air carriers by air carriers, or other common carriers (or others). The section does not, however, appear to restrict acquisitions by air carriers of other interests—e.g., purchase by an airline of a railroad. It might be thought that this omission was purposeful and that the statute attempted only to protect an infant air industry from capture, and not to protect others from capture by air carriers. Nevertheless, finding a statutory gap, the Board has filled it by decision.

Thus, in the *Air Freight Forwarder Case*, 9 C.A.B. 473, 504 (1948), the Board said:

"Nowhere does Section 408 in terms forbid the control of a common carrier by an air carrier. However, for the reasons we have already stated in connection with the cases involving the common control of a surface carrier and an air carrier, we think the situation presented here is not in substance different from that where the surface carrier owns an air carrier."

Following this statement, the Board has repeatedly found jurisdiction over acquisitions by air carriers of other carriers. Thus

(i) In *Transcontinental and W.A.—Ethiopian Agreement*, 9 C.A.B. 713, the Board found 408(a)(3) jurisdiction over TWA's proposed management of a yet-unformed Ethiopian air line.

(ii) In *Trans-Caribbean Airways, Interlocking Relationships*, 34 C.A.B. 777 (1961), the Board found jurisdiction over TCA's proposed acquisition of a mass transit bus company operating in and around New York City. The Board said (34 C.A.B. at 779):

"While section 408 of the Act does not in *haec verba* make

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unlawful the acquisition of control of a surface carrier by an air carrier without prior Board approval, the Board has held that the plain intent of Congress was to make unlawful, in the absence of Board approval, any acquisition which results in an air carrier and another common carrier becoming subject to unified control [citing the Air Freight Forwarder Case]. We therefore find that the proposed transaction is subject to the provisions of Section 408, unless exempted therefrom."

(iii) When Trans Caribbean Airways proposed to acquire a Central American railroad, the Board quoted and followed the language just recited above—Order E-18893(1962).

(iv) More recently, the Board held section 408 applicable

(a) To Overseas National Airways acquisition of the Greene Line, operating a paddle wheel riverboat—Order 69-10-76 (1969);

(b) To Overseas National Airways acquisition of a passenger cruise ship—Order 69-9-133 (1969); and

(c) To Consolidated Freightways’ (a motor carrier owning an air forwarder applicant) proposed acquisition of control of Pacific Far East Lines, a major transpacific steamship cargo carrier—Order 69-9-71 (1969).

In short, the Board uniformly holds that section 408 reads both upstream and downstream.

C. ‘‘Use of aircraft to public advantage in its operation.’’

The second proviso of section 408(b) requires that the Board disapprove a surface carrier’s control of an air carrier ‘‘unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.’’ The ‘‘use to advantage’’ clause requires interpretation. If broadly interpreted, almost any surface carrier could claim that control would be to public advantage in the surface carrier’s operation. If narrowly interpreted, the proviso would be restricted to operations such as aircraft flying passengers from the deck of a passenger ship. Early in its history, the Board opted for a narrow interpretation.

In the American Export Lines, Control—American Export Airlines case cited above, 3 C.A.B. 619 (1942), the Board said of the second proviso:

‘‘This proviso is extremely restrictive and only those limited air
transport services which are auxiliary and supplementary to other transport operations, and which are therefore incidental thereto, can meet the conditions laid down by that proviso.”

But, if the second proviso is this narrow, the Board would have to prohibit almost all surface carrier-air carrier relationships, whatever public advantage might be conferred. In order to have any regulatory room to operate, some means was necessary to permit some relationships. These means the Board has found.

D. Disclaimers and Exemptions

Consider the following situation, presented in Application of Universal Airlines, Inc., Order 68-7-98 (1968):

— a holding company (UCI) owns 100% of the stock of a supplemental air carrier (UVA);
— UCI proposes to acquire 21% stock control of Bush Terminal;
— Bush Terminal owns 100% of the stock of Bush Terminal Railroad Company, a rail common carrier operating solely within 50 miles of New York City.

If section 408 applies and particularly if the second proviso of section 408(b) applies—then the acquisition may be barred. But, quite plainly, a terminal railroad and a supplemental air carrier do not compete, and there is no logical reason why the acquisition should not be permitted. Faced with these facts, the Board decided “to disclaim jurisdiction over UCI’s common control of UVA and Railroad and the interlocking relationships described herein.” While noting that it had held that “in appropriate circumstances it will disregard the separate corporate entities where failure to do so might defeat the legislative purpose of sections 408 and 409” the Board achieved its disclaimer of jurisdiction by deciding “to recognize and respect the several corporate entities involved.” In other words, if section 408 is read literally, and no corporate veils are pierced, the Board would have no jurisdiction.

The Universal Airlines disclaimer is not unique. For example, in Studebaker Corporation, Disclaimer, 37 C.A.B. 738 (1962), the Board considered the application of section 409 (interlocks) to Studebaker’s directors who were also directors of a railroad, a pipeline, and aviation

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equipment manufacturers. Studebaker proposed to acquire all the stock of Trans International Airlines, a supplemental. If Studebaker’s control of Trans International made Studebaker an air carrier, Section 409 applied. The Board noted its power to “disregard the corporate entity and treat Studebaker as TIA’s alter ego.” But, under the circumstances it determined “to recognize and respect the corporate entities,” and disclaimed jurisdiction.

As a procedural device, the disclaimer of jurisdiction is a workable means of disposing of trivial control problems without hearings. Still, there is not much intellectual satisfaction to be found in a procedure which works only by determining the transparency of corporate veils. Thus, in several recent cases the Board has firmly refused to disclaim jurisdiction, and has instead granted exemptions pursuant to section 416 of the Act.

For example, in Trans Caribbean Airways, Interlocking Relationships, 34 C.A.B. 777, where TCA proposed to acquire a local bus company, the Board found “that enforcement of Section 408 would be an undue burden upon TCA by reason of the limited extent of its operations, and is not in the public interest.” TCA was then “exempted pursuant to section 416(b) of the Act from the provisions of Section 408 thereof to the extent necessary . . .”

In another TCA case the Board examined TCA’s proposed acquisition of International Railways of Central America. Holding section 408 applicable, the Board found “that the transaction does not involve an undesirable combination, restraint of competition or conflict of interest.” An exemption pursuant to section 416(b) was granted—Order No. E-18893 (1962).

Disclaimers and exemptions are not the only routes to approval without hearing. When Consolidated Freightways, owning both a motor carrier and an air forwarder applicant, proposed to acquire Pacific Far East Lines, a steamship company, the Board issued an “order of Tentative Approval”—Order 69-9-71 (1969). In this order, the Board recites a number of contentions as to the difference between carriage of cargo by sea and by air, including cargo weight, transit time, frequency of service, and so on. It concluded: “There appears to be no reasonable expectancy of effective competition in the immediate future between PFEL’s operations and those of [air forwarder].” The tentative order of approval (permitting an opportunity for those objecting to file comments or seek a hearing) was then issued under the third proviso of section 408(b).

None of the foregoing should be taken to mean that the Board is
currently applying section 408 so flexibly as to permit all kinds of common control. For example, in Acquisition of Los Angeles Airways, Inc. by Westgate-California Corporation, Docket 19855 (Order 69-141 (1969), affirming Examiner Stodola's decision of October 14, 1968), the facts were:

(i) Westgate-California, a conglomerate holding company, owned 90% of the taxicabs in Los Angeles, provided airport limousine service, and engaged in air freight trucking.

(ii) Westgate proposed to purchase

(a) control of Los Angeles Airways, a helicopter carrier, and

(b) all of the property of an air taxi operator.

The Examiner's decision begins by finding Westgate a common carrier and "the real party in interest." As a common carrier, Westgate had to meet the stiff terms of the second proviso of 408(b). This it failed to do, because it did not show it would use aircraft to public advantage in its operations. On the contrary, the Examiner felt that "common control of competing transportation activities would give rise to conflicts of interest that might impair the development of the kind of transportation LAA was certificated to provide." Application denied.

Throughout the disclaimers, exemptions, grants and denials under section 408 there runs a common thread: the protection of the air carrier from adverse outside influences, particularly the noxious influence of surface carriers. Where the surface and air carriers involved in the control relationships are in no way competitive, the Board very practically finds a way to approve.

There is a certain paradox in application of the second proviso of section 408(b). The proviso permits surface carrier control only of an air carrier it can use to advantage in its operations. Yet, once the surface carrier approaches a close working relationship with an air carrier, the spectre of competition is raised and denial is highly likely. At the same time, very remote competitive relationships (where aircraft could not possibly be used to advantage in running a belt railroad) are approved. This is not to say the Board was wrong, but only that sensible results do not fit well with the statutory language.

In short, if for no other reason than to codify the Board's doctrines, section 408 could undergo some legislative tightening. The latest changes in the section, which we next consider, did not do this, but did add a remarkable new area to the Board's jurisdiction.
III. The 1969 Amendments

Formerly, section 408(a) of the Act extended only to acquisitions of control of an air carrier by another air carrier, another common carrier, or a person engaged in a phase of aeronautics. Since August 20, 1969, when P.L. 91-62 was approved, subsection (a)(5) extends to control of an air carrier by "any other person."

The legislative history of the 1969 amendments reveals considerable concern over takeovers of certain airlines by "undesirable" interests such as gamblers and rumored underworld interests. In the face of this threat, the existence of loopholes in the regulatory power of the Board to deal with airline takeovers possibly harmful to the airline industry were brought to Congressional attention. Section 408 offered no protection, since it covered only acquisitions by other air carriers, other carriers or other persons concerned with aeronautics. Section 401, 49 U.S.C. 1371, restricting the transfer of operating certificates without Board approval, was no help, since it was not applicable where control was effected by transfers of stock ownership. As a result, the Board's only remedy lay in the difficult and time-consuming procedure of attempting to revoke the operating certificate under Section 401 in the event it felt the new management posed a threat to the public interest. In the interim, the new management might do considerable damage to the carrier. Moreover, there was considerable doubt of the Board's practical ability to revoke certificates since Section 401(g) provides that a certificate can be revoked only after notice and hearings, and only when a carrier intentionally fails to comply with the statute or Board orders, rules or regulations.


By the time the Bill had emerged from Conference, the particular situations of threatened acquisitions which had lent urgency to the measure were resolved. Congressional Record, Vol. 115, August 7, 1969, p. H7156.
Public Law 91-62 also reflects the growing Congressional concern over the activities of acquisitive corporate conglomerates. The Senate report noted that the "trend toward acquisition of control of many diverse economic interests by single-corporate entities has accelerated markedly in recent months." Congressman Brock Adams summarized the possible dangers to the health of the air industry posed by conglomerate acquisition as follows:

"[R]aiders on the air-carriers ... buy out a company in a particularly good cash position, drain the cash and use the cash for other of their operations. This is the traditional attack of the conglomerates on companies in cash positions. And we understand the air carriers are in a vulnerable position because they must accumulate large amounts of cash in order to update their equipment."

Congress might have attacked the problem of corporate takeovers by conglomerates as a whole, rather than proceeding piecemeal, beginning with a regulated industry. In enacting P.L. 91-62, Congress decided to move ahead at once with respect to air transportation with the stated reasons being the government's "investment" of subsidy in the industry, and the longstanding public concern with fostering the industry's development. In this view, conglomerate takeovers posed exactly the sort of danger to air carriers that regulation had been designed to prevent—i.e., control of air carriers by those without single-minded dedication to promoting air commerce.

One of the chief fears reflected in the Congressional hearings on the legislation were that the CAB would find itself in the business of regulating conglomerates as well as airlines. This might conflict with the Board's traditional regulatory role as an agency protecting and regulating air commerce exclusively. Moreover, there was considerable discussion as to whether the new amendments provided the Board with the needed standards. As Senator Pearson pointed out:

"... the bill does not provide any criteria for weighing public interest in the acquisition of an air carrier by a noncarrier not engaged in any phase of aeronautics. While the Federal Aviation

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13. "To further such development [of air transportation], we have not only regulated the economic activity of carriers, but have, as well, extended subsidies and other aids to facilitate appropriate development. The interest and investment of the public in our transportation system must be protected." Senate Report at 211.
CONTROL OF AIR CARRIERS

Act of 1958, as amended, does provide criteria for measuring the public interest, those criteria were specifically designed for determining only the merits of acquisitions involving two or more carriers, or a carrier and one engaged in a phase of aeronautics." 14

This concern was intensified by discussions as to the effect of Board approval of conglomerate acquisitions of control under Section 414, 49 U.S.C. 1384.

Section 414 provides for relief from operation of the antitrust laws for persons affected by CAB orders under section 408 "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order." Thus, not only on issues of approval of a takeover but also possibly on questions as to what constituted "control", the CAB might move far into the antitrust field. 15

Although not persuaded that the standards of sections 102 and 408(b) were ideal, the Department of Justice declined to recommend amendments to the substantive standards of the Act in light of "the precedent and the record which the Board has established in administering the criteria." This was coupled with an expression of faith "that the CAB [would] continue to be properly attentive to competitive considerations in evaluating future acquisitions subject to Section 408." 16

Most of the standards of section 102 speak towards the promotion of air transportation. Section 102(d), which does mention competition, likewise puts it in the context of the development of an air transportation system. In Section 408(b) the first proviso requires that the Board shall not:

"approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition.


15. Congress did not insert a proviso in PL-91-62 as urged by the Justice Department explicitly stating that CAB orders approving acquisitions should not preclude action under other anti-trust laws dealing with the effects of the acquisitions in industries outside air transportation. However, the House, Senate and Conference Reports all included strong statements that the new legislation was not intended to either diminish or increase the scope of relief then afforded by § 414 or the coverage of other anti-trust laws. See Senate Report at 1212; House Report at 4-5; Conference Report at 1221-22.

16. Letter to Congressman Staggers from Richard W. McLaren, Assistant Attorney General Anti-trust Division, April 4, 1969, House Hearings at 63-64.
but this is followed by the language:

"[which would] . . . jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control."

Thus, although on balance the Justice Department expressed agreement with the legislation, during the Senate hearings Mr. McLaren, Assistant Attorney General, Antitrust Division, was concerned that:

"[U]nder such legislation anticompetitive effects outside the air transportation industry either would receive no scrutiny at all or would be considered only by an agency with no experience in, or responsibility for the maintenance of competition outside of air transportation. Moreover, even if the CAB did scrutinize the competitive effects in other markets it would do so under a "public interest" standard of the Aviation Act. The result would be the application of different legal tests to transactions having identical efforts in nontransportation markets, depending on whether an air carrier was collaterally involved."17

Again in the House hearings, Mr. McLaren said:

"[T]he CAB Act contains an antimonopoly proviso and that to me may fall short of standards that ought to be applied in such cases."18

Some nice problems in this field will arise if the new provisions of § 408(a)(5) are integrated into the line of Board cases which read air carrier acquisitions of other carriers to be within the purview of Section 408. If the other parts of 408 apply both upstream and downstream, then the Board might argue that 408(a)(5) now affords a basis for review of acquisitions by air carriers of any other concerns.19

During the hearings, there was considerable Congressional concern that the new provisions would inhibit the financial security and growth of air carriers, especially the smaller carriers, the air-taxi operators, etc. Under these provisions such carriers might have difficulty securing investments or raising needed capital. The resulting tension between this

17. Senate Hearings, at 76-77.
19. A related question as to whether the legislation would cover the establishment of a holding company by an airline was briefly touched upon in an exchange between Senator Cotton and Mr. Tipton, President, Air Transport Association, during the Senate Hearings at page 69.
policy and the determination to prevent takeovers of air carriers by undesirables is reflected in the proviso to 408(a)(5) allowing the Board to exempt acquisitions of a noncertificated air carrier from requirements of approval.\textsuperscript{20} This same concern also figured largely in the debates as to the percentage of voting securities or capital to which the presumption of control would attach.

In addition, the hearings raise a number of other interesting questions sure to receive Board attention in the next few years. Even without the presence of the new amendment, the Board has had no dearth of major questions of control policy. And, as we next show, in the latest decisions there are indications of a lessening fear of the dangers of intermodal control.

\textbf{IV. The Motor Carrier-Air Freight Forwarder Investigation}\textsuperscript{21}

Air freight forwarders consolidate air cargo shipments and forward them under their own air waybills in the aircraft of direct air carriers. They are thus the airborne equivalent of freight forwarders regulated by Part IV of the Interstate Commerce Act.\textsuperscript{22} or the “non-vessel operating common carrier by water” under the Shipping Act.\textsuperscript{23}

While air freight forwarders are not specifically mentioned in the Federal Aviation Act of 1958, they are treated as “indirect air carriers” defined in section 101(3), 49 USC 1301(3). The Board’s jurisdiction over air forwarders has been judicially approved: \textit{American Airlines et al. v. Civil Aeronautics Board}, 178 F.2d 903 (C.A. 7, 1949).

The proviso to section 101(3) gives the Board power to relieve indirect air carriers from the provisions of the Act. Utilizing this proviso, the Board’s economic regulations, Part 296, relieve air forwarders from the requirements of notice and hearing prior to receiving a certificate of public convenience and necessity, and forwarder operating authorizations may be issued without hearing (Part 296.43). Air forwarders are not, however, exempted from most of the other regulatory provisions of Title IV of the Act, including sections 408 and 409.

The natural question is, if section 408 applies to air forwarders.

\textsuperscript{20} This provision also reflects a concern that the Board should not be overburdened with hearings on acquisitions of control, \textit{Conference Report} at 1221.

\textsuperscript{21} Readers of this section are warned of a possible conflict of interest on the part of the authors, whose firm has represented and does represent surface carrier applicants for air forwarder authority.

\textsuperscript{22} 49 U.S.C. 1001 et seq.

\textsuperscript{23} Determination of Common Carrier Status, 6 F.M.B. 245 and 287 (1961).
whether the second proviso of section 408(b) applies to surface carrier acquisition of air forwarders? If so, a surface carrier would have to demonstrate that it would use aircraft to public advantage in its operations. In the original *Air Freight Forwarder Case*, 9 C.A.B. 473, 502 (1948), the Board held the second proviso inapplicable to acquisitions of forwarders. The natural reason for the holding was that the proviso was not intended to apply, because a forwarder cannot itself use aircraft in its operations. The Board’s interpretation was upheld in *American Airlines v. Civil Aeronautics Board*, 178 F.2d 903, 909 (C.A. 7, 1949), and the Board reaffirmed in it the *Air Freight Forwarder Investigation*, 21 C.A.B. 536, 545 (1955) and 23 C.A.B. 376, 378 (1956).

In its first *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), the Board applied the policy of section 408 to air forwarder applications and approved four surface forwarder applicants. At the same time, control of an air forwarder by a surface forwarder was held subject to section 408 (with the second proviso of 408(b) not applying) and 408 approvals were issued. Ten air freight forwarder applicants in the case were related to motor carriers (only three of which were Class I carriers, and those with geographically limited operations); these 10 prevailed. The railroad-controlled applicants were not as fortunate, and on the reasoning that railroads would protect their large fixed investments instead of promoting air forwarding, their applications were denied “particularly in the light of the provisions of section 408.”

Railroad affiliates were successful one year later in the *Air Freight Forwarder Case (International)*, 11 C.A.B. 182 (1949), and again in the *Air Freight Forwarder Investigation*, 21 C.A.B. 536 (1955). In contrast, the Railway Express Agency was unsuccessful: *Railway Express, Airfreight Forwarder Application*, 27 C.A.B. 500 (1958).

In 1964, motor carriers of household goods received authorization to forward such goods by air in *Airfreight Forwarder Authority Case*, 40 C.A.B. 673 (1964). The Board noted that it had prohibited entry by surface carriers into air forwarding “where it appeared that such conflicts of interest would arise between air and surface operations as to result in material diversion of traffic from air to surface

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25. *The Air Freight Forwarder Case* was followed in *Braunart et al. Interlocking Relations*, 19 C.A.B. 456 (1954). Examiner Keith interpreting the precedent as holding that “motor carrier affiliates, especially those of a local pickup and delivery character, would be useful to the applicants in bringing cargo to their consolidation points and in distributing shipments from break-bulk points” (19 C.A.B. at 461).
transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding." Finding no such elements present, it granted the applications.

Next, in 1965, the Board’s staff, acting under delegated authority, disapproved common control of a motor carrier of refrigerated commodities and an air forwarder applicant: Telstar Air Freight, Inc., Order E-22479 (1965). Reading the Board’s precedents restrictively, the staff was "unable to find that approval of the relationships would not be inconsistent with the public interest."

Meanwhile, the rapid yearly growth of air cargo had stimulated truckers' interest. Denied access to direct control of air carriers by the second proviso of section 408(b), four long-haul truckers sought air forwarding authority. The stage was thus set for a major battle, with the stated issue: "whether long-haul motor carriers of general commodities should be granted entry into the airfreight forwarding field" (Order E-23117 (1966)).

Round one went to the applicants. The April 27, 1967 Initial Decision of Examiner Ruhlen in Motor Carrier—Air Freight Forwarder Investigation considered the number of existing forwarders (137 in 1967), the growth of air cargo, unused air freight capacity, and the proposals of the various applicants to establish new forwarder service, either themselves or through subsidiaries. He concluded that the "well-financed" organizations of the applicants "would contribute a substantial benefit to the public", that existing forwarders would suffer only "minor losses" from diversion, that conflicts of interest would not divert air cargo to surface transport, and that the applicants would not dominate direct air carriers. The Initial Decision would have granted all applications, together with all section 408 and 409 approvals required.

The Board’s decision of September 22, 1967 (Order E-25725) affirmed the Examiner, Vice Chairman Murphy dissenting. The Board opinion is short (10 pages) and notes (1) trucker incentive to ship by air if forwarding authority is granted; (2) the incentive for intermodal air-truck carriage; (3) the availability of the applicants' "traffic generating capabilities" to stimulate air transportation, thus filling available air cargo space; and (4) the development of new markets aside from the major cities. In his dissent, the Vice Chairman advised "that one does not send a rabbit to market for lettuce" and that the "clearly defined conflicts of interests" of truckers "may bring about anti-competitive results rather than free competitive benefits." Round two to three of the four applicants.\footnote{One of the four applicants was unsuccessful, the Board deciding to await further proceedings dealing with control of the applicant by a motor carrier holding company.}
Round three went to the existing forwarders. On appeal, *ABC Air Freight Company v. C.A.B.*, 391 F.2d 295 (C.A. 2, 1968), the Court reversed. Judge Friendly's opinion holds:

1. The Board decision did not "measure up to the standards required by Section 8(b)" of the Administrative Procedure Act. The most serious deficiency found was the ambiguity of the decision—whether it merely granted four applications, or whether it "established a policy of entry for all truckers."
2. Until the Board decision under review, the Board's policy was to study particular applications to assure no material air-to-surface traffic diversion, and to assure conscientious promotion of air cargo. This policy was reversed without adequate explication.
3. The Board failed to make adequately supported findings as to conflict of interest, or as to public advantages anticipated.

Judge Moore, concurring reluctantly, was willing to have the case sent back to resolve any ambiguity (he seeing none), and to have the Board "buttress its position with further facts and findings."

Round 4 found the case back at the Board, with a 37-page Opinion on Remand (Order 69-4-100, April 21, 1969). Finding first a need for a new policy, the Board then noted the "alarming" increase in excess air carrier freight capacity and the need for a "dramatic" air freight breakthrough. Many existing air forwarders were found to lack necessary capital, while the applicants were large and well-financed, able to penetrate secondary markets, and capable of stimulating "an immense growth in air freight." Reconsidering the conflict of interest problem, the Board found that each of the three successful applicants met the test of conscientiously promoting air transport and indeed were anxious to shift small shipments to air. Then, announcing a controlled experiment, the Board said:

"The time has come, the Board believes, to test the conflicts hypothesis in a controlled experiment. . . . During the experimental period, the Board will receive from the applicants special reports showing whether the applicants are stimulating offline business, increasing traffic from outside present terminal areas, and receiving new traffic. . . ."

"If other trucking-related enterprises can show that they are equally dedicated to air cargo promotion, they too will be eligible to participate in the experiment under the terms of the proposed regulations issued today."\(^{27}\)

\(^{27}\) The proposed regulations appeared in the Board's April 21, 1969 Notice of
Finally, the Board reviewed possible impact on existing air forwarders and concluded "the case for protectionism is far more speculative than the case for competition. And to the extent necessary, competition is also the preferred statutory goal."

Vice Chairman Murphy again dissented, urging that "the trucker applicants are not essential to the continued healthy growth and expansion of the air freight market . . . the monitored entry procedure is to all intents and purposes free entry upon recital of the required incantation."

Round 5, and thus far the last round, again went to the applicants. The second Court of Appeals decision in *ABC Air Freight Company v. Civil Aeronautics Board*, (C.A. 2, October 25, 1969, Docket No. 33623), considers both the Board's Opinion on Remand and the rule-making proceeding instituted by the Board. The Court declared itself satisfied with the Board's opinion, warning that it expected the Board to demand the promised performance, and to "take the condition of the independent forwarders into proper account." As for the proposed rule-making, the Court declined to interfere.

Thus, after two Board and two Court opinions, the controlled experiment is about to begin. Judging from a number of recent public expressions by Department of Transportation officials and others, the *Motor Carrier—Air Forwarder Case* may be only the first of several efforts to extend the bounds of permissible common control of air and surface carriers. 28 If nothing else, the *Motor Carrier—Air Forwarder Case* is evidence that the infant industry is growing up.

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28. In a recent speech before the Traffic Club of New York City, Paul W. Cherington, Assistant Secretary of Transportation, urged that:

"Common ownership should be permitted where improved performance characteristics of the integrated firm can be reasonably demonstrated in application for common ownership."

This speech was reported in *Traffic World*, November 22, 1969 at pages 24-25.
THE FEDERAL MARITIME COMMISSION—LATE BLOOMER IN REGULATING MERGER, CONSOLIDATION AND ACQUISITION

HAROLD E. Mesirow*

Today, the Federal Maritime Commission is as active a regulator of corporate mergers, consolidations and acquisitions as any regulatory agency. This, however, has not always been the case. Until 1962 the Commission had been quiescent in this area to an extreme. From 1916 when the Commission was created by the Shipping Act, 1916,¹ until 1962 when it asserted jurisdiction over the consolidation of the common carrier fleets of Isbrandtsen Company, Inc., and American Export Lines, Inc.,² there is no record of the Commission ever having publicly or formally acted on the matter of merger, consolidation or acquisition. The Commission’s Bureau of Hearing Counsel specifically noted in its brief in the 1962 Isbrandtsen-Export case that:

“We are aware of no case in which the Board took Section 15 action to approve or disapprove any consolidation, merger, or acquisition of control during the years from 1916 up to the outbreak of World War II. It is possible that the question was never formally presented to the Board, but it is hard to believe that during the two-and-one-half decades between 1916 and 1941 no such transactions took place.”

And nowhere is there any record of the Commission’s having attempted to assert its jurisdiction during those prewar years. Moreover, during the later 1940’s and the decade of the 50’s several consolidations of sizable companies³ did in fact take place, but there is no evidence that the companies involved sought formal approval of the Commission pursuant to Section 15, or that the Commission sought to interject itself to any degree into such matters.⁴

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³ For example, in this period States Steamship Company absorbed Pacific Transport Lines, Moore-MacCormack Line absorbed Pacific-Argentina-Brazil Line and Seas Shipping Co., and United States Line absorbed South Atlantic Steamship Co.

⁴ There can be no question but that the agency was aware of at least those consolidations involving subsidized U.S.-flag carriers, as the Commission in its then dual capacity of administering the Merchant Marine Act of 1936 and the Shipping Act had to
In truth, there has been no published or other public explanation for the Commission’s inaction in this field. No doubt, this stemmed in some measure from the fact that the Shipping Act, which the Commission is charged with administering, does not state in express terms that all mergers, consolidations, etc., involving carriers subject to the Act must be approved by the agency. Rather, because of the peculiar problems of the international shipping trade caused by the unique organizations known as “steamship conferences” and the sophisticated anti-competitive devices they developed, Congress in enacting the Shipping Act couched the Commission’s authority over anti-competitive activities in relatively broad terms. Thus, Section 15 of the Act provides, in pertinent part:

“That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term ‘agreement’ in this section includes understandings, conferences, and other arrangements.

“The Commission shall by order, after notice and hearing,
disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations."

A fresh observer would undoubtedly be quick to comment that the language of Section 15 clearly appears to embrace mergers, consolidations and the like, particularly in its reference to agreements "controlling, regulating, preventing, or destroying competition." There has been, however, a strong dispute over that point which was not settled until the Ninth Circuit specifically ruled in 1968 that the Commission has jurisdiction under Section 15 to consider merger agreements.\textsuperscript{8} The protracted fight against such a ruling was led first by the Commission's own Bureau of Hearing Counsel, which was subsequently joined by the Department of Justice and carrier opponents of particular proposed mergers or consolidations. A prime basis for their fight lay in the fact that Commission approval under Section 15 of any agreement carries with it exemption from the antitrust laws.\textsuperscript{9}

It was in all probability the desire of the parties to the Isbrandtsen-Export consolidation to obtain such antitrust immunity which sent them to the Commission in 1960 seeking approval under Section 15 of their complicated agreement, the net effect of which was to bring their common carrier fleets under common ownership. That transaction involved two of the bigger U.S.-flag lines which were in direct competition on one of the major United States foreign trade routes. The filing of that agreement actually marked the beginning of active, public involvement by the Commission in merger, consolidation and acquisition endeavors of the steamship industry. And presumably to insure that

\textsuperscript{8} Matson, Navigation Co. v. Federal Maritime Commission, 405 F.2d 796 (9th Cir. 1968).

\textsuperscript{9} "Every agreement, modification, or cancellation lawful under this section or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto."
involvement by the Commission. Isbrandtsen and Export added to their transaction an agreement not to compete, which on the basis of past Commission action clearly brought their agreement before the Commission.

While the *Isbrandtsen-Export* case and, indeed, the sparse litigation involving consolidation efforts which followed, dwelt more on the matter of Commission jurisdiction than any other issue, they provide a good insight into how the Commission has reached its present posture as a vigilant and active overseer of carrier attempts at consolidation.

Interestingly enough, despite the fact that it had never formally, specifically treated with its jurisdiction over carrier agreements covering consolidation, and despite the great emphasis placed on the question of jurisdiction by its Bureau of Hearing Counsel, the Commission was quite perfunctory in its initial consideration of the issue. Hearing Counsel’s principal argument was that the Commission lacked jurisdiction as there was no specific statutory language establishing Commission jurisdiction, as had been the practice of Congress, citing and quoting at length from the legislative history of the Act. The Commission in its initial decision, after noting (1) that Isbrandtsen and Export competed directly in service between U.S. Atlantic and Gulf Ports and ports in Southwest Asia and Africa on the Red Sea and Gulf of Aden, and (2) that the effect of the agreement would be to eliminate competition between them, claimed jurisdiction, stating simply that:

"That clear, unqualified language of section 15 of the Shipping Act, 1916 therefore requires us to approve, disapprove, cancel, or modify No. 8555."

10. The case was heard by an Examiner, after which the Commission required the record to be certified to it for initial decision, which was rendered on November 27, 1961, and published at 7 F.M.C. 15.

11. Among the fringe arguments raised was the claim that there was no way the Commission could regulate consolidations involving foreign steamship lines, which are under its general jurisdiction because they operate in the foreign commerce of the United States. The Commission did not meet this argument here, but did note in the *AML-APL-PEEL* case, *infra*, that it recognized it could not control foreign mergers. The Commission stated: "A reasonable construction of section 15 would normally exclude foreign mergers from the coverage of its provisions just as it would include domestic mergers." (11 F.M.C. 53 at 58).

12. See footnote 5, *supra*.

We hold that Congress means what it says. Congress (by section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify ‘every agreement . . . controlling, regulating, preventing, or destroying competition’. To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition except agreements of the nature of the agreement here under scrutiny, would constitute statutory amendment masquerading as statutory construction. We are not authorized anywise, with respect to particular types of agreements, (or anything else), to emasculate the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do.”

With jurisdiction disposed of, the Commission turned to the substance of the transaction, to which it applied the traditional statutory criteria set forth in Section 15. Its approval of the consolidation was, however, basically on a public interest approach and grounded primarily upon a determination that:

“To prosper, even to survive, United States-flag operation must achieve maximum operating efficiency, and the public interest demands its achievement by all lawful means.”

There was no consideration of traditional antitrust questions, per se. The Commission simply found that the consolidation would provide such efficiency, and would not harm Prudential Line, the U.S.-flag carrier with which Isbrandtsen-Export competed, stating the latter finding in conformance only with the requisites of Section 15.

Both Hearing Counsel and Prudential excepted to the initial decision, evoking from the Commission only a strong defense of its jurisdiction, and no change whatever in its holding on the substance of the agreement. The Commission’s reaction to the repeated challenge to its jurisdiction is noteworthy as it can be looked upon as the keystone of the Commission’s increasingly active and deeper participation thereafter in carrier consolidation activities. The Commission stated:

“The exceptions argue that steamship lines are not required to file such agreements with the Commission, thus being left free to

14. 7 F.M.C. 15 at 18.
15. Id. at 19.
keep this regulatory agency in the dark about such situations, even if they are wholly repugnant to the Shipping Act and the public interest. We hold, to the contrary, that such agreements must be filed with the Commission, and the Commission fully informed.

"The exceptions argue that such unfiled, unapproved agreements may be carried out by the parties without violating section 15 of the 1916 Act.

"We hold, to the contrary, that carrying out such agreements (unfiled or unapproved) violates section 15, and subjects the parties to penalties of as much as $1,000 for each day the agreements are effective.

"The exceptions argue that the Commission lacks power to approve such agreements (under any conditions whatsoever), even those which are consistent with maritime and antitrust standards and may be expected to have beneficial results.

"We hold, to the contrary, that we have, as the public interest requires us to have, power to approve such agreements, modifying them with safeguards in appropriate cases.

"The exceptions argue that we have no power to disapprove and thereby prevent such agreements, even if they will operate to the detriment of the commerce of the United States, and are contrary to the public interest.

"We cannot agree. The exceptions are overruled. An appropriate order will be entered."

The strong position taken by the Commission in the Isbrandtsen-Export case, however, had little effect on its own Bureau of Hearing Counsel which, joined by the Department of Justice and affected carriers, in the very next formal proceeding involving a consolidation agreement again vigorously challenged the Commission's jurisdiction. The decisions of the Commission in that proceeding, Agreement For Consolidation Or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc., are marked not only by detailed discussion and defense by the Commission of its jurisdiction, but also by a much more detailed and considered look into the transaction before it than in the Isbrandtsen-Export case.

The proceeding, as its title connotes, involved an agreement to merge entered into by three west coast based carriers—APL, AML and

16. 7 F.M.C. 125 at 131.
17. The Department of Justice in fact participated only on the issue of jurisdiction.
18. 11 F.M.C. 53 (1967), and 11 F.M.C. 81 (1967).
PFEL—operating in the Far East trade. It was protested by States Steamship Company, a major competitor in that trade, and Matson Navigation Company, a carrier only indirectly affected at the time of its protest, but with firm plans to soon become a major competitor in the Far East Trade. Sharing top billing with the issue of jurisdiction was the question of whether the agreement was a complete and final one which could be finally acted upon by the Commission, as the final terms of the merger were not set forth in the agreement, and were to be decided upon at a later date.

Responding to the vigorous attack on its jurisdiction, the Commission disposed of that issue on this occasion with a lengthy consideration of every facet of the matter—from legislative history and general administrative practice to antitrust implications. It thereupon reaffirmed its holding in the Isbrandtsen-Export case noting with finality:

"We find nothing inconsistent with the intent of Congress to include mergers by agreement within the scope of section 15 and our jurisdiction over Agreement 9551 under that section is clear."\(^{19}\)

It took the Commission somewhat longer to reach the matter of finality of the agreement, first bowing to the position of its then Vice Chairman that the agreement was only "an agreement to agree", but ultimately determining on reconsideration\(^{20}\) that the agreement was indeed a final one warranting Commission action under Section 15.

In turning then to its consideration of the merits of the agreement, the Commission for the first time went far beyond the standard criteria of Section 15 and dwelt at length on the antitrust aspects of the agreement. The attention which the Commission gave these issues can be attributed no doubt to the vigor of the attack upon its jurisdiction and to the holding of the Supreme Court some months earlier in \textit{Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission}, 390 U.S. 261 (1968) that "... in deciding whether to approve an agreement, the Commission is required under Section 15 to consider antitrust implications."\(^{21}\) Of its antitrust adventure the Commission noted:

"The Commission is not to measure proposed agreements by the standards of the antitrust laws, and in fact cannot decide definitely whether a contemplated transaction is forbidden under any of the ramifications of those laws; nevertheless, it may not ignore their

\(^{19}\) 11 F.M.C. 53 at 66.

\(^{20}\) 11 F.M.C. 81 (December 21, 1967).

\(^{21}\) 390 U.S. 261 at 274.
policy . . . The 'public interest' within the meaning of section 15 includes the national policy embodied in the antitrust laws. The problem is one of accommodation of section 15 and the antitrust laws. 22

The Commission's "accommodation" entailed essentially a weighing of the benefits of the proposed merger with the impact upon competition, following an extensive discussion of Section 7 of the Clayton Act 23 and cases arising thereunder. On balance, the Commission found that the benefits of merger, including administrative economies, stronger management, improved operating efficiency and economies, and better service, outweighed what it deemed only a minor lessening of competition, and the merger was approved.

The Commission's actions in this area were subjected to judicial review for the first time when Matson appealed, attacking the Commission's jurisdiction, and the holding as to finality of the agreement, as well as the merits of the proposed merger. Matson Navigation Co. v. Federal Maritime Commission, supra. As noted at the outset of this article, the court there put to rest the jurisdictional question, upholding the Commission's affirmative ruling; and the manner in which it did so added a further stimulus to active and thorough review of merger and consolidation agreements by the Commission in the future. Quoting at length from Volkswagenwerk, the court made clear that a merger or consolidation agreement is " . . . the kind of arrangement as to which expert scrutiny [by the Commission] most clearly is to be desired." 24 Its final commentary carried home to the Commission its clear duty in such matters:

" . . . to leave enforcement of antitrust policy in such cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements contrary to the intent of the Shipping Act that industry considerations must be taken into balance in judging industry arrangements." 25

The important role which the court found the Commission to hold in its consideration of jurisdiction was directly responsible for the court's further holding that the Commission had acted not on a final merger

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22. 11 F.M.C. 81 at 106.
24. 405 F.2d 796 at 800.
25. Ibid.
agreement but on an agreement to agree. Because of the antitrust immunity which Section 15 grants, the court stated that the Commission must consider and act upon not the agreement to agree but rather the "resulting merger arrangement itself that will, by virtue of Commission approval, ultimately enjoy immunity, perhaps beyond reach of any governmental power of divestiture." 26

Thus, without reaching the question of the merits of the agreement before it, the court remanded the matter to the Commission for further proceedings. The court, however, did indicate that the Commission's consideration of the merits was not as broad as it might be and it provided the Commission with additional "questions" stemming from recent holdings of the Supreme Court, 27 which it felt the Commission should consider in this and future merger cases. Those questions were:

"The question is presented whether the threat to competition posed by the merger and the consequent interference with antitrust policies is of sufficient substance to bring into play the requirement that it be justified by a serious transportation need or important public benefits.

"A second question is presented whether, under any standard, resort to merger is justified in the public interest when the only benefits that cannot as well be achieved by less restrictive and more flexible means (such as cooperative working agreements) would appear to redound to the stockholders rather than to the public." 28

Unfortunately, the Commission never got the opportunity to review those questions within the context of the AML-APL-PFEL merger, for shortly after the remand the parties to the agreement withdrew it 29 and the Commission discontinued the proceeding.

Some months later the Commission was presented with a new opportunity to exercise its authority in this area when W.R. Grace & Co. and Prudential Lines, Inc., reached an agreement providing for the sale of W.R. Grace's wholly-owned subsidiary, Grace Line, Inc., to

26. Id. at 801.
28. 405 F.2d 796, at 802, footnotes omitted.
29. By letter of March 11, 1969, counsel for the carriers wrote the Commission that:

"In part because of the further costs and delays of reopened proceedings, the three parties to the agreement have concluded that they do not at this time wish to pursue their merger plans."
Prudential. The agreement (for stock purchase) required the buyer to apply to the Commission for a ruling that no approval of the transaction is required, and if not "obtained promptly" to apply for approval of the agreement. The agreement was filed on July 28, 1969. Although there was no response to the Commission's notice of the filing, published in the Federal Register, the Commission on September 30, 1969, issued on its own an "Order of Investigation". The order is most informative with respect to the Commission's current thinking on mergers and accurately reflects the progression of events following the filing of the Isbrandtsen-Export agreement more than nine years ago. First, it unequivocally recites the Commission's jurisdiction over the agreement. It next recites the requests already made by the Commission's Staff for information and justification of the agreement and the responses of the parties. From a reading of the order, the responses evidently afford information similar to that upon which the Commission approved the AML-APL-PFEL agreement. That is, they indicate little competitive impact from the acquisition (as Grace Line and Prudential are not competitive) and significant benefits to the surviving company. The Commission, however, noting its fate before the Ninth Circuit in the Matson case, specifically detailed additional information which it required be filed with it "as a minimum" for its consideration of the agreement. Specifically the parties were required to:

- A. Provide a list of all potential savings;
- B. Provide details of all improvements from alleged strengthened management;
- C. Provide an estimate of administrative economies including, but not limited to, proposed payroll reductions, combined equipment usage, and effect upon the labor force;
- D. Provide all plans for initiation and implementation of improved transportation methods of operations and expenditures needed to accomplish such proposals for each trade area;
- E. Explain the effect upon competing carriers in the trades involved, and submit, separately, for each trade route, a listing of all competing carriers including fleet sizes of the foreign and American-flag lines. Provide also, for each trade route, statistical

30. As a part of the agreement, upon completion of the stock acquisition Prudential will sell and transfer to Grace Line, Inc., all its vessels, vessel contracts, subsidy rights, etc.

31. No objection to the Commission's jurisdiction has been raised. The Department of Justice, an active opponent through the court's decision in the Matson case, has not even sought to intervene. The Commission's Bureau of Hearing Counsel has also abandoned that fight.
data comparing tonnages carried by respondents and competing carriers (if available) for the preceding three calendar years, i.e., 1966, 1967 and 1968;

"F. Submit copies of any complaints, protests and/or comments, if any, received by respondents with respect to the proposed agreement;

"G. Provide details of conditions in the trades involved which are considered as justification for the proposed agreement; and

"H. Provide details of benefits to be derived by the public arising out of the proposed agreement."

As of this writing, Prudential and Grace have filed in accordance with the order of investigation and the Bureau of Hearing Counsel has replied, taking the position that (1) the parties have complied with the information requirements and, (2) the record before the Commission, including that information, supports approval of the agreement. The matter is now awaiting Commission action. Whatever that action may be, the significant thing is that the Commission by this order has made clear its total involvement in regulating merger, consolidation and acquisition agreements entered into by the steamship industry.

Thus, in the short span of the past decade the Commission has done more in asserting itself as a regulator of steamship line mergers, consolidations and acquisitions than it had done in the previous 44 years of its existence. In short, in the 1960's it had transformed itself from a passive to an active regulator. This change in posture does not mean necessarily that the Commission has become or might become decidedly anti-merger in its outlook. Every indication is rather that it will take a long, hard and searching look at each and every consolidation proposition which comes before it. That can only mean that the proponents of consolidation will very definitely be put to the test in making their case for approval. Such a policy can in the long run only redound to the benefit of the public interest and the shipping industry as well.
THE DEVELOPMENT AND ADMINISTRATION OF THE
LABOR PROTECTIVE CONDITIONS IN THE
TRANSPORTATION INDUSTRIES

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The purpose of this article is to explore labor protective conditions in the transportation industries. The discussion focuses on three particular industries—railroads, motor carriers and airlines.

Mergers are the order of the day, and it appears that the trend will continue. Total mergers in 1968 reached a historic high of 4,000, an increase of 69 percent over 1967.1 The number of large acquisitions, those involving acquired firms with assets of $10 million or more, also increased dramatically. The total value of large acquired assets equalled $12.6 billion in 1968, 50 percent greater than in 1967, and three times greater than the total for 1966.2

When a merger occurs, how much attention is devoted to the effects of the merger on the employees involved? In the transportation industries, merger activities and their effects on employees are subject to government regulation. The Interstate Commerce Commission has jurisdiction over railroad and trucking mergers, and therefore must approve any proposed changes; and the Civil Aeronautics Board must sanction any mergers or consolidations involving airlines. The degree to which these agencies involve themselves in matters and problems affecting the employees of these regulated industries is often a virtually unexplored area in any merger discussion. Is their role a passive one which leaves the protection of employee interests to the parties involved? Or do the agencies promulgate and apply comprehensive sets of conditions and protections?

The courts and agencies have developed labor protective conditions to assist and compensate employees whose employment status is disrupted as a result of the merger. Protection, then, refers to the preservation of employment or the compensation of employees who lose their jobs or who are forced to accept lower paying positions as a result of a merger or consolidation. To the employee, the compensation is an equitable adjustment for the loss of certain rights to job opportunities. In a sense, it is the repayment for the equity which is reflected in his years of service

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* Member, Morgan, Lewis & Bockius, Washington, D.C.; B.S., Georgetown University (1953); LL.B., Georgetown University (1956); LL.M., Georgetown University (1957).
2. Id. at 2.
in the industry and for the carrier involved. To the carrier, protective conditions are part of the price of consolidating or improving its facilities, operations, and services. It is viewed by the carrier as a form of insurance; that is, as a result of the labor protective conditions, industrial strife caused by a merger should be substantially minimized.

I. HISTORY AND DEVELOPMENT OF THE LABOR PROTECTIVE CONDITIONS

A. The Role of the Supreme Court

There was a time, within this century, when the Supreme Court strictly construed the commerce clause of the Constitution and restricted the areas in which Congress could properly legislate. The Court believed that a free market economy, coupled with the unfettered right of capital accumulation, was the primary reason for the phenomenal economic growth that marked the latter half of the 19th century. A majority of the Justices dedicated themselves to insuring that the free market economy would continue to flourish during the 20th century as well. Minimum wage and hour laws were struck down on the ground that such laws were not within the police power of the state and therefore not a proper subject for legislative action. Such laws ran counter to the Court’s belief in an individual’s freedom to enter into a contract which included an individual’s employment contract. An example of the Court’s philosophy is revealed in the following quotation from a case that invalidated a maximum hours law for bakery workers. Speaking for the Court Justice Rufus Peckham stated that such laws are:

an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with. . . .

This represented the thinking of the Supreme Court during the early part

of this century. The Court had committed itself to preserve the freedom of an individual to assume contractual obligations with respect to his employment. This belief in the inviolability of the individual's freedom to contract also found expression in the Court's belief that business should be allowed to operate with the least amount of government interference. In furtherance of this judicial philosophy, the Court invalidated the Agricultural Adjustment Act, the Bituminous Coal Conservation Act of 1935, and certain laws dealing with the regulation of child labor.

There were, however, certain exceptions to the laissez-faire attitude which the Court had embraced during this period. Congress, with the high court's approval, as far back as the 1880's began to regulate labor relations in the railway industry. The strategic position of the railway industry in the American economy at that time and the consequent inconvenience or harm to the public whenever railroad service was interrupted prompted early recognition by the judiciary that Congress had the right to regulate railroads—although at times even this was carefully restricted. In this area government regulation began with the Arbitration Law of 1888 and was followed by various legislative enactments during the 1890's and early 1900's. The passage of the Railway Labor Act in 1926 was the culmination of all this piecemeal legislation and has served as the prototype for legislation governing labor relations in the railway and airlines industries. As the first to be subjected to governmental regulation of its labor relations, the railroad industry has served as an experimental laboratory in developing our present statutes governing labor relations. It is therefore not surprising to find that the railway industry was the first to concern itself with the problem of providing for job elimination or job reclassification resulting from a merger, consolidation, or other organizational change adversely affecting employment status.

B. The Experience of the Railroad Industry

Protection for railroad employees began informally around 1900 when carriers sometimes paid moving and transportation expenses in hardship cases where there had been a transfer of jobs because of a change in operations. The impetus for the imposition of protective conditions

began during the Depression years. Between 1929 and 1933, the gross national product fell from $104.4 billion to $55.9 billion. Wages and salaries paid dropped from $50 to $28.9 billion in this period. Unemployment was estimated to number as many as 15 million. These circumstances contributed to the creation of a new social environment which in turn resulted in a new government attitude toward organized labor. The government was guided more by the pragmatic facts of life than by the strictures of economic philosophy. The railroad industry was recognized as indispensable to any economic rebirth. The existence of the railway industry was insured by the government which, during this period, began to involve itself actively in guiding the financial and physical structure of the industry. Thus, the protective conditions were developed not in the abstract but as a response to the necessary economic restructuring of the railway industry.

The first statutory protection was created in 1933, a time in which general employment was widespread, with the Emergency Railroad Transportation Act in which Congress established a job freeze on all those actively employed as of May, 1933, who might be affected by a consolidation or organizational change. The inadequacy of this remedy soon became quite evident. The 1933 Act was designed to encourage more efficient railroad operation; yet if joint uses of railroad facilities were established, by the Act’s own force no employee could be displaced.

When the Emergency Railroad Transportation Act expired in 1936, there was widespread Congressional support for the continuation of some form of statutory protection for employees adversely affected by mergers and other organizational changes. The railroads, cognizant of the impending legislation, and hoping to get more favorable terms than appeared likely if the matter were left solely to Congress, began to negotiate with a number of labor organizations representing railroad employees. These negotiations culminated in the establishment of a comprehensive set of conditions known as the “Washington Job Protection Agreement,” which has since served as a guide for all protective conditions governing railroad as well as airline and motor carrier employees. The agreement, approved by approximately 85 percent of the railroad carriers and 20 of the 21 railroad brotherhoods, contained a schedule of substantial benefits for employees adversely affected by consolidations. Basically, the agreement provided that an employee deprived of employment because of a consolidation, or

11. 48 Stat. 211.
“coordination,” was to receive a monthly allowance, with the option of electing a lump-sum dismissal payment in lieu of this monthly allowance. An employee forced to accept a lower paying position also qualified for a monthly allowance. In addition, moving, transportation, and any loss on the sale of the employee’s home were paid by the carrier. On the surface, these benefits may appear to be easily applied; however, there have been difficulties in their interpretation and application.

Between 1936 and 1940, there were no specific federal statutes authorizing or requiring the ICC to impose conditions for the protection of employees adversely affected by a merger or consolidation. But the Commission, relying on the merger provisions of the Transportation Act of 1920, continued to impose some of the protective conditions contained in the Washington Agreement on two railroads involved in extensive leasing arrangements. In the Commission’s view, its power to impose protective conditions was not affected by the expiration of the 1933 Act, as the Transportation Act of 1920 required the Commission to approve mergers, “subject to such terms and conditions and such modifications as it shall find to be just and reasonable,” and which “will promote the public interest.”

The carriers challenged the basis upon which the ICC continued to impose labor protective conditions. Ultimately the Supreme Court affirmed the agency’s authority to impose the protective conditions. In a perceptive opinion written by Chief Justice Stone, the Court noted that the ICC estimated that 75% of the savings resulting from consolidations would be at the expense of labor and thus the authority to provide for the labor force was an appropriate inquiry for the agency in passing on the “public interest” aspect of the leasing arrangement.

This decision dispelled any doubt about the authority of the ICC to impose just and reasonable terms and conditions to protect employees affected by consolidations. Just a year later, Congress confirmed the Court’s opinion by providing the ICC with the specific power to impose such conditions under the Transportation Act of 1940. Section (5)(2)(f) of the Transportation Act provides that the Commission is required to “give weight . . . to the interests of the carrier employees involved.”

Pursuant to this statutory authorization, the Commission insists on a “fair and equitable arrangement to protect the interests of the railroad

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14. Id. at 233.
employees affected." Its standard order provides that for a period of four years from the effective date of the order, the merger will not result in employees of the carriers "being in a worse position with respect to their employment." If, however, the carriers and the unions involved agree to terms for protection, such as those embodied in the Washington Agreement, the Commission will not prescribe any terms and conditions for protection. The clear intent of the Congress in including this latter provision was to encourage the private resolution of disputes arising from any form of organizational change requiring ICC approval.

In the period following the enactment of Section (5)(2)(f), the ICC, with the active participation of a number of railway unions, has continued to develop and refine various sets of conditions for the protection of employees affected by consolidations.\(^\text{16}\)

C. The Motor Carrier Industry

The motor carrier industry's experience with protective labor conditions, although related to the developments in the railway industry and therefore the same in many respects, has differed significantly in other respects.

Both railroads and motor carriers, pursuant to Section 5(2) of the Interstate Commerce Act, must seek ICC approval for any merger or consolidation or purchase, lease or contract to operate the properties of another carrier. Section 5(2)(c) of the Interstate Commerce Act sets forth a number of factors that must be weighed by the ICC when it passes upon such transactions. One of these considerations is "the interests of the carrier employees affected." That is, when a carrier applies to the Commission for approval of a merger or acquisition, the ICC is required to examine the various effects the transaction may have on the employees involved. Generally speaking, the Commission, deriving its authority from the general mandate of Section 5(2), determines whether the carrier's employees would be adversely affected by the proposed action. If the employees are so affected, the Commission may deny the carrier's application for approval. In most cases, however, the ICC either imposes various protective labor conditions, or conditionally approves the transaction but reserves jurisdiction to subsequently impose protective conditions if necessary.

The Act distinguishes between the protection accorded railroad and

motor carrier employees. Section 5(2)(f), see supra, is directed exclusively to railway employees. This Section requires that a “fair and equitable arrangement” be made to protect their interests and also imposes certain minimum protection spanning a period of four years so that these employees will not be in a worse position with respect to their employment because of the carrier’s acquisition or merger.

However, no explicit requirements have been enacted by Congress for motor carrier employees. The only statutory language relevant to protective labor conditions for motor carrier employees is broad language dealing generally with the factors the ICC must weigh when it passes upon a merger type transaction.

In summary, then, the ICC is required to impose minimum protection for railway employees. The Commission does have the discretion to increase such protection, but it must provide some minimal amount. In motor carrier transactions, however, no minimum protection is prescribed, and the Commission may decline to impose any protective conditions whatsoever. But the Commission is granted the discretionary authority to impose those conditions that it deems to be in the public interest.

The Commission’s policy with respect to protective labor conditions for motor carrier employees is best illustrated by the following quotation from one of its decisions:

Based upon our examination of the legislative history of the Transportation Act of 1940, and the plain language of the provisions of Section 5(2)(c), which require that we give weight to the “effect of the proposed transaction upon adequate transportation service to the public,” and to the interest of the carrier employees affected, we are, as previously indicated, convinced that the law does not require that we impose conditions for the protection of motor-carrier employees. Section 5 does require us to consider all aspects of the transaction as they affect the public interest. This includes the effect on employees. And in determining whether employees should receive any protection or compensation for the adverse effect which a transaction has upon them, we must consider the size and financial resources of the carriers involved, the expanding nature of the motor-carrier industry, and the high degree of transferability of motor-carrier employees within the industry. With rare exceptions, motor carriers involved in Section 5 transactions and their employees have been able to resolve their differences by mutual agreement. In no cases involving motor carriers have the protective conditions imposed
gone beyond requiring the payment of severance pay to dismissed employees. Although we have occasionally suggested voluntary consideration of the nature of the Oklahoma and Burlington conditions, they have not been, and in our opinion, they should not be, in the absence of a Congressional mandate similar to that contained in Section 5(2)(f), imposed in motor carrier proceedings unless compelling reason so dictate. 17

The differing treatment accorded motor carrier employees has been upheld by the courts, 18 including the Supreme Court. 19 It is now well established that the ICC is not required to follow the Congressional mandate regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier employees.

But despite the absence of express statutory mandate, the ICC has provided some protection for those motor carrier employees affected by a merger, purchase, or other type of transaction subject to Section 5 approval. The Commission has justified the imposition of protective conditions for these employees on the ground that it was the clear intent of Congress to accord such employees "fair and equitable treatment." 20 The Commission has decided, for example, that public policy is best effectuated by requiring motor carriers to provide severance pay for those employees who are dismissed because of a merger or acquisition. 21

The Commission, however, has resisted attempts by various unions who have sought greater protection for motor carrier employees adversely affected. 22 Two specific reasons have been put forth by the Commission. First, unlike railroad employees, motor carrier workers do not require financial protection because "they move in an expanding industry and possess quite a degree of transferability within the industry itself." 23 One of the prime reasons leading to the enactment of protective conditions in the railroad industry was the fact that employees dismissed


21. The Commission also has required in one case that certain moving and transportation expenses be paid. Midwest Buslines, Inc., 97 M.C.C. 568 (1964).


or laid off due to merger or acquisition were at a severe disadvantage in finding other work in the railroad industry. The industry was contracting and not simply readjusting. The motor carrier industry, however, has been characterized by a shortage of qualified employees. Unlike the experience of the railway industry, more often than not motor carrier employees have been the prime beneficiaries of a merger or acquisition.

Second, the Commission has maintained that the skills of motor carrier employees are more adaptable than the more technical and limited skills of most railroad employees. In short, displaced railroad employees meet with more difficulties in obtaining similar positions and therefore need more protection than do motor carrier employees.24

Technological advances and the utilization of labor-saving devices have more directly affected the railroad employee than his counterpart in the motor carrier industry. Despite the featherbedding practices of the railway industry, many technological innovations have been utilized, and labor-saving devices have been installed. For example, many railway clerks have been displaced by an IBM system of freight billing; containerization has replaced cargo handlers; and automated safety devices have replaced the guards at railroad crossings. The importance and significance of protective labor conditions to these technologically obsolete employees becomes obvious. In contrast, the motor carrier industry due to the nature of its service is not an industry readily adaptable to mechanization. Despite certain technological advances, the need for qualified employees has not diminished; rather, it has increased. Although labor-saving devices have been introduced, no substitute has been found for drivers.

Another reason that might explain the different treatment accorded motor carrier employees is that at the time protective conditions were developed and applied to railroad employees, the motor carrier industry was in its infant stage. There were relatively few over-the-road-drivers, and most of the work was confined to specific localities, within a limited geographical area. Consequently, Congress in enacting Section 5 in 1940, saw little need to provide extensive protection for an industry then generally confined to local areas.

In addition, the overwhelming number of motor carrier companies are relatively small concerns. Thus, a merger or consolidation affects relatively few employees. Contrast this with the railway industry, where it is not uncommon to have a merger or consolidation which affects several thousand employees.

24. Id. at 483.
In summary, the nature of the industries and the predictable effect of a merger or consolidation continue today to justify the statutory distinction regarding the imposition of labor protective conditions between the railroad and motor carriers.

D. The Airlines Industry

The imposition of labor protective practices in the airlines industry combines many features of both railroads and motor carriers, and in addition there are practices which are unique to the airlines industry. Many factors that have influenced the formulation and application of protective conditions in the railroads have been instrumental in the development of similar conditions in the airlines industry. For example, both have undergone vast changes due to technological advances. The labor force in both industries is proficient in skills not readily adaptable to any other industry. A merger in the airlines, as in the railroads, usually involves a substantial number of employees.

However, in certain respects, the airline industry differs significantly from the railway industry, and has much in common with motor carriers. Both industries have experienced unprecedented growth. Despite the technological advances of recent years, employment opportunities have been increasing, not decreasing. Critical shortages of certain types of employees exist. Furthermore, when protective conditions were first being adopted in the 30's, both industries were in their infant stage.

The Civil Aeronautics Board is empowered to approve any merger or consolidation involving airlines, and under this power the Board has developed protective conditions for the airlines industry. The CAB's jurisdiction over these transactions is derived from Section 408 of the Aviation Act, which provides that the CAB shall approve mergers and other related transactions, "upon such terms and modifications as it may prescribe... unless the Board finds that... merger... will not be consistent with the public interest...." As in the statute regulating merger activity in the motor carrier industry, there is no express authorization for the imposition of minimum labor protective conditions.

In implementing the statutory mandate the CAB has borrowed from the ICC some of the methods used to regulate both railroad and motor carrier mergers. The CAB has developed standard labor protective conditions not unlike those utilized by the ICC in the railroad industry.

At the same time the CAB leaves the implementation of these general conditions to the parties involved in a given merger or consolidation in a manner somewhat similar to the more flexible regulation in the motor carrier industry.

The CAB first imposed labor protective provisions in 1950,26 and has adopted several features of the Washington Agreement as developed by the ICC for railroad employees.27 The Board has justified the imposition of these conditions on the grounds that they serve the public interest by promoting the adequacy and efficiency of the air transportation system and by facilitating mergers, consolidations, and acquisitions. The Board maintains that the application of these conditions tends to prevent labor disputes,28 and its authority to impose protective conditions has been upheld by the courts.29

II. THE APPLICATION OF THE PROTECTIVE CONDITIONS

To illustrate the preceding general discussion this section focuses on a selected number of specific labor protective conditions which concern the airlines industry and the standard provisions as applied by the Civil Aeronautics Board.

A. Employees Protected

The right to impose labor protective conditions is derived from the agency’s statutory authority to approve mergers, consolidations, and acquisitions. Consequently, the protections are limited in application to only those employees adversely affected by such a transaction.30 Employees affected for other reasons are not covered by the protective provisions. Thus, a carrier is not required to apply the protections to employees dismissed for valid business considerations not directly caused by a merger or consolidation.31 Employees who retire, resign, or who are dismissed for just cause also are not protected.

Often a problem arises in attempting to distinguish between those

26. United-Western, Acquisition, Air Carrier Property, 11 C.A.B. 701 (1950), aff’d sub nom., Western Air Lines v. CAB, 194 F.2d 211 (9th Cir. 1952).
29. Outland v. CAB, 284 F.2d 224 (D.C. Cir. 1960); Kent v. CAB, 204 F.2d (2d Cir. 1953).
31. Id.
employees affected solely by a merger, and those affected by technological changes and economic reasons unrelated to merger activities. The carrier will argue that certain disruptions of its labor force occurred as a result of action dictated by sound business practice and in no way related to a merger; whereas its employees or their union will contend that the adverse effect results directly from the merger or consolidation.32

B. The Displaced Employee

Employees displaced or dismissed because of merger activities are protected by a standard labor protective condition which provides a form of severance pay. The CAB has uniformly ordered that any employee deprived of employment as a result of a merger or consolidation shall be accorded an allowance based upon his length of service.33 An affected employee receives a monthly payment equal to 60 percent of his earnings in the year prior to the loss of employment, subject to certain qualifications. If the employee obtains other employment, or receives unemployment compensation, his allowance is reduced. If the employee resigns, or without proper cause fails to return to employment after a recall notice, his allowance is terminated.34 The employee is entitled to elect to receive a lump-sum dismissal allowance in place of the monthly allowance.35

An indication of how the CAB views this protective provision can be found in the Braniff-Mid-Continent Merger Case, where the CAB rejected the contention that the lump-sum payment would result in a windfall in cases where an employee finds reemployment immediately.

32. In this connection, the CAB, in the Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952), broadened the scope of the protections to include certain employees dismissed prior to the merger. In this case, one of the unions argued that the carriers could successfully avoid paying benefits contained in the Board's protective conditions by reducing the number of employees prior to the merger. Consequently, the Board ordered that if either carrier rearranges or adjusts its forces in anticipation of the merger "with the purpose or effect of depriving an employee of benefits to which he should be entitled under the protective conditions as an employee immediately affected by the merger, the protective conditions are to apply to such an employee as of the date when he is so affected." Id. at 716.

33. Appendix A, attached hereto, contains the Labor Protective Conditions imposed in the United-Capital Merger Case. These conditions contain what are generally referred to as the Board's standard protective conditions. Dismissal allowance is covered in Appendix A, sec. 5.

34. Appendix A, sec. 5.

35. Appendix A, sec. 7.
after dismissal. The Board observed that "to some extent, all severance pay entails some danger of this so-called 'windfall.' In point of fact, however, severance pay is intended to offset to some extent the hazards and inconveniences involved in seeking new employment."\(^{36}\)

Carriers have contended that the basic formula should be altered, or the claim period should be shortened.\(^{37}\) In rejecting these arguments, the CAB has emphasized that it is undesirable to make changes in the standard provisions which have been imposed in preceding cases.\(^{38}\) Consequently, the Board's protective provisions in almost all merger cases are the same. Only minor changes have been made over the years. This attitude may be self-defeating. Precedent should not be an excuse for stagnation, and rulings which have little relevance to the facts presented are a disservice.

Seniority considerations often give rise to job displacement disputes where an employee is "bumped," forced out of his present position, to a job paying less money because another employee has greater seniority. In those cases, under the standard labor protective conditions, an employee is entitled to receive the difference between his earnings after displacement and his earnings at his prior position.\(^{39}\) This allowance applies to changes which occur within a period of three years from the effective date of the merger. The allowance is paid for four years from the date on which the employee is displaced.

Employees who voluntarily resign rather than accept appropriate positions requiring a change of residence are not entitled to dismissal and displacement allowances. In the United-Capital Merger Case, the CAB offered its justification for this exclusion by pointing out that "should employees have the option not to move and still be eligible for benefits of the nature afforded by our present provisions, and should a large number of employees elect not to move to another city to maintain employment with the surviving carrier, which would then have to replace them, the cost to the surviving carrier could indeed be staggering."\(^{40}\)

The Board noted that those employees who are required to change their places of residence "are not without a measure of protection from the hardships of that requirement."\(^{41}\) The employee is reimbursed for all the expenses involved in moving his household, as well as for the

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38. Id. at 323.
41. Id. at 328.
traveling expenses incurred by him and his family.\textsuperscript{42} He is entitled to receive living expenses and his actual wage loss during the time necessary for such a transfer.\textsuperscript{43}

C. The Role of the Agency and Arbitration

The Board's view of its role is not difficult to discern. In the CAB view its function is to provide the framework for a fair and equitable arrangement, protecting the interests of the employees, the carriers, and the general public. The Board, with court approval, has determined that the public interest in maintaining peaceful labor relations to effect an orderly continuation of operations is satisfied, in part, by the provisions it has developed for the protection of employees adversely affected by a merger of consolidation.\textsuperscript{44} Consequently, the Board has systematically rejected many specific proposals and modifications presented by parties to particular mergers or consolidations, relying rather on the general conditions that were developed in the early 50's, and refined in the United-Capital Merger Case. In the Board's view these conditions are of sufficient detail to provide the proper guidance. Furthermore, with some justification the Board argues that to go beyond the general labor protective conditions and attempt to resolve specific disputes arising from a merger not only would overburden the Board's limited staff, but also would unduly involve the CAB in areas beyond its expertise.

If any difficulty arises, initially the parties are left to private resolution. If this does not work, the parties can resort to arbitration. This view is well illustrated in the Delta-Chicago and Southern Merger Case, where the CAB stated:

\[\text{No formula can be sufficiently precise to cover every case, and we do not believe that we should be called upon to pass upon specific transportation and per diem allowances. The provisions (\ldots which have been previously imposed \ldots) offer sufficient guide for protection of all parties concerned and in the event that there is finally a disagreement which is not resolved by amicable negotiations, the resort to arbitration is ultimately available.}\]

Machinery has been provided whereby disputes arising from a merger may be resolved. Each protective order issued by the CAB (and the ICC)

\textsuperscript{42} Appendix A, sec. 8.
\textsuperscript{43} Id.
\textsuperscript{44} See Kent \textit{v. CAB}, 204 F.2d (2d Cir. 1953).
\textsuperscript{45} Delta-Chicago & Southern Merger Case, 16 C.A.B. 647, 658 (1952).
contains an arbitration provision which provides that if a dispute or controversy arises in connection with an interpretation, application, or enforcement of any of the provisions of the protective order, it may be referred by either party to a neutral referee."

III. A Recommendation Concerning Agency Involvement

The CAB's failure to involve itself in the details of the terms of employment governing the integration after merger of the pre-existing labor forces has in one area not served the public interest. That area is union representation.

A. The Merging of Seniority Lists

The merging of seniority lists provides a framework for the discussion of post-merger union representation. The treatment of seniority lists is generally capable of peaceful and equitable resolution through the existing agency practice of issuing general labor protective conditions with resort to arbitration to resolve disputes. Seniority confers upon an employee a claim to available work relative to the seniority of his fellow employees and to other fringe benefits flowing from his employment, such as vacations, promotions, and transfers.

The standard condition imposed by the CAB in this area provides that "provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees expected." In the event that the parties fail to agree, the controversy may be submitted, by either party, to arbitration for consideration and determination.

Carriers seldom raise any serious obstacles to seniority integration. The carrier's main concern is to reconstitute its labor force, retain experienced workers, and develop a plan that is equitable to as many of its employees as possible. Employees and their union representatives, however, are very much concerned and have indeed created many obstacles with respect to this problem—and to an extent, this is understandable. On occasion employees disaffected by the methods and criteria used to integrate the labor force, as well as by the final integrated

47. Appendix A, sec. 3.
list, have contested the issue before the CAB and in the courts.\textsuperscript{50} In all cases, the CAB, with court approval, has upheld the method of seniority integration arrived at by the parties to the merger. The final seniority list had been either formulated by the parties themselves or was the result of an arbitrator's decision.

On occasion the CAB has deviated from its standard operating procedure and actually involved itself in the details of integrating seniority lists.\textsuperscript{51} In one case involving the question of the seniority of flight engineers and the relationship of a collective bargaining agreement between the surviving carrier and its engineers, the Board ordered, after attempts at private resolution failed, that service with each carrier was to be given equal effect.\textsuperscript{52}

The surviving carrier's employees sought court review on two fundamental issues, the authority of the CAB to rule on the question, and the conflict between the CAB decision and an existing collective bargaining agreement. The Court of Appeals for the Second Circuit sustained the position of the Board on both issues. On the question of the CAB authority to rule on the issue the court ruled:

> [W]hen a merger involves two or more groups of employees each having separate seniority rights, the public interest in maintaining peaceful labor relations so as to effect an orderly continuation of operations is not always satisfied merely by conditioning approval of the merger on financial protection to the employees. Industrial strife may arise by reason of a dispute between the two or more employee groups as to how a unified seniority list should be drawn. And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carriers so as to protect adequately the public interest is what Section 408(b) of the Act contemplates, and that is what these orders accomplish.\textsuperscript{53}

With regard to any conflict between the existing collective bargaining agreement and the CAB order the court stated:

> A private contract must yield to the paramount power of the Board

\textsuperscript{50} Outland v. CAB, 284 F.2d 224 (D.C. Cir. 1960); Aling v. ALPA, 346 F.2d 270 (7th Cir. 1965), cert. denied, 382 U.S. 926 (1966).

\textsuperscript{51} Saturn-AAXICO Merger Case, 41 C.A.B. 827 (1965).

\textsuperscript{52} Kent v. CAB, 204 F.2d (2d Cir. 1953).

\textsuperscript{53} Id. at 265, 266.
to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest . . . . The paramount public interest required that due consideration be given conflicting seniority interests of both groups of these engineers. The Board has done that with meticulous care and, far from acting in an arbitrary and capricious way, has provided a method which fairly distributes the burdens and the benefits . . . it was within the competence of the Board to make its determination free from private contract restraint . . . 54

B. Union Representation

When a carrier is contemplating a merger, one of the initial considerations regarding personnel involves the question of union representation. It is not uncommon to find that a group of employees, described in the airline and railroad industries as a craft or class, is represented by a labor organization while the employees performing the same job function for the surviving carrier are unorganized. Typically the organized craft or class will have a collective bargaining agreement with the merging carrier. Two questions arise: will the union continue its representative status following the merger and, what is the effect of the existing collective bargaining agreement on the surviving carrier?

A variation of the same vexing problem occurs when both carriers class or craft of employees are represented, but by different unions. Which, if either, collective bargaining contract will govern the wages, hours, and conditions of employment of the combined class or craft following the merger?

The CAB's role in the area of union representational rights is limited. Union representational rights under the Railway Labor Act, 45 U.S.C. § 184 (which also applies to the airlines), is the exclusive province of the National Mediation Board. Interpretation of the collective bargaining agreement under the Railway Labor Act is handled by third party arbitration, a system board of adjustment. Thus at the time of merger only one question is presented to the CAB: whether the Board, as a condition of approving the merger, will require the surviving carrier to assume the labor agreement of which the merged carrier was a party.

Where there is no question as to majority status, for example where the organized class or craft commands an overwhelming majority in the

54. Id. at 266.
combined class or craft, the carrier will as a condition of merger accept the union as the employee representative and any existing collective bargaining agreement in effect. The problem area occurs when a union represents a small group of employees of the merged carrier which is integrated into a larger unorganized class or craft at the surviving carrier. If the union's representational rights continue, it will represent a minority group within the entire class or craft. The Railway Labor Act prohibits a minority union.\textsuperscript{55} The question of representation is one for the National Mediation Board. However, the representational issue is presented to the CAB in a collateral sense when it is asked by the union to require the surviving carrier to assume the collective bargaining agreement in effect between the union and the merged carrier. The CAB when faced with this issue has, to date, avoided the question by imposing the standard labor protective conditions which, in effect, provide that the dispute between the union and the surviving carrier regarding the collective bargaining agreements' applicability to the merged operation is a matter to be worked out between them.\textsuperscript{56}

Such a decision can hardly be considered in the interest of the carrier, its employees or their union representative, or the public in general. The result has been extensive and needless litigation between the union and the surviving carrier.\textsuperscript{57} The issue is one for which the courts have provided the CAB with the guidelines\textsuperscript{58} necessary for a decision, and therefore the Board should exercise its statutory power in this situation and provide the parties with an answer to this fundamental question at the commencement of the merger operation. In the situation in which the carrier would be compelled to deal with a minority union, the CAB should hold that the contract terminates upon approval of the merger and the union must pursue its representational rights before the National Mediation Board, pursuant to the Railway Labor Act.

The situation is somewhat analogous to the seniority dispute discussed, supra; the present CAB should follow the precedent established there by the predecessor Board members and approved by the Second Circuit Court of Appeals. The Board should eliminate this cause of industrial strife by decision at the time of the merger thereby putting the matter of contract survivability to rest. Such a course of action


\textsuperscript{56} Appendix A, sec. 13.


\textsuperscript{58} \textit{BRC v. United Airlines}, 325 F.2d 576 (6th Cir. 1963).
would in the long run benefit the carriers, unions, and the public in general.

IV. Conclusion

This article has dealt with a complex area that has not received a great deal of attention and is often overlooked even by those who are actively involved in merger activities. It was intended as a discussion, not as an exhaustive study, of the types of protective conditions that have been imposed. For example, there was no analysis of the notice requirement, which compels the carrier to present a full statement of the proposed changes to be effected by the merger. Nor was there any mention of the rapidly expanding role of the Federal Maritime Commission in the area of mergers, consolidations, and acquisitions of common carrier fleets.

The nation has come a long way since a maximum hours law for bakery workers was declared unconstitutional. It has witnessed the growth of governmental involvement in the field of labor relations. With respect to regulated industries, the government has taken upon itself the responsibility to insure that the rights and interests of all the parties involved are protected and safeguarded. Protective conditions were first developed at a time when employees were relatively powerless to improve their plight. Over the years, these provisions have served to minimize industrial strife caused by merger activities. Employees beset by doubt and insecurity are assured that they will receive some protection. Carriers, fearful of work stoppages and extreme union demands, are aware of the benefits that must be provided for their employees.

The government’s role in this area should be to act as an overseer. Its goal should be to protect and balance the interests of the employees, the carriers, and the general public. It should seek to minimize the causes of friction between the parties to a merger or acquisition. It should be alert to the danger that the participants may place their own interests above those of the general public; and consequently, it should make every effort, through its agencies, to guard against this danger. In the

60. For a discussion of the Federal Maritime Commission’s emerging role in this area, see The Federal Maritime Commission—Late Bloomer in Regulating Merger, Consolidation, and Acquisition, TRANSPORTATION L.J. ( ). The “Order of Investigation” discussed on pages is particularly noteworthy in that for the first time the Federal Maritime Commission requires the parties to submit information on the “... effect upon the labor force.”
last analysis government should foster a climate which promotes the process of collective bargaining and encourages the parties to equitably resolve their differences and thus to reach private agreements and safeguard the rights and interests of all.
APPENDIX A

LABOR PROTECTIVE PROVISIONS AS SET FORTH IN THE UNITED CAPITAL MERGER CASE

Section 1. The fundamental scope and purpose of the conditions specified in paragraph 2(c) of this order are to provide for compensatory allowances to employees who may be affected by the proposed merger of United and Capital approved by this order, and it is the intent that such conditions are to be restricted to those changes in employment solely due to and resulting from such merger. Fluctuations, rises and falls, and changes in volume or character of employment brought about solely by other causes are not covered by or intended to be covered by this order.

Section 2(a). The term “merger” as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term “carrier” as used herein refers to either United or Capital or to the corporation surviving after consummation of the proposed merger of the two companies.

(c) The term “effective date of merger” as used herein shall mean the effective date of the amended certificates of public convenience and necessity transferred to United pursuant to the approval granted in this order.

(d) The term “employee” as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

Section 3. Insofar as the merger affects the seniority rights of the carriers’ employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Section 4(a). Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the merger who is continued in service shall as a result of the merger be placed in a worse position with respect to compensation than he occupied immediately prior to the effective date of such merger so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules, and practices to obtain a position producing compensation equal to or
exceeding the compensation of the position held by him immediately prior to such date, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last 12 months in which he performed service immediately preceding the date of his displacement (such 12 months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee; and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

(d) The protection afforded herein shall only apply to displacements occurring within a period of 3 years from the effective date of the merger (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of 4 years from the date on which the employee is displaced.

Section 5(a). Any employee of either of the carriers participating in the merger who is deprived of employment as a result of said merger shall be accorded an allowance (hereinafter termed a dismissal allowance), based on length of service, which (except in the case of an employee with less than 1 year of service) shall be a monthly allowance equivalent in each instance to 60 percent of the average monthly
compensation of the employee in question during the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the merger. This dismissal allowance will be made to each eligible employee, while unemployed, by United during a period beginning at the date he is first deprived of employment as a result of the merger and extending in each instance for a length of time determined and limited by the following schedule:

<table>
<thead>
<tr>
<th>Length of service</th>
<th>Separation allowance</th>
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<tbody>
<tr>
<td>Years</td>
<td>Months' pay</td>
</tr>
<tr>
<td>1 and less than 2</td>
<td>3</td>
</tr>
<tr>
<td>2 and less than 3</td>
<td>6</td>
</tr>
<tr>
<td>3 and less than 5</td>
<td>9</td>
</tr>
<tr>
<td>5 and over</td>
<td>12</td>
</tr>
</tbody>
</table>

In the case of an employee with less than 1 year of service such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by section 7.

(b) For the purposes of this order, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for 1 month’s service for each month in which he performed any service (in any capacity whatsoever) and 12 such months shall be credited as 1 year’s service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: Provided, That in calculating the dismissal allowance for such an employee, such allowance shall be based upon the compensation paid such employee by the carrier during his last 12 months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c) An employee shall not be regarded as deprived of employment in case of his resignation, death, or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction in forces due to seasonable requirements
of the service; nor shall any employee be regarded as deprived of employment as the result of the merger who is not deprived of his employment within 3 years from the effective date of said merger.

(d) Each employee receiving a dismissal allowance shall keep United informed of his address and the name and address of any other person by whom he may be regularly employed.

(e) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f) An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g) If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he shall be entitled to protection in accordance with the provisions of section 4.

(h) If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: Provided, That this shall not apply to employees with less than 1 year’s service.

(i) A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of—

1. Failure without good cause to return to service after being notified of position for which he is eligible and as provided in paragraphs (f) and (g).

2. Resignation.
3. Death.
4. Retirement or on account of age or disability in accordance with the current rules and practices applicable to employees generally.
5. Dismissal for justifiable cause.

Section 6. An employee affected by the merger shall not during the applicable protective period be deprived of benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 7. Any employee eligible to receive a dismissal allowance under section 5 hereof may, at his option at the time of merger, resign and (in lieu of all other benefits and protections provided in this order) accept in a lump sum a separation allowance determined in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Length of service</th>
<th>Period of payment</th>
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<tbody>
<tr>
<td></td>
<td>Years</td>
</tr>
<tr>
<td>1 and less than 2</td>
<td>6</td>
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<tr>
<td>2 and less than 3</td>
<td>12</td>
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<tr>
<td>3 and less than 5</td>
<td>18</td>
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<tr>
<td>5 and less than 10</td>
<td>36</td>
</tr>
<tr>
<td>10 and less than 15</td>
<td>48</td>
</tr>
<tr>
<td>15 and over</td>
<td>60</td>
</tr>
</tbody>
</table>

In the case of employees with less than 1 year's service, 5 days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in section 5.
(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to time of the merger.

Section 8(a). Any employee who is retained in the service of the carrier surviving the merger (or who is later restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as result of such merger, and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter (not to exceed 2 working days), used in
securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred within 3 years from the effective date of the merger, and the claim must be submitted within 90 days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the merger and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 9(a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of the carriers involved in this merger (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the merger to be unaffected thereby: Provided, however, That if the home is not sold within a substantial period of time after the merger, then the fair-value of the home shall be determined as of a date as closely related to the date of sale as possible, with an agreed-upon adjustment being made to exclude any effect of the merger on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the merger and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.
(c) No claim for loss shall be paid under the provisions of this section which is not presented within 3 years after the effective date of the merger.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and, in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier, respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 10. If either carrier, on or after July 19, 1960, shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this order as an employee immediately affected by the merger, the provisions of this order shall apply to such an employee as of the date when he is so affected.

Section 11. United and Capital shall jointly or severally give at least 45 days' written notice containing a full and adequate statement of the proposed changes to be effected by the merger, including an estimate of the number of employees of each class, craft, or field of endeavor affected by the intended changes. Such notice shall be posted on bulletin boards or other conspicuous places convenient to the employees of said carriers, and a copy of the notice shall be sent by registered mail to all authorized representatives of any of the employees of both carriers.

If requested in writing by any employee or employees of either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the
merger shall be agreed upon within 10 days after such request is received by the carrier. The meeting shall commence within 30 days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with section 13.

Section 12. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order be required to accept employment with the surviving carrier that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date of this order.

Section 13. In the event that any dispute or controversy (except as to matters arising under sec. 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees.
COMMON OWNERSHIP OF TRANSPORT MODES—SOME ANTITRUST POLICY PERSPECTIVES

BY JACK PEARCE

Introduction

The talk about common ownership has been going on a long time. The author's experience with such discussions has created two somewhat conflicting impressions on his mind. First, it often seems that everything has been said by someone at some time. Second, it often seems that the major observable effect of the continuing discussion is to add to the total number of words devoted to the subject.

What can one contribute in such a situation? I will here set myself a somewhat modest task. First, I will restate the problem. Second, I will discuss a few alternative solutions available, relating some general concepts of antitrust analysis to some of these alternatives. Last, I will suggest a few thoughts about different methods of arriving at public policy on a problem such as this.

1. A View of the Issue

First let us distinguish the perspectives required of those who would decide an issue such as this for the public, and the perspectives which present themselves to members of the industries involved. Differences between a "public" and a "private" perspective have been known to men since at least the time of Ur. But, as is attested to by the frequency with which people make an issue of the matter, we seem to have a great deal of difficulty in keeping the distinctions clear, and our communities suffer a good deal of mischief from our confusions.

Let us recapitulate relevant private perspectives. They largely consist of desires to enter new and profitable markets, to pick up operations which would bolster those already owned, and to avoid market entry by others. For example, to men managing railroad companies, common ownership may present enticing profit opportunities. The return on investment in trucking is higher than in railroading. The company can be larger, and presumably financially sounder, if it has a wider range of profitable services to offer. Ownership of companies providing services used in conjunction with rail service might result in more efficient integration of such services. Certainly one can understand a manager's

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inclination to think he could make it so in some cases. But whether great efficiency results or not, such ownership would carry the right to the profits. Also, ownership of carriers feeding rail carriers would tend to provide more assurance of rail traffic, despite any disclaimers to the contrary.

There may well be no express malice toward competitors involved in this reasoning, and no monopolistic tendency beyond that inevitably resultant from the run-of-the-mine avarice of mankind, which generally leads those managing any firm to seek to make it grow as much as it profitably can.

Trucking companies, ocean transport companies, and inland waterways companies on occasion have similar yearnings concerning their neighbors' pastures. But also, to truckers and waterway companies, the railroads ambitions present a threat of entry into their markets. Generally, one can expect those in any settled, well populated market to frown on new entry. Transport companies seem to make few exceptions to this rule. Also, carriers in one mode may on occasion fear disadvantage from competitors obtaining an ability to offer a range of services not available to single-mode companies.

The general public may be thought to care little for the pushing and shoving which may result from these conflicting ambitions, except as the outcome of the brawl may effect what it gets from transportation. The public needs results—an optimum mixture of economy, adaptability, and progressiveness. From the standpoint of the general community the ambitions of companies yearning for common ownership may be indulged insofar as extension of common ownership is superior to other available methods in achieving results wanted. If other measures can produce desired results with fewer drawbacks, common ownership appetites must be restrained.

Thus, in the transport industry as in others, those who would expand cannot expect rules to be made with the purpose of satisfying their penchant for expansion, any more than those who object to such expansion can expect the rules to be made to satisfy their penchant for protection. Nor can the modes expect policy to be made to balance off gains and losses between them. The problem, at bottom, is not how the public's servants are to divide its purse, but how to make it bigger. From the public's point of view, gains and losses to individual companies, or to industries, must be considered side effects of the over-all process of meeting community demands.

To put it another way, free and fair opportunity to meet public needs does not entail the right to require the public to accept arrangements.
designed for the producers' benefits, or to meet their sense of fairness in the rivalry between them.

For the economy as a whole, these propositions have been so long and so pervasively accepted that they form a part of the collective subconscious. The rules are often bent, but rarely does the body politic allow them to be broken for long. In transportation, the long and intimate interaction between government and the producers, and the power of the producers to influence Congressional action, have kneaded into government thinking a tendency to view the resolution of issues as the settlement of contests between the contending transportation interests. In such a frame of mind, regulatory bodies tend to dole out and divide up the opportunity to serve. These tendencies have a number of unfortunate consequences.

If then, intermodal ownership is to be judged on what it will do for the community, not what it will do for the transportation companies, let us examine what advantages intermodal ownership might afford the general community. It seems that claims of efficiency gain from ownership of different forms of transportation describe two major types. One relates to the possibility of combining different modes of transport for movements of freight more efficiently than may practically be done under separate ownerships (e.g., motor, rail, and water carriers moving freight from Chicago to the outskirts of London). The argument in support of this claim implies that under common ownership physical facilities are likely to be coordinated more quickly and efficiently, and operating systems (such as documentation, claims handling, planning of movements) made more efficient and adaptable, than would be likely with a market composed of independent sellers in different modes, assuming an acceptable level of public aid in perfecting market arrangements.1

It is easy to conceive of this as a straightforward comparison of the efficiency of a centrally administered organization versus the efficiency of market organization.2

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1. I think it is useful to conceive of market participants as bringing about collective activity to facilitate market transactions. For example, merchants have been managing trade fairs and other collectively organized markets (e.g., securities exchanges) for centuries. Merchants lead in organizing public ports. Trade associations organize seminars for trade problems. Some have sometimes charged that regulatory agencies tend to become trade management devices, organized largely for industry participants. (E.g. Kolko, *Railroad Regulation, 1877-1916*) It seems there is some truth to the charge, but a measure of assistance to sellers is not necessarily inconsistent with the public interest.

2. In such a comparison, elements other than obvious short term efficiency differentials should be taken into account: e.g., the long term contribution to adaptability and efficiency
The second kind of efficiency claimed is, it seems to me, gain from a single ownership's administrative allocation of traffic between the modes rather than market allocation when each of two or more modes might be used for the total transport movement. The argument in support of this claim can be generalized to the proposition that companies controlling all forms of transport would, if competitive among themselves, seek to maximize the value added potential of each form of transport, and would be more successful in this than would a competitive market. This argument presumes, among other things, either that limitations of management control and government oversight would be slight, or that markets with intermodal competition are not achieving a close allocation, and cannot be made to do so.

So much for the general conceptual framework. Now a brief recapitulation of the way in which the issue has been handled. To date, the body politic has tended to keep ownership of the various modes of transportation largely separate. A recent article by Byron Nupp shows that the Panama Canal Act was passed in 1912 to free water carriers from railroad control, and the Interstate Commerce Commission has generally followed the intent of the legislation, with some exceptions allowed where it appeared the water carrier was supplementary to rather than competitive with the rail carrier. The same article and a 1959 Supreme Court Decision, point out that the ICC has interpreted a provision in the Motor Carrier Act of 1935 prohibiting railroad

3. It could be argued, using a somewhat simpler approach, that a monopolist with all modes of transport would try to minimize costs, and thus use all modes most efficiently. But at least under current public opinion, this solution would be unacceptable, because of the difficulty of controlling such a monopoly, the losses thought likely to result from sacrifice of diversity and competition, and possible diseconomies of scale. Thus, one must presuppose a substantial measure of competition between the integrated concerns.

4. At least one reason might be suggested for such a failure of the market—interference by public authority, such as the ICC, in an attempt to allocate traffic on the basis of historic market positions, or simply to avoid prejudicing the positions of existent carriers (See Nelson, Railroad Transportation and Public Policy, pp. 132-145). One is led to observe that if this has occurred, the proper remedy would be to have such interference cease. To satisfy the conditions stated in text, the misallocation would have to be significant, and the ability to reform the agency's practices insignificant.


ownership of motor carriers unless it can be shown that the motor carrier operations can be used to the advantage to the public, and the acquisition would not unduly prejudice competition, both to restrict railroad acquisition of motor carriers, and to restrict direct investment by railroads in motor carriage to services ancillary to rail services, so as generally to prevent "railroad incursions into the field of motor carrier service." The Federal Aviation Act of 1938 contained a standard substantially the same as the motor carrier standard concerning ownership of air carriers by other modes, and the CAB has tended to interpret the standard in substantially the same way—to prevent ownership by other modes where there is significant competition.

Appendix A shows standards applicable for each of thirty kinds of intermodal acquisitions. As this chart makes clear, the legislative scheme for controlling intermodal acquisitions is neither symmetric nor comprehensive. This is because Congress has enacted explicit standards for intermodal acquisitions only when it was concerned with what appear to be immediate problems—the prevention of railroad domination of other surface modes (motor carriers and water carriers) and the prevention of domination of the fledgling air transport industry by any of the more-developed surface transport industries. Other intermodal joiners have been left either to the usual "public interest" test for ICC intramodal merger control, or to control by the antitrust laws.

The fear of adverse results from one mode's controlling another rests on the judgment that such control would eliminate desirable competition, and stunt the growth of the newer or smaller mode, preventing the realization of its potentials. In retrospect it is hard to know to what extent this fear might have been generated by entrepreneurs who feared the foreclosure of new fields of endeavor, and to what extent it related directly to the needs of the user community. Undoubtedly, each element was involved in the motivations of some of the men who concerned themselves with and voted on the issues.

To the extent this approach was motivated by a fear that under the ownership of another mode, a new form of transportation would not

8. 49 USC §1378(b).
9. Nupp, pp. 30-32, and cases cited. The CAB made an exception to allow surface motor carriers to acquire air freight forwarders recently. Apparently the Board was persuaded that motor carriers could feed air freight forwarders a good deal of traffic, and would be unable to dominate air freight forwarding so as to lessen competition between air carriage and surface carriage. See *ABC Air Freight Co. v. CAB*, 391 F.2d 295 (2nd Cir. 1968).
realize its full potentials, it would seem to imply a judgment (1) that the controlling mode's decisions as to which mode to use in given situations would not be as closely in accord with the potentials of these modes of transportation as would the results of a market responding to the competitive initiatives of independent firms; (2) that competition between the modes would produce lower prices and better service than would single control of all the modes; or (3) some combination of these judgments.

Those who seek a modification of these policies often seem to suggest that (1) the size and stage of development of the competing modes are such as to make it unlikely that any one mode can obtain a sufficiently large share of another as to permit it to govern either the degree of intermodal competition which would exist, or the rate and nature of the development of the potentials of the competing mode; or (2) integration will produce efficiencies and new transport arrangements greater than would be lost by whatever degree of prejudice to intermodal competition results from the amount of intermodal ownership allowed to occur.\footnote{This proposition can assume that there will be little prejudice to competition, or much. If it assumes all intermodal competition would be eliminated and a limited number of fully integrated firms would control two competitive modes, or all modes, then the assumption would seem to be that integration would produce more efficiency, adaptability, and progressiveness in transportation than would continuation of the intermodal competition involved.}

The case for modifying a policy of strict separation between modes is stronger if major new service potentials can be better exploited by integrated firms than by a market in which the modes are under separate ownership. The advent of containerization seems to many to indicate the existence of such new potentials, at least as to railroading and trucking. But, to be laboriously explicit and repetitive, this view must suppose not merely that containerization offers new prospects for efficiently combining diverse modes on a substantial volume of shipments, but also that allowing intermodal firms will produce more exploitation of these potentials with fewer drawbacks than leaving such exploitation to separately owned modes making arrangements through the market.

II. Discussion of Alternatives

A. A Statement of Alternatives

Major alternatives for public action can be stated in simple terms: either to permit or encourage more inter-modal ownership of some sort; to encourage means of achieving operational integration of modes
without putting different modes under common ownership: to undertake a combination of the two; or to maintain current policies on common ownership and let things work out as they will.

First, though, it would be useful to determine what kind of inter-modal relationship ought to be encouraged, discouraged, or left to the mercy of the present machinery. Common ownership could cover a great many different arrangements, with different consequences. Generally, the arrangements can be grouped in categories noted before; joinders of firms for the purpose of combining modes on individual movements, and joinders of firms performing parallel transportation movements. This distinction corresponds to the distinction between "horizontal" and "vertical" mergers in antitrust analysis: that is, the distinction between mergers of firms in a competitive relationship, and the merger of firms in a supplier-purchaser relationship (or, in transportation, a traffic interchange relationship).\footnote{A merger can involve both relationships, of course, where either or both of the firms can both compete with and furnish goods (here, traffic) to the other.}

Also, it would be well to consider the best way to go about encouraging inter-modal ownership, if some form of it is to be encouraged. Since a great many strategies could be used, I will not try to list every possible approach, but will instead delineate and deal with three general types.

(1) Elimination of some or all of the rules governing inter-modal ownership (including both the Interstate Commerce Act rules and the antitrust rules). This could be done with varying degrees of thoroughness; in piecemeal fashion or generally.

(2) Change of some or all of the rules governing inter-modal ownership, including both Interstate Commerce Act rules and antitrust rules. This would allow somewhat more discriminate action. Again, action could be either piecemeal or general.

(3) Encouragement of inter-modal ownership by providing incentive for the creation of such organizational structures. (It seems few are so bold as to utter such a thought; but it is a possible course of action.)

Methods of achieving the results claimed for intermodal integration without inter-modal ownership can be considered under two categories: devices for increasing the efficiency and adaptability of inter-modal shipments using modes under different ownership, and measures to improve the market's allocation of traffic between modes. The first category includes such things as efforts to facilitate the use of single-factor rates and through bills of lading, efforts to provide for
satisfactory claims handling when several carriers are involved, the construction of port facilities for containerized traffic, and the encouragement of equipment and document standardization. Measures to improve the allocation of traffic between modes include, most notably, attempts to permit more freedom in competitive pricing for the various modes of transport.

B. Some Implications of Antitrust Law and Policy for the Selection of Alternatives

With this sketch of alternatives behind us, let us consider what guidance antitrust law and policy may provide in searching for judgments concerning whether, and which forms of, inter-modal ownership which might be useful; and, if inter-modal ownership were to be favored over other means of gaining transport efficiency, what means of encouraging such ownership might be chosen.\(^\text{12}\)

First, let us consider general features of the antitrust laws. The antitrust laws favor freedom of activity in the market, by prohibiting defined types of transactions and permitting all others without administrative processing. Administrative screening might be thought justified to permit a more rigorous application of a given test.

\(^{12}\) I suggest this general review of the implications of antitrust policy because of its major role in the economy—it is often described by the Supreme Court as the fundamental economic policy of the nation. The policy seeks to obtain both economic results—progressiveness, efficiency, a good allocation of resources—and political and social results—a society in which economic, social, and political power is not concentrated in few hands, and in which economic and social mobility is afforded by affording a great many opportunities for economic entrepreneurship to the general populace—by preserving markets and industries as free, unconcentrated, and competitive as is consistent with reasonable economies of scale and reasonably efficient forms of economic organization. This approach supposes that regulation is imposed to serve basically the same goals, supplementing competitive market forces where market organization would not be adequately competitive, or would for other reasons fail to achieve the needed results. This implies that competitive forces and regulatory controls are to be used in a complementary fashion. Finally, if this approach is adopted, one is led to the view that the use of government sanction to organize markets with primary reference to the interests of producers—with the result that markets tend to be concentrated unnecessarily, individual producer profits tend to be assured when this is not needed to assure adequate service to the public, business tends to be allocated and apportioned to producers to assure their income expectations when this is not as efficient as market allocation, and unnecessary barriers to entry favoring market incumbents tend to be created—is an evidence of poor government.
It can also be argued that administrative agencies can advantageously be used to achieve refined judgments using complex tests.\textsuperscript{13}

Generally, one can conceive of a trade-off between the use of clear-cut rules of general applicability, with little discretion in administration, and reliance on administrative discretion in the integration of a wide variety of considerations. (The "public interest" test is a result of the latter choice.) Many persons favor the former approach where the applicable rules can be formulated in a fashion thought to provide adequate direction. The approach furnishes a relatively free field for businesses, minimizes the extent to which commerce must wait on the Government administrator, provides the body politic a relatively clear and visible indication of what public policy is supposed to be, tends to provide less scope for inconsistent and arbitrary Government action, and tends to economize on the use of Government resources. Further, in practice it has tended to provide less opportunity for companies to channel the administration of a vague standard into a case-by-case accommodation of conflicting interests, rather than consistent application of a general rule designed to facilitate trade.

Second, the antitrust laws distinguish sharply between expansion by acquisitition and expansion by internal growth. Expansion by internal growth subjects the firm to market disciplines which can be avoided by acquisition. If, for example, a railroad wishes to expand trucking operations and does so by direct investment, it must gain business in rivalry with others. Market forces test the efficiency and utility of the operation. If the expansion is made by acquisition, the acquiring firm merely appropriates the market position and the inter-carrier operating arrangements.

Further, the entry of new firms, and the possibility of such entry, have potent pro-competitive effects in markets. But acquisitions of competitors directly lessen competition. Thus, the antitrust laws contain no inhibitions on internal expansion except the prohibition against monopolizing; but do contain stringent prohibitions against acquisitions which may adversely affect competition.\textsuperscript{14}

In sum, under the approach adopted in the antitrust laws, the creation

\textsuperscript{13} Many would doubt this. See Marver Bernstein, \textit{Regulating Business by Independent Commission}, Chapters 4 and 10.

\textsuperscript{14} Regulatory acts differ in that they typically have relatively permissive merger tests, and usually provide for administrative control of market entry achieved through investment. The differential is thus toward less entry by investment and more by merger—a bias toward less competition.
of inter-modal ownership patterns by direct investment rather than acquisition would not be barred, except and to the extent such investment monopolized or was used as a part of an attempt to monopolize a line of commerce. Whether intermodal ownership produced superior transportation service would be tested by the marketplace. As to merger, such intermodal ownership patterns as did not eliminate or prejudice competition would be permitted freely, those which would do so would be prevented.  

Under traditional tests this approach would not be modulated to allow for efficiency gains through cross-modal acquisitions: under a modified standard such as that incorporated in the Bank Merger Act of 1966, efficiency gains could be given some weight.

Now let us consider the method of analyzing competitive effects developed under the antitrust laws, to see what sort of barrier to intermodal acquisitions would accord with the procompetitive policy applied in the Courts.

Because the antitrust laws are designed to preserve competition by a guard-the-gold method—prevent a loss whenever possible—the Government is directed to prevent any reasonably probable substantial loss of competition on any line of commerce in any part of the country. This generally leads to identifying the competition thought to be in danger of extinction, both as to the type of transaction going on and the place where people are doing it—or, to be more refined, the definition of product and geographic markets.

To get a geographic market, one adopts the obvious expedient of finding the places in which the firms are competing. Competition may be considered in terms of substitutability: thus, geographic markets identify the geographic areas where one seller's goods can substitute for the other's. The markets can be small as one city—or as large as the nation. They may be shaped to match the shape of the competing operations.

Several markets can be considered in one case. Also, submarket-

15. This approach need not sacrifice realization of efficiencies, if entry by direct investment is open. Companies can gain efficiencies by establishing their own enterprises. However, intermodal operations and any attendant efficiencies would probably be realized more slowly than if acquisition were allowed.


19. E.g., Brown Shoe supra.
market relationships can be defined. 20 It is not necessary that the area of competition engage a major fraction of the total operations of either party to the merger. 21 Nor is it necessary that the boundaries of the market be defined with mathematical precision. 22 In transportation, city-pair movements, movements along major parallel routes, transportation within a region, and transportation within the nation as a whole could be considered, if the facts so indicated.

Product markets are defined by the same approaches. An effort is usually made to find the area of effective competition between companies, both present and potential—those of their goods or services which are substitutable. 21 It is not necessary that they compete across the entire range of services—one may locate and measure the product lines in which they do compete. 21 If for example, a large railroad with a broad commodity consist were to propose to merge with a large motor carrier with a broad commodity consist, and the two carriers were in direct and close competition for commodity movements constituting only a fraction of the traffic of each, the merger could be barred.

Thus—to pick examples without intending to imply a limitation of the tests to such situations—the merger could be barred if both of the merger partners were very large and the area of anticompetitive effect, taking into account both geographic and product markets, were to be small in relation to their total operations, and if one carrier were large and the other small, with the anticompetitive effect involving a relatively small part of the large carrier’s operations.

It is customary, in antitrust analysis, to attempt to gain an impression of the size of the anticompetitive effect of a proposed merger by determining the percentage shares of merger partners in defined markets. (In transportation, this would sometimes necessitate gaining traffic data of a sort rarely seen at present.) As is evidenced by numerous cases and by merger guidelines issued during a prior administration, combined market shares of less than 10 percent can trigger a finding of illegality in some circumstances. 25

20. E.g., Reynolds Metal Co. v. F.T.C., supra, Pabst Brewing, supra.
21. E.g., Brown Shoe, supra, at p. 337.
23. E.g., Brown Shoe, supra, at 325-328.
25. See Brown Shoe, supra and Von’s Grocery Co., 384 U.S. (1965). The guidelines suggest that in a highly concentrated market (four firms holding 75 percent or more of
In vertical mergers, the analysis typically focuses on the effect of the merger in tending to prejudice competitors of either the acquiring company or the acquired company in their attempts to bid against one family member for the business of the other. The merger guidelines suggest that an acquisition would encounter opposition whenever it appeared that the acquisition (1) would foreclose access to a significant market for non-integrated competitors on either side of the transaction, or (2) would tend to raise barriers to entry on either side of the transaction (e.g.—assuming an inland surface carrier-water carrier merger—in either surface transportation of a particular type of traffic (e.g., containerized traffic) or the ocean transportation of such traffic).

It has not been necessary to trigger antitrust objection that large market shares be involved. For example, the guidelines suggest that percentages of 10 percent for the “supplying” firm, and 6 percent for the “purchasing” firm would probably give rise to antitrust challenge.

Obviously, the danger of foreclosure is great if either the acquired firm or the acquiring firm has a market position requiring competitors of its affiliated company to rely on it to a significant extent for purchases or sales (in transportation, interline traffic); such as unique access to a limited resource, a lack of competitors of adequate size to supply demand, a unique product or process, or a market protected to a significant degree by entry barriers.

Finally, both the cases and the guidelines lay very heavy stress on avoiding trends toward horizontal market concentration, or trends toward vertical integration likely to leave non-integrated firms at a disadvantage, and to raise barriers to entry.

The foregoing has dealt with the usual forms of intermodal joiners. The growth of “conglomerate” ownership structures poses a newer

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In a less concentrated market, the shares listed are:

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26. E.g., Brown Shoe, supra, Reynolds Metal, supra, and Kimberly Clark, supra.

27. A great many cases could be cited: Brown Shoe, Von’s and Continental Can are adequate to set out the reasoning and illustrate its application.
form—the lumping of carriers of two or more different modes in a large, varied corporate structure with many other types of enterprise. While the inclusion of carriers on such ownership structures may cause several competitive problems, the problems attendant to putting carriers of different modes in such ownership structures appear likely to be basically the same as those entailed in direct carrier-to-carrier acquisitions. Of course, the "conglomerate" and "intermodal" competitive problems would be additive, thus making it more likely that a transaction might, overall, be thought objectionable. Appendix B contains a note on relationships between conglomerates problems and intermodal ownership patterns.

I will not here attempt any precise delineation of the probable results of a close and careful application of these tests to the transportation industries. However, the reader familiar with transportation can discern without much effort that the net is both loose and fine: many mergers in which companies would be interested would be proscribed; and many mergers (which might be thought to be less attractive) might encounter no hindrance.

One problem though, bears special note. Where there is a substantial degree of concentration on one or both sides of a vertical transaction competitive problems are likely. For example, most routes, cities and ports are served by only a few railroads. A merger of a large Eastern District rail carrier with a large ocean container operator would pose severe foreclosure problems. (Further, the reduction of numbers in rail systems consequent to mergers of parallel lines increases the severity of such market foreclosure problems.)

The antitrust tests, and the policies which lie behind them, are intended to produce overall market structure results. This is because, over the long term, to a very substantial degree, the structure of markets affects their performance. What general aspects of market structure do these tests bring forward for attention, and what market structure problems do they suggest may be posed by movement toward more intermodal ownership?

The differences in the market structures of the different modes would give rise to substantial problems if major attempts were made to join them. Stated generally, if a large degree of intermodal integration were

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28. Because, for example, they would link two large carriers in an end-to-end relationship and foreclose markets for others, or join two large direct competitors who would not be regretful to have in the family most of the previously-competitive traffic.

29. For example, joiner of firms in different parts of the country, or in very different types of transportation (e.g., in barge and air transport).
accomplished by acquisition, either ownership in each mode would be
shrunk to the number in the mode with the smallest number; or some
 carriers would get left out, leaving a transport world part integrated and
part not.

Either approach has substantial adverse competitive effects. The
shrinkage of a mode which can have an unconcentrated market
structure—such as trucking—to the market structure of a mode with a
concentrated market structure—such as railroading—would entail
massive losses of competition. Tying all or most of one mode—such as
railroading—to only a fraction of another—such as either motor
 carriage or ocean transport—could leave unaffiliated carriers at a
substantial disadvantage.\textsuperscript{30} Regulatory control could limit the ability of
the integrated carriers to favor their affiliated operations. But it could
not eliminate this ability. Further, regulatory controls have costs both
the cost of the monitoring governmental apparatus, and the cost of
restrictions on operating freedom and flexibility attendant to the
government supervision.

Finally, unintegrated firms in competition with integrated firms would
face the possibility of cross-subsidization between the services with which
they are competitive and those with which they would not be
competitive. Cross-subsidization can be restrained by regulation to some
extent; but, again, only partially, and only at a price.

It would clearly be undesirable to reduce the unconcentrated market
structures of some modes to the concentrated structures of others by
horizontal acquisitions. It also appears undesirable to allow acquisitions
to create large captive interchanges in the interfaces between transport
modes; particularly modes with different degrees of concentration in
their market structures. Nor is it desirable to create substantial
opportunities and incentives for cross-subsidization.

Thus, it can be observed with some justification that the market
structure results toward which anticompetitive intermodal acquisitions
tend do not appear substantially more welcome than the results which
the framers of the Clayton Act sought to avoid in the economy as a

\textsuperscript{30} This would happen whether the linking came about either by internal expansion or
merger. But if it were done by internal expansion, the arrangement would have been
market-tested and, in the absence of monopolistic tactics, found to have some efficiency
justifications.

This problem would be particularly severe when one or more of the modes involved has
high barriers to entry. In such circumstances, there is less opportunity for the market to
provide substitute services for those tied up in ownership links. Unfortunately, there are
significant entry barriers in most of the modes; where the economics of the industry do
not supply them the Government does.
whole. Very substantial advantages, obtainable in no other more acceptable fashion, would be required to justify pushing far along this path.

There are grounds for some skepticism about claims of such advantages. There is little evidence or reason to suppose that administrative allocation of traffic between modes would produce an allocation more in accord with the relative advantages of each than would a competitive market. The obviously beneficial results of intermodal competition in recent years—both in generating technical and organizational progress and in gradually pressing rates into a closer relationship with costs—suggest that substantial sacrifices of such competition would be harmful. There has been a great deal of discussion concerning advantages of vertical combinations, but little hard documentation. Under an enlightened regulatory regime desirable vertical integration could be managed by investment. Also, there is now precedent for allowing efficiency-generating vertical acquisitions if no major losses of competition would be involved.31 Numerous parties involved in transportation have been making substantial efforts to create more favorable conditions for end-to-end combination of independently-owned modes for some time; their efforts have had some results, as in piggy-backing, and can be expected to continue to be useful.

In sum, the necessity for anticompetitive acquisitions is not clear. And there is much to say for maintaining active and competitive markets for traffic interchanges: diverse approaches stimulated by competitive pressures can generate progress, and minimize the extent to which large volumes of trade must be corseted within the preferences of one or a few transport entities.

If there is a clear potential for adverse market structure consequences from intermodal acquisitions, and if there is doubt about the existence of major advantages to the public from intermodal acquisitions, there is much to say for applying something like the Clayton Act tests adverted to before, with a good deal of vigor.

To conclude this portion of this article, the foregoing discussion suggests a number of propositions concerning the alternatives outlined at the outset of this section of the paper.

First, where operational integration of different modes could be facilitated either by acquisitions or by other devices of the sort previously described, the alternative devices should be chosen unless clearly excessive in costs.

31. See the Hay case, supra, footnote 5, and the ABC case, supra, p. 87, note 9.
Second, although there seems little reason to subject intermodal acquisitions without anticompetitive effects to strict surveillance, types of intermodal acquisitions which have anticompetitive effects should be permitted, if at all, only in those cases or categories of cases in which such acquisitions offer major gains not otherwise available. This implies that rules which restrain anticompetitive intermodal acquisitions should be relaxed, if at all, not generally, but only after thorough study and exploration of alternatives reveals, as to each type of intermodal acquisition which may be considered, whether and to what extent such acquisitions must be allowed. Also, this implies that if rules are to be changed, they should be framed with as much precision as is possible, so as to permit the efficiency gains sought with as little sacrifice to competition as is possible. The rules might be framed solely in terms of competitive effects, or framed to take into account, additionally, economies and efficiencies not otherwise obtainable. Also, rules might be framed to refer explicitly to specific types of transaction, stating tests to be applied to that type of transaction.

The problems posed by the differing market structures of the several modes, the degree of concentration in some modes, the barriers to entry in most modes, and the importance of transportation to the economy generally, suggest that detailed inquiry might indicate that the most appropriate course would be to devise comprehensive tests for intermodal mergers which would include an even more stringent competitive standard than now exists in the Clayton Act, with any necessary deviations from the policy provided on an exception basis. This could be justified if (1) generally, intermodal ownership offered little or nothing in transport efficiency, adaptability, and progressiveness that could not be got advantageously by other means, and (2) if under current tests, a series of small mergers which would escape prohibition could in cumulative effect significantly lessen competition either within a given mode or modes, or between modes.

32. Unless substantial changes are made in the operating environment of agencies, which now tends to bias them away from preserving competition and toward protectionism, there is additional reason to seek precision in the tests, and limitations on the agencies' discretion to accommodate carrier interests. (The problem is not unlike those faced in handling ambassadors—requiring, under current conditions, a combination of firm guidelines, a relatively short tether, short tenures, and men both unusually diplomatic and unusually capable of keeping the mother country's interests clear.)

33. Arguably an even more strict approach could be justified—a ban on intermodal acquisitions—if such acquisitions did little or no good, could be harmful, and it was thought advisable to conserve the administrative effort required for case-by-case determination of the probable effects of such acquisitions.
In sum, the broad outlines of market organization in the different modes, taken with the general procompetitive policy of this country, suggest that if legislation were in order, it should probably be of a sort which would ensure the application of a generally strict competitive test for all intermodal acquisitions, and allow for a generally lenient treatment of cross-modal entry by direct investment. If a different approach were taken—more lenient with respect to intermodal acquisitions—a good deal of justification would be required to show that the efficiency gains available in this way, and in no other, clearly exceeded the disadvantages. If different tests were appropriate for different types of acquisitions, bases for the differentiation in policy would be necessary. The nature of the information required for such judgments, and the ways in which decision might be made, will occupy my attention for the remainder of this article.

III. Methods of Reaching A Public Decision on Available Alternatives

There are time honored ways for reaching a decision on matters of this sort. The process usually starts when sundry interests become aware of economic threats or opportunities to which they would like to respond. While opportunity or threat may be clearly perceived, typically the nature of the economic process involved, and the over-all consequences to the community of any given course of action, are seen only dimly at first. The processes and the consequences are apt to be described by interested persons in terms of their effects on the interests of such persons, rather than in any comprehensive and systematic form. If action by the relevant political organization would help or harm some of those interested, they are apt to set about inducing such action.

Often this process proceeds somewhat as follows. Interested parties make public statements of views. Others respond. A sort of loose colloquy evolves—as if a hundred people drifted into and out of a large room, intermittently addressing remarks to sundry among themselves. Occasionally portions of the group clump together to attempt organized discussion. Public officials listen to the babble, step into and out of the clumps, and occasionally make pronouncements. Sometimes the

34. To extend a child’s fable, it is as if a group of men find an elephant among them, and set about mounting its back, avoiding its feet, making plans for the sale of its liver, and otherwise weaving webs of thought and action in which to ensnare it, or a part of it, for gain. If they have a political organization, it must react also. It is understandable if at the outset their political organization reacts in a somewhat ad hoc fashion, without thoroughly comprehending the elephant’s anatomy, or its place in the ecology.
Government will appoint committees to do a somewhat systematic canvass of the persons in the room and perhaps some outside it. If this is done reasonably well, diverse views are sampled. The Committee cogitates and makes recommendations. (Government agencies often are used to do the work of committees. Their canvasses of the community may be somewhat less systematic, their internal deliberations may, or may not, be more systematic.) If legislation is proposed, Congress invites interested parties to argue their views. Then a law is passed, and we all abide the consequences.

One notable characteristic of this process is its ad hoc nature. Legislation tends to be passed, as one Congressman recently put it, when there is a pain on. Granted, systematic legislative structures are built, but to a considerable extent they are jerry-built.

Another notable characteristic is that in many of the colloquies preceding action on transportation regulation, public officials have in the past often heard largely the views of a relatively limited portion of the community, the commercial producers, and, usually to a lesser extent, commercial buyers of transport services, who are directly and immediately involved. This arrangement of the sources of information can cause the officials' picture of the problems and of appropriate public action, to be cast largely in the terms of reference of these producers. Such a view, proposed by only a portion of the community, often fails either adequately to describe the issues, or to define a course of conduct of optimum utility to the general community.

The system is not as bad as this sketch may make it appear. Of course, we find it much more congenial than the ukase of kings, or the tightly centralised and bureaucratic decision making of some of our Eastern neighbors. The citizenry has muddled through to a good deal of serviceable law, and manages a somewhat irregular but continuing clean-up of past mistakes. Many participants in the public colloquy do try to construct a valid and objective view of what is involved. A widely shared public conscience constrains all who participate to some extent and tends to keep public actions generally oriented more toward the public

35. See, for example, the observations in Kalko, Railroad Regulation, 1877-1916; Jones, Cases and Materials on Regulated Industries, pp. 484-504; 732-740.

36. It seems that at this stage of our development most humans feel some compunction to tell the truth, at least when someone may be able to check out their statements, but they habitually prefer to discuss those propositions which favor their interests, and to leave to someone else the task of dealing with other propositions, concerning which, in any event, they would prefer to suspend judgment or belief. Whatever may be said about the ethics involved, the result is often a less than complete representation of the issue.
good than toward our mutual destruction. Also, the collective consciousness of the community seems to have some order and organisation which directs our perception of issues, and our efforts to act on them, in a better than random fashion. Moreover, there are practical virtues in acting *ad hoc*; there is at least some probability that the activity will have immediate effect, rather than being dissipated.

But because men share in the general order-building propensity of living things, and we have generally been progressing of late, there are persistent attempts to make the conceptual framework for considering the interests of the community more comprehensive, systematic, reliable, and valid; and likewise to make the processes of decision more systematic and reliable.

Government agencies have had a share of such persons. And the agencies have reflected, to some extent, the general tendencies just mentioned.

Increasingly, the conceptual constructs of economics are used to give some order and clarity to issues. The tools of this discipline are limited, and, if this fact is not appreciated, limiting. They do not completely supersede older and more general thought structures. But they can serve to organize a great deal of experience in clear, consistent, and reasonably precise forms.

In addition, and in conjunction with this, the trend seems to be toward obtaining “objective” data, which meets increasingly sophisticated standards of reliability and representativeness; and lends itself to careful and orderly methods of analysis.

Those who follow these tendencies reflect an appreciation of the utility of the forms of inquiry used in physical sciences, and a desire to adapt those forms of inquiry to their needs. In the opinion of the author, the distinctive and fruitful forms of inquiry used in the physical sciences include planned, systematic searches for information relevant to the questions involved; widespread sharing and discussion of the information gathered; an attempt to assure reliability of data by various means, including the use of concrete, specific, and often quantified data of a sort which can be verified by others; a systematic examination of alternatives involved in any given problem; the formulation of conceptual (and often mathematical) models to explain processes under consideration; and the testing of the models and their predictions (indeed, views by whatever name described) against objective data to the extent possible. Perhaps most distinctive is the appeal to reliable, objective data.\(^\text{37}\)

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\(^{37}\) Both lawyers and economists know there is a great deal of ambiguity in the description “reliable, objective data.” Such data is a construct. But the description implies
The development of formal models is not limited to explanations of events. It has also been applied to the process of making decisions: that is, models are constructed for putting into a systematic framework possible courses of action, probable results, and means of arriving at useful decisions among possible courses of action.

The attempts to use these methods of inquiry have had uneven results. The issues involved rarely fit completely into the analytical models available. Always, some of the data needed are not available. The men conducting the studies often do not have the storehouse of information and experience needed to make informed judgments when, as is usual, the objective data available take one only part of the way to decision. Too often, the paraphernalia of objective inquiry mask an advocacy merely made more elaborate, not more valid, by carefully selected and carefully arranged arrays of data. Men enamoured of analytical techniques often seem to underestimate the complexity of the economic fabric, and to over-estimate the reach of their tools. But these caveats are like the warnings which accompanied gunpowder and nitroglycerin when introduced—badly used, the tool is dangerous; however used, powerful.

A recent policy inquiry conducted by the Federal Communications Commission illustrates one attempt to furnish a basis for decision on an important issue by methods at once public, systematic, and analytical. The problem was whether the Federal Communications Commission should regulate the combination of computer with communication operations. and, if so, in what way. The agency first formulated the issues involved in comprehensive and analytic form. It then sought comment from a wide variety of interested parties, including notably, the entities likely to use the services involved. In stating the issues for comment, the agency indicated with some particularity the sort of information sought. Upon receipt of submissions, it sought systematic analysis by a competent research organization. The results of this analysis were made available for public comment.

The agency did not undertake substantial independent fact gathering using its own staff or a research organization. Nor did it succeed in quantifying as much as would have been desirable the various effects of alternative policies. Its procedures would not necessarily be best for all situations. But the FCC proceeding did produce a more informed, systematic and objective basis for decisions than usually exists.

Should a similarly elaborate program of analysis be created to deal

\[\text{a particular sort of attitude on the part of the inquirer, and a degree of refinement in the data, which have a good deal of practical meaning.}\]
with intermodal ownership questions? It could be argued that this is not necessary. In the computer-communications case, a major new service for the economy clearly is emerging, and a decision on regulatory ground rules clearly was required. It is not so obvious that intermodal ownership is necessary or appropriate to create major new capabilities in the transport industry.

But if this subject is important enough to generate serious proposals for legislative change, and if changes under consideration would include some which would seem to be likely to have adverse market structure consequences, the subject is worth a thorough, reliable, objective and informed inquiry. The construction of an orderly and adequate regulatory regime requires more than merely generating proposals to accommodate the desires of members of one mode or another for enhanced opportunities, attempting to strike some rough equivalence in the restrictions on different types of carriers, or extending selected elements of some regulatory scheme on the grounds that there is precedent for the action.

There is a more general argument for proceeding to such an inquiry. If the natural course of economic entities is gradually to create more orderly and better integrated systems, it is, arguably, time to go beyond the early, ad hoc responses to some salient aspects of intermodal relationships, and to create a more comprehensive and systematic statutory structure. And if this were done, the effort, and its results, should measure up to contemporary standards for evidence and analysis. Otherwise, there would be little point in undertaking it.

In short, if public action is to be taken on the issue of intermodal ownership patterns, the costs and benefits of alternative means of coordinating transport modes should be investigated systematically and thoroughly. The various claimed efficiencies for the types of intermodal ownership under consideration should be precisely identified, the claims systematically investigated, and their dimensions quantified to the full extent feasible. The market structure consequences of each method of creating intermodal ownership structures should be traced out in as much detail as is possible. Claims should be substantiated, to the full extent possible, by objective, reliable data. Such data, and perspectives in which they are organized, should be subject to dispassionate and skeptical analysis. The advantages and disadvantages of different means of governing intermodal relationships should be fully explored. And the process of analysis and of decision should be made as public as is possible.

To conclude, one of the most charming features of this vigorous
society is its wealth of opinion, argument, good intentions, persons sure of their ground, and, more abundantly, persons sure of their interests. As the oldest sector of the economy to be organized and regulated on a national scale, the transportation industry seems particularly rich in these things: indeed, its arguments are often treated as wisdom, its assumptions as settled, and its habits as tradition. New methods of analysis and decision, grasped with some alacrity by more recent arrivals on the scene, must displace a considerable accumulation of baggage to find space in transportation's train of thought. But unless public decision making in this field is to lag in quality some decades behind its progress elsewhere, an effort must be made to meet the best of current standards for such decision making, and even (to think boldly) to improve on them. A resolution of questions raised by pleas for extension of intermodal ownership by acquisitions may or may not furnish occasion for such decision making. But if it doesn't, we are likely to suffer from the result.
APPENDIX A
PATTERN OF REGULATORY CONTROL OVER INTERMODAL ACQUISITIONS

<table>
<thead>
<tr>
<th>Type of Acquisition</th>
<th>Regulatory Standard</th>
<th>Agency Administering Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Motor Carrier Acquisitions of:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) railroads</td>
<td>public interest</td>
<td>ICC</td>
</tr>
<tr>
<td></td>
<td>49 USC §§5(2), 5(13)</td>
<td></td>
</tr>
<tr>
<td>(b) intercoastal and inland waterways carriers</td>
<td>public interest</td>
<td>ICC</td>
</tr>
<tr>
<td></td>
<td>49 USC §§5(2), 5(13), 902</td>
<td>CAB</td>
</tr>
<tr>
<td>(c) air carriers</td>
<td>public interest, effective use of facilities, protect competition. 49 USC § 1378(b)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>none</td>
<td></td>
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<tr>
<td>2. Railroad Acquisitions of:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) motor carriers</td>
<td>public interest, effective use of facilities, protect competition. 49 USC §§5(2)(b), 5(13)</td>
<td>ICC</td>
</tr>
<tr>
<td>(b) intercoastal and inland water carriers</td>
<td>prohibition on ownership of carriers using Panama Canal; as to others, public interest, effective use of facilities, protect competition. 49 USC §5(14), (16)</td>
<td>ICC</td>
</tr>
<tr>
<td>(c) air carriers</td>
<td>public interest, effective use of facilities, protect competition. 49 USC §1378</td>
<td>CAB</td>
</tr>
<tr>
<td>Type of Acquisition</td>
<td>Regulatory Standard</td>
<td>Agency Administering Standard</td>
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<tr>
<td>(d) ocean carriers in foreign commerce</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>(e) pipelines</td>
<td>none</td>
<td>none</td>
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<tr>
<td>3. Intercoastal or Inland water carrier acquisitions of:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) rail carriers</td>
<td>public interest 49 USC §§5(2), 5(13), 902</td>
<td>ICC</td>
</tr>
<tr>
<td>(b) motor carriers</td>
<td>public interest 49 USC §§5(2), 5(13), 902</td>
<td>ICC</td>
</tr>
<tr>
<td>(c) air carriers</td>
<td>public interest, effective use of facilities, protect competition. 49 USC §1378</td>
<td>CAB</td>
</tr>
<tr>
<td>(d) ocean carriers</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>(e) pipelines</td>
<td>none</td>
<td>none</td>
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<tr>
<td>4. Air Carrier acquisitions of:</td>
<td></td>
<td></td>
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<tr>
<td>(a) rail carriers</td>
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<td>none</td>
</tr>
<tr>
<td>(b) motor carriers</td>
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<td>none</td>
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<tr>
<td>(c) inland and intercoastal water carriers</td>
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<td>none</td>
</tr>
<tr>
<td>(d) ocean carriers</td>
<td>none</td>
<td>none</td>
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<tr>
<td>(e) pipelines</td>
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<td>none</td>
</tr>
<tr>
<td>5. Ocean carrier acquisitions of:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) rail carriers</td>
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<tr>
<td>(b) motor carriers</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Type of Acquisition</td>
<td>Regulatory Standard</td>
<td>Agency Administering Standard</td>
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<tr>
<td>---------------------</td>
<td>-------------------------------------------------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>(c) intercoastal and inland water carriers</td>
<td>none public interest, effective use of facilities, protect competition. 49 USC §1378</td>
<td>none CAB</td>
</tr>
<tr>
<td>(d) air carriers</td>
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<td>none</td>
</tr>
<tr>
<td>(e) pipelines</td>
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<td>none</td>
</tr>
<tr>
<td>6. Pipeline carrier acquisitions of:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) rail carriers</td>
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<td>none</td>
</tr>
<tr>
<td>(b) motor carriers</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>(c) intercoastal and inland water carriers</td>
<td>none public interest, effective use of facilities, protect competition. 49 USC §1378</td>
<td>none CAB</td>
</tr>
<tr>
<td>(d) air carriers</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>(e) ocean carriers</td>
<td>none</td>
<td>none</td>
</tr>
</tbody>
</table>
APPENDIX B—Note on Relationships Between Anticompetitive Effects in "Conglomeration" of Business Enterprises and Intermodal Ownership Patterns

There has been a good deal of concern that the "conglomerate" corporate structures may have anticompetitive effects which, although less direct than those involved in a conventional horizontal merger, may in combination and in overall scope be of some consequence. Thus the effort of those concerned with antitrust enforcement to attempt to describe types of anticompetitive effect involved.

Concern seems to center on two aspects of the over-all anticompetitive effect—the creation in a large conglomerate merger of multiple anticompetitive potentials; each of which potentials may or may not measure large in either the amount of commerce affected, the degree of anticompetitive potential, or the presently discernible probability of anticompetitive effect, but all of which together constitute substantial anticompetitive potential, and substantial probability of significant anticompetitive effect: and the cumulative effect of large numbers of such mergers, involved in conglomerations on a massive scale, which, it might be argued, might be a significant overall decrease in present and potential competition in the economic system, and concomitant concentration of assets in fewer hands.

In five cases¹ the Department has spelled out the following major types of anticompetitive potential thought likely to result from acquisitions by the large "conglomerate" companies involved:

(1) Elimination of potential competition, including potentials for entry by portions of one party to the transaction into defined lines of commerce in which the other party was engaged, and potentials for entry by both merging entitles into defined lines of commerce in which neither firm was engaged but both firms had the capacity to enter.

(2) Creation of potentials for and likelihood of intra-family trading.

leading to prejudice to firms competing with members of the family (or, to put it another way, the creation of a number of "vertical" relationships because of the many companies which could sell to and buy from each other under the conglomerate tent); and

(3) Creation or enhancement of potentials for reciprocity effects—the use of the buying power of one or several of the subsidiaries of the conglomerate to induce other companies to buy from one or more of the subsidiaries of the conglomerate, and the tendency of those who deal with a large conglomerate to buy from the conglomerate in the hope that elements of the conglomerate will buy from them.

The Department has argued, in addition, that these anticompetitive effects can in some circumstances tend to entrench in dominant market positions large firms owned by the conglomerates involved, and tend to raise barriers to entry in some of the lines of commerce involved. Also, the Department's cases seem to suggest that inter-industry competition may be lessened by the joinder of firms capable of independent development of products and services which would, over time, engender a significant amount of inter-industry competition. Finally, it has argued that if a relatively small number of conglomerates come to face each other in a large number of markets, replacing independent companies in those markets, they will come to recognize an over-all interrelationship between themselves, and tend to moderate their competitive activities to achieve a generally more comfortable modus vivendi.2

Obviously, joining a carrier with a conglomerate which is a large user of transportation services might create both vertical foreclosure potentials (in the purchase and sale of transportation), and reciprocity potentials (e.g., you use my carrier and I'll buy your widgets). Less obviously, but certainly conceivably, acquisition of a carrier in some instances might remove the prospect of independent entry into transportation by the acquiring company (either private carriage or common carriage); or remove the prospect of independent entry by the transportation company into lines of commerce in which the non-transportation company is or may be engaged. Conceivably, entry by a large conglomerate into a small transportation market might inhibit the competition of the rivals of the acquired carrier, because of fear of cross subsidization from the conglomerate to its carrier.

The dimensions of the direct elimination of competition involved in a

2. In a recent brief in the North West Industries case, the Department urges: "What is at stake is whether Section 7 can reach mergers whose impact is not immediate and perceivable in discrete markets...but which are of a sort that threaten long-run changes in the pattern of competition in a large proportion of the nation's markets."
"horizontal" intermodal merger, or of foreclosure of transportation markets involved in "vertical" intermodal joinders, would seem to be the same whether the joinder is brought about by a conglomerate or by a direct carrier-carrier transaction. However, the combination of the anticompetitive potentials of the intermodal joinder, the anticompetitive potentials from joinder of a large conglomerate with a carrier, and conceivably, the anticompetitive potentials of joining two conglomerates, each of which owns a carrier, could result in a larger over-all anticompetitive effect—and therefore deterrent to acquisition—than would result from the intermodal joinder alone.

The joinder of conglomerates with carriers could cause the patterns of court and agency review to appear inconsistent; and might produce court-agency conflicts over jurisdiction. For example, a large conglomerate would be required to get CAB approval for acquiring an air carrier. It could then acquire an ocean carrier and a motor carrier subject only to the antitrust law tests. If it then wished to acquire another air carrier the joinder of all of its operations, including the surface carrier and air carrier operations, with the second air carrier would be subject to CAB review. If it wished to acquire a railroad, the ICC could consider the motor carrier-railroad relationship, but not necessarily any other relationships, and the antitrust laws would seem to govern the joinder of the other operations with the railroad. If between the acquisition of the ocean carrier and the motor carrier the company were to snack on a steel company and a food chain the antitrust laws would be the measure of the legality of its appetite. If allowed, these elements of the corporate structure would be taken into account as above in the subsequent carrier acquisitions.

Now suppose that our conglomerate A, having succeeded in all these acquisitions, wishes to merge with conglomerate B, which has, perhaps miraculously, run a parallel course. What does the CAB consider? What can it immunize from the antitrust laws? Can it immunize any joinder from an ICC prohibition? What does the ICC consider? What can it immunize from the antitrust laws? Can it immunize any transaction it approves from a CAB prohibition?

I will leave the resolution of the proper application of regulatory and antitrust standards in this situation to the reader, in the event a client’s interests or his own propensity for puzzles in logic propel him into the maze; should the reader be a law professor, for prophylactic use, with suitable embellishment, in examinations for law students who have betrayed a misguided predilection for trade regulation; or, should the reader be a law student either apprehensive or curious enough to be
interested, for an illustration of how the economy constantly obsoletes regulatory law.

Presumably the potentials for complication of regulatory control outlined above will be realized piecemeal. It may be some time before we are forced into constructing an orderly general scheme for such situations.
COMMON OWNERSHIP IN CANADA WITH PARTICULAR REFERENCE TO REGULATION OF ACQUISITION OF MOTOR CARRIERS

BY IVAN R. FELTHAM*

Common ownership has apparently not been regarded as a problem by either the Canadian government or the regulatory agencies. The federal government itself owns one of the two transcontinental multimodal transportation systems, which competes on a broad front with the privately owned Canadian Pacific system. The government-owned system, Canadian National Railways and its subsidiary, Air Canada, comprises air, rail, highway, water, express and hotels. Canadian Pacific offers similar services, as well as having substantial ocean shipping and passenger capacity and extensive interests in natural resources and manufacturing. Together, Canadian Pacific and Canadian National operate a transcontinental telecommunications system. The Canadian Pacific trucking operation is by a wide margin the largest in Canada and ranks among the four largest in North America in terms of gross revenue. Both airlines have extensive international routes—Air Canada to the United States, the Caribbean and Europe including the U.S.S.R. and Canadian Pacific to the Orient, Australasia, Mexico and South America and Europe.

The international extensions of the two systems are generally not in competition, but the domestic air, rail and truck services are in competition on routes between many major cities. In transcontinental transportation, the two systems face other competition only in trucking.1 Regional air carriers and truckers offering a great variety of routes and services also compete on the shorter hauls.

This is obviously a very generalized picture of transportation in Canada. Although no account is given of competition by region or market, the description will suffice for general comparison with the United States. Generally speaking, concentration and common ownership is a principal characteristic of transportation in Canada. By contrast, the U.S. scene is characterized by the existence of several competitors on major routes and little, if any, significant common ownership of two or more modes.

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1. Busses compete for passenger traffic.
The modern competitive climate in land freight traffic in Canada is generally considered to have developed only in the last twenty years.

If there is any purpose served by putting a date on the emergence of our modern competitive transportation era it could be said that the events of August 1950, when a nation-wide rail strike tested the capabilities of the alternative forms of transport available, gave clear evidence that a breakthrough had been made and that the railways had finally lost the monopolistic position in Canadian transportation which they had maintained for almost a century.\(^2\)

The 1961 Report of the Royal Commission on Transportation dealt at some length with railway company expansion into trucking and concluded that there was little, if any, cause for concern about this development if proper safeguards were imposed. Although the Royal Commission’s conclusions do not constitute a statement of government policy, one can infer from the development of extensive trucking operations by the Canadian National that the Commission and the government were of one mind on this question. In the first volume of the Report, issued in March, 1961, the Commission stated:

Another trend in transportation that certainly deserves serious consideration is the movement of the railways themselves into the trucking business. Initially this action was viewed in terms of a marginal operation on the part of the railways in their effort to improve and integrate their services—pick-up and delivery, short-haul feeder operations, substitute services, etc. Now, however, the railways are into the trucking business on an impressively large scale—the Canadian Pacific Railway in fact, owns or controls one of the largest trucking fleets in Canada, while the Canadian National has recently bought up several good-sized trucking lines and appears to be in the trucking business to stay. The implications of this trend are complex and difficult to assess. The railways view it as a natural development in response to competitive forces which, by integrating their transport services, will improve both their competitive position and the transportation services available to the public. The truckers, on the other hand, fearful of the very great financial resources of the railroads, have claimed that it represents a potential return to a monopoly era in transportation—once the railways have achieved a dominant position in trucking, say the

independent truckers, the competitive stimulus in transportation now provided by this form of carrier will disappear. While there is cause for concern, certainly, in this trend toward a sort of "transportation supermarket", owned and operated by the railways, it would appear that the economics of the trucking industry, unlike that of the railways, inhibit the likelihood of monopoly tendencies becoming pervasive and, in particular, the ever present alternative provided by private trucking would seem to rule out the possibility of a re-emergence of a monopolistic transportation environment dominated by the railway companies. We would also assume, on the basis of our experience during this investigation, that the virile and articulate trucking industry, through its Associations, should be able to alert the public and the federal authorities in the event of cases of restraint of trade arising from this source.3

The Commission was even more definite on the point in the second volume of the Report issued in December, 1961.

It is also likely that the business corporations who must face such specialization and possible retrenchment will seek to diversify by branching into investment in other modes. Railway company purchase of truck lines is the obvious example. We conclude that, in the environment of public investment in road building which has been developed at an increasing rate, it is normal for management in transportation to attempt to invest in resources where the larger proportion of costs are escapable. Railway companies are transportation entrepreneurs. As such, if their considered policy is to transfer resources and initiative to road hauling or to a combination of road and rail, there is no good reason why it should be inhibited by the National Transportation Policy. Arbitrary attempts to limit the possible growth of economic power by limiting conditions of ownership in the various modes we regard as unwise, for reasons set out in Chapter 3.4 Such limitations can inhibit the withdrawal of investment from the less efficient mode, introduce rigidities into transport investment and delay the integration necessary for movements by two or more modes when efficiency calls for it.5

3. Ibid., p. 11.
4. Reproduced below.
* * *

One final comment is appropriate in this chapter dealing with satisfactory competition. Representations have been made to us concerning the possibility of the great resources of the railways being used to assert a monopoly position in the trucking industry. We are satisfied that already these resources have made the two largest railway companies between them the largest owners of truck fleets in Canada.

What reasons are set out for this fear? We can find no evidence that this large ownership will, except for very short periods, lead to higher prices for truck transport. Such a brief windfall can exist for any truck owner. If the danger is real, the principles enunciated below for significant monopoly can be applied, and the restrictive trade practices legislation invoked.

We have stated that, with free entry, and the ever present possibility of private trucking, the structure of the trucking industry is such that effective monopoly in prices cannot persist. With competition thus protecting shippers, the only other disadvantage of large-scale railway ownership of truck lines lies in the danger that it poses to independent truckers. This danger can only persist if railway ownership is more efficient than either independent or private trucking. Efficiency should not be penalized.

We re-emphasize also that, in the environment of increasing public investment in road building, it is normal for management in transportation to attempt to invest in resources where the larger portion of costs are escapable.

However, railway ownership of truck lines involves two policy recommendations concerning this diversification. The first concerns the real economic advantages of combining road and rail facilities. To the extent that these exist, railways must be required to offer to all truckers rail facilities at prices and under conditions the same as are offered to rail-owned trucks. When a trucker decides to use rail facilities for part or all of the distance, he is a shipper and should have the right to come before the Board of Transport Commissioners in that capacity, either singly or jointly with others. In order that the Board may determine the realities of any inter-carrier discrimination, railway companies, by virtue of being truck owners, must be required to make fully available to the Board the

6. Original footnote: “The establishment of realistic prices for capital to the publicly-owned railway is particularly important in the purchase of truck lines.”
pertinent cost and revenue data including, particularly, costs of capital.

The second recommendation concerns the possibility of hidden subsidies from rail assets or income to trucking operations, or vice versa.

The Board must be given authority to require the railways to keep strictly separate accounting of their operations inter-modally. The costing section of the Board of Transport Commissioners must be able, at all times, to provide the Commissioners with pertinent cost separations for rail and road operations of the railway company. Undoubtedly this will require initial and recurring changes in the Uniform Classification of Accounts, to keep them applicable to costing operations rather than for strictly balance sheet requirements.

Under these conditions, and with the publicity attendant upon the discovery of revenue transfers, and the possibility of legislative or regulatory restraint, we see no reasons to limit the entrance of railway companies into any other mode of transport. The experience of other countries with such restrictions does not encourage us to recommend it in Canada.

The trucking industry

It is estimated that there are about 12,000 for-hire carriers in Canada, 11,000 of which have gross operating revenues of less than $100,000. The Canadian Trucking Association comprises about 7,000 members in its constituent associations. In 1967, 57,000 people were employed in the for-hire sector of the trucking industry in establishments employing over 20 persons, including household moving and storage personnel. A Dominion Bureau of Statistics survey in June of the same year revealed a further 41,000 persons in firms with less than 20 employees. In addition, there are about 10,000 working proprietors in the industry. It is therefore apparent that the Canadian trucking industry as a whole is characterized by a large number of relatively small operations. However, estimates indicate that some 240 carriers accounted in 1966 for 73% of

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7. Most of the statistical information about the industry is taken from "Trucking in Canada, 1957-1967", a paper presented at the annual meeting of the Canadian Trucking Association, June, 1969, by Earl T. Steeves, Chief, Transportation Section, Transportation & Public Utilities Division, Dominion Bureau of Statistics, Canada. A second paper with the same title was presented by Mr. Steeves at the 43rd Annual Convention of the Automotive Transport Association of Ontario, Toronto, November, 1969.
the total revenues earned by all for-hire motor carriers and that the top 50 carriers accounted for almost half the total freight revenue.\textsuperscript{8}

Although for-hire trucks made up only about 6\% of the 1.1 million trucks and road tractors licensed in Canada at the end of 1967, the D.B.S. survey indicates that for-hire trucks account for approximately half the total trucking activity in Canada. This estimate is based on "capacity-ton miles", that is, total number of miles travelled multiplied by the estimated capacity or the weight of the heaviest load carried, whichever was larger. For-hire trucking grew substantially in the 10-year period, 1957-1967. The tonnage carried increased an average of 5\% per year. For-hire trucks in 1967 carried 220 million tons of freight compared to 128 million tons 10 years earlier and ton-miles more than doubled in the ten-year period to 14 billion. Private intercity trucking changed hardly at all during the 10-year period, although private urban trucking showed an increase of 50\% over the decade. Forty percent of the tons carried in 1967 were accounted for by urban-area movements. The urban proportion of ton-miles was only 6\%.

The relative position of intercity trucking in comparison with other modes of transport in Canada is indicated by the fact that intercity tonnage (including private carriers) amounted to 285 million in 1967 compared with rail tonnage of 249 million tons. However, measured by ton-miles, railways account for 41\% and trucks about 10\%. Water and pipelines are about equal at 24-25\% and air is less than 1\%. It is generally agreed that the factors which contributed to the growth of trucking in Canada in the past will continue to sustain a good rate of growth for the industry.\textsuperscript{9}

There are no very useful data available with regard to the types of carriers and the work they do. Provincial regulations are not uniform in licence classifications and it is therefore difficult if not impossible to make a comprehensive national survey distinguishing general commodity common carriers, specialty carriers, contract carriers, etc. Data of this sort will be essential for any precise evaluation of concentration and competitive factors in the industry.

There is a common assumption that there is a high rate of consolidation in the trucking industry. The available statistics do not bear this out, at least when one has reference only to the number of firms involved. The information is not yet available upon which one might


\textsuperscript{9} See Steeves, \textit{ibid}.

form a judgment as to the rate of concentration in terms of gross revenues or other indicia of market share.

A study recently published by the Economic Council of Canada shows relatively little merger activity in the period studied. The pertinent Dominion Bureau of Statistics industry classification is "transportation, communications and other utilities" and the study distinguishes between foreign mergers and domestic mergers. The study defines a foreign acquisition as one in which a foreign-controlled company, with or without Canadian operations either directly or through a Canadian subsidiary, acquires a company or division in Canada. The purchase of a company or division in Canada by a Canadian-controlled company is defined as a domestic acquisition. Both definitions apply regardless of the nationality of the ownership and control of the acquired company prior to the acquisition. The study states that "in most cases the acquired company has been owned and controlled by Canadians, but in a significant number of cases—18% of the foreign acquisitions and 6% of the domestic acquisitions—the acquired companies had been under foreign control". The study also uses the term "international mergers" which I assume to refer to foreign mergers as defined.

The total number of domestic mergers in the industry classification was 109 for the 17-year period. During the same period, there were 27 foreign acquisitions. The annual figures show no particular distribution, although the statistics for domestic mergers do indicate more mergers toward the end of the period studied. In the foreign merger classification, the largest number was recorded in 1956 with 9. There were 4 in 1955, 4 in 1954 and 3 in 1961. In several years, there were none reported and in the other years there was only 1 per year. Figures for the characteristics of acquiring companies showed a total of 27 companies in the transportation field under the heading of foreign mergers and 102 under the heading of domestic mergers.

The foregoing information was collected through the instrumentality of an official enquiry under the Combines Investigation Act. Some further pertinent conclusions about the nature of the business and the relative sizes of the companies involved might be extracted from the data, but they are not yet available.

11. These figures are, of course, not strictly comparable to those for trucking alone but, being the best available, they give some indication of the dimensions of the merger activity.
12. Ibid., p.12. The words "merger" and "acquisition" are used interchangeably.
A study prepared for the MacPherson Royal Commission on
Transportation\textsuperscript{14} summarized concentration in the industry to the date
of the Report and concluded that in 1960

the degree of concentration in the for-hire trucking industry in
Canada was still not large, though the over-all CPR organization
was approaching a dominant position.

This relatively small degree of concentration was evident in the
results of the survey of trucking firms. The survey included some
of the largest scale for-hire operators in the industry. The five
largest of these handled only about 2.8 per cent of the tonnage
hauled by all Canadian for-hire trucks in Canada in 1959. [not
including CPR and CNR trucking operations] This level of
concentration may be attributed partly to the stage of development
of the trucking industry in Canada. But, in addition, the
possibilities for profitable large-scale operations were indicated to
be fairly limited.\textsuperscript{15}

For the period since 1961, there are no statistics comparable to those
of the 1945-61 study. The Office of the Director of Investigation and
Research under the Combines Investigation Act maintains a merger
register in which is compiled information drawn from published sources
such as the financial press. The merger register records some 38
transportation mergers in the period since 1961, of which 36 involved
acquisitions of trucking firms. Information has not been compiled
respecting the size and market share of the companies involved, the type
of service involved, or other factors which might be pertinent to a
judgment regarding impairment of competition.

The over-all picture is so unclear as to be hardly useful in assessing
concentration and competition in the trucking industry in Canada.
Although there is some information, as noted above, about
concentration in the industry over a 25-year period, there is no
information to which it can be related about any of the relevant markets
within which the carriers operate. In particular, there is no information
about the number of new operators who have come into the industry in
the period with which might be compared the number of operators who
have disappeared from the industry either through having been acquired
or through bankruptcies and other situations which may result in

\textsuperscript{14} "Truck-Rail Competition in Canada". by D.W. Carr and Associates, Report of the
\textsuperscript{15} Ibid., p. 43.
liquidation of a business. Nor are there any precise data about the market impact of the more obvious concentrations which have been developed during the post-World War II period. This span of years has seen the growth of both the Canadian Pacific and Canadian National intercity truck fleet.

It will be useful to distinguish four general classes of mergers pertinent to the Canadian scene, namely, intra-modal, multi-modal, conglomerate and acquisition of Canadian operations by foreign interests. The data described above, sparse as they are, probably related principally to intra-modal concentration. Apart from the one or two cases revealed in the annual reports of the Director of Investigation and Research under the Combines Investigation Act (referred to below), there is little evidence of impairment of competition. However, this statement may just be a reflection of the paucity of evidence, rather than an accurate indication of the state of competition in the relevant markets. Even if one were to double the number of takeovers reflected in the available statistics, it would still not represent a large number in relation to the total number of independent trucking operations in Canada. However, as noted, there is no published information assessing the size and market impact of the concentrations that have occurred.

With regard to multi-modal mergers, I have already noted the development of the very large Canadian National and Canadian Pacific highway transport operations. These companies operate, as is well known, the two trans-continental rail systems in Canada and their intercity highway transport fleet places them among the largest truck operators in North America. In addition, they operate the two trans-continental airlines in Canada and both airlines have extensive overseas operations. The foregoing description is not intended to be in any way a statement about coordination of the several modes of transportation within these companies. It is commonly understood that the Canadian Pacific system operates on a profit-center basis and it has been often observed that the trucking fleets of both companies compete in some instances with their own rail services. It is also commonly understood that both companies offer their services to all truckers for piggyback (“T.O.F.C.”) operations without discrimination.

Evaluation of the advantages of multi-modal operations is beyond the scope of this paper. Suffice it to say for present purposes that the Canadian transportation scene is characterized by the existence of two very large rail-highway-air multi-modal operations. There is also at least one major ship-road multi-modal operation: the Canada Steamship Lines-Kingsway Transport system. The Kingsway operation covers
points between and including Quebec City on the east and Vancouver, British Columbia, on the west and in its eastern regions parallels the St. Lawrence Seaway and Great Lakes systems which are served by Canada Steamship Lines. Again, the foregoing is intended only to be a factual statement and not to imply any judgment with regard to the competitive impact of the system. If a study of that impact has been made, it has not been published.

The picture regarding conglomerates does not have any particular characteristics. Recent reports have noted a few of significance, for example, the 1968 acquisition of Direct Winters Transport Limited by Fuqua Industries, Inc., which operates the Interstate Motor Freight system in the United States. Neomex International Limited, a Canadian-based conglomerate, has made a couple of trucking acquisitions which give the company substantial trucking capacity between the west coast and points in the St. Lawrence area. There may be others, but reports of them are not readily available.

Concern is expressed from time to time about acquisitions of Canadian operations by non-Canadian interests. As noted above, the 1945-61 study of the industry disclosed 27 such acquisitions in the classification "transportation, communications and other utilities" for the 17-year period and the merger register maintained by the Office of the Director of Investigation and Research under the Combines Investigation Act for the period since 1961 discloses acquisition activity by about half a dozen American companies. Again, it has to be stated that the readily available information is far from complete and more data are required before a judgment can be made about the acquisition activity in the Canadian trucking industry by non-Canadian interests.

The Combines Investigation Act

The Combines Investigation Act\(^16\) prohibits mergers and acquisitions "whereby competition is or is likely to be lessened to the detriment or against the interest of the public."\(^17\) A merger offense must relate to a "business" which is defined in the Act as "the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles".\(^18\) A fine in the discretion of the court may be imposed in addition to or in lieu of imprisonment\(^19\) and further

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\(^{16}\) Revised Statutes of Canada, 1952, c. 314, as amended.

\(^{17}\) Ibid., s. 33 and s. 2 (e).

\(^{18}\) Ibid., s. 2 (a).

\(^{19}\) Criminal Code, ss. 622 and 623.
commission of the offence may be enjoined and the merger dissolved.20
The merger provision clearly applies to the transportation industry.21

There have been only two significant court decisions involving the predecessor to the present merger section and none under the section as it stands in the present Act.22 The predecessor section contained the same essential element of detriment to the public and in both cases the court determined as a matter of fact that the mergers in question did not operate against the public interest. Neither of the cases involved transportation enterprises directly and neither of the cases proceeded beyond the trial division. However, the annual reports of the Director of Investigation and Research under the Combines Investigation Act indicate that the merger provisions of the Act are not without effect.23 The existence of the anti-merger provision may, depending upon the circumstances, operate to deter business activity which might otherwise be thought desirable in terms of acquisition and development of larger units in the transportation industry and it is, therefore, an important element in the legal framework within which transportation enterprises operate. As with the other provisions of the Combines Investigation Act, the anti-merger provision applies generally to extra-provincial and intra-provincial undertakings.

In the two leading merger cases, the findings of fact indicated that the judges applied a test requiring a very high degree of limitation of competition before the borderline of legitimate activity has been crossed. In the Manitoba Sugar case,24 the mere possibility of competition from eastern sugar producers was held sufficient to protect the interest of the public, as required by the Combines Investigation Act.

It may also be significant that there have been relatively few merger prosecutions instituted by the Attorney General of Canada.25 However,

20. Combines Investigation Act, s. 31.
23. Annual Reports of the Director of Investigation and Research under the Combines Investigation Act. Ottawa, Queen’s Printer. The last report is for the year ended March 31, 1969.
25. The Director’s annual report for 1969 records that two prosecutions charging, inter
the possibility of an inquiry by the Director of Investigation and Research, acting under his statutory duty to do so if he concludes that a violation of the Act is being or is about to be committed.\textsuperscript{26} Undoubtedly operates as a substantial deterrent to merger activity which might approach the border line. The prospect of having records seized and copied, and executives, business associates and even competitors interrogated under the broad investigatory power conferred on the Director of Investigation and Research\textsuperscript{27} is sufficient to discourage a prospective merger even if the parties are reasonably satisfied that their proposed activity does not violate the Combines Investigation Act.

In his 1966 Annual Report, the Director sets out the sort of information that the Combines Branch looks for in attempting to assess the significance of a particular merger.\textsuperscript{28}

1. Is there a sensibly defined product for which there are no close substitutes?
2. Is there evidence that a substantial market (even though this may be regional) is likely to be affected by the merger and is capable of fairly unambiguous definition?
3. In the absence of competition among domestic suppliers, is there evidence in the form of a substantial tariff or statistics showing that only a small proportion of the market is supplied by imports, that foreign suppliers cannot be looked to, to protect the public?
4. Is there reasonable assurance that there is no significant government regulation?
5. Is there evidence that existing concentration ratios are high or that there is a large size-differential between the acquiring company and its rivals?
6. Is there evidence that the barriers to entry in the industry are high or that they will be raised by the merger or that new firms have not in fact entered the industry for some significant period of time?
7. Is there evidence that competition remaining in the market is likely to be ineffective?
8. Does the acquiring firm have a history of growth by merger

\textit{Alta.} Illegal mergers are presently under way. Report of the Director for the Year Ended March 31, 1969, p.37. One company has pleaded guilty.

\textsuperscript{26} Combines Investigation Act, s. 8.

\textsuperscript{27} \textit{Ibid.}, sections 9, 10, 11 and 12.

\textsuperscript{28} At p. 19. The Director has often repeated this list in public statements. See the article referred to in footnote 21, at pp. 5 and 6.
or a history of coercive or predatory action or any other anti-
competitive behaviour?

9. Is there any evidence of intent to reduce competition or to
dominate the industry?

10. Is there any likelihood that there will be foreclosure of an
important market or source of supply to firms unconnected with
the acquiring company?

11. To what extent is there evidence of a real possibility of
increased efficiency via economies of scale or the transfer of assets
from incapable into capable hands?

12. Is there direct evidence of detriment such as excessive
profits or price enhancement following the merger?

He went on to explain the position that he had taken in rejecting the
"virtual-monopoly test" of detriment to the public that some counsel
had drawn from the available judicial authorities on the subject.29

In his annual reports, the Director records in summary form his
disposition of merger matters and proposed mergers which have come
to his attention either through the program of compliance or otherwise.
The latest annual report refers to a proposed acquisition by a specialized
carrier of three of its competitors, notice of which was given to the
Director of Investigation and Research under Section 20 of the National
Transportation Act.30 The Director reports that the acquiring company
held authorities permitting transportation of the products of the industry
which it serves from Ontario to the three prairie provinces and British
Columbia. Each of the acquired companies held similar authorities with
respect to the transportation of these goods from Ontario to the relevant
provinces and also between certain of the four western provinces.

Information obtained from one of the major customers served by
the acquired companies indicated that developments in railway
transportation in recent years had led to the use of railway
transportation for movement of its products to off-loading points
in each of the four western provinces from which haulaway truck
transportation was used to distribute these products throughout the
provinces. This same customer indicated some concern about
monopolization within the motor vehicle transportation sector
servicing it. Information received from other major customers
using this particular transportation service confirmed the use of

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29. See also the discussion in the recent article (footnotes 21) at pp. 26-28.
railway transportation as indicated above. These customers also indicated the existence of alternative haulaway truck companies offering their services in each of the four western provinces. This was also confirmed by information in the Trade Directories published by the motor vehicle transportation industries.

After taking account of the three acquisitions by the acquiring company, there remain four additional alternative shippers in Manitoba, three in Saskatchewan, two in Alberta and three in British Columbia besides the acquiring company. With respect to British Columbia; two of the alternative shippers were active primarily in the Vancouver area.

It was clear that this sector of the motor vehicle transport industry was becoming quite concentrated, doubtless in part as a result of the changes in railway transportation noted above. Moreover entry to the industry was unlikely to be easy due to heavy investment in specialized equipment. However, the major customers for the specialized transportation service include several of the largest manufacturing companies in Canada. They possess very considerable bargaining strength which would be sufficient to minimize and probably eliminate any monopoly profits which might be accruing to the specialized shippers. It was concluded that the available evidence would not support an allegation of a merger offence and the inquiry was discontinued. This was reported to the Minister on March 27, 1969.31

The Director's conclusion appears to emphasize the bargaining strength of the customers, rather than the potential for continuing competition among the carriers. His conclusion that the available evidence would not support an allegation of a merger offence is undoubtedly a reflection of the two decided cases.32

However, the Director's Report goes on to refer to five other merger proposals involving in each case firms which were members of a highly concentrated industry of very small numbers.33 The firms involved were also leaders in their field. In each case the Director concluded that the consummation of the proposed mergers would result in the commencement of a formal inquiry and the consulting manufacturers each indicated after such notification by the Director that the merger proposals had been abandoned. It cannot be assumed therefore that the

31. Ibid., p. 46.
32. See footnote 22.
COMMON OWNERSHIP IN CANADA

Combines Investigation Act is without teeth. Although the transportation merger was permitted to proceed without interference by the Combines authorities, the five other proposed mergers (about which we have very little detail) were in effect prevented by the existence of the statutory prohibition against certain mergers.

The Director mentioned in his 1967 Report a complaint by a company operating in a specialized field of transportation of measures used by the largest company in the field allegedly to restrict and discourage the entry of new firms into the industry. After considerable investigation, the Director concluded that the most important barriers against new companies entering this field had not been due to the activities of the company complained about, but rather to the nature of the service itself. In addition he concluded that the major customers in the field were in effect potential competitors in the event that the carrier should attempt to abuse its monopoly position. He therefore concluded that the matter did not justify further inquiry.

The Director’s report of March 31, 1969 discloses that he entertained with regard to Section 33 of the Act three inquiries in 1965, four in 1966, seven in 1967 and seven in the first nine months of 1968. His report also discloses that in the same period inquiries with regard to Section 33 of the Act (total of 21 inquiries) included 18 from manufacturers and the balance of 3 were classified as “other or unspecified” as distinct from being from manufacturers, wholesalers or retailers. There were apparently no inquiries with regard to proposed mergers in 1964. The report further discloses that of the 21 inquiries with reference to Section 33 of the Act, 11 were given qualified approval and 6 were given qualified disapproval. The other 4 could not be categorized. The compilation of information regarding Section 33 starts with the year beginning April 1, 1963.34

This listing of inquiries does not include general requests for information which were not related to actual or proposed business activities and those which were really complaints of infraction. In view of the number of acquisitions and mergers consummated in recent years, the consultation covered only a small portion of the growing concentration of industry.35

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35. The total numbers recorded in the merger register are shown at p.31 of the 1969 Report.
Provincial regulation operating as an exemption from the Combines Investigation Act

One of the two merger decisions is significant in respect of the relation between the Combines Investigation Act and provincially regulated activities. One of the bases for the decision of the court in *R. v. Canadian Breweries Ltd.* was that the Liquor Control Board of Ontario had the duty and power to regulate the price and other aspects of the distribution of beer and therefore the price, as fixed by the L.C.B.O., and other regulated activities could not be deemed to be contrary to the public interest. Put another way, the proposition is that, for the purposes of the Combines Investigation Act, it must be assumed that the public interest is protected by the provincial regulatory agency. Since by definition a prohibited merger is one whereby competition is or is likely to be lessened to the detriment or against the interest of the public, a merger of enterprises in an industry controlled by provincial legislation is in effect free of the anti-merger provision of the Combines Investigation Act, at least in respect of regulated activities.

In his Annual Report for the year end of March 31, 1969, the Director of Investigation and Research deals with the relation between the Combines Investigation Act and other legislation controlling certain competitive activity, as follows:

To the extent that the controls which may have an effect on competitive patterns are imposed pursuant to valid special legislation, the position is generally taken that the Combines Investigation Act does not apply. In *Container Materials, Ltd., et al. v. The King*, Mr. Justice Kerwin (as he then was) said: "the public is entitled to the benefit of free competition except insofar as it may be interfered with by valid legislation..."

In a recently published article, the Director states

It may be observed that, in the Beer Case, once it was established that the brewing industry was regulated by the provincial boards under valid provincial legislation, it was accepted that *pro tanto* its operations did not fall within the scope of the Combines Investigation Act. This is consistent with views expressed on several occasions by the Supreme Court of Canada. This would be

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sufficient to dispose of that case, any arguments with respect to market shares and concentration being thereafter irrelevant.\textsuperscript{28}

The precise relation between the Combines Act prohibitions and regulated activity (whether under provincial or federal jurisdiction) has not been defined.

\textit{Recommendations of the Economic Council of Canada: Interim Report on Competition Policy, July 1969}\textsuperscript{29}

The transportation industry may be affected by changes which may result from the recently published recommendations of the Economic Council. These are recommendations only and there has been no indication with respect to government policy. The Report covers a number of points touching on the regulated industries such as transportation, as well as dealing with general competition policy.

The Economic Council concludes that the objective of Canadian competition policy should be the encouragement of economic efficiency, and the Council assess the current legislation by that test.

It is unlikely that the Act has done much to affect efficiency via changes in the structure of the Canadian economy. The main claim that might be advanced is that the banning of resale price maintenance has probably encouraged the entry into some sectors of price-cutting retailers. It is possible too that other prohibitions of conduct in the Act may have had some indirect effects on economic structure. But in respect of corporate mergers, which are one of the most important means by which changes in industrial concentration and other dimensions of economic structure take place, the Act has been all but inoperative. The only two cases brought to court under the merger provision (the \textit{Canadian Breweries} and \textit{Western Sugar Refining} cases) were both lost by the Crown, and were not appealed. There may have been certain deterrent effects in this area (the Director's \textit{Annual Reports} indicate that some prospective mergers have been abandoned following consultations under the “program of compliance” discussed below), but the Crown's lack of success in the courts has presumably limited the amount of deterrence achieved.\textsuperscript{30}

In minimizing the impact of the Combines Investigation Act with

\textsuperscript{38} \textit{loc. cit.}, footnote 21, pp. 24-25.
\textsuperscript{39} \textit{Ottawa, Queen's Printer}.
\textsuperscript{40} \textit{ibid.}, p. 64.
regard to mergers, the Economic Council appears to depart from their own test of relevance, namely, whether the competition policy has promoted economic efficiency. To be relevant to their own test, they should have concluded that the lack of effective deterrence of merger activity has adversely affected economic efficiency or, put another way, that the merger activity which has occurred has had an adverse effect on economic efficiency.

The Council deal at length, but not definitively, with the implications of concentration through mergers and acquisitions, particularly in the chapter on the "Structural Aspects of Canadian Industry".41 Their conclusion and recommendation is that a Competitive Practices Tribunal should be set up to examine mergers that appear to contain a significant potential for harm. The Council further stipulates eight considerations that would be applied by the Competitive Practices Tribunal to determine whether a particular merger was likely to lessen competition to the detriment of consumers or whether there was likely to be any offsetting benefit.42 The eight heads amount to a very wide range of relevant factors to be considered by the proposed tribunal. The tribunal would be empowered to block a merger unconditionally, allow it to proceed unconditionally, or allow it to proceed in altered form or subject to conditions designed to insure that potential disadvantages were reduced to the point where they were outweighed by potential good effect.43

National Transportation Act—regulation of acquiring companies

The National Transportation Act requires a transportation company subject to the legislative jurisdiction of the Parliament of Canada to notify the Canadian Transport Commission if it "proposes to acquire, directly or indirectly, an interest by purchase, lease, merger, consolidation or otherwise, in the business or undertaking of any other person whose principal business is transportation, whether or not such business or undertaking is subject to the jurisdiction of Parliament".44 The Commission is required to give or cause to be given such public or other notice of any proposed acquisition as appears to be reasonable in the circumstances, including notice to the Director of Investigation and Research under the Combines Investigation Act.45 If any person affected

41. Ibid., p. 73.
42. Ibid., p. 116.
43. Ibid., p. 114.
44. National Transportation Act, Statutes of Canada, 1966-67, c. 69, s. 20(1).
45. Ibid., s. 20(2).
by a proposed acquisition or any association or other body representing carriers or transportation undertakings affected by such acquisition object to such acquisition on the grounds that "it will unduly restrict competition or otherwise be prejudicial to the public interest".46 the Commission is required to make an investigation and it may disallow any such acquisition if in its opinion "such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest".47 The disallowance power can operate only if the acquirer is within federal jurisdiction. It cannot be used directly to prevent acquisitions by trucking companies operating only intra-provincially, nor does it apply to Canadian or foreign acquirers who are not in the transportation business. Moreover, it does not appear to cover a holding company that is not itself directly in the transportation business.

It will be noted that the Commission may act under section 20 only if objection to the acquisition is made by certain specified persons or associations. It may not act itself in the absence of such objection: nor does inaction by the Commission or its failure to disallow an acquisition when objection has been received amount to approval of the acquisition. The National Transportation Act does in section 16 give to the Commission wide power to investigate acts of carriers which it thinks may prejudicially affect the public interest, but the purport of the section seems to be confined to rate-making activity. Further, the specific mention of acquisitions in section 20 might be taken to exclude that subject matter from the operation of section 16.

Those required to report a proposed acquisition include "a person operating a motor vehicle undertaking"48 and "person" clearly includes an individual or a corporation. There is a statutory definition of "motor vehicle undertaking".49 but there is no indication as to whether the undertaking is limited to the operation itself or whether it is broad enough to encompass the total corporate structure a part or all of which is engaged in transportation. The acquisition of an indirect interest is covered in section 20 and it might properly be inferred from the omission of any such extended definition with regard to an acquirer that it is only a company or individual directly operating a motor vehicle undertaking within the jurisdiction of the Parliament of Canada that is required to give notice under that section. Further, section 20 refers specifically to acquisitions by "railway companies" etc., which are pretty clearly

46. Ibid., s. 20(3).
47. Ibid., s. 20(4).
48. Ibid., s. 21.
49. Ibid., s. 3(d).
defined terms, and the specific reference to the operating company would lead to the inference that, although the reference to a person operating a motor vehicle undertaking is possibly broader in scope, it is intended to be confined to the operating companies or individuals. Whatever the constitutional or other justification for the limited scope of section 20, the fact of the limitation has to be noted in assessing the effectiveness of the Commission's review power under that section. The limited scope of section 20 is important because the result of the limitation is to bring under review by the Canadian Transport Commission only acquisitions by the named companies and not others. Therefore, a proposed acquisition by a company not now in the transportation business is clearly not covered nor, as indicated, is it clear that the section covers acquisitions by a holding company, least of all a conglomerate.

The provisions of the National Transportation Act do not specifically derogate from the general effect of the Combines Investigation Act and the duties of the Director of Investigation and Research under that Act. Whether or not objection is received to a proposed acquisition of which notice is given under section 20, it would appear that the Director of Investigation and Research would be free to consider the acquisition as he would any other acquisition. Indeed, it would be his duty to do so. However, the only objection the Commission may consider is that the proposed acquisition "will unduly restrict competition or otherwise be prejudicial to the public interest". Although the Commission is not required to disallow such acquisition even if in its opinion such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest, it is hard to imagine a situation in which the Commission would decide not to disallow an acquisition but where it would still be appropriate for the Director of Investigation and Research to act against the acquisition under the Combines Investigation Act. There still appears to be some uncertainty with regard to the role of the Commission and of the Director, particularly in a case where objection has been filed and the Commission has determined not to disallow a proposed acquisition.50

 Federal regulation of acquired companies.

The Canadian Transport Commission would have the power under Part III of the National Transportation Act to make regulations "prohibiting the transfer, consolidation, merger or lease of motor vehicle undertakings except subject to such conditions as may be prescribed by

such regulations. This power is not in force, but the Minister of Transport has announced the Government's intention to implement federal regulation at an early date. There is as yet no indication as to how much of the possible federal jurisdiction will be assumed, nor whether regulations will be promulgated to deal with acquisition of federally regulated motor carriers. The broad power of this provision contrasts with the relatively limited scope of section 20 discussed above.

A similar power to control transfers of commercial air services is conferred upon the Commission under the Aeronautics Act. The question of acquisition of control through publicly traded shares is not dealt with in the statutes, nor in the Commercial Air Services Regulations. The latter provide simply that no acquisition of control of any commercial air service or transfer of shares or capital interest that results in transfer of control shall be effective without the Commission's approval.

**Provincial regulation of acquisition of motor carriers**

The power to regulate the transfer of control of motor carriers is conferred upon the provincial regulatory agencies by some of the provincial statutes. For example, the Ontario Public Commercial Vehicles Act prohibits the transfer of an operating licence without approval and

> The Board may in its discretion require the directors of a corporation that is the holder of an operating licence to present to the Board for approval any issue or transfer of shares of its capital stock, and, where, in the opinion of the Board, a substantial interest is issued or transferred, such issue or transfer shall be deemed to constitute a transfer of all operating licences held by such corporation, and the corporation shall forthwith pay the fees prescribed by the regulations for the transfer of operating licences.

It will be noted that the section does not require notification of the Board of a proposed transfer. Although the section is far from clear, it

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51. Section 35(n).
53. Revised Statutes of Canada, 1952, c.g., as amended, s. 13(e); Commercial Air Services Regulations, SOR/65-369, s.14.
54. Ibid.
55. Revised Statutes of Ontario, 1960, c.319, as amended, s.4a and 10.
56. Ibid., s. 5.
appears to give the Board power to disapprove any transfer of shares. Where the Board considers that a substantial interest is being transferred, fees applicable to the transfer of operating licences are payable. Looking at the section as a whole, one might infer that it was intended primarily to give the Board power to disallow only transfers of a substantial interest which would be tantamount to the transfer of an operating licence. In any event, it is not broad enough to cover holding companies, nor does it deal with publicly traded shares. Data are not readily available (if at all) on which to base a systematic analysis of the practice of the Ontario Highway Transport Board with regard to acquisition of motor carriers within its jurisdiction.

The Quebec Transportation Board Act contains the following broad provision:

Any merger, sale or transfer of any transportation service, or any transaction, agreement or contract of such a nature as to bring about a change in the control of such service, must be previously approved by the Board, on pain of nullity.

In the case of a transaction, agreement or contract relating, at the same time, to a transportation service and to other matters, the nullity enacted by this section shall apply only with respect to the transportation service.  

A recent decision of the Quebec Transport Board reviews several decisions of the Board, including the 1958 decision the result of which was that the intra-provincial operation of H. Smith Transport Ltd. was separated from the inter-provincial operation. Smith Transport Ltd., controlled by Canadian Pacific Railway Co. The instant case involved the proposed transfer to Smithsons Holdings Ltd., a wholly owned subsidiary of Canadian Pacific, of 51 per cent of the shares of H. Smith Transport Ltd. The balance of 49% was already owned by Smithsons. The Board approved the transfer and, in the course of its Order, relied on the recommendations of the MacPherson Royal Commission. The

57. There is no guidance to the Board in the statute or regulations as to what constitutes a "substantial interest".
59. Revised Statutes of Quebec, 1941, c. 16, as amended, s.35.
60. Bruce Smith, Theodore Smith, Harry Smith (Petitioner-Vendors) and Smithsons Holding Ltd. (Petitioner-Purchaser) and H. Smith Transport Limited (Mise-en-cause). Quebec Transport Board Role M#1056, 1969.
61. Discussed supra, p. 114 et seq.
burden was on the opponents to show that the transfer of shares would be contrary to the public interest and this burden was not satisfied.\textsuperscript{62} Reviewing the factors leading to its decision, the Board stated:

\ldots intra-provincial, interprovincial, international and intercontinental transport require a narrow [close] cooperation between all the modes of transport involved: highway, rail, water and air.\textsuperscript{63}

Conclusion

Generally speaking, neither federal nor provincial laws and regulations distinguish between multi-modal,\textsuperscript{64} intra-modal or conglomerate mergers or mergers involving non-Canadian interests. The “public interest” test is wide enough to enable the regulatory agency or other approving authority to draw any such distinction relevant to public interest, but there is as yet no indication of the development of a general policy by the regulatory authorities.


\textsuperscript{63} Ibid., p. 6.

\textsuperscript{64} Section 27 of the Canadian National Railways Act, Statutes of Canada, 1955, c.29, may restrict the authority of the Canadian National to acquire and operate motor vehicles only “in conjunction with or substitution for rail services under their management or control”. This section was added in the 1955 revision of the Canadian National Railways Act. There is a general provision of the same Act, which was continued without alteration in the 1955 revision (s.31) which confers on the company a wide power to acquire, subject to the approval of the federal government, shares of any other transportation company and “any business which in the opinion of the Board of Directors may be carried on in the interests of the Company.”
COMMENT

NO "COMMON OWNERSHIP" PROBLEM IN CALIFORNIA

MARY MORGAN PAJALICH* AND ROBERT A. LANE**

Neither the California Commission nor the trucking or shipping industries, to the writers’ knowledge, have had any problem with intermodal transportation. As we understand it, the concern is that a common control of various modes of transportation can so channel business back and forth between “family” concerns as to stifle or destroy competition.

Fundamental to our regulation is the regulation of rates. Thus the threat of inter-carrier economic competition is diminished. Partial control of entry into the field, control of joint or through rates and joint use of facilities have taken care of part of any additional potential problem: the virtually unlimited entry into the highway carrier field by “permitted” carriers has taken care of most of the rest.

RATES

In the late twenties the truck emerged as a significant factor in transportation.

A new type of carrier emerged. They either served a relatively few shippers or served many shippers in a restricted area. They were not common carriers in the traditional sense and they were not governed by the pre-1930 regulations of railroads and regular route highway common carriers. At about this time also, the great depression was upon the land. Chaos struck transportation as a result of the combination of unregulated trucks competing with regulated rails, on the one hand, and the general depression, on the other hand. In this atmosphere, regulation of truck transportation was born.

In the early 30’s there was general concern with developing chaotic conditions in transportation. The Commission concluded after extensive study that either the trucks should be regulated or, in the alternative, the rails should be deregulated and the laws of the jungle “allowed full and equal play.” The general hue and cry was for “government to do

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** Principal, Freight Economics Branch, Transportation Division, California Public Utilities Commission; A.A., San Mateo Jr. College (1932); College of Advanced Traffic (1951).
something." Responsive thereto the Commission recommended regulation of these new truck carriers. It proposed to the 1933 legislature, revised legislation providing for the conventional type of regulatory control coupled with heavy reliance on restricted entry into the field. These legislative proposals failed to pass.

Between 1933 and 1935 the chaotic conditions increased, making legislative action imperative. In the 1935 session, compromise legislation was hammered out for regulation of trucking which had the support of agricultural, business, industrial and carrier interests.

This legislation did not follow the conventional pattern. It departed from the limited entry theory; in fact, it reversed it. It embodied a concept of unrestricted entry and, instead of the usual carrier established and published rates, the Commission was directed to establish and approve maximum or minimum rates. It thus became the Commission's responsibility to establish rate control within the framework of the legislative policy. This California system is unique.

California's pattern of regulation was in fact a dual system. The rail carriers generally were subject to the conventional scheme of regulation and the so-called permit truck carriers were subject to regulation through rate control. This dual pattern of regulation is in existence today. California's current pattern of regulation has not been followed or adopted to any significant degree by any other state to our knowledge. Other jurisdictions have followed the conventional pattern.

Rates are fixed on a graduated scale according to size of the shipment, based upon costs. Small shipments have a fully compensatory rate; truckload rates, also cost-related, reflect the lesser unit cost to transport greater weights.

The minimum rates (which in practice tend to be the going rates) provide a "basement" for all highway carriers, regardless of their type or common control. If rail rates are lower than minimum rates for the transportation of the same commodity between the same (rail) points, the highway carrier may apply the rail rate as an alternate to the minimum rate.

Rail rates are subject to Commission scrutiny and comparison with minimum rates, and if clearly out of line the Commission may investigate them.

While unique, and in many ways not perfect, this rate system has provided a practical equality of rates between competing rail and highway carriers, and has provided a healthy transportation system for this constantly growing state.
Control of Entry

Transfers or Mergers

Section 851 of the California Public Utilities Code prohibits, absent prior Commission authorization, any disposition of necessary and useful public utility property, any franchise or permit or any right thereunder or any merger or consolidation with another public utility.

Security Issues

Section 852 prohibits, absent prior Commission authorization, the acquisition of the capital stock of one public utility by another. The criterion for such authorization is whether it will or will not be adverse to the public interest. In arriving at a decision the Commission would consider any protests and whether the resultant transfer or merger would tend to stifle competition or to unfairly increase the ability of the transferee or surviving utility to compete.

Certificates of Public Convenience and Necessity—Permits

The California Legislature has provided that the following must obtain certificates of public convenience and necessity from the Commission prior to commencing operations: Vessels operating intrastate (Sec. 1007), express corporations and freight forwarders (Sec. 1010), buses (Sec. 1031), highway common carriers, cement carriers and petroleum irregular route carriers (Sec. 1061). Pipelines which transport crude oil or other fluid substances (except water) are not required to obtain a certificate but must file tariffs. Of course, these may be suspended and investigated.

By comparison, the Highway Carriers' Act (Sec. 3501 et seq.) provides much less costly and virtually unlimited entry into the field of highway transportation. No public convenience and necessity need be shown; upon the filing of an application, required insurance, and establishment of financial responsibility, the Commission "shall issue a permit" (Sec. 3572). Such permits are issued to radial highway common carriers, highway contract carriers, petroleum contract carriers and cement contract carriers. Newly enacted amendments create the category of dump truck carriers (Sec. 3517 et seq.). The effect of these sections is to provide competition with the certificated carriers by the permitted carriers, to say nothing of the economic impact of unregulated persons operating trucks or pipelines which transport only their own property, and farmers and nonprofit agricultural cooperative associations which
transport their own, neighboring farmers' or members' property (Sec. 3511).

**JOINT USE, JOINT RATES**

The Commission may order joint use of the facilities of public utilities and may prescribe reasonable compensation therefor (Sec. 767). It may order the establishment of joint rates between two or more common carriers (Sec. 732) and prescribe the division if the carriers do not agree (Sec. 733).

**INSTANCES OF COMMON CONTROL OF DIVERSE CARRIERS**

While the Commission's control of rates, partial control of entry, and competition between various modes of transportation have served to control any "common ownership" problems, a fairly recent development has been the acquisition by truck lines of express or freight forwarder operating rights to fill out their operations. This has resulted in the consolidation of less-truckload shipments by the express or freight forwarder entity and their shipment over the common carrier truck line entity at the latter's truckload rate, the saving to the controlling entity, of course, being the difference between the less-truckload rate and the truckload rate. There is no adverse impact on shippers, and no unreasonable impact on competitors in this method of operation.

The only instance of a problem in the common control of diverse modes arose out of Southern Pacific Company's control of Southern Pacific Pipelines, Inc. The pipeline was built along the railroad's right of way. There is no requirement that a pipeline obtain a certificate of convenience and necessity. It filed its rate schedules for the transportation of petroleum between points served by the petroleum-carrying barges of River Lines, Inc. and others at substantially lower rates. In *River Lines, Inc., et al. v. Southern Pacific Pipe Lines, Inc., et al.*, (1964) 62 CPUC 238, the Commission found that the reasonableness of Pipelines' rates, alleged to be unreasonably low by its competitors, would be determined by the Commission. The Commission found them to be reasonable either on the basis of out-of-pocket costs or fully distributed costs. Complainants also alleged that because of the common ownership and control of Southern Pacific Company and Pipelines, the Commission should treat Pipelines as the alter ego of the rail line, and thus a "land carrier"; that Section 727 of the Public Utilities Code declares that it is the policy of the State to encourage use of waterways, and that in fixing water carriers' rates the Commission is
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directed to establish a differential under the rates of "competing land carriers" such that the water carriers shall be able fairly to compete for such business. The Commission found that the creation of the subsidiary had not frustrated the lawful operation of the statute; that the fact that the pipeline was owned by a railroad made it no less a pipeline; that the statute dealt with rate relationships between railroads (and highway carriers) on the one hand and water carriers on the other, and simply did not apply to pipelines. In River Lines, et al., v. CPLC, et al., (1965) 62 Cal.2d 244, the California Supreme Court affirmed the decision of the Commission, holding, however, that the statute required the Commission to adjust water carriers' rates and not those of the land carrier. The Court stated that if it were to conclude "that to encourage competition the commission was required to raise rates of competing land carriers where the costs of water carriers exceeded those of the land carriers," this would not only create "an administrative aberration, but would be economically unsound at the expense of the consuming public."

CONCLUSION

Due primarily to our unique rate regulation and secondarily to broad jurisdictional powers, we conclude that there is at least at this time no "common ownership" problem in California.
NATIONAL TRANSPORTATION POLICY IN THE UNITED STATES—AN ANALYSIS OF THE CONCEPT

BYRON NUPP*

Transportation leaders and practitioners, statesmen, and members of the general public use the term "National Transportation Policy." Political leaders may criticize the party in power by saying that the need for a "National Transportation Policy" has not been met. Frustrated shippers, travelers, or transportation executives may remark on the need for a "National Transportation Policy." The term was apparently used first in the works of Harold G. Moulton, the Brookings Institution scholar in his groundbreaking studies of the relationships of government and transportation in the 1930's.1 The phrase attained a legislative sanctity when the preamble to the Interstate Commerce Act as consolidated in the Transportation Act of 1940 was officially entitled The National Transportation Policy.

Despite its wide and popular usage, the concept and content of National Transportation Policy as a process of government has not been elaborated or given articulation in any of the scholarly writings on transportation. Textbook treatments do not provide any background discussion of the concept, other than to repeat the delphic utterances in the Interstate Commerce Act.

Yet the historic national struggle with transportation policy shows a definite form and content; a series of processes and institutions which are characteristic of the operation of policy making; an awareness of practitioners and scholars that National Transportation Policy is a discrete entity that can be identified. It is the purpose of this paper to set forth the background and features of the institutions and processes which may be termed the National Transportation Policy.

In fact the policy making process which we characterize as National Transportation Policy is not unique; it is characteristic of an entire approach to policy making. In such areas as anti-trust policy, labor relations, banking and finance, international trade, and economic stabilization the features of policy making are similar to those displayed in transportation.

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The Planning Approach to National Transportation Policy

Salient features of the policy making process might be made clearer if they were contrasted with the features of another approach which has received considerable attention in administrative literature. The concepts of national planning utilized in many foreign countries, and further elaborated in the extensive literature on United States foreign aid are suitable for this purpose.²

An excellent description of how the planning process might be applied to transportation is contained in the compendium by Gary Fromm of the Brookings Institution entitled Transport Investment and Economic Development (1962). This book is concerned with the programming of transportation investment for underdeveloped countries, particularly with reference to United States aid programs. Fromm expresses the planing philosophy as it has been developed in the extensive literature on planning. National development is seen as a rational process dependent upon a general development plan, with transportation plans a principal sector within such a general plan and related specifically to it. A comprehensive National plan, or indeed a comprehensive sectoral plan for National transportation development might contain the following parts or elements: (1) a data and information system, (2) specification of goals, (3) a long range development plan, (4) near term plans implementing long term plan, (5) cost-benefit evaluation of projects, (6) specification of political and social constraints, and (7) presentation of legislative alternatives. Certain limitations on the planning process are noted, including political leaders prerogatives, free enterprise incentives and existing disequilibria among economic sectors.

Rationality and the search for predictable results are the foremost aims of the planning process. The rationality not only embraces the analytical processes which relate intellectual conclusions to action programs, but also the administrative control which exists throughout. Rationality also features the initial collection of data, program formulation, implementation, and finally revision and reevaluation of policies and plans after the passage of time. Goal setting is perhaps the key element. Goals are specified rationally after a suitable analytical process has been implemented. The processes of rational analysis and rational

administrative implementation are inhibited by political debate. Alternative economic goals operating through the private enterprise sector and established institutions are unwelcome constraining factors.

It must be obvious to any serious student of American transportation that the process just described is not the one that has given us our National Transportation Policy. There is no comprehensive plan or set of objectives for the Nation, of which transportation is an integral part. Transportation has developed in its own right, and through processes of its own has fitted into National development. Statements of transportation goals have not been clearly specified, quantified, and expressed as plans and programs. The goals of the Nation have been in dispute, and legislation has attempted to reconcile them. There has not been a continuous iteration of administrative actions to formulate and implement successive plans; there has been an evolution based on the experience of reconciling many contrary goals and objectives over a considerable period of time.

The Legislative Approach to National Transportation Policy

National Transportation Policy has been based on successive legislative enactments and issues, not on successive rational plans or a planning process. It is therefore appropriate to speak of the process of policy making which has produced our National Transportation Policy as "legislative" in contrast to the planning approach.

In summary the main features of the legislative approach to transportation policy are as follows:

1. A development through evolution, rather than rational derivation;
2. A dialectical process of deriving goals and objectives through legislative debate in place of defined or assumed ones;
3. Implementation through legislative amendment after a dialectic process rather than rational iteration of plans and data;

3. Dialectical method was stated as a fundamental method in Western philosophy by Hegel, who viewed all human activity as moving from thesis, the initial identity or proposition to antithesis or the emergence of an opposing proposition, to synthesis, the emerging new reality derived from the opposition of thesis and antithesis. Synthesis became the new thesis, generating its own antithesis, and from thence to a new synthesis in a continuing process. While the analysis of Hegel is overdrawn and excessively ponderous, the dialectical process in politics may be considered in more practical terms as the political resolution of varying objectives among conflicting groups in the body politic. The legislative process may be considered the means of resolving such conflict in a manner which leaves every point of view considered and beneficial aspects of varying positions salvaged.
4. Application of policy through social, economic, and political motivation rather than by directive or management system.

There is a long historical evolution of transportation policy along the lines described. The legislative approach has been utilized in the promotion and development of transportation by Federal, State and local governments since the early days of the republic, and in promotion through private enterprise. Regulation was introduced into the maturing transportation economy in the same fashion, and has been amended by the same process. In more recent years concern with general transportation policy issues involving regulation and promotion have received the same kind of attention.

The key element in the policy making process, and the element which differentiates the legislative approach from others is the goal formulating process. The legislative approach is dialectical and this is evident in the many conflicting objectives that have characterized transportation policy development. The fundamental antithesis in transportation policy has been regulation and promotion. The predominance of one over the other has been cyclical; early American transportation policy was dominated by promotional considerations. With the maturity of the transportation network in the 1870's and 1880's regulation emerged as a policy issue and in a relatively few years became the principal focus of National Transportation Policy. In the later 19th and early 20th century there was little transportation promotion. Then promotional issues emerged again, and at the present time are the predominant consideration in official policy as highways, aviation, waterways, and urban mass transportation have been promoted.4

Other dichotomies have been the issue of strict versus liberal construction of the Constitution, public versus private enterprise, Federal versus State initiative, issues of equity as opposed to those of economic efficiency, and the public interest of users of transportation as opposed to the public interest in carriers serving the public.

A National economic policy is set forth in the Report on Manufactures by Alexander Hamilton.5 Transportation, although not receiving much specific treatment in the report, was conceived as a part of a grand policy of economic development under the leadership of an urban elite. Albert Gallatin gave a Jeffersonian bent to economic policy, and set forth a

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transport promotion plan in great detail, specifying canal routes, improved roads, and ports and harbors as a means of internal improvement.⁶ These two documents, however, did not become the blueprint of National development; they remained only suggestive of the scope of development. Actual development followed its own pace in the wake of basic political issues which became resolved in the National legislative process.

Scruples about the Constitutional prerogatives of the Federal government set the stage for the first group of transportation policy issues. Direct National development of transportation got off to a good start in the Federalist and early Jeffersonian periods. The National Road was a characteristic project. But beginning with President Monroe's veto of the National Road bill in 1822, the forces of strict construction gained strength. Jackson's veto of Maysville Pike was followed in 1845 by Polk's veto of the Rivers and Harbors bill. This event completely removed the Federal government from the direct management of transport promotion. Processes of indirect promotion followed with tremendous consequences for future transportation policy.

The ultimate effects of this triumph of strict construction were state and local control of highways, private enterprise control of railroads, and legislative rather than executive control of the Corps of Engineers. Even when Hamiltonian and Whig doctrine reemerged after the Civil War, a decidedly legislative bent was given to the augmented Federal promotion of waterways, railroads, and highways.

Programs of transport promotion were incentive-oriented in place of mandatory goals. Grants-in-aid came to be offered to States on the basis of their voluntary submittal of plans, plans guided only by general performance standards. Land grants were offered to States for the construction of canals and roads, and to private companies for railroad construction.⁷ Even the sole remaining Federal program, the waterways improvement activities of the Corps of Engineers, was predicated upon local sponsorship under the guidance of Congressional representatives. Because of the resolution of the Constitutional issue, transport promotion was a combination of National objectives, broadly stated and promoted through incentives, and the response of State and private interests.

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Broad National transportation development brought in its waks another great political issue, the public interest involved in the profitable operation of transportation under private control. Regulation came in the latter 19th and early 20th centuries to dominate United States transportation policy. With the completion of railroad network, and the stabilization of the legislative control over the inland waterway program, promotion of transportation virtually ceased as a Federal objective. The entire transportation debate came to be centered in the need for regulation and the form it might take.

Regulation triumphed in 1887 with the passage of the Interstate Commerce and attained its apogee in 1910 with the Hepburn and Mann-Elkins amendments. Its triumph was so complete that by 1920 even promotional objectives assumed regulatory form. The Transportation Act of 1920 attempted to use regulatory standards to strengthen the common carriers financially and to stabilize their development through a policy of railroad consolidation. The work of the Federal Coordinator, beginning in 1933, utilized regulatory procedures as a means of attaining and enforcing promotional objectives. His coordination plans were submitted to the concerned carriers, then they were submitted to the Interstate Commerce Commission, where after due hearing and modification, they were issued as regulatory orders. In another area of promotion, the subsidies paid airlines for development were administered in a regulatory setting after an initial experiment of utilizing Post Office payments for carriage of mail. Finally, in the Transportation Act of 1940, Congress attempted to utilize regulatory legislation as a basis for comprehensive transportation policy formation. A Congressional agency named the Board of Investigation and Research conducted extensive studies of regulatory and promotional policies as a basis for asserting regulatory leadership in all phases of National Transportation Policy.

Aside from airline subsidies, none of the regulatory efforts to engage in


9. The background and administration of these provisions has been treated in detail in William N. Leonard; Railroad Consolidation under the Transportation Act of 1920 (New York, Columbia University Press, 1946).


11. The most significant document in this commendation is the Public Aids to Domestic Transportation (79th Cong. 1st Sess., House Doc. No. 159, 1945), sequel to a similar analysis by the Federal Coordinator. The background and economic implications of all major public expenditure programs are analyzed in great historical and statistical detail.
promotional policy were particularly successful. Railroad consolidation in the 1920's founded on carrier opposition and ICC indifference. The Coordinator failed as carriers opposed his plan and as he became politically isolated from the mainstream of Roosevelt's New Deal. The Coordinator then turned to exclusive sponsorship of orthodox regulation for motor, air, and water carriers; thereby assuring the separation of regulatory and promotional policy. The agency created by the 1940 Act was too weak to be effective. Promotion, thereafter, took its more conventional form under the aegis of great executive agencies, the Corps of Engineers which after the time of Theordore Roosevelt became more oriented toward executive policy,\textsuperscript{12} the Bureau of Public Roads, and the Civil Aeronautics Administration, later the Federal Aviation Administration. This course of events led to the separation of regulatory from promotional policy. The dialectics of regulatory policy emerged as a focus for continued debate about the proper course for common carrier development and its relation to a National Transportation Policy.

Equity for shippers and regions contended with economic efficiency for predominance in regulatory policy. At first regulatory statutes were conceived as a means of the redistribution of National income with the discrimination statute the principal policy tool.\textsuperscript{13} Later statutes sought to reinforce shipper and regional equity with carrier equity, equalizing competitive effects through the regulatory restraints of minimum rates and control of entry. The Transportation Act of 1940 was the apex of this development.

Efficiency as a regulatory objective has not been so effective, and this goal has been promoted primarily by critics of the regulatory process. Some explicitly economic objectives have been introduced into the regulatory statutes following the Coordinator's work in the 1930's, most notably in some of the clauses of the so-called National Transportation Policy preceding the substantive provisions of the Interstate Commerce Act as consolidated in the Transportation Act of 1940. Efficiency as a regulatory goal has become a principal theme of independent professional opinion emanating from universities and research institutes,\textsuperscript{14} and this

\textsuperscript{12} See Preliminary Report of Inland Waterways Commission, (1908).
\textsuperscript{13} The Hoch-Smith Resolution of 1925 declared the policy of Congress to favor the adjustment of rates among the several industries, particularly agriculture, to promote their free interchange and commercial development. This is the most direct statement of policy favoring equity in transportation.
stream of thought received some recognition in the Transportation Act of 1958, particularly Section 15a(3), with its partially limiting language applying to the protection of high cost carriers against competitive inroads of low cost carriers.

Again regulatory policy has veered from emphasis on controlled monopoly to controlled competition. The 1940 Act again was crucial in this development, recognizing the emergence of competitive forms of transportation and seeking to find a means of regularizing carrier competition in the regulatory process. The means of accomplishing this objective has dominated debates over regulatory policy in the period beginning with the close of the second World War.

Concern with competitive transportation has led to a dichotomy between the public interest in shipper protection and the public interest in carrier welfare. Certainly the preamble to the 1940 Act is partial to carrier interests. Regulation of non-rail forms of transportation was motivated by carrier interests in guaranteed rates of return and freedom from competition. The carriers themselves were the principal motivating forces behind the inception of their regulation. The Transportation Act of 1920 was a decisive event in turning regulation from shipper toward carrier orientation.

In more recent years, there has been reaction against this dominance of carrier influence in regulation. The 1958 Act began the movement away from carrier protection. Independent professional opinion took the lead in the critical examination of the carrier oriented policies of the regulatory bodies.

**National Transportation Policy through Administrative Reform**

With the failures of regulatory method as a means of transport promotion, the elaboration of promotional programs under the executive branch of the Federal government, and the increasing concern of regulation with the dialectics of policy, the stage was set for the introduction of administrative reform as a means of transportation policy development.

Harold Moulton in his book the *American Transportation Problem*, published by Brookings Institution in 1933, drew together the principal threads of the administrative approach to National Transportation Policy. It was he who first used the term in an article in the American Economic Review. Moulton carried on the tradition of Brookings studies of government organization and its interaction with policy that had begun

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15. See American Economic Review article, op. cit.
in the 1920's with W.F. Willoughby and Frank Goodnow, following the
founding of the Bureau of the Budget and the interest that event aroused in
efficient and effective government.\textsuperscript{16}

Moulton was the first to be conscious of the total impact on the
transportation system of the Nation of the numerous Federal programs
dealing with highways, aviation, maritime affairs, and inland waterways.
He noted the parallel between new Federal programs and the growth of
competition with the railroads. The Nation's transportation problem,
Moulton, believed was a result of the lack of comprehensive goals for
transportation, the uncoordinated administration of Federal programs,
and the lack of harmony between promotional and regulatory activity.

The Moulton-Brookings line of analysis was carried forward in the
work of the Senate Select Committee to Investigate the Organization of
the Executive Branch of the Government pursuant to Senate Resolution
No. 217, (74th Cong. 1937) which issued its 16 volume report on overall
executive organization in 1936. Brookings was retained by the Committee
to do its analysis. One of these volumes dealt with transportation. It
traced the growth of promotional and regulatory programs and urged
administrative centralization, either under the Department of Commerce
or as a separate Department of Transportation.

While the Brookings study of transportation for the Select Committee
called for centralization, the burden of the entire series of reports,
developed under the leadership of Lewis Meriam, was in the direction of
more decentralization of Federal programming, under the joint
coordination of Congressional and Presidential agencies. This theme was
elaborated more specifically in a book by Lewis Meriam in which he
analyzed the processes of administrative coordination and control.\textsuperscript{17}
Considering the great amount of detailed information that is necessarily
involved in the coordination of complex programs, Meriam concluded
that the elaboration of Cabinet Departments was not an effective means
of improving Federal management. Both Congress and the Executive
Branch have roles in the control of Federal Administration, said Meriam
quoting basic constitutional provisions. The existence of 60 or more
separate active programs offered no insuperable obstacles to managerial
control, if control and coordinating agencies could be organized. The

\textsuperscript{16} See the discussion in Dwight Waldo; \textit{The Administrative State, A Study of the}
\textit{Political Theory of American Public Administration}, (New York, Ronald Press Company,
Institution, 1927).

\textsuperscript{17} Lewis Meriam and L.F. Schmeckebier; \textit{Reorganization of the National Government}
single Cabinet executive or indeed the President himself were not equipped to deal with this problem. Their role was broad political and administrative leadership and not management.

The Meriam thesis was, however, eclipsed by the famous work of Louis Brownlow and his 1937 report of the President’s Committee on Administrative Management which set forth a well articulated plan for the organization of the Executive Branch.\textsuperscript{18} The Brownlow report relied on straight line and staff doctrine, calling for an elaboration of the Budget Bureau and similar executive staff agencies and the concentration of all independent agencies into a limited number of cabinet Departments. Brownlow did not perceive the need for a Department of Transportation or any concentration of transportation promotional programs. The transportation programs in the Brownlow report were assigned on the basis of functional relationships to other programs; highways to a Department of Public Works, waterways to a natural resources complex and aviation within the Department of Commerce. Brownlow, taking his cue from Robert Cushman, advocated the inclusion of the regulatory agencies within the executive branch, with each regulatory agency assigned to a parent Department with similar functional responsibilities.\textsuperscript{19} The transport agencies then in existence, ICC and CAB, were to be assigned to the Department of Commerce.

Following the Reorganization Act of 1939 the Brownlow approach dominated Federal management until after the second World War. In 1947 the Commission for the Organization of the Executive Branch of the Government under former President Hoover made elaborate surveys and detailed recommendations for further consolidation and management reform in the Federal government. Recommending that regulatory administration be left about as it was, the Hoover Commission dealt with transportation in detail, this time in the Brookings tradition. The Brookings task force under Charles L. Dearing and Wilfred Owen recommended the formation of a Cabinet Department of Transportation, but this report was reversed by the Commission itself in favor of the concentration of transportation programs in the Department of Commerce.\textsuperscript{20}


\textsuperscript{19} R. E. Cushman;\textit{ The Independent Regulatory Commission} (New York, Oxford University Press, 1941) based on his study for the Brownlow Committee.

With Reorganization Plan No. 21 of 1950 and related plans, President Truman caused major transport program responsibility to be lodged in the Department of Commerce under the leadership of an Under Secretary for Transportation. This concentration of programs and authority was to last for 15 years. While the Commerce Department elaborated great programs for highway development, merchant marine promotion, aviation improvement, and regulatory reform under the leadership of the President, the leadership role was not politically strong enough to deal with all the emerging problems, particularly in aviation which was split off into an independent Federal Aviation Agency in 1958.\textsuperscript{21} The Department was also unable to control the burgeoning highway program to meet the planning needs of urban society, and it failed to generate political support for its regulatory reforms.

In 1966 Congress, followed the recommendation of President Johnson, created the Department of Transportation in the image of the Brookings reports. The new Department took over all the major transport promotional agencies with the exception of the Corps of Engineers and the Maritime Administration.\textsuperscript{22} It elaborated an extensive array of staff offices to control and coordinate the complex program responsibility and to perform a National leadership role in all transportation policy including new approaches to regulatory policy, even though economic regulation remained in the independent regulatory agencies, the ICC, CAB, and FMC.

Even as administrative reform gained the ascendancy, alternative administrative approaches to transport promotion and transport leadership survived or emerged in relation to specific problems. The development of inland waterway transportation in the Corps of Engineers continued to be carried out in close coordination with other aspects of multiple purpose water resource planning, along with a difficult programming problem involving numerous water resource agencies.\textsuperscript{23} In the Federal Aviation Act of 1958 an administrative solution to the burgeoning air space problem was found in a functional relationship


\textsuperscript{22} Public Law 89-670, October 15, 1966. See Message of the President of the United States (House Document No. 399, March 2, 1966).

\textsuperscript{23} Creation of the Water Resources Council by statute was accomplished in 1962 following approval by Congress of Senate Document No. 97, \textit{Policies, Standards, and Procedures in the Formulation Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources}. 
among all airspace developers and users; aviation, military, space, and communications. While this complex agency was once again included in the transportation family with the enactment of the Department of Transportation Act, coordinative problems with functionally related programs in other agencies, notably NASA and the Department of Defense remain. There remains also the latent problems of functional coordination of highway and mass transit development with overall urban development and planning, now a main focus of the Department of Housing and Urban Development. This problem had in the early 1960's led to substantial modifications in the planning philosophy of highway programs and in the inception of new programs for improving mass transportation systems under the aegis of HUD and its predecessor agencies. Again the formation of the Department of Transportation led to a retreat from this concept, but the problems remain.

Congress did provide for the retention of the maritime promotional programs in the Department of Commerce in functional relationship to that Department’s concern with foreign trade. More recently the growing interest in oceanography was linked to a major Federal transportation agency, the Coast Guard, with a resource development function, and there have been calls for its separation from the Department of Transportation. Oceanographic agencies in Commerce, Interior, and Transportation have been proposed for inclusion for a new agency.

By 1967 the use of administrative reform as a means of achieving a National Transportation Policy received its highest development. The creation of a Department of Transportation represented the ascendancy of one approach to administrative reform. This approach, even in the elaborated Department of Transportation, lived in tension with another administrative philosophy, the functional relationship of individual transport programs with other governmental functions.

The Emergence of the President as a Force in Transport Policy Formation

As administrative reform progressed as a means of transport policy development, the legislative approach to transportation policy took another step; the emergence of the Presidency as an innovator and motivating force in National Transportation Policy.

The President as a legislative leader is a well noted phenomenon in the political life of the United States. His formal assumption of that role became elaborated institutionally in the years immediately following the second World War.24 At this time, Presidents began the custom of

24. This has been traced in detail in the two articles by Richard Neustadt in the American
presenting Congress with series of messages on various programmatic needs and these messages began to set the agenda of each session of Congress.

Transportation did not figure in this process until well into the 1950's, after the transportation recommendations of the Hoover Commission had been implemented through the assignment of programs and leadership roles to the Secretary of Commerce. When the various program assignments had been completed in 1950 the Secretary in that year published a statement of overall policy objectives, repeating and emphasizing some of the findings of the Hoover Commission and outlining the broad relationships of Federal programs, regulatory statutes, and progress in transportation through the private enterprise carriers.23 This report of Secretary Charles Sawyer was in effect a White Paper of Executive Branch leadership in transportation policy.

In the Republican Administration which followed, Executive leadership in the reform and coordination of the regulatory statutes was exercised in the program of Secretary Sinclair Weeks, developed in coordination with the entire executive apparatus through a special Presidential Advisory Committee on Transport Policy and Organization. This Report called for a regulatory policy more in keeping with principles of economic efficiency, less paternalistic toward the carriers, and more in line with competitive goals than with the canons of regulated monopoly. The Presidency thus threw down the gage to the regulatory system, taking sides with independent professional opinion for a redress of the balance in the continuing dialectic of regulatory policy.

Congressional hearings throughout the middle 1950's on the President's agenda set the stage for the enactment of the Transportation Act of 1958, the only post-war enactment in the regulatory field. This Act brought into the Interstate Commerce Act some of the thinking which had been advanced by professional scholars.

In 1962 President John F. Kennedy continued the legislative role of the President by advancing further regulatory reforms. Although the debate on the Kennedy Transportation Message of April 1962 did not lead to major legislation, it provided a further opportunity for the exploration of alternatives in regulatory policy.

It is also expected that the Department of Transportation will assume

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the role of leader in the executive branch in the formation of National Transportation Policy, advancing programs in both the promotion and regulation of transportation.

**Prospects for Transportation Policy**

By the year 1970 National Transportation Policy in the United States displayed a number of characteristics as a result of the workings of the policy debates and other dialectical features of the legislative approach to policy making. In 1970 the following characteristics prevailed:

1. Promotion was definitely in the ascendency over regulation as an emphasis in policy;
2. In both promotion and regulation the economic emphasis was being stressed over political and social aspects;
3. Promotional policy was being administered and programmed in a context of transportation oriented agencies, the climactic event being the creation of the Department of Transportation in 1967;
4. In regulation the interest of the carrier was in the ascendency over the general public interest or that of the shipper;
5. Consistent with the economic emphasis in policy, private enterprise was ascendent over public enterprise.

Large Federal expenditure programs for roads, aviation facilities, waterway facilities, mass transit, and merchant marine, guaranteed the ascendency of promotion, while regulation in the old tradition became more and more discredited in the eyes of most sectors of independent professional opinion; economists, general newspapers and news media, lawyers outside the regulatory specialities, and students of business administration. The expenditure programs, moreover, continued to be formulated and administered for single purpose objectives; highways for the interest of highway users, aviation facilities for air carriers and private plane owners, waterways for barge lines. The programs continued to be supported by special interest lobbies whose power was still uncurbed. These interests, however, were becoming increasingly motivated by programming economics; that is within each program the interests were insisting that the funds be used effectively. Cost effectiveness was being promoted and benefit-cost studies were being accepted as a tool of programming. Political backing was in terms of the integrity and size of the entire program and not so much as in years gone by on the parochial interests of individual political leaders and their local clients.

Economic emphasis in regulation and some promotional programs was being reinforced by transport competitors who were losing the competitive
race. Railroads were insisting on economic emphasis in regulation as a competitive interest, and the user charge movement in highways, aviation and waterways was being encouraged by transport competitors. Some frugality in highway and aviation expenditures was being encouraged by program clients, such as truckers and commercial airlines who faced user charge increases to foot the bills for increased spending.

These ascendent principles of transportation policy, however, were in 1970 facing the nascent challenge of other doctrines and the stage was being set for a continuation of the development of transportation policy through the legislative process.

1. Social priorities were being increasingly recognized in the allocation of transportation resources themselves; an increasing number stressing mass transit over private automobiles as a means of urban mobility and high speed trains over expressways and aviation in intercity transportation. These programs were being advanced in the face of consumer sovereignty and other economic doctrines. Federal subsidy was being advanced as an aid to implementation.

2. Political and social priorities were being recognized increasingly in promotional programs. Extra costs were being incurred and orthodox benefits were being foregone to preserve neighborhoods from expressways and airports, to accommodate minority and other politically potent groups, and more and more citizen participation was being granted in transportation decisions.

3. National priorities were being extended toward preservation and creation of environmental amenities, even when significant transportation facilities had to be foregone completely. Noise and air pollution modified or eliminated many transport projects. Natural and historical amenities have been given priority over transport projects of tremendous tangible benefit; the preservation of the Everglades in place of the huge Miami airport being an example.

4. A certain amount of public interest began to be exerted in the regulatory sphere, particularly in programs to guide the organization of important transportation industries. Interest in railroad and airline mergers is a case in point; the take-over of transportation by conglomerate enterprises is another. Rate regulation received a stimulus as carriers began to raise rates to offset inflationary influences in the economy. Safety regulation received new emphasis and was extended to new areas such as automotive design, railroad track maintenance, and gas pipelines.

All of these concerns are now being debated actively in political circles. Even so, the debate has had little significant effect on overall channels for
transport policy formulation or its administration in the Federal government, a sure sign that the debate has not yet reached a decisive stage.

The debate has continued to follow the format of the legislative approach to transportation policy. Old issues are ranged against new, and resolutions of issues are being attempted out of many debates, analyses, agitations, and expressions of interest. National Transportation Policy shows signs of important changes in emphasis and promises to be a continuing evolution of political, social, and economic forces, relying on the motivations in hering in these forces, and not on administrative direction or compliance with rational pronouncements.
INTERSTATE SCHOOL BUS OPERATIONS: AN ADMINISTRATIVE LAW STUDY

BY

JAMES C. HARDMAN*

The problems which have arisen and which will continue to arise as a result of the school population explosion are varied and numerous. They cover the full spectrum of the traditional disciplines of law.¹

The solution of these problems is not only of interest from a professional standpoint, but also as citizens and parents.

One problem area which has arisen co-extensively with the multitude of others is that regarding school bus operations.²

One of the fundamental areas of law which governs the conduct of school bus operations involves the Motor Carrier Act of 1935³ and the administrative rules and regulations promulgated thereunder.⁴

This article shall focus attention on this legislation in an endeavor to familiarize members of the legal profession with basic issues, the acquaintance of which is warranted.

The Statutory Exemption

Although interstate motor carriers of passengers normally require specific authorization under the Act to conduct operations,⁵ school bus operators are partially exempt from regulation⁶ if certain requirements are met.

The partial exemption is one of entry into the field and the territorial

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¹ See, for example, Comment, Governmental Immunity in Illinois: The Moltor Decision and the Legislative Reaction, 54 NW. U.L. Rev. 588 (1949) (School Bus Tort Liability) and McKenna, The Transportation of Private and Parochial School Children at Public Expense, 35 TEMP. L.Q. 259 (1962) (Constitutional Law).

² One expert asserts that "... school transportation usually causes more headaches for school boards and administrators than does any other part of the school program." Featherston, School Transportation—The Things a Board Should Know, 157 THE AMER. SCHOOL BD. J. 15, 16 (1969).


⁴ See Title 49 of the Code of Federal Regulations.


scope of operation thereunder. A bus operator is still subject to the safety rules, hours of service regulations, and standards of equipment.\textsuperscript{7}

The exemption reads as follows:\textsuperscript{8}

\ldots (b) Nothing in this part [Part II of the Interstate Commerce Act], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; \ldots

The basic requirements in order for a trip to qualify under the exemption are:\textsuperscript{9}

1. The trip must be directly connected with and contribute to the education development of school children;\textsuperscript{10}
2. The trip must be sponsored and supervised by school authorities;\textsuperscript{11} and,
3. The trip must be performed in school buses employed solely in the transportation of school children and their teachers or bona fide chaperones.

Although the above requirements seem to be clear and unequivocal their application in specific factual situations have caused problems.

\textit{School Related Activities}

A trip is not exempt merely because the passengers are school children. The exemption only applies to a given movement if it is directly connected with the classroom activities of the children who will take the trip.\textsuperscript{12}

In deciding whether a trip is directly connected to a school related

\textsuperscript{8}  Ibid.
\textsuperscript{9}  Pat & Gordon, Inc. — Charter, 102 M.C.C. 533, 557 (1966).
\textsuperscript{10} The term "school children" refers to students up to and including high school students. Fox River Bus Lines, Inc., Investigation of Operations, 110 M.C.C. 423 (1969).
\textsuperscript{11} The term "school" means an institution primarily devoted to the education development of children and possessed of some of the educational indicia usually associated with the formal education of children, such as established curricula, scheduled classes, regular teachers, tutors, classrooms, and the like. Fox River Bus Lines, Inc., Investigation of Operations, 110 M.C.C. 423 (1969).
activity, the determinative factor is the primary purpose of the trip, i.e., whether it is an educational endeavor.\textsuperscript{13}

The above requirement does not preclude trips which involve secondary recreational aspects so long as the educational endeavors of the trip outweigh the recreational aspects.\textsuperscript{14}

The normal type of trips which have been considered and found to be directly connected with school related activities have been field and sightseeing trips to points of historical and cultural interest in order to provide the students with a first hand knowledge of places, events, and techniques studied in the classroom.\textsuperscript{15}

On the other hand, it has been found that trips in the nature of fund raising activities or civic functions to be apart from regular school activities and thus to be without the exemption.\textsuperscript{16}

The requirement that the trip must be directly connected with and contribute to the educational development of school children also seemingly precludes trips related to extra curricular activities. It would appear that extra curricular activities, although of an educational value are basically designed for recreational purposes and therefore not directly related to or connected with classroom or educational activity.

The precise issue, however, has not been formally before the Interstate Commerce Commission\textsuperscript{17} although the Commission has issued an informal opinion finding, in part, that extra curricular activities not specifically related to any formal class activity would bring the activity without the scope of the exemption.\textsuperscript{18}

In \textit{Fox River Bus Line, Inc., Investigation of Operations},\textsuperscript{19} the issue of extra curricular groups was also raised. One of the operations under investigation involved the movement of members of a high school ski club to ski resorts on weekends and during school vacations. The Commission did not discuss whether such trips satisfied the requirement here under

\textsuperscript{13} \textit{Id.} at 558.
\textsuperscript{14} \textit{Ibid.}
\textsuperscript{16} \textit{Pat & Gordon, Inc.--Charter}, 102 M.C.C. 553, 559 (1966).
\textsuperscript{17} Hereinafter referred to as the Commission.
\textsuperscript{18} Informal Opinion of T.J. Delaney, Associated Chief, Section of Motor Carriers, Interstate Commerce Commission, dated April 10, 1969.
discussion, but found such trips to be without the exemption on the
grounds the trips were not sponsored or supervised by school officials.\textsuperscript{20}

\textit{School Sponsorship and Supervision}

The requirement that exempt trips must be sponsored by the school and
under its supervision contemplates that the trip actually be arranged for
and supervised by school authorities although it is not necessary that the
school authorities pay all or a portion of the transportation costs.\textsuperscript{21}

Thus, in regard to extra curricular groups, such movements would be
without the scope of the exemption because they are arranged for by the
students themselves, a faculty member acting on behalf of the students or
a faculty adviser as opposed to school officials.\textsuperscript{22}

In cases in which the Commission has formally considered and found
certain trips exempt, the school board and/or principal specifically
sponsored and authorized the trips and assumed responsibility for the
children on the trip.

In those cases where the administrative agency has found the exemption
to be inapplicable, the general sponsorship and supervision of the trip has
been under organizations such as the P.T.A., the Y.M.C.A., the local
police or similar groups.\textsuperscript{23}

\textit{Regular School Buses}

The third requirement which relates specifically to the buses which must
be used and the passengers which may be carried appears to be the most
clear and unequivocal. It is, in fact, however, one which leaves many
unanswered questions.

Although it is clear that the Commission considers a reasonable
number of parents acting as chaperones to be within the statutory
terminology “school children and their teachers”,\textsuperscript{24} its position in respect
to the equipment which must be used is not entirely clear.

In \textit{Fox River Bus Lines, Inc., Extension—Charter Operations},\textsuperscript{25} the
Commission addressed itself to the issue.

\textsuperscript{21} \textit{Pat & Gordon, Inc.—Charter}, 102 M.C.C. 553, 558 (1966).
\textsuperscript{22} See, Note 18, supra, and \textit{Keller Common Carrier Application}, 94 M.C.C. 238, 242
\textsuperscript{23} See, e.g., \textit{Van Galden Common Carrier Application}, 53 M.C.C. 816 (1961) and \textit{Pat &
\textsuperscript{24} \textit{Pat & Gordon, Inc.—Charter}, 102 M.C.C. 553, 558 (1966).
\textsuperscript{25} 107 M.C.C. 672 (1968), modified, \textit{Fox River Bus Lines, Inc., Investigation of
The school children in the above case were transported, in charter operations, in buses which were used to transport various other groups such as fraternal organizations, college students, Boy Scouts, and a minor league football team.

The Commission stated:

Here . . . the vehicles to be used in the proposed services are used to transport various commercial interests, and as such, the partial exemption embodied in section 203(b)(1) is not applicable.

The case report did not disclose what percentage of the time the buses were engaged in school related activities as opposed to non-school activities and seemingly it appeared that it did not make a difference.

On reconsideration, the Commission took the position that the existing status of the law was that a single use of a bus for non-school activities would preclude its subsequent use in exempt operations and that the exemption did not apply unless the vehicle employed was used exclusively in exempt school bus operations.

In support of the above position, the Commission cited three prior decisions. A fair reading of those cases, however, seemingly would lead to the conclusion that the Commission's past interpretation of the law was different from that now stated in the Fox River Bus Lines case.

In Pat & Gordon, Inc.—Charter, for example, it was stated:

. . . the overall use to which the vehicle is regularly put seems the only logical referent of that word ["solely"].

The above would indicate that the Commission, in the past, had applied the statute as though it read "regularly" and that the occasional use of a bus for non-school activities would not preclude its operation under the exemption.

The Pat & Gordon case also seemingly decided the issue of whether the exemption was to be applied on the basis of the particular movement


26. 107 M.C.C. at 675. The Commission also stated that the type bus utilized was of no consequence and it did not distinguish between intrastate and interstate movements.


being made by the bus or the basis of the overall use to which the bus is regularly put. In reaching the conclusion that the overall use to which the bus is put was the determinative factor, the Commission stated:30

An interpretation that the exemption covers particular movements of vehicles employed for a single trip in transporting school children and teachers would be possible in the absence from the statute of the word “solely”, but the overall use to which the vehicle is regularly put seems the only logical referent of that word.

The issue, however, was resurrected in Fox River Bus Lines, Inc. Investigation of Operations.31

The respondent in the above case asserted that a requirement that the vehicle be used “exclusively” in exempt school bus operations would, for all practical purposes, put an end to exempt operations. It urged the Commission to recognize the carrier’s right to operate interstate under the exemption with motor vehicles that are being used at the time of operation “solely in transporting school children to or from school”.32

The Commission, deciding that the interpretation given the exemption in the Pat & Gordon case was made without reference to congressional intent or the practical effect of such an interpretation on the motorbus industry, found that the assertion of the respondent warranted further consideration.33

A rulemaking proceeding in which the desirability of adopting a rule or rules interpreting the phrase “motor vehicles employed solely” was ordered.34 The Commission intends to formulate an interpretation that will best serve the interest of regulated carriers, carriers operating under the exemption, and the public at large.35

Until the conclusion of the rulemaking proceeding and the promulgation of rules to the contrary, it should be assumed that the use of a bus for non-school transportation activities save on rare occasions will cause the exemption to be inapplicable.

30. Ibid.
32. Id. at 426-427.
33. Id. at 430.
35. Fox River Bus Lines, Inc., Investigation of Operations, 110 M.C.C. 423, 431 (1969). The lawfulness of certain of the operations under investigation was held open pending final determination of the rulemaking proceeding.
Non-Exempt Operations

If operations cannot be conducted under the statutory exemption, a school bus operator must secure authority to conduct such operations from the Commission. 36

The Act created two classes of motor carriers i.e., common carriers and contract carriers. 37

A common carrier under the Act is one which holds itself out to the general public on non-discriminatory terms, 38 while a contract carrier is one which operates under continuing contracts with one person or a limited number of persons and furnishes its service through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or by designing its service to meet the distinct need of each individual customer. 39

The Act also recognizes two distinct categories of common carriers of passengers, (1) those engaged in operations generally over regular routes and between fixed termini and, (2) those engaged in special or charter operations without regard to any regular route or fixed termini operations. 40

Bus operators have sought and acquired authority as common carriers and contract carriers. 31

37. A carrier’s status, whether common or contract, is not necessarily the same under Federal regulation as it is under State or foreign law. Motor Haulage Co., Contract Carrier Application, 46 M.C.C. 167 (1946), aff’d, Motor Haulage Co. v. United States, 70 F. Supp. 17 (E.D. N.Y. 1947), aff’d 331 U.S. 784 (1947), and Nadeau Transp. Ltd., Conversion Proceeding, 82 M.C.C. 541, 544 (1960).
40. The Act refers to “special or charter operations.” 49 Stat. 551 (1935), 49 U.S.C. §307 (1964). The term is not defined in the Act. Special or chartered parties is defined in the applicable regulation as “... a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier’s tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination, or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.” 49 C.F.R. §1054.2. A distinction between “special” and “chartered” parties has developed by case law.
41. As of June 30, 1967, 23 contract and 1,998 common passenger carriers have received authority from the Commission. 81 Annual Report of I.C.C. 105 (1967). All, however, are not engaged in school bus operations.
Contract Carriage

Contract carrier authority is particularly suited for school bus operators. Normally such operators serve only a few schools or a single school district and the services it offers would be designed to meet a distinct need.

It must be recognized, however, that the school bus operator under a Permit\(^\text{42}\) would still be limited in its services by the contract requirement. For example, a contract carrier with a Permit authorizing service under bilateral contracts with a school district could not carry extra curricular school groups unless the service was performed under the sponsorship of the school district who would have to be a signator to the contract.

The basic advantage a school bus operator would experience by securing a Permit is that he could utilize his school buses and commercial buses interchangeably when serving the schools under contract.

A Permit authorizing contract carrier operations shall issue to any qualified applicant if it appears that the applicant is fit, willing and able to properly perform the service of a contract carrier by motor vehicle and otherwise conform to the rules and regulations of the Commission and, further, that the proposed operations are consistent with the public interest and national transportation policy as expressed in the Act\(^\text{43}\).

Regular Route Common Carriage

Regular route common carriage\(^\text{44}\) is not normally involved in school bus operations. This type of service contemplates serving the general public on a regularly scheduled basis between fixed termini. It is the basic ground transportation upon which the traveling public depends for its day-to-day transportation needs irrespective of its purpose or purposes for which a trip or trips are made.

It must also be noted that under normal circumstances schools or school districts utilizing school bus service will not draw their students

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44. Common carriers involved in the transportation of property may also be irregular route carriers, i.e., their operations are not confined to specialized service routes or between fixed termini. They may operate over any or all routes within their operational territory. Motor carriers of passengers, however, are not issued irregular route authority save in charter or special operations. 49 Stat. 551 (1935), 49 U.S.C. §307(a) (1964).
from a second state and thus it would only be in unusual circumstances where interstate commerce would be involved.45

Likewise, if the school bus operator were interested in extra curricular movements, special or charter authority would be more responsive to the demonstrated need.

If an operator, however, finds himself in a position where interstate transportation of pupils can be effectively and efficiently combined with the transportation of other members of the public, a Certificate of Public Convenience and Necessity shall issue if the operator is found fit, willing and able to perform the service proposed and to conform to the rules and regulations of the Commission and if the proposed service is or will be required by the public convenience and necessity.47

Special or Charter Operations

The same criteria are used in determining whether a Certificate of Public Convenience and Necessity should issue authorizing special and/or charter service.48

Special operations involve a type of bus service which is performed over the authorized routes of a carrier or within its authorized territory and consists of the transportation of a group of passengers gathered together by the carrier wherein the passengers pay individual fares and are given exclusive occupancy of the bus upon the purchase of a specific number of fares.49

45. This could occur in serving private schools or where the public school is located in a town contiguous or near a state border and as a matter of normal routing, the bus transverses routes which cross the state borders from origin to destination.


48. Id. Prior to 1967, a carrier which was issued a Certificate of Public Convenience and Necessity had the automatic right to engage in special or chartered parties under regulation of the Commission as an incident to its regular route operations. 49 Stat. 552 (1935). This was changed and specific authority for such transportation is now obtainable only by proof of a need for the service. 80 Stat. 154 (1966), 49 U.S.C. §308(c) (Supp. III 1964). See Corber, Interstate Charter Rights for Carriers of Passengers, 34 I.C.C. PRACT. J. 221 (1967).

49. See, e.g., Fordham Bus Corp. Common Carrier Application, 29 M.C.C. 293 (1941), and Liederbach Common Carrier Application, 41 M.C.C. 595 (1942).
Charter service, on the other hand, involves the chartering or contracting for of a bus to a preformed group at a fixed charge for the exclusive use of the group for a particular itinerary.50

Either type of authority seems particularly suited for school bus operations which do not fall within the exemption.

Safety Rules and Regulations

As previously noted, all interstate school bus operations, whether exempt or non-exempt, are subject to the safety rules and regulations, hours of service regulations, and standards of vehicles.51 These rules and regulations deal with such diverse subjects as qualifications of drivers, driving regulations, accident reporting, and the inspection, equipping and maintenance of vehicles.52

The rules and regulations are quite detailed and a school bus operator is required to have knowledge of and comply with such regulations.

The federal regulations do not differentiate between school buses or other buses. Each safety rule and regulation governing motor carrier of passengers or the equipment utilized in such carriage is applicable to school bus operators.

School bus operators, however, may be subject to special safety rules and regulations under the laws of the state or states in which operations are conducted.53

It is specifically provided in the Act that the safety rules and regulations do not preclude a state or subdivision thereof from establishing or enforcing State or local laws relating to safety provided that compliance with such State or local laws would not prevent compliance with the federal rules and regulations.

The rules and regulations of the various States vary and must be individually consulted. Compliance must be made with the rules and regulations of each state in which operations are conducted.

In some instances, it may be found that the rules and regulations of the state may effectively preclude exempt interstate school bus operations.

In Pat & Gordon, Inc.—Charters,54 for example, the school bus operator could not use its school buses on the proposed trips because the

50. Michaud Bus Lines, Inc., Extension Tours, 100 M.C.C. 432 (1966), and Regulations, Special or Chartered Party Service, 29 M.C.C. 25 (1941).
52. See generally Title 49 of the Code of Federal Regulations Parts 390-398.
53. Brief summaries of these rules and regulations are compiled in the CCH State Carrier Guide.
54. 102 M.C.C. 553 (1966).
state authorities prescribed different physical specifications for charter buses than those for school buses.

The fact that the State required charter buses to be used on the proposed trips did not waive the statutory requirement that school buses had to be utilized if the operations were to be conducted under the exemption.55

The Department of Transportation is vested with the duties of administering and enforcing the safety rules and regulations56 and state officials by cooperative agreements, may also assist in this regard.57

The enforcement program is quite extensive and it is important that all school bus operators, whether operating under the exemption or otherwise, comply with the safety rules and regulations as their observance relates directly to and are a chief contribution to the safety of the children being transported.

Violations: Penalties and Remedies

A school bus operator knowingly and willingly conducting non-exempt operations under the guise of their being exempt operation, is subjecting himself to a fine58 and/or the issuance of an appropriate writ or other process precluding future or continuing operations.59 This is also true in respect to operations in violation of the terms of any Certificate or Permit issued for non-exempt operations, the tariffs or schedule of rates published to cover such operations, or the safety rules and regulations.

School officials and other individuals dealing with school bus operations must also ascertain the legality of a proposed operation as any person who knowingly and willingly assists, suffers or permits a carrier to

55. Id. at 557. Significantly, the Commission specifically noted that it was not considering the issue of whether the regulations of the State interfered with interstate commerce so as to cause a violation of the U.S. Constitution.


57. 49 C.F.R. Part 388. Under such cooperative agreements, Federal officials will also help enforce state laws. The latest reported figures show that 34 states have entered into agreements with the Department of Transportation. CCH State Carrier Cases, Par. 21,998.

58. 71 Stat. 352 (1957), 49 U.S.C. §322(a) (1964). The fine for the first offense is not less than $100 nor more than $500, and not more than $500 for any subsequent offense. Each day of such violation is considered a separate offense.

59. 79 Stat. 649 (1965), 49 U.S.C.A. §322(b) (1969 Cum. Ann. Pocket Part). Any person injured by the violation or the Commission may apply to the District Court of the United States for any district in which the motor carrier operates to enforce obedience with the Act. The judicial proceeding may be stayed if the Commission notifies the Court that it intends to consider the matter on an administrative level.
conduct illegal operations is guilty of a misdemeanor and subjects himself to a monetary fine.\(^{60}\)

In addition to the above penalties and remedies, the Commission may upon complaint or its own initiative, after notice of hearing, suspend, charge, or revoke in whole or part, the Certificate or Permit of a carrier for willful failure to comply with the provisions of the Act or any lawful order, rule or regulations promulgated thereunder or with any terms or limitations of the Certificate or Permit.\(^{61}\)

Apart from the above remedies, a carrier guilty of willful and knowing violations will also find that such violations will be considered in proceedings wherein a Certificate or Permit is sought.\(^{62}\)

In addition to the penalties and remedies which exist under the Act, persons concerned with school bus operations should also be cognizant of state legislation.

**Conclusions**

In 1935 when the Motor Carrier Act was passed, school bus operations were undoubtedly only a small part of the motor bus industry. Since 1935, however, it would appear that school bus operations have increased greatly and would now account for an increasingly larger share of passenger motor bus revenues.\(^{63}\)

If the Act is abused and non-exempt operations are conducted under the guise of their being exempt operations, regulated motor bus carriers will

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60. 71 Stat. 352 (1957), 49 U.S.C. §322(c) (1964). The fine for the first offense is not less than $200 nor more than $500, and not less than $250 nor more than $2,000 for any subsequent offense.

61. 80 Stat. 943 (1966), 49 U.S.C.A. §312(a) (1969 Cum. Ann. Pocket Part). A proviso reads: "Provided, however, that no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order made as provided in Section 204(c) of this title, commanding obedience to the provisions of this part, or to the rule or regulation thereunder, or to the term, condition, or limitation of such certificate, permit or license, found by the Commission to have been violated by the holder . . . ."


63. In 1968, two out of every three public school children, 17,250,000, took the bus to school. The $830 million spent during the 1967-68 school year for school transportation approximated 3.2 per cent of everything that was spent for public schools that year. One expert asserts that 75 percent of the growth in school bus operations has taken place since World War II. Featherston, *School Transportation—The Things a Board Should Know,* 157 THE AMER. SCHOOL BD. J. 15 (1969).
be denied revenue which is essential to the conduct of service for the general public.\textsuperscript{64}

If school bus operators are the logical carriers to be utilized in non-exempt, but school related operations, and other carriers cannot meet the needs of the schools in this regard, there should be no objection to their securing a Certificate or Permit under the Act.

Operations, whether exempt or non-exempt, however, should be conducted within the purview of the applicable portions of the statutes and regulations discussed herein.

The attorney as a professional, citizen, and parent should and must assure compliance by the schools in his community and by the carriers who might be his clients.

\textsuperscript{64} Revenue from regular route scheduled service accounts for an increasingly smaller share of motor bus carriers' total revenue. This is particularly true in respect to local and suburban schedules. 82 Annual Report of I.C.C. 78-79, 151 (1968). Encroachment of school bus operators into the regulated carriers' field of operations, particularly charter and/or special operations, could lead to the demise of regulated carriers and the community's local transportation system.
ONE THIRD CENTURY OF MOTOR CARRIER SAFETY
REGULATION

Ernest G. Cox

After thirty years of Federal safety regulation of interstate commercial
transportation, the past four years (1966-70) have witnessed a greatly
expanded Federal involvement in highway safety measures—affecting
trucks and buses, as well as automobiles, motorcycles—vehicles of all
types. The expanded effort stems from two legislative enactments
approved September 9, 1966, as well as increased resources for the
administration of previously enacted measures. This paper undertakes a
review of the several measures providing for Federal regulatory programs
and the pace of provisions for their administration.

It is noted that State governments, through Vehicle Codes and through
operation of State regulatory commissions, have been active in the same
fields. This report will deal with the Federal role only. There has been a
continuing trend toward State adoption of the Federal regulations.

FEDERAL SAFETY JURISDICTION IN TRANSPORTATION

The Federal government has exercised, in some measure, safety
supervision over transportation agencies for many years. A Federal
steamboat inspection service was initiated in the second quarter of the
nineteenth century. The number of deaths and injuries to railroad
employees, particularly trainmen, resulting from coupling and uncoupling
cars, and falling from the top of moving cars, attracted attention
throughout the country and resulted in demands for remedial legislation.
In 1889, President Harrison urged Congress to act, saying, in part, “It is
a reproach to our civilization that any class of American workmen should
be subjected to a peril of life and limb as great as that of a soldier in time
of War.” His recommendations were repeated in 1890 and 1891. The first
railroad safety-appliance law became the Act of March 2, 1893, but not
until 1900 did the Act become fully effective. Difficulties in enforcement
resulted in amendments. Additional legislation related to railroad
employees’ hours of service, reporting and investigation of accidents,
locomotive boiler inspection, and other safety equipment measures, was
enacted during the early years of the twentieth century.

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Serious accidents in the transportation of dangerous articles resulted in the passage, in 1908, of the Transportation of Explosives Act, legislation which was revised and, in 1921, substantially strengthened. In its strengthened form, it provided regulatory authority over explosives and dangerous articles other than explosives, with the provisions applying not only to carriers, but also to shippers. The authority conferred by this series of laws, insofar as carriers were concerned, extended only to common carriers, including transportation by land and water.

Motor Carrier Safety

Congress in 1935 provided for regulation of motor carriers of passengers and property engaged in interstate or foreign commerce. It did this through enactment of the Motor Carrier Act, now Part II of the Interstate Commerce Act (49 U.S.C.A. 301, et seq.),¹ which charged the Interstate Commerce Commission to exercise the regulatory authority. Common and contract carriers were made subject to economic and safety regulation by Section 304(a)(1) and (2). As to safety the duties were specified, as to common and contract carriers, as follows:

§304(a) "It shall be the duty of the Commission—
“(1) and (2) To regulate common [contract] carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to . . . . qualifications and maximum hours of service of employes, and safety of operation and equipment."

Section 303(b) excludes from the economic regulatory jurisdiction a number of services provided in vehicles operated by for-hire carriers, but retained jurisdiction over such carrier services as to safety. It does this by providing:

"§303(b) 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 operation or standards of equipment shall be construed to include—(there are listed seven categories of vehicles and two types of transportation. The vehicles are those used in specialized transportation of specified commodities such as livestock, fish, and agricultural commodities; the two types of transportation are limited as to territorial scope or to casual or

¹. In this paper section numbers of the U.S. Code are used, except in quotations from Commission reports, where sections of the Interstate Commerce Act are quoted, with sections numbered 100 numbers lower than the Code.
occasional transportation by persons not engaged in motor vehicle transportation as a regular occupation or business)."

A similar reservation of safety jurisdiction, while excluding direct economic jurisdiction, is contained in section 302(c), relating to motor vehicle transportation, within terminal areas of transfer, collection, or delivery services, when such regulation is achieved through regulation of another carrier or freight forwarder.

Section 304(a)(3) provides for safety jurisdiction as to private carriers of property. This provision is worded differently from the two sections relating to common and contract carriers, and is conditional on a finding of need. It reads:

"§ 304(a) It shall be the duty of the Commission (3) To establish for private carriers of property, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment."

Section 304(a)(3a), added in 1956, requires establishment of comfort and safety requirements for the transportation of migrant workers for distances of 75 miles or more, if such transportation crosses a state boundary.

Although the regulation of highway carriers through the Transportation of Explosives Act (18 U.S.C.A. 831-835) reached only common carriers, the dangerous articles regulations were applied to contract carriers and private carriers of property by virtue of the "Safety of operations" provisions of Section 304(a) of Part II. However, a particularly serious explosion, involving the truck of a private carrier, occurred in Roseburg, Oregon, in August, 1959. The detonation of the cargo resulted in the death of 13 persons, injuries to more than 100 others, and property damage estimated to exceed ten million dollars. Following this disastrous event, Congress enacted a revision of 18 U.S.C. 831-835, which was approved September 6, 1960. This placed contract carriers and private carriers of property under an identical statute with common carriers with respect to transportation of explosives and other dangerous articles.

1966 Legislation

Stimulated by a sharp rise in the number of street and highway deaths, and the reversal of the downward fatality rate (deaths per one hundred million miles of vehicle travel), during the early sixties, some members of
Congress became deeply concerned and expressed interest in finding a more effective Federal role in dealing with the alarming trend. One of these was Senator Abraham Ribicoff, Chairman of the Subcommittee on Executive Reorganization of the Committee on Government Operations. He had acquired considerable recognition, as Governor of Connecticut, in his stepped up enforcement drive in highway traffic matters. Later, as Secretary of Health, Education and Welfare, he had oversight of the work of the U.S. Public Health Service. That agency had become active in the field of street and highway safety, in recognition of the significant deaths and injuries resulting from crashes of motor vehicles.

Senator Ribicoff, in a Senate speech on February 18, 1965, emphasized the gravity of the problem and declared his intention to learn what the various Federal agencies were doing to bring about a reduction in the carnage. In March, 1965, he held hearings, explaining he intended “to examine and review from top to bottom those agencies—both public and private—Federal, State, and local—which direct and support the Nation’s traffic safety efforts.” He said “In the Federal Government alone some 16 separate agencies have some traffic safety responsibility or role.” Heads of many agencies, including the Chairman of the Interstate Commerce Commission, testified and were questioned.

Later in 1965, publication of the Ralph Nader book “Unsafe at Any Speed” stimulated further interest in the entire highway safety problem.

Congressional hearings led to enactment of two statutes—the National Traffic and Motor Vehicle Safety Act and the National Highway Safety Act. Both laws were approved September 9, 1966, and were designated Public Laws 89-563 and 89-564.

The National Traffic and Motor Vehicle Safety Act (80 Stat. 718) provided for the promulgation of Federal Motor Vehicle Safety Standards. It also called for labeling of tires to inform purchasers of their safety attributes. Very severe penalties were provided for violations. The law requires manufacturers to meet the standards to be prescribed. Among other things, it provided that states, and the Interstate Commerce Commission, might not adopt, or continue in effect, any vehicle safety standard different from any effective safety standard. Responsibility for administration of the law was assigned to the Secretary of Commerce.

The National Highway Safety Act (80 Stat. 731), directed the Secretary of Commerce to assist the States in improving their highway safety programs and to administer a grant-in-aid program to assist the States in financing such improvement.

About a month later, on October 15, 1966, the President approved Public Law 89-670, which provided for creation of the Department of
Transportation. That Act transferred all safety functions from the Interstate Commerce Commission—railroad, motor carrier, and hazardous materials, to the Secretary of Transportation. One section provides that the Federal Highway Administrator shall exercise the functions, powers, and duties of the Secretary as to the motor carrier safety responsibilities transferred. A Bureau of Motor Carrier Safety was established in the Federal Highway Administration after the new Department was activated on April 1, 1967.

The D.O.T. Act also transferred to the new Department, from the Secretary of Commerce, the duties to administer the National Traffic and Motor Vehicle Safety Act and the National Highway Safety Act. These measures were the responsibility of the National Highway Safety Bureau which also was in the Federal Highway Administration until March, 1970, when it was removed and its Director reported to the Office of the Secretary of Transportation.

THE I.C.C. AND D.O.T. ROLE IN MOTOR CARRIER SAFETY

The 1935 charge by Congress to the Interstate Commerce Commission provided for the first direct Federal government safety regulation of motor vehicle operators on the highways. The Bureau of Public Roads, and its predecessor agencies, since their establishment in 1916, had given consideration to safety factors in the design of highways. The Commission had, under the Transportation of Explosives Act, prescribed some regulations related to the preparation of shipments of hazardous materials, for movement by freight and passenger-carrying highway vehicles. But there had been no direct safety regulation governing carriers or their drivers and vehicles by a Federal agency until the Commission made the Motor Carrier Safety Regulations effective, beginning April 1, 1937.

To administer the provisions of the Motor Carrier Act, the Commission in 1935 established the Bureau of Motor Carriers. The Bureau was comprised of a number of Sections, including the Section of (Motor Carrier) Safety. The Section devoted its efforts, during the early years, to formulating the initial safety regulations, to be applicable to common and contract carriers.

Although the initial regulations became effective in 1937, the Commission did not obtain a field office staff specifically assigned to motor carrier safety duties until June 1, 1939. It had the services of field office District Directors, District Supervisors, and some other personnel, with responsibilities in all fields of motor carrier regulation. Their work, however, was mainly concerned with determination of applications for
certificates of public convenience and necessity and contract carrier permits, and related requirements, such as tariffs, insurance and accounting.

In 1939 the first group of Motor Carrier Safety Inspectors was employed—twenty in number. The capability of the Commission to administer and enforce its safety regulations did not grow commensurately with the growth of the safety problem. Although the field safety staff had twenty safety inspectors in 1939, fifteen years later, in 1954, there were only eighteen. This fact was mentioned in the annual report to Congress, principally as a result of the explosion of a number of explosives laden trucks in 1953 (six such explosions occurred in a period of 90 days). These explosions, and other serious truck and bus accidents, focused considerable attention, by members of Congress, Governors, and some mayors, on the question of the adequacy of government regulation of commercial vehicle safety. One result was a substantial increase in staff in 1956 and 1957, the number of inspectors reaching 100 in the latter year. Since then, however, there has been no further growth, despite more than a two-fold increase in the number of motor carriers identified as engaged in interstate operations.

Despite the failure of the Commission's staff and resources for safety to keep pace with the great growth of motor carrier transportation, the agency, in its reports to Congress, emphasized the importance of its function. It maintained that it had not limited its responsibility in the highway safety field to prescribing and enforcing regulations. It said, in its 69th annual report (1955):

Our function in the prevention of commercial vehicle accidents is of vital importance. It is unique, and it complements but does not duplicate the activities of the states in the attainment of the objective of safety on the highways. We deal with basic accident cause factors peculiar to highway transportation, which only a Federal government agency can effectively control through examination of records and properties of carriers at places located outside the jurisdiction of the States through which they operate. By investigation we determine the causes of accidents occurring throughout the nation, and through such investigations and knowledge gained thereby develop and improve equipment and driver standards.—Our function has to do, for example, with maximum hours of service, driver qualifications, and uniform vehicle design elements, as contrasted with enforcement of traffic regulations by State and local police. We need the cooperation of State agencies, but it is our obligation to extend leadership and to
establish standards in the interstate field. The State agencies look to us for this leadership."

**Development of Motor Carrier Safety Regulations**

Following establishment of the Section of Safety in the Bureau of Motor Carriers, the Commission, on its own motion, instituted a series of proceedings for the purpose of determining the nature and extent of safety regulations to be adopted for various categories of motor carriers engaged in interstate or foreign commerce.

Public hearings were held at various points throughout the nation with respect to these proceedings. In Ex Parte No. MC-4, reported at 1 M.C.C. 1 and at 14 M.C.C. 669, the Commission found that it had authority to prescribe qualifications for drivers employed by common and contract carriers engaged in interstate commerce and also found the need for and prescribed such qualification requirements as well as initial requirements related to parts and accessories of vehicles, driving practices of commercial vehicles, reporting of accidents by common and contract carriers and maintenance requirements. In Ex Parte No. MC-2, reported at 11 M.C.C. 203, it found it had authority to prescribe maximum hours of service for employees of common and contract carriers engaged in interstate or foreign commerce and such regulations were prescribed. In Ex Parte No. MC-28, reported at 13 M.C.C. 481, the Commission found that it had authority to prescribe qualifications and maximum hours of service for employees of common, contract, and private carriers of property, but that the authority was limited to those employees whose activities affect the safety of operation. In Ex Parte No. MC-3, reported at 23 M.C.C. 1, the Commission made the finding contemplated in section 304 (a) (3) that a need existed for federal regulation of private carriers of property to promote safety of operation of motor vehicles used by such carriers in the transportation of property in interstate or foreign commerce.

"Private carrier of property by motor vehicle" is a term defined in Section 303(a)(17) of the Interstate Commerce Act as follows:

The term "Private Carrier of property by motor vehicle" means any person not included in the terms, "Common carrier by motor vehicle" or "Contract carrier by motor vehicle" who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."
In making its findings that a need for federal regulation of the safety of operation of private carriers existed, the Commission made the following findings, among others:

1. That approximately 3 million motor vehicles were then operated in interstate and intrastate commerce by private carriers of property.
2. That approximately 20% of those vehicles were used in transporting property in interstate or foreign commerce, which, at that time, exceeded the number of motor vehicles operated by common and contract carriers in such transportation.
3. That several states did not impose the same safety regulatory requirements upon the operation of trucks by private carriers of property as they did on trucks operated by common and contract carriers.
4. That 28 states did not then in any way regulate or limit the hours of service of drivers of motor vehicles operated by private carriers of property.
5. That a number of states permitted boys 16 years of age to drive trucks, and many states permitted boys under 21 years of age to do so.

Based upon extensive testimony and after consideration of a number of legal contentions, the Commission determined that a need did exist for federal regulation of private carriers of property to promote safety of operation of the vehicles of such carriers used in interstate or foreign commerce. Its report, dated May 1, 1940, applied to private carriers of property essentially the same regulations which had previously been adopted for application to common and contract carriers. However, the Commission did not require of private carriers the reporting either of accidents or excess hours of service of drivers, both of which were requirements applicable to common and contract carriers. In addition, certain exceptions were made for various selected classes of trucks and drivers. The physical examination requirements were not required with respect to drivers of farm trucks and the minimum age requirement of 18 rather than 21, was permitted with respect to drivers of farm trucks which did not weigh in excess of 10,000 pounds for both vehicle and load. The hours of service requirements were modified with respect to driver-salesmen who spent more than one half of their time in selling and less than one half in performing such duties as driving, loading, and unloading.
ENFORCEMENT PROCEDURES

During the early years of administration of the motor carrier safety responsibilities, the Commission normally addressed its efforts toward counseling, teaching, and encouraging motor carriers to become familiar with the regulations and to comply with them. However, as time went on, it was found that some carriers were non-responsive to this approach. With increasing frequency, the Commission resorted to the application of criminal penalties provided in Section 322 of the Act. After a number of years, the Commission instituted a few cases questioning the fitness of applicants for common carrier operating authority. A principal case in which a carrier was found not to be fit to receive added operating authority is Hughes 46 M.C.C. 603. The Commission also began the practice of considering the safety and accident experience of applicants for temporary authority and withheld such authority on a number of occasions when it was satisfied that the applicant was not in an adequate degree of compliance with the safety regulations.

Although Section 312 of the Act permitted the Commission, after investigation, to issue cease and desist orders, and, in the event of further non-compliance, to suspend a carrier's operating rights, this procedure was not used until the middle 1950's. Serious accidents resulting from failure to maintain vehicles in adequate condition resulted in a program of intensive investigation and inspection, with inspectors authorized to remove vehicles from service at the point of inspection. In 1957, on a single day, the Commission instituted 6 cease and desist proceedings, five of which resulted in the issuance cease and desist orders.

In only one case has the Commission actually suspended the operating rights of a motor carrier and this was based not only upon safety, but also because of serious violations of other regulatory requirements as well.

Since transfer of the motor carrier responsibilities to the Department of Transportation, in 1967, specific provisions have been published in the Code of Federal Regulations with respect to the administration of a number of compliance procedures.

In title 49, C.F.R., Part 385 contains provisions for the collection and compromise of claims for forfeitures under Section 322 (h) of the Interstate Commerce Act. In that part, the Federal Highway Administrator delegated to the director of the Bureau of Motor Carrier Safety the functions, powers, and duties of the administrator to collect and to compromise claims for civil forfeitures not exceeding 20,000 dollars. This procedure applies only to non-compliance of regulations which are covered by section 322 (h) which relates to failure or refusal to make reports or to keep records in the form and manner prescribed. In
practice, this applies very extensively to failure to make accident reports, or failure of carriers to require drivers to keep drivers' daily logs in proper form as required by the regulations.

Part 386 of title 49, C.F.R. contains the rules of practice for motor carrier safety proceedings under Section 304 (c) of the Interstate Commerce Act. The rules in this part are intended to enable the Federal Highway Administrator, after notice and hearing, to determine whether any motor carrier subject to the jurisdiction of the Administrator under Part 2 of the Interstate Commerce Act or Title 18 U.S. Code, Sections 831-835, has failed to comply with any provision or requirement of these statutes or of the regulations issued under them and, if such a violation is found, to issue an appropriate order to compel compliance with the statute or the regulations. The procedures provide for disposition of such investigation procedures, if a respondent elects not to contest, by means of execution of an appropriate agreement for disposing of the case by consent. Under these circumstances an agreement is filed with the Administrator who may accept it, reject it and direct that proceedings in the case continue, or take such other action as he deems appropriate. If the Administrator accepts the agreement, he enters an order in accordance with the terms of the agreement. Proceedings under this part are commenced by issuance of a notice of investigation. The notice must contain a statement of the legal authority and jurisdiction for the institution of the proceedings, a clear, concise, statement of the facts alleged to constitute a violation, and the relief demanded which normally would be in the form of an order for the Administrator's signature. A reply is required to be filed within 30 days of service of the notice of investigation. In the event a consent order is not agreed upon the matter may be referred to a hearing examiner who will conduct a pre-hearing conference and later hold a hearing on the basis of which the hearing examiner would develop proposed findings of fact, conclusions of laws, and a proposed order. The Administrator may adopt, modify, or set aside the hearing examiner's findings of fact and conclusions of law. The Administrator will issue a final order disposing of the proceedings, the order to be served on the parties.

Part 389 of Title 49, C.F.R. contains the procedures for rulemaking with respect to motor carrier safety regulations. They include publication of a notice of proposed rulemaking, receipt of written comments by interested parties, hearings, if necessary, and adoption of final rules. The Federal Highway Administrator, on June 8, 1970, delegated his authority to adopt and to modify motor carrier safety regulations to the Director of the Bureau of Motor Carrier Safety, effective June 12, 1970.
OTHER DEVELOPMENTS

Over the course of a number of years, the Interstate Commerce Commission from time to time made determinations on the basis of applications for certificates of public convenience and necessity to the effect that certain types of operations were not subject to the Commission's jurisdiction. For example, the Commission years ago held that transportation of the United States mail was not subject to economic regulation. In later years, similar decisions were made by the Commission when it was presented with applications for certificates covering the transportation of debris, rubble, other types of waste, and human corpses. Most of those decisions were couched in language which merely held that such transportation was not subject to the commission's jurisdiction. This was construed, for a number of years, to mean that even the safety jurisdiction did not extend to such operations, particularly was this so in the case of U.S. mail. However, since transfer of the motor carrier safety responsibility from the Commission to the Federal Highway Administration in the Department of Transportation, this policy has been changed and all transportation of property, including the U.S. mail, when performed by a commercial carrier engaged in interstate or foreign commerce, is now considered subject to the safety jurisdiction of the Federal Highway Administrator and to be subject to the provisions of the Motor Carrier Safety Regulations.

Another matter of interest with respect to developments resulting from the 1966 legislation is the apparent conflict between the provisions of section 220 (f) of the Interstate Commerce Act (49 U.S.C. 320) which provides that no report of an accident filed with the agency by a motor carrier pursuant to any regulation, nor any investigation or report of investigation by the agency of any such accident, may be admitted as evidence or used in any other manner in any suit for damages rising out of such accident. This provision, of course, is published under title 49 of the U.S. Code. However, with enactment of the National Highway Safety Act of 1966, Congress adopted Section 106 of that Act which is published under Title 23 of the U.S. Code. The effect of that section is to provide that no information gained in investigation of a highway accident may be withheld from any person who wishes to obtain it, provided only that the names of individuals shall not be disclosed. This Congressional action, although under another title of the code, coupled with the effect of the Freedom of Information Act, resulted in the Federal Highway Administrator, early in 1969, rescinding that provision of the motor carrier safety regulations which provided that accident reports filed by motor carriers shall not be open to public inspection.
EFFECT OF FAIR LABOR STANDARDS ACT EXEMPTIONS

The Fair Labor Standards Act, 29 U.S.C. 201 et seq., approved June 25, 1938, established maximum hours of service for certain classes of employees engaged in commerce or in the production of goods for commerce, unless such employees received compensation at a premium rate for the employment in excess of the specified maxima (now, usually, one and one-half times the regular rate for time above forty hours).

Section 13(b) of the Fair Labor Standards Act provides that the provisions of Section 7 (the premium time provision) "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has the power to establish qualifications and maximum hours of service pursuant—to the provisions of section 204 of the Motor Carrier Act, 1935;—" There is no exemption from the minimum wage requirements of the Fair Labor Standards Act. Further, the premium pay exemption is not applicable to any employee with respect to whom the Commission has power to establish qualifications and maximum hours of service solely by virtue of section 304(a)(3a)—(the migrant worker transportation provisions).

The Commission determined that its power to establish qualifications and maximum hours of service regulations was limited to those employees of carriers whose duties directly affect the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce. Ex Parte MC-2, 11 M.C.C. 203; Ex Parte MC-28, 13 M.C.C. 481; Ex Parte MC-2 and MC-3, 28 M.C.C. 125. This determination was upheld by the U.S. Supreme Court. U.S. v. American Trucking Associations, 310 U.S. 534. The Commission determined that the employees of carriers whose duties affect safety of operation are drivers, drivers' helpers, loaders, and mechanics. Regulations governing qualifications and maximum hours of service were established for drivers. No such regulations have been established for the classes of employees named, other than drivers. As to the Fair Labor Standards Act premium pay exemption, it is not material whether such regulations have been established; the controlling consideration is whether the employee falls within the power of the agency to do so.

CONCLUSION

The Motor Carrier Safety Regulations, now published in Title 49, Code of Federal Regulations, Subchapter B, Parts 385-398, have served a useful purpose in encouragement of improvement in motor carrier safety.

Although the agencies responsible, both the Interstate Commerce
Commission and the Federal Highway Administration in the Department of Transportation, have been traditionally very limited as to funds and personnel, very encouraging and useful results were realized. This fact is due in considerable measure to the excellent cooperation received by the agency from corresponding State agencies and from the organizations representing the regulated industries. In testimony before the Senate Committee mentioned above, the Chairman of the I.C.C. in 1965 said:

Mr. Chairman, we are convinced that the Commission has contributed substantially to safe highway performance by the motor carrier industry. To the extent that our work has been productive, it is due, in my opinion, to clear legislative mandates and a well-defined sphere of responsibility. While much has been achieved, we realize that the highway accident problem may become even more acute with the increase of traffic and the trend to heavier and more powerful commercial vehicles. I assure you that the Commission recognizes this challenge and is preparing to meet it.

Most observers would probably concur, although it remains clear that, in 1970, the dimensions of the problem are yet to be met. With the establishment of the Department of Transportation and the creation of the National Transportation Safety Board in that Department, it may be hoped that a greater awareness of the challenge is gaining more meaningful recognition, and with the prospect of more adequate resources with which to meet it, may be nearer than it has been during the past one-third century.
SEARCH FOR THE LEGAL LIABILITY OF AIR TRAFFIC CONTROLLERS

LYNDON BARNES*

WILLIAM MACDONALD**

We are now at a crucial point in the evolution of flying and controlling. According to forecasts air traffic will multiply by leaps and bounds in the following years. Besides the problems of congestion that increased traffic will create, other problems are going to be intensified. With the advent of the Jumbo jet the problem of wake turbulence is alarmingly increased. Wake turbulence is an invisible, cone shaped atmospheric disturbance that flows from the wing tips of one plane, and that can effect, distort, or destroy the aerodynamic lift of planes behind. Previously, this had been of concern mainly to light aircraft, however, a growing number of accidents have been attributed to this phenomenon. Since it is proportioned to lift, the vortices become stronger as aircraft weight increases. Tests indicate that a Jumbo jet could produce peak vortex velocities of more than 200 ft. per second for another plane one mile behind.

The problems we are going to concern ourselves with is the legal liability of Air Traffic Controllers in Canada. When an Air Traffic Controller issues a clearance, if there was an accident would the man who issued the clearance be liable? Is there any liability on the controller who fails to warn a pilot about possibilities of wake turbulence? Is the controller responsible for giving the pilot notice of changing weather conditions? What is a controller's position in circumstances where fatigue interferes with a controller's performance? In Canada, overtime is the rule rather than the exception and there doesn't appear to be a maximum yet one notes that pilots must generally observe limitations in the amount of flying they do.

The controllers are not so much concerned about the financial aspects of being liable because they are protected under Sections 3 and 4 of the Crown Liability Act, R.S.C. 1952, and in December, they were reassured by the Treasury Board that if a controller was named as defendant, legal counsel would be provided. The controllers are worried about, as they put it, their reputation, their personal dignity, and their families' welfare. If they are found liable what guarantee do they have that the government


won't revoke their licence. It is for this reason that the controllers wish to know the limits of their liability. They wish to know when there is an onus on them to provide a pilot with relevant information i.e. respecting weather or wake turbulence. These and other questions or grey areas will be discussed in some depth.

A basic comprehension of the Statutory Basis of Air Control is necessary in attempting to evaluate controller liability. The Aeronautics Act, The Air Regulations and the Air Navigations Orders form the basis of Canadian air traffic control measures. Canada is also a signatory of the Chicago Convention (Convention on International Civil Aviation). Under Article 12 and Article 28 of the Convention, Canada does provide air traffic control and air traffic facilities for both national and international traffic. Annex 11 to the Convention authorizes contracting States to establish and supervise Air Traffic services and also sets out the objectives of the Air Traffic services which are set forth in para. 22 of Ch. 2 of Annex 11 which are to:

1. prevent collisions between aircraft;
2. prevent collisions between aircraft on the maneuvering area and obstructions on that area;
3. expedite and maintain an orderly flow of air traffic;
4. provide advice and information useful for the safe and efficient conduct of flights;
5. notify appropriate organizations regarding aircraft in need of search and rescue aid and assist such organizations as required.

Annex 2 spells out the Rules of the Air and para. 2. 3. 1. of chapter 2 makes the pilot in command of an aircraft responsible for its operation in accordance with the rules of the air except in cases where it is absolutely necessary to depart from such rules “in the interests of safety”.

In part one of the Aeronautics Act Parliament is given the necessary

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1. Annex 2-231 which says:

   The pilot in command of an aircraft shall whether manipulating the controls or not be responsible for the operation of the aircraft in accordance with the rules of the air except that he may depart from these rules in circumstances that render such departure absolutely necessary in the interest of safety.

FOLLOWING CDN. PROVISION:

   Nothing in the regulations shall be held to relieve the owner, operator, or flight crew members of an aircraft of the consequences of any neglect in the use of lights or signals; or neglect to keep a proper lookout—of of neglect of any precaution that is req'd by the ordinary practice of the air or by special circumstances of the case.

Amendment # 1 Supplement to Annex 2 (5th Ed.) Rules of the Air.
statutory authorization to provide ATC. The responsible minister in the first instance is the Minister of Transport. Pursuant to s.s. 1 of para. 4 the minister by regulation subject to the approval of the Governor-General in General-in-Council is authorized to regulate ATC.

The Air Regulations consist of eight parts. Section 500 of part 5 incorporates a reference to the rules of the air contained in Annex II of the Chicago Convention and then contains rules of general application. Sections 600 and 601 of part six refer to ATC.

Section 600 “The Minister may subject to these regulations make such directions as he deems necessary.

(a) Respecting the provision of ATC service within such portions of the air space and at such airports as may be specified by him and

(b) Respecting the standards and procedures to be followed in the operation of any ATC service or at any ATC unit.”

Therefore ATC measures are made entirely through the directions of the Minister of Transport.

The Minister may also make directions in the form of the Air Navigation Orders. Series V of the Air Navigation Orders contain subject matters applying to and effecting ATC.

The pilot’s duty to comply with ATC instructions is found in part 5, section 505 of the Air Regulations.

“Pilot in command of an aircraft shall comply with all ATC clearances or instructions received by him.”

The only time the pilot has the right to deviate from instructions is in the case of emergency. In the case of Grossman & Son v. Rex it was stated that when there is a control tower on an airport it is from there that the aerial traffic is governed and all pilots are bound to comply with instructions they receive from the operator.

The above statutes are of little value in determining liability. According to Jacques Fortier, Counsel with Legal services Division of the Canadian Department of Transport, there has been no recent court decisions involving air traffic control. Although there have undoubtedly been incidents where controllers have been involved, they have all been settled out of court. The United States National Transportation Safety Board recently estimated 335 midair collisions in the next ten years with a death

4. Air Regulations S. 552 ss. 2.
toll close to 800. This is 50% higher than tolls in the past ten years which would indicate that it probably won't be too long before controllers will be defendants in civil suits in Canada arising out of these mid-airs. Therefore a consideration of the British jurisprudence which appears to be based on the fault theory of negligence and the American jurisprudence which imposes a relatively strict degree of liability on the air traffic controller, will aid us in attempting to suggest a basis of liability in Canada.

The English courts have not had the experience dealing with this topic that the Americans have. It has been suggested, however, that the broad principles of the law of negligence will apply. Air Traffic Control is defined under United Kingdom Air Navigation Order schedule 11, paragraph 1, as "a service to promote the safe, orderly and expeditious flow of Air Traffic". Pilots in command of an aircraft are under an obligation, having the force of statute and enforceable by penalties, to comply with the instructions or obtain the permission of the Control Authorities in a large variety of circumstances. The ultimate responsibility for the safety of an aircraft rests with its captain or pilot, but in discharging his responsibility he must often rely completely on those who provide or operate air navigation facilities.

Tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressible by an action for unliquidated damages. The torts with which air law is chiefly concerned are acts of carelessness and acts which are breaches of duties specially prescribed by statutory enactments and cause injury or damage.

The duty of the controller could be based on the general principle in Gilbert v. Trinity House Corp. (1886) 17 QBD at 799:

"The law is plain that whoever undertakes the performance of, or is bound to perform duties—whether they are duties imposed by reason of the possession of property; or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties."

Therefore, we would have to agree with Shawcross and Beaumont that based on the British fault theory of negligence that Air Traffic Controllers are under a statutory duty to take care and that liability would arise under the following circumstances:

1. that persons exercising ATC are under a duty to take

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reasonable care in giving instructions, permission or advice which the person to whom they are given, is legally bound to obey or obtain and that they and those responsible as their employers would be liable for any damage caused by a breach of this duty.

2. that they are probably under a similar duty and liability in respect of any instructions or advice issued with the intention that they should be acted on, even if not falling within the categories of instruction which the recipient is legally bound to obey.

3. that they are probably also under a duty to take reasonable care to give all such instructions and advice as may be necessary to promote the safety of aircraft within their area of responsibility and would therefore be liable for negligently omitting to give such instructions as well as for negligently giving incorrect instructions or advice.

Of course, to what extent the controller will be found liable is hard to foresee until a body of case-law is developed. In our opinion it is unlikely the liability will be as strict as that of the United States.

The United States appears to be the only Jurisdiction where there is a sizeable body of judicial decisions to study.

In the United States, under the Federal Tort Claims Act, the government may be held responsible for the negligent actions of its air traffic controllers. Defences normally put forward by the government are: the discretionary function exception to the Act, no duty, misrepresentation, primary responsibility of the pilot and no negligence on the facts.

The courts have rejected the claims by the government that the actions of air traffic controllers could lie within the discretionary function exception to the FTCA and also at the same time rejected the clause that the U.S. shall be "liable in the same manner and to the same extent as a private individual under the circumstances." The courts held in Union Trust vs. U.S. that the controller was not performing the sort of

9. 28 U.S.C.A. S.S. 2680 provides "Exceptions. The provisions of this chapter and ss 1346(b) of this title shall not apply to—(a) Any claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or failure to perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused."
11. Union Trust v. United States, 113 F. Supp. 80 (D.C. D.C.1953)—where the United States assumes the function of regulating air commerce and the responsibility of regulating the flow of traffic at a public airport. The government is liable under Federal Tort Claims
discretionary functions envisaged by section 2680(a) of the FTCA. The court went on to state that “discretion was exercised when it was decided to operate the tower but the tower personnel had no discretion to operate it negligently.” The second defence which the government attempted to present was that it was performing a function which was not performed by private individuals but this defence did not survive examination by the court. The court found that there were private control towers, that air traffic services had initially been provided privately by the airlines and that there was no reason why they could not be again. Therefore, the government employee was liable in the same way as a private individual.12

Neither has the defence of no duty, been received well by the courts. In United Air Lines vs. Wiener13 the courts held that although the primary responsibility in VFR conditions to avoid collision was upon the pilot the “good Samaritan” doctrine of Tort Law applied in that “if the Government undertakes to perform certain acts or functions thus engendering reliance thereon, it must perform them with due care; that obligation of due care extends to the public and the individuals who compose it.”14 The defence of “no duty” will be dealt with further later.

The defence of no responsibility has generally been upheld only in cases involving aircraft flying under Visual Flight Rules. The courts have held that the ultimate responsibility for the safe operation of an aircraft flying under VFR weather conditions rests upon the pilot,16 and has stated that this is so under government regulations having the force of law.16 In Hochrein v. U.S.17 it was held that this “primary responsibility” defence only arose after the controller had fulfilled his duty to warn.

Act to suit for injury or death resulting from negligence of its servants or agents engaged in such regulation.—Evidence established negligence of control tower personnel in clearing both planes for the same runway at approximately the same time.


(a) 74 . . . when the United States entered the business of operating a civil airport and an air traffic control tower in connection therewith, it assumed a role which might be and was assumed by private interests. Hence under 28 U.S.C. ss.1346 (b) and 2674, the government is liable for the negligent acts or omissions of its control tower operators in the performance of their functions and duties. . . .


14. United Airlines, Inc. v. Wiener Id at 396 citing from Fair v. United States 234 F.2d 88 at 294 (5th Cir. 1956).


. . . tower controller had been negligent in failing to warn plaintiff’s decedent,
It has also been held that the controller has no duty to ascertain the qualifications of a pilot e.g. whether he was qualified to fly under IFR or what equipment was on board the aircraft.\textsuperscript{18}

Although under VFR weather conditions the primary responsibility for avoiding other aircraft is upon the pilot the onus is shifted to the controller when the pilot is operating under instrument flight rules (IFR). The courts have imposed a concurrent duty on both the pilot and controller to ensure the safety of the plane and its passengers.\textsuperscript{19} Liability in each case will have to be determined by the courts or by mutual agreement but generally the controller will be involved in each case as a party to the action.

In the earlier period of aviation the pilot was regarded as being solely responsible for the operation and safety of his aircraft. Since that time the responsibilities of the controller have greatly increased and there is a great area of concurrent liability of the pilot and the controller. The delineation of responsibility in this area of concurrent liability is hazy and a question of fact to be determined by the courts. This question of fact seems to have determined by the courts with sometimes apparently conflicting results.

Since the Union Trust case the government has rarely attempted to use “discretionary function” or the private party analogy as a defence. The government has attempted to limit the controller’s liability to that laid out in the manual but this defence has been revoked by the courts. In Lightenburger \textit{v. U.S.}\textsuperscript{20} a controller was held liable when he did not follow the mandatory laid out in the Air Traffic Control Procedures Manual yet in Furumizo \textit{v. U.S.}\textsuperscript{21} where the controller fulfilled the obligations laid out in the manual and warned the pilot of a light aircraft of turbulence from a departing DC-8, the court held that the controller had a duty when he saw the light aircraft attempting to takeoff into an obvious danger to stop or attempt to stop the takeoff. The court said that nothing in the regulations says that a controller shall not act. The court said that “there was simply a slavish purported following of the ‘book’ ” with no attempt to exercise a judgment, which under the circumstances it was the duty and within the power of the controller to exercise, and which would and could have

who had been given clearance by radio, of possible danger from second airplane which had not acknowledged controller’s signals.


Evidence established that negligence of airline crew, bomber pilots and government air traffic controller in near miss between airliner and bomber resulting in injuries to passenger should be apportioned, for purposes of contribution between government and airline, in the percentage of 65% to the government and 35% to the airline.


avoided the accident. In *Hartz v. United States*\(^2\) the court held that the controller's negligence in failing to properly caution the pilot according to the instructions contained in the manual was the proximate cause of the crash although the pilot was subsequently found guilty of contributory negligence and 25% of the fault was attached to him. In that case it was held that terminology used by the controller was to “watch the propwash” from a departing DC-6. The court held that this was not sufficient warning and not in accordance with the manual. The implication to be gathered from the Hartz case is that if the controller had given the proper instructions as outlined in the manual he would not have liable but perhaps this is too great an implication to be taken from the case.

Wake turbulence is possibly the most contentious field of liability that faces the controller or for that matter the pilot. Wing tip vortices are the most persistent and dangerous form of wake turbulence. These vortices have been likened to “horizontal tornadoes” in that they spill off the wing tips of an aircraft and form a rotating cone of air similar in shape to a tornado. They trail behind the aircraft, settling until a certain height above the ground, then spreading apart. The dissipation time etc. has not been completely ascertained, although one crash of a Cessna 310 has been blamed on the vortices of a Boeing 707 which did a missed approach 10-11 minutes before the Cessna's approach and the court in this case said that a good rule of thumb for clearance behind an aircraft of the configuration of this 707 was 12 1/2 minutes.\(^2\) Since the size and power of vortices is a function of speed size weight and configuration, it is clear that the distance which must be allowed behind an aircraft such as the Boeing 747 will have to be greater. Presently London and New York airports have decided to allow 10 miles clearance behind the 747’s. This would be approximately 3 minutes apart so it is clear that a much smaller aircraft should not be allowed even this close. Another fact to consider is that presently the busiest airports in the United States have an arrival or departure every 20 seconds or so at peak periods. The greatest problem lies in the fact that turbulence is not visible and it is up to the judgment of the pilots or controller as to where they are or whether they are still in existence. Despite an early decision where a controller was found negligent in allowing a light aircraft to attempt a takeoff even after he had warned it of the existence of turbulence,\(^2\) later decisions have gone in the direction that if the controller has adequately warned the pilot of the existence or

\(^2\) *Lightenburger v. United States* (supra, footnote #15).
\(^2\) *Furumizo v. United States* (supra, footnote #16).
possible existence of turbulence he will not be judged negligent. But a
reversion back to the standards of Furumizo is not impossible in any case.
The conflicting necessities of avoiding turbulence and moving traffic in
and out of busy airfields place a considerable burden on both pilots and
controllers, although enough is known of them that procedures can be
taken in many cases to avoid them, studies should be encouraged into all
possible methods of ascertaining where this turbulence is and if it is in
existence.

Each case in the area of weather reporting must be decided on its
merits. There is no rule which can fix responsibility on control tower or
crew where weather accident occurs. But there are enough cases which
have been decided to give some idea of where the bounds of a controller's
liability lie as regards the disseminating of weather information. It is
stated in Kullberg v. U.S. that there is "no duty for approach controller
to volunteer weather information except in accordance with Air Traffic
Control Procedures Manual, or if he has previously given dangerously
inaccurate or misleading information, or perhaps unless he has actual
knowledge of hazardous current weather conditions which aircraft may
encounter in flight and of which it may not yet be aware."

As can be readily seen the initial broad exclusion from duty is so
qualified that the interpretation of this statement by a subsequent court
can be very broad indeed.

It is clear that inexact or incomplete information or communicating
other than the latest available weather reports where there has been a
significant change in the weather will result in a finding of negligence
against the Air Traffic Controller. Air Traffic Controllers have also been
found negligent when they allowed the pilot of an aircraft to proceed with
a takeoff even though they had given the pilot the latest weather
information. In Neff v. U.S. the tower personnel were found negligent

25. Lightenburger v. United States (supra, footnote #15).
   "where it appears that if the controller had warned the pilot of the possibility of
   wake turbulence he would have been absolved of negligence in respect to this
   aspect of the case although there were other aspects of negligence."

   "That small plane operator had final authority in question of his plane did not
   absolve airport controller of his duty to warn of possibility of wake turbulence
   from departing airliner."

31. Supra, footnote #21.
in not advising the crew of an aircraft attempting a takeoff of all the weather information which was available to them. Where the controller has communicated the best weather information available to him he was found not negligent in spite of the fact that this information was not correct.\textsuperscript{32} When giving weather information the controller is under no duty to ascertain the qualifications of the pilot or whether the aircraft has suitable equipment for such a flight.\textsuperscript{33} It must be established that there was a duty of ATC and this duty must be established by the plaintiffs.\textsuperscript{34} The plaintiff must also establish that the defendant’s action was the proximate cause of the crash.\textsuperscript{35} The pilot and not the controller has the responsibility for determining whether or not a given weather situation is suitable for a landing.\textsuperscript{36}

If there is any new or significant weather information which comes to the controller’s attention which might affect the pilot’s decision to take off he must bring this to the pilot’s attention even if the pilot has started taxiing.\textsuperscript{37}

In Michelmore v. U.S.,\textsuperscript{38} it is stated that the pilot had the responsibility to determine whether it was safe to undertake a proposed flight in light of en route weather.

In a recent case a pilot asked a specialist at a flight service for an altimeter setting and the winds at 5000 feet. The specialist was held negligent in that he did not ask the pilot of his route. This appears to be an extension of the duties of Air Traffic Control and not entirely warranted.\textsuperscript{39}

Looking now at the situation in Canada we find it analogous to Great Britain in that there are no reported cases to base accurate findings upon. However, we did learn that an action against an air traffic controller was filed in March, 1969. This case is due to come to court in the very near future. It involved an Apache type aircraft that crashed on April 22, 1968, due to it encountering wake turbulence while on final approach to Vancouver International Airport. The suit for damages is filed under the

\textsuperscript{33} Kulberg v. United States (supra, footnote #22).
\textsuperscript{34} Somlo v. United States, 274 F. Supp. 827.
\textsuperscript{35} Supra, footnote #29.
\textsuperscript{36} Supra, footnote #29.

“Where pilot asked specialist at flight service station maintained by federal aviation agency about the current altimeter setting and winds at 5000' failure of specialist to enquire of pilot his route and destination and to advise him of severe weather which he would encounter on his course was negligence.”
Family Compensation Act 1960 RSBC-c 138, charging negligence on behalf of the pilot or alternatively B.C. Airlines or alternatively the Airport Control Operator.

The DOT⁴⁰ in Canada in their operating instructions to their controllers seem to rely heavily on the American Jurisprudence as guidelines for their ATC.⁴¹ The Canadian Statutes like the statutes in the jurisdictions previously mentioned do not specifically define the duties of ATC; they merely state broad categories over which ATC is to have the power to regulate and broadly define the aims of ATC. The controller, therefore, relies on his Air Traffic Control Manual of Operations which is published by Dept. of Transport Air Services Civil Aviation Branch and is under continual revision and amendment.

The Manual of Operations has in some cases in the United States been upheld in that if the controller has fulfilled his obligations imposed in the manual he has been cleared of further liability⁴² but in other cases⁴³ the controller has been found liable for negligence even though he carried out the requirements of the manual. It seems that all that can be counted upon is that if the controller does not fulfill the obligations; in the absence of some outside factor preventing him from doing so, imposed upon him by the manual he will be found liable, and even if he has fulfilled the obligations imposed by the manual he may still be found liable. An example of this happened in the Vancouver area in 1968, when an AT controller followed the procedure as outlined in his manual and gave clearance for a VFR climb to a pilot. The controller in carrying out the procedure as outlined in the Manual of Operations informed the pilot who was requesting the VFR climb of other traffic above him in the area of his intended climb in this case approaching aircraft doing a letdown. There was subsequent near miss.⁴⁴ It was approximately seven days before a complaint was filed by one of the pilots involved. The controller was then called before an Incident Investigation Committee at the Regional level. He was not informed why this investigation was called and therefore did not give any testimony on his behalf. He simply answered the questions put to him. A short time after this he was informed that he had been

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⁴⁰ The Department of Transport of Canada will undergo a major change and become the Ministry of Transport according to a press release by the Honourable Mr. Jamieson 17 February, 1970.
⁴¹ conversion with ATC controllers at Toronto Center.
⁴² Kullberg v. United States (supra, footnote #27).
⁴³ Furumizo (supra, footnote #16).
⁴⁴ Unreported information supplied by J. Jordan formerly CATCA rep. Vancouver area.
suspended without pay for ten days. Grievance procedures were commenced immediately under the Public Service Staff Relations Act by CACTA. Under this act an appeal to an adjudicator is granted for one of the following four reasons:

1. Interpretation of the collective agreement
2. Loss of financial gain
3. Suspension
4. Discharge

An adjudicator, W.S. Martin, a Winnipeg lawyer, was appointed. Apparently Mr. Martin had no knowledge of Air Traffic Control concepts or procedures. On adjudication the suspension was merely reduced to five days. The controllers themselves feel that if the adjudicator had had an understanding of ATC the controller would have been absolved of all liability. Also it is interesting to note that the appeal was granted after the controller was suspended for ten days with loss of pay. Surely the controller should have been informed of the right to appeal by the Incident Investigation Committee and if he elected to appeal the suspension should have been withheld pending the result of that hearing. From this example and from our conversations with ATC personnel it is generally accepted that the Manual has legal status at least as far as the controller is concerned. Under s. 600 of the Air Regulations (supra) it is possible that the manual does have legal status. On this point we received no reply from DOT. Surely if the Manual is a legal document it should not be drafted by laymen alone. Presently it is being drafted by Standards and Procedures personnel of the DOT.

As we mentioned the Manual is under continual revision. In our opinion this shows the real need for frequent refresher courses. This need is given recognition on p. 24 Art. 8.01 (B) in the Agreement between the Treasury Board and the CATCA which states that there should be refresher training given to controllers.

-IFR controllers 5 working days each year
-VFR controllers three working days each year.

The controllers have led us to believe that this requirement has generally not been met to this date. It would be interesting to know what the lack of the required refresher courses would mean to a controller involved in an incident.45

The new contract also purports to reduce the controller's working hours but the controller is now working a longer week than he was before. The

45. See attached annex (footnote # 1).
extra hours are composed of "compulsory" overtime. A controller in order to avoid this "compulsory" overtime must submit a letter giving his reasons. In spite of this letter they may still be pressured to work overtime. The reason that overtime is required from controllers is a shortage of qualified personnel. In light of our previous comments on fatigue and the loss of efficiency and skill which results from this which has been substantiated in recent aviation medical studies this overtime is heightening the chance of an incident. Generally the overtime worked is not in the form of extension of shift length but arises with working of days which the controller is normally off. E.G. a controller is scheduled to work six days on and three days off in the Toronto region. Therefore, with overtime a controller is often working seven or more consecutive days. J.D. Lyon, president of CATCA, recently stated in Winnipeg that controllers averaged a 44-hour week and have worked 54 consecutive days. U.S. AT controllers recently accused the U.S. government of recklessly endangering the lives of passengers because the controllers are working overtime when they are mentally and physically unfit to do so. F. Lee Bailey, acting for the American controllers, said that he is confident that a Federal District Court in Washington will order a stop to compulsory overtime.

If an incident occurred involving an AT Controller, who may have been fatigued due to this so-called "voluntary" overtime and was operating at below normal efficiency and skill, surely his position would be prejudiced due to his having accepted this overtime. Therefore it is apparent that there should be an immediate review of the overtime system and an increase in the number of ATC trainees.

The Air Traffic Control Manual of Operations and the Air Regulations are also of further concern due to obscure meaning and legal definition where the controllers believe that they are protected because of the words used say that something is the pilot's responsibility and subsequently is settled in adjudication that it was the controller's responsibility. A good example of the difference between legal and operational interpretation is a recent British Columbia case in which a pilot was fined for low flying. The Air Regulations state that a pilot cannot fly below 2000 feet in the vicinity of aerodrome except when taking off or landing. In this case the pilot while attempting a landing did a missed approach and climbed for another attempt. The judge said the rule stated landings or takeoffs and that this was neither, therefore it did not fall within the exceptions to the rule.

Therefore the pilot was fined. To anyone with a basic understanding of flying procedures this decision is ridiculous because of its vast implications if carried to extremes. If this decision was followed it would mean that once a pilot on a landing approach descended below 2000 feet he would be forced to land or face a fine. It is interesting to note that the Manual of Operation makes continued reference to missed approaches and clearance to overshoot can be granted.

A few of the more realistic examples of ambiguous terms are such terms as “clearances normally shall be issued”\(^{47}\) and “in the vicinity of the airport”\(^{48}\). We appreciate that all phrases cannot be defined specifically and that the discretionary nature of the controller’s work cannot be completely specified, but surely a phrase such as “in the vicinity of the airport” could be defined to avoid ambiguity. It is also evident that the manual is vague in specifying the controller’s duties in transmitting weather information to aircraft.\(^{49}\)

“... the IFR controller shall also provide to the pilot during descent, any significant information he may receive which may affect the descent, approach or landing of the aircraft.”

How can the controller determine what “may affect” or be “significant” to an aircraft e.g. aircraft of the same type may have optional equipment i.e. in possible icing conditions does a controller have to affirm that an aircraft has de-icing equipment. The Canadian controller unlike his American counterpart cannot close the airport for weather conditions, except under two limited conditions which would seldom occur. These conditions being:

a. High intensity lighting not working properly.

b. Runway visual markings obscured to the point they would not be clearly visible to the pilot.\(^{50}\)

and then only for aircraft taking off. This apparently rules out the result in the Stork case\(^{51}\) where the FAA controller was found liable for not preventing the takeoff of an aircraft.

The above examples are brought up to point out that both the rules and regulations governing the movement of aircraft should be written so that their legal and operational interpretations agree. The words used should

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48. Supra, s. 363 (f).
49. Supra, s. 381-1.
50. Supra, s. 213-3.
51. Stork v. United States (supra, footnote #25).
be definitive in meaning and consistent in their usage; if possible different words should not be used to mean the same action or freedom of action.

The difference between U.S. and Canadian Air Regulations raises a possibility of liability for controllers on both sides of the border with aircraft transversing national control zone boundaries. The problem is due to the difference of certain aspects of Canadian and American air regulations concerning vertical separation. Under Canadian regulations there is a 1,000 feet vertical separation between aircraft below 23,000 feet, and 2,000 feet vertical separation above 23,000 feet. However, the U.S. uses 1,000 feet vertical separation up to 29,000 feet and 2,000 feet vertical separations above 29,000 feet. This results in aircraft arriving in Canadian airspace at altitudes which are not usable under our regulations with what is known as book separation. This problem is highlighted by the fact that 27,000 feet is a westbound flight level in Canada and eastbound in the U.S. and if it were not for co-operation between controllers of the two countries this could result in aircraft approaching each other at the same altitude at the boundaries of Canadian and U.S. airspace.

The above examples show the numerous hazy and grey areas which exist in Air Traffic Control and how they will affect the liability of the controller in Canada until a body of cases is built up or the rules and regulations are clarified.

The clarification of the rules and regulations will greatly assist the courts and controllers in determining the law. However, in matters of technical complexity the court should be assisted by an assessor. This assessor would possess aeronautical, engineering or other special knowledge and perform similar functions to the Nautical Assessor in Admiralty law. The job of this assessor would be to assist the judge in understanding technical aspects of Aeronautics and not to be an expert witness for either party. Any party to an action should have the right to have an assessor appointed if the judge has not already appointed one.

The controllers are also concerned with coroners' inquests. Apparently

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52. Book separation is the separation in miles that must be maintained between aircraft according to air regulations, whereas when the aircraft are visible on a radar scope it is sufficient if they are kept separate on the scope. "Nautical assessors, experienced shipmasters, or other persons having special knowledge of navigation and nautical affairs, who are called to the assistance of a court of Admiralty, in difficult cases involving questions of negligence, and who sit with the judge during the argument and give their advice upon questions of seamanship or the weight of testimony,"—Black's Law Dictionary, Fourth Edition, West Publishing Co., St. Paul, Minn. 1951.

they have recently been subpoenaed to testify and have not been made aware of their rights under the relevant evidence acts of their respective Provinces and of Canada. The rights which they are not aware of is their right to invoke these acts to prevent their testimony being used in subsequent proceedings involving them. The controller should be made aware of his rights under these acts.

There is also another aspect of evidence worth mentioning and this is the use of tape recordings. Each ATC unit is equipped with recording devices which may have open microphones allowing background conversation to be recorded. This background conversation has been admitted to evidence in a civil action in B.C. We agree that the use of the primary conversations on a tape is beneficial but use of background conversation can be irrelevant and misleading. An example to show how easily background information can be misunderstood: An airline pilot while in conversation with the controller reported hearing someone in the background saying “my God, you’ll kill him”. Upon landing the pilot learned from ATC personnel that the conversation was not associated in any way with his controller. However, he admitted that hearing this remark “had scared the hell out of him”. Realizing the difficulty of having juries disregard the background noise it would be better to eliminate the recording of this noise.

For protecting the controller’s interests we recommend that the incident committee and the adjudication committee adhere to the rule of natural justice that were made by the Ontario Royal Commission Inquiry into Civil Rights. These conditions are:

1. Notice of the intention to make a decision should be given to the party whose rights may be affected.
2. The party whose rights may be affected should be sufficiently informed of the allegations against his interest to enable him to make an adequate reply.
3. A genuine hearing should be held at which the party affected is made aware of the allegations made against him and is permitted to answer.
4. The party affected should be allowed the right to cross-examine parties giving evidence against his interest.
5. A reasonable request for adjournment to permit the party affected to properly prepare and present his case should be granted.

55. Ontario Queen’s Printer 1968 at 132.
6. The Tribunal making the decision should be constituted as it was when the evidence and argument were heard.

We feel that if these rules are adhered to, then a fair procedure is guaranteed in investigating incidents. We also feel that whenever an AT controller is subpoenaed as a witness or a party to an action he be provided with counsel of his own choice. We are aware that the controller is entitled to be represented by a DOT counsel when he is party to an action but not in respect to when he is a witness. We feel that it should be an independent lawyer who represents the controller to safeguard against any problems which may arise due to a conflict of interest of the attorney due to divergent interests of the controller and DOT. When speaking to Mr. Abramson the Legal Branch of the DOT he said “that he could not see that there would be an occasion when the interest of the Department of Transport would be divergent from those of the controller” The reason we recommend that a controller has legal advice when being called as witness is that in the pending case in British Columbia, previously referred, to the controller is being sued as direct result of the testimony he gave at the Coroner’s inquest. We recommend that the rules of Natural Justice be embodied in the contract.

The problem of ATC liability regarding wake turbulence is the most difficult to assess. It has been advanced by some controllers that it should be regarded as an act of God. Carried to its extreme this would be impracticable because it would effectively absolve controllers from all liability as regards these phenomena in spite of the fact that they know they exist behind every aircraft for some distance. The problem lies in the fact that these turbulences and vortices vary with weight, speed and size of aircraft and remain in existence for varying lengths of time and cannot be detected or seen by the controller with any current equipment. Therefore, until further studies are carried out and a method is found that can give accurate data on location and strength of these phenomena the best solution we can recommend is concurrent liability of pilot and controller.

Hopefully in the not too distant future systems will be available which will be capable of solving many of the problems facing ATC. A technical study report describing an advanced ATC and navigation system for possible implementation in the 1980’s has just been published by FAA of the Department of Transportation in the U.S. The system would provide both air and ground-based collision avoidance systems. A major benefit

56. Supra.
of the design is the fact that it can be installed in stages, as existing equipment becomes obsolete. Furthermore, it would not become saturated even under traffic loads far beyond anything that can currently be expected for the period of the 1980's. However at the present time in Canada the equipment is not even up to today's standards. Much of Canada is not under ATC radar coverage although all of the southern area of Canada is covered by NORAD military radar but this is not tied into ATC in spite of the fact that it is feasible. It is realized that this military radar may not be optimum for ATC requirements but must be better than no coverage whatsoever.
AGREEMENT
BETWEEN
THE TREASURY BOARD
AND
THE CANADIAN
AIR TRAFFIC CONTROL ASSOC.

CONVENTION
ENTRE
LE CONSEIL DU TRESOR
ET
L'ASSOCIATION CANADIENNE DU CONTRÔLE
DU TRAFIC AÉRIEN

Code: 402/12/69

EXPIRES: September 30, 1971
DATE E'EXPIRATION: 30 septembre 1971

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ARTICLE 1

PURPOSE

1.01 The purpose of this Agreement is to establish and maintain harmonious relationships between the Employer, the Association and the employees and to set forth herein the terms and conditions of employment upon which agreement has been reached through collective bargaining.

1.02 The parties to this Agreement share a desire to improve the quality and to increase the efficiency of the Air Traffic Control Service and to promote the well-being of its employees so as to provide safe and efficient services to the public.

ARTICLE 2

RECOGNITION AND RELATIONSHIP

2.01 The Employer recognizes the Association as the exclusive bargaining agent for all employees in the bargaining unit as defined in the certificate issued by the Public Service Staff Relations Board on the 28th day of November, 1967, to the Canadian Air Traffic Control Association.

2.02 The Employer agrees to provide all new employees entering the bargaining unit with a copy of this collective agreement and amendments to this collective agreement hereto, and to provide the Association
quarterly with the names of new employees, their geographic location and classification.

2.03 The Employer agrees to recognize and deal with a Collective Bargaining Committee of not more than four (4) employees (or their alternates) for the purpose of:

(a) negotiating collective agreements between the Employer and the Association, and

(b) dealing with matters concerning the administration of this Agreement except grievances under Article 5 and matters coming within the scope of Article 21.

2.04 For meetings with the Employer under 2.03(a) members of the Collective Bargaining Committee will be granted leave without pay and for meetings with the Employer under 2.03(b) members of the Collective Bargaining Committee shall be protected against any loss of normal pay by reason of attendance at such meetings. At meetings with the Employer under 2.03 the Collective Bargaining Committee may be assisted by representatives other than employees.

2.05 The Association shall notify the Employer promptly and in writing of the names of its representatives, the respective dates of their appointment and the names, if any, of those representatives who are being replaced or discontinued.

2.06 The Employer acknowledges the right of the Association to appoint employees as Stewards. The total number of Stewards appointed shall not exceed 125. The Association and Employer jointly shall determine the jurisdiction of each Steward having regard to the plan of organization, the dispersement of employees at the work place, and the administrative structure implied in the grievance procedure.

2.07 The Association recognizes that employees who are representatives of the Association have regular duties to perform in connection with their work for the Employer.

A Steward shall obtain the permission of his immediate supervisor before leaving his work to investigate complaints or grievances of an urgent nature, to meet with local management for the purpose of dealing with these matters and to attend meetings called by management. Such permission shall not be unreasonably withheld.
ARTICLE 3

Management

The Association recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:

(a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;

(b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,

and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

ARTICLE 4

Check-Off

4.01 Subject to the provisions of this Article 4 the Employer will, as a condition of employment, deduct Association membership dues from the monthly pay of all employees in the bargaining unit.

4.02 The provisions of 4.01 will be applied effective the first of the month following the signing of this Agreement and the deductions from pay for each employee in respect of each month will start with the first full month of employment. Where an employee does not have sufficient earnings in respect of any month to permit deduction, the Employer shall not be obligated to make such deduction from subsequent salary.

4.03 The amounts deducted in accordance with 4.01 shall be remitted by cheque to the National Secretary Treasurer of the Association within a reasonable period of time after deductions are made and shall be accompanied by particulars identifying each employee and the amount of the deduction made on his behalf.

4.04 The Employer shall provide a voluntary revocable check-off of premiums payable on health and sickness, and life insurance plans
provided by the Association for its members on the basis of production of appropriate documentation, provided that the amounts so deducted are combined with Association dues in a single monthly deduction.

4.05 The Association agrees to indemnify and save the Employer harmless against any claim or liability arising out of the application of this Article.

ARTICLE 5

GRIEVANCE PROCEDURE

5.01 Employee complaints or grievances will be dealt with in accordance with the procedure set forth in this Article.

5.02 Definitions

(a) Days—All “days” referred to in this procedure are calendar days exclusive of Saturdays, Sundays and designated holidays.

(b) Immediate Supervisor—The “immediate supervisor” is the supervisor who has been specified by the Department to deal with a complaint from employees in his work area, and to receive written grievances and process them to the appropriate step in the procedure.

(c) Management Representative—The “management representative” is the officer identified by the Employer as an authorized representative whose decision constitutes a step in the grievance procedure.

5.03 Right to Present Grievances

Subject to and as provided in Section 90 of the Public Service Staff Relations Act an employee who feels that he has been treated unjustly or considers himself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in accordance with the procedure provided by this Article except that:

(a) where there is another administrative procedure provided in or under any Act of Parliament to deal with his specific complaint such procedure must be followed, and

(b) where the grievance relates to the interpretation or application of this Collective Agreement or an arbitral award relating thereto he
is not entitled to present the grievance unless he has the approval of and is represented by the Association.

A grievance must be presented not later than twenty (20) days from the day on which the employee was notified, informed or otherwise became aware of the decision, situation or circumstance that is the subject of his grievance.

5.04 Representation

An employee may be assisted and/or represented by an authorized representative of the Association when presenting a grievance at any step. Such representative may meet with the Employer to discuss a grievance at each or any step of the grievance procedure.

5.05 Procedure

Complaints—An employee who has a complaint should attempt to resolve the same through discussion with his immediate supervisor.

5.06 Step One

An employee may present his grievance in writing to his immediate supervisor within the twenty (20) day period referred to in 5.03 above. The immediate supervisor shall sign the form indicating the time and date received. A receipted copy will be returned to the employee and a copy forwarded to the management representative authorized to make a decision at Step One. The management representative shall give his decision as quickly as possible and not later than ten (10) days after the day on which the grievance was presented. The decision will be in writing and a copy will be returned, through the immediate supervisor, to the employee.

5.07 Step Two

If a decision in Step One is not acceptable to the employee, he may, not later than ten (10) days after receipt of the decision in Step One, or if no decision was received, not later than fifteen (15) days after the last day on which he was entitled to receive a decision, present the written grievance to his immediate supervisor who will sign it indicating the time and date received. A receipted copy will be returned to the employee and a copy forwarded to the management representative authorized to make a decision at Step Two. The management representative shall give his decision as quickly as possible and not later than fifteen (15) days after the grievance was presented. The decision will be in writing and the employee copy will be returned, through the immediate supervisor, to the employee.
5.08  **Step Three**

If a decision in Step Two is not acceptable to the employee, he may, not later than ten (10) days after receipt of the decision in Step Two, or if no decision was received, not later than fifteen (15) days after the last day on which he was entitled to receive a decision, present the written grievance to his immediate supervisor who will sign it indicating the time and the date received. A receipted copy will be returned to the employee and a copy forwarded to the Deputy Minister or his delegated representative authorized to make a decision at Step Three. The Deputy Minister or his delegated representative shall give his decision as quickly as possible and not later than twenty (20) days after the grievance was presented. The decision will be in writing and the employee copy will be returned, through the immediate supervisor, to the employee. The decision of the Deputy Minister or his delegated representative at the final step in the grievance procedure shall be final and binding upon the employee unless the grievance is a class of grievance that may be referred to adjudication.

5.09  **Copy to Association**

Where a grievance relates to the interpretation or application in respect of an employee of a provision of this Collective Agreement or an arbitral award relating thereto, or where the employee has indicated that he is being represented by the Association, a copy of the reply at each step of this procedure shall be forwarded to the authorized representative of the Association.

5.10  **Discharge Grievance**

A grievance resulting from the discharge of an employee shall begin at the final step of the grievance procedure. The written decision of the Deputy Minister or his delegated representative shall be given as quickly as possible and not later than thirty (30) days after the grievance is presented.

5.11  **Time Off to Present Grievance**

An employee may be granted time off during working hours to discuss a complaint or grievance provided prior permission of his immediate supervisor is obtained.

5.12  An employee who is a representative of the Association may, with the permission of his immediate supervisor, be granted time off during working hours to assist an employee in the presentation of a grievance. Where such assistance is given during working hours in the
representative's area of jurisdiction he may be granted time off with pay, and where such assistance is given at locations other than in the representative's area of jurisdiction, leave without pay.

5.13 Employees, and employees who are representatives of the Association, will not be entitled to be paid when a discussion or meeting on a complaint or grievance takes place outside their normal working hours.

5.14 Permission to Enter Premises or Offices

A representative of the Association other than an employee may be permitted access to the Employer's premises to assist in the settlement of a grievance, provided the Association has formally identified the representative in writing to the Employer and the prior approval of the Employer has been obtained.

5.15 Adjudication of Grievances

Where an employee has presented a grievance up to and including the final step in the grievance procedure with respect to:

(a) the interpretation or application in respect of him of a provision of this Collective Agreement or an arbitral award relating thereto, or

(b) disciplinary action resulting in discharge, suspension or a financial penalty,

and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

5.16 Where a grievance that may be presented by an employee to adjudication is a grievance relating to the interpretation or application in respect of him of a provision of this Collective Agreement or an arbitral award relating thereto, the employee is not entitled to refer the grievance to adjudication unless the Association signifies in prescribed manner:

(a) its approval of the reference of the grievance to adjudication; and

(b) its willingness to represent the employee in the adjudication proceedings.

5.17 Extension of Normal Time Limit

The time limits stipulated in this procedure may be extended by mutual agreement between the Management representative and the employee, and the Association representative where the Association is representing the employee.
5.18 *Abandonment*

An employee may, by written notice to his immediate supervisor or local officer-in-charge, abandon a grievance at any time during the grievance process. If the grievance in question has been processed with the support of the Association, the Employer will notify the Association that the employee has abandoned the grievance. The abandonment of a grievance shall not prejudice the position of the Association in dealing with grievances of a similar nature.

5.19 Where an employee fails to present a grievance to the next higher step within the prescribed time limits he shall be deemed to have abandoned the grievance.

**ARTICLE 6**

**Operating Irregularities**

6.01 At any administrative inquiry, hearing or investigation into an operating irregularity, where the Employer considers that the actions of an Air Traffic Controller had a bearing on the operating irregularity or on events and circumstances leading thereto, and the Controller is required to appear at the administrative inquiry, hearing or investigation being conducted into such irregularity, he may be accompanied by an employee representative of his choice in those circumstances where his license may be affected.

6.02 The Controller and his representative may require the Department’s representative in charge to state the circumstances leading to the inquiry, hearing or investigation before the Controller is required to answer any questions put to him.

6.03 The Controller and his representative may make representations and direct questions concerning the irregularity or events and circumstances leading thereto, to the Department’s representative in charge.

6.04 The Department shall provide the Controller and where applicable, his representative, with a summary report including the findings of the investigation.

6.05 A Controller, his representative or employees called by the inquiry as witnesses will suffer no loss of normal pay while appearing before an administrative inquiry, hearing or investigation.
ARTICLE 7

DISCIPLINE

7.01 An employee shall be notified in writing of any disciplinary action, except an oral warning, taken against him by the Employer within a reasonable period of that action having been taken.

7.02 The employer agrees not to introduce as evidence in a hearing relating to disciplinary action any document from the file of an employee, the existence of which the employee was not aware at the time of filing or within a reasonable period thereafter.

ARTICLE 8

TRAINING

8.01

(a) The Employer shall determine training requirements and the means and methods by which training shall be given and shall provide operating employees with adequate training and instruction on equipment and procedures prior to their introduction and refresher training where appropriate.

(b) In addition to the training referred to in clause 8.01 (a), controllers shall be provided refresher training as follows:

   (i) Effective January 1, 1970
       IFR Controllers—5 working days each year
       VFR Controllers—3 working days each year

   (ii) Effective January 1, 1971
       IFR Controllers—5 working days each year
       VFR Controllers—5 working days each year

   (iii) Notwithstanding the above standards which are minimum, where staff permits the Employer will provide refresher training in accordance with part 10 of the Air Traffic Control Manual of Operations.

8.02 The Employer shall provide familiarization flights as follows:

(a) IFR Controllers and Shift Supervisors

   One return flight each year involving not more than three (3) days' absence from his normal place of duty. These flights will be
scheduled to include every five years, a long range navigational flight or a visit to a U.S.A. high density Unit.

(b) **VFR Controllers and Shift Supervisors and Unit Chiefs**

One return flight each year involving not more than two (2) days’ absence from his normal place of duty. These flights will be scheduled to include visits to Regional high density towers (Class IV) and to the Area Control Centre with IFR responsibility for his airport. Controllers and Shift Supervisors at Class IV towers will be authorized to visit a U.S.A. high density Control tower every five (5) years.

(c) **Trainees at Air Services Training School**

As may be arranged in Department of Transport aircraft.

(d) **The Employer shall not be responsible for any failure to provide such flights wherever this occurs as a result of an airline declining to provide the necessary transportation.**

8.03 If the Employer requires an employee to become proficient in the use of a second language, language training will be paid for by the Employer, and the employee shall not suffer loss of basic salary during such training.

**ARTICLE 9**

**Sick Leave**

9.01 An employee shall earn sick leave credits at the rate of one and one-quarter (1 ¼) days for each calendar month for which he receives pay for at least ten (10) days.

9.02 An employee is eligible for sick leave with pay when he is unable to perform his duties because of illness or injury provided that:

(a) he has the necessary sick leave credits, and

(b) he satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.

9.03 An employee is not eligible for sick leave with pay during any period in which he is on leave of absence without pay or under suspension.

9.04

(a) Where an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of 9.02, sick
leave with pay may, at the discretion of the Employer, be granted for a period of up to fifteen (15) days subject to the deduction of such advanced leave from any sick leave credits subsequently earned.

(b) Unless otherwise informed by the Employer before or during the period of illness or injury, a statement signed by the employee describing the nature of his illness or injury and stating that because of this illness or injury he was unable to perform his duties shall, when delivered to the Employer, be considered as meeting the requirements of Clause 9.02 (b):

(i) if the period of leave requested does not exceed three (3) days, and

(ii) if in the current fiscal year, the employee has not been granted more than seven (7) days' sick leave wholly on the basis of statements signed by him.

ARTICLE 10
SPECIAL LEAVE

10.01 An employee shall earn special leave credits up to a maximum of twenty-five (25) days at the following rates:

(a) One half-day (½) for each calendar month in which he received pay for at least ten (10) days, or

(b) One quarter-day (¼) for each calendar month in which he received pay, but for less than ten (10) days.

As credits are used, they may continue to be earned up to the maximum.

10.02 After the completion of one (1) year's continuous employment in the Public Service, an employee who has the credits available and who gives the Employer at least five (5) days' notice, shall be granted special leave with pay to the extent of his credits but not more than five (5) days, for the purpose of getting married.

10.03 Bereavement Leave

For the purposes of this Clause and Clause 10.05, immediate family is defined as father, mother, brother, sister, spouse, child of the employee, father-in-law, mother-in-law and relative permanently residing in the employee's household or with whom the employee permanently resides.
(a) Where a member of his immediate family dies, an employee shall be entitled to bereavement leave for a period of up to four (4) consecutive calendar days and not exceeding the day following the funeral. During such a period, he shall be paid for those days which were not regularly scheduled days of rest for that employee. In addition, he may be granted up to three (3) days' special leave for the purpose of travel.

(b) In special circumstances and at the request of the employee, bereavement leave may be extended beyond the day of the funeral but the total number of days granted must be consecutive and not greater in number than those provided above, and must include the day of the funeral.

(c) An employee is entitled to special leave with pay, up to a maximum of one day in the event of the death of the employee's grand-parent, son-in-law, daughter-in-law, brother-in-law, sister-in-law.

10.04 Leave for Birth of Child

At the discretion of the Employer, a male employee may be granted special leave with pay up to a maximum of one day on the occasion of the birth of his son or daughter.

10.05 Leave for Other Reasons

At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the employee, including illness in the immediate family as defined in Clause 10.03, prevent his reporting for duty.

ARTICLE 11

11.03 Public Service Staff Relations Board Hearings Pursuant to Section 20 Public Service Staff Relations Act

(a) Where operational requirements permit, the Employer will grant to an employee who makes a complaint leave with pay if the Public Service Staff Relations Board decides in favour of the employee and leave without pay in all other cases.

(b) Where operational requirements permit, the Employer will grant leave without pay to an employee who acts on behalf of an
employee making a complaint, or who acts on behalf of the Association making a complaint.

(c) The Employer will grant leave with pay to an employee called as a witness by the Public Service Staff Relations Board.

(d) Where operational requirements permit, the Employer will grant leave without pay to an employee called as a witness by an employee or the Association.

11.04 Arbitration Tribunal and Conciliation Board Hearings

(a) Where operational requirements permit, the Employer will grant leave without pay to an employee representing the Association before an Arbitration Tribunal or Conciliation Board.

(b) The Employer will grant leave with pay to an employee called as a witness by an Arbitration Tribunal or Conciliation Board and, where operational requirements permit, leave without pay to an employee called as a witness by the Association.

11.05 Adjudication

(a) The Employer shall grant, to an employee who is a party, leave with pay if in the opinion of the Employer a decision is made by the adjudicator which significantly alters in favour of the employee management’s third level decision and leave without pay in all other cases.

(b) Where operational requirements permit, the Employer will grant leave without pay to the Association representative of an employee who is a party.

(c) The Employer may grant leave without pay to a witness called by an employee who is a party. Such leave without pay shall not be unreasonably withheld.

11.06 Where operational requirements permit, the Employer shall grant leave of absence without pay to officers of the Association to attend to Association business. Employees with similar qualifications may cover shifts for such officers on Association business, provided this arrangement does not infringe on the provisions of this Agreement on the number of consecutive hours or days worked or require the payment of overtime.
ARTICLE 12

Call-In

When an employee is called in to work overtime that is not contiguous to his scheduled shift, he is entitled to the greater of:

(a) compensation at the applicable overtime rate, or
(b) compensation equivalent to four (4) hours' pay at his straight-time hourly rate.

ARTICLE 13

Hours of Work

13.01 Non-Operating Employees

Thirty-seven and one-half (37½) hours exclusive of lunch periods shall constitute the normal work week for non-operating employees.

13.02 Operating Employees

(a) Effective the first of the month following the signing of this agreement, thirty-seven and a half (37½) hours, inclusive of a mandatory fifteen (15) minute period in which the employee shall prepare himself to assume his duties prior to the commencement of each shift, shall constitute the normal work week for operating employees; except that when hours of work are scheduled on a rotating or irregular basis employees will work thirty-seven and a half (37½) hours per week averaged over a period of time not to exceed seventy (70) days.

(b) Effective July 1st, 1970, thirty-six (36) hours, inclusive of a mandatory fifteen (15) minute period in which the employee shall prepare himself to assume his duties prior to the commencement of each shift, shall constitute the normal work week for operating employees; except that when hours of work are scheduled on a rotating or irregular basis employees will work thirty-six (36) hours per week averaged over a period of time not to exceed seventy (70) days.

(c) Where operational requirements permit, the Employer will provide operating employees with meal and relief breaks.

(d) An employee's days of rest shall be consecutive and not less than two (2).
13.03 **Standby**

(a) A standby duty roster and schedule may be established at Area Control Centres or other locations when, in the opinion of the Employer, it is warranted by operating conditions.

(b) An employee designated for standby duty shall be available during his period of standby duty at a known telephone number and be able to report for duty as quickly as possible if called.

(c) An employee on standby duty shall have credited as hours worked in his normal work week, one (1) hour for each shift for which he has been designated as being on standby duty. No credit shall be granted if the employee is unable to report for duty when required.

(d) An employee on standby who is called into work and who reports for work shall be compensated in accordance with 12.01.

13.04 Except in an emergency, shift schedules shall be posted at least fifteen (15) calendar days in advance in order to provide an employee with reasonable notice as to the shift he will be covering. The shift as indicated in this schedule shall be the employee’s scheduled hours to work.

13.05 Provided it will not require the payment of overtime, equally qualified rotating shift employees at the same Air Traffic Control Unit may exchange shifts with forty-eight (48) hours’ notice to and permission of the Unit Chief.

13.06 Every reasonable effort shall be made by the Employer:

(a) not to schedule the commencement of a shift within eight (8) hours of the completion of the employee’s previous shift.

(b) not to schedule shifts of less than seven (7) hours’ duration.

13.07 Non-operating employees will submit weekly attendance registration only to report leave or overtime.

13.08 The employer shall not schedule split shifts.

**ARTICLE 14**

**PAY**

14.01 Except as provided in this Article the terms and conditions governing the application of pay to employees are not affected by this Agreement.
LIABILITY OF CONTROLLERS

14.02 An employee is entitled to be paid for services rendered at:

(a) the pay specified in Appendix “A” for the classification of the position to which he is appointed, if the classification coincides with that prescribed in his certificate of appointment, or

(b) the pay specified in Appendix “A” for the classification prescribed in his certificate of appointment, if that classification and the classification of the position to which he is appointed do not coincide.

14.03 The qualifying period for the payment of acting pay is ten (10) consecutive working days.

14.04 An operating controller who is required to perform for a continuous period of at least two (2) months the full duties of a controller position that has been classified at a level higher than the classification shown in his certificate of appointment, is entitled to be paid for the period he performs the full duties of the higher position, an extra duty allowance equivalent to one increment above the rate of pay he is receiving for each classification level by which the classification of the duties he is performing exceeds that shown in his certificate of appointment but the total remuneration received by a controller shall not exceed the maximum rate of pay established for the classification shown in his certificate of appointment.

14.05 The Employer will notify the Association in writing thirty (30) days in advance of the creation of any new jobs within the bargaining unit or the establishment of a new classification plan for jobs within the bargaining unit.

ARTICLE 15

OVERTIME

15.01 Time worked by an employee in excess or outside of his scheduled hours of work shall be considered as overtime.

15.02 For the purpose of this Agreement the following shall be considered as operating employees:

(a) all shift supervisors and controllers in Area Control Centres and Terminal Control Units;

(b) all shift supervisors and controllers including Unit Chiefs who are required to perform Control duties in Control Towers;
(c) all shift supervisors and coordinators in the Airspace Reservation Coordination office.

All employees other than those listed above shall be considered non-operating employees.

15.03

(a) For purposes of this Agreement "straight-time hourly rate" means the rate obtained by dividing an employee's annual rate of pay by 1950 in the case of non-operating employees and by 2080 in the case of operating employees.

(b) Effective the first of the month following the signing of this Agreement and for the purposes of this Agreement "straight-time hourly rate" means the rate obtained by dividing an employee's annual rate of pay by 1950 in the case of operating employees.

(c) Effective July 1, 1970 and for the purposes of this Agreement "straight-time hourly rate" means the rate obtained by dividing an employee's annual rate of pay by 1872 in the case of operating employees.

15.04

(a) Non-operating Employees. A non-operating employee shall be paid for overtime worked by him at one and one-half (1 1/2) times his straight-time hourly rate except that if the overtime is worked by the employee on his second and subsequent day of rest where days of rest are consecutive, the employee shall be paid at two (2) times his straight-time hourly rate. An employee is entitled to overtime compensation for each completed thirty (30) minute period of overtime worked by him. At the discretion of the Employer, a non-operating employee may be granted time off in lieu of overtime at the appropriate overtime rate.

(b) Operating Employees. An operating employee shall be paid for overtime worked by him at one and one-half (1 1/2) times his straight-time hourly rate except that if the overtime is worked by the employee on his second or subsequent day of rest where days of rest are consecutive, the employee shall be paid at two (2) times his straight-time hourly rate. An employee is entitled to overtime compensation for each completed fifteen (15) minute period of overtime worked by him.

(c) Except as provided in 1503 (a) the Employer will endeavour to
make cash payment for overtime in the month following the month in which the overtime was worked.

(d) Where an employee works in excess of the regularly scheduled hours of work on a day that is a holiday, or on his first working day to which the holiday has been moved, he shall be paid at two (2) times his straight-time hourly rate for all hours worked in excess of his regularly scheduled hours.

15.05 The Employer will endeavour to keep overtime work to a minimum and shall assign overtime equitably among employees who are qualified to perform the work that is required at the location concerned.

15.06 Except in an emergency, no operating employee shall work more than twelve (12) consecutive hours or more than nine (9) consecutive days.

ARTICLE 16

HOLIDAYS

16.01 Subject to 16.02 the following days shall be designated holidays for employees:

(a) New Year's Day;
(b) Good Friday;
(c) Easter Monday;
(d) The day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday;
(e) Dominion Day;
(f) Labour Day;
(g) The day fixed by proclamation of the Governor in Council as a general day of Thanksgiving;
(h) Remembrance Day;
(j) Boxing Day;
(k) One additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed, or in any area where no such day is so recognized, the first Monday in August.

An employee shall not be paid for the holiday if he is absent without pay on both the working day immediately preceding and the working day following the holiday.
16.02 When a day designated as a holiday under 16.01 coincides with an employee's day of rest, the holiday shall be moved to the employee's first working day following his day of rest.

16.03 When a non-operating employee works on a holiday he shall be paid, in addition to the pay he would have received had he not worked on the holiday, one and one-half (1 ½) times his straigh-time hourly rate for all hours worked by him on the holiday.

16.04 Where an operating employee works on a holiday he shall:

(a) be paid at one and one-half (1 ½) times his straight-time hourly rate for all hours worked by him on the holiday, and

(b) be granted a day of leave with pay at a later date in lieu of the holiday.

16.05

(a) The designated holidays in a fiscal year shall be anticipated to the end of the year and "lieu day" credits established.

(b) Lieu days may be granted as an extension to vacation leave or as occasional days and shall be charged against the lieu day credits on the basis of one shift for one day.

(c) Consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to grant lieu days at times desired by the employee.

(d) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or commencement of retiring leave or after he becomes subject to clause 13.01 shall be subject to recovery of pay.

ARTICLE 17

VACATIONS

17.01 An employee who has earned at least ten (10) days' pay for each calendar month of a fiscal year shall earn vacation leave at the following rates:

(a) three (3) weeks per fiscal year if he has completed less than twelve (12) years of continuous employment;

(b) four (4) weeks per fiscal year if he has completed twelve (12) years of continuous employment, except that an employee who has
received or is entitled to receive furlough leave shall accumulate three (3) weeks only per fiscal year between his twentieth (20th) and twenty-fifth (25th) years of continuous employment.

17.02 An employee who has not received at least ten (10) days' pay for each calendar month of a fiscal year will earn vacation leave at onetwelfth (1/12) of the rate referred to in 17.01 for each calendar month for which he receives at least ten (10) days' pay.

17.03 An employee earns but is not entitled to receive vacation leave with pay during his first six (6) months of continuous employment.

17.04 Subject to operational requirements the Employer shall make every reasonable effort to grant an employee his vacation leave during the fiscal year it is earned. Where in any fiscal year an employee has not been granted all of the vacation leave credited to him, the unused portion of his vacation leave shall be carried over into the following fiscal year.

17.05 Employees shall take vacation leave on the basis of the schedule being worked.

17.06 The vacation year extends from April 1 to March 31 and vacation may be scheduled by the Employer at any time during this period.

Local representatives of the Association shall be given the opportunity to consult with representatives of the Employer on vacation schedules. Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

17.07 Where a day that is a designated holiday for an employee falls within a period of vacation leave with pay, the holiday shall not count as a day of vacation leave.

17.08 Where, in respect of any period of vacation leave, an employee:

(a) is granted bereavement leave, or

(b) is granted special leave with pay because of illness in the immediate family, or

(c) is granted sick leave on production of a medical certificate,

the period of vacation leave so displaced shall either be added to the vacation period, if requested by the employee and approved by the Employer, or reinstated for use at a later date.

17.09 Where an employee dies or otherwise terminates his employment
after a period of continuous employment or not less than thirty (30) days but not more than six (6) months, he or his estate shall, in lieu of earned vacation leave, be paid an amount equal to four per cent (4%) of the total of the pay and compensation for overtime received by him during his period of employment.

17.10 Subject to 17.11, when an employee who has completed more than six (6) months of continuous employment is about to terminate his employment, the Employer shall grant the employee any vacation leave earned but not used by him before the employment is terminated.

17.11 When the employment of an employee who has completed more than six (6) months of continuous employment is terminated by reason of:
   (a) death,
   (b) discharge, or
   (c) a declaration that he has abandoned his position

the employee or his estate shall, subject to 17.12, in lieu of earned but unused vacation leave, be paid an amount equal to the product obtained by multiplying the number of days of earned but unused vacation leave by the daily rate of pay applicable to the employee immediately prior to the terminating of his employment.

17.12 An employee whose employment is terminated by reason of a declaration that he abandoned his position is not entitled to receive the payment referred to in 17.11, unless he requests it within six (6) months following the date upon which his employment is terminated.

17.13 Recall from Vacation Leave

Where, during any period of vacation leave, an employee is recalled to duty, he shall be reimbursed for reasonable expenses, as normally defined by the Employer, that he incurs:

   (a) in proceeding to his place of duty, and
   (b) in returning to the place from which he was recalled if he immediately resumes vacation upon completing the assignment for which he was recalled,

after submitting such accounts as are normally required by the Employer.

17.14 The employee shall not be considered as being on vacation leave during any period in respect of which he is entitled under Clause 17.13 to be reimbursed for reasonable expenses incurred by him.
LIABILITY OF CONTROLLERS

ARTICLE 18

SEVERANCE PAY

18.01 Resignation

Subject to 18.02, an employee who has ten (10) or more years of continuous employment is entitled to be paid on resignation from the Public Service severance pay equal to the amount obtained by multiplying half of his weekly rate of pay on resignation by the number of completed years of his continuous employment to a maximum of twenty-six (26), less any period in respect of which he was granted severance pay, retiring leave or a cash gratuity in lieu of retiring leave by the Employer.

18.02 Retirement

On termination of employment an employee who is entitled to an immediate annuity under the Public Service Superannuation Act shall be paid severance pay equal to the product obtained by multiplying his weekly rate of pay on termination of employment by the number of completed years of his continuous employment to a maximum of twenty-eight (28), less any period in respect of which he was granted severance pay, retiring leave or a cash gratuity in lieu of retiring leave by the Employer.

ARTICLE 19

USE OF EMPLOYER FACILITIES

19.01 The Employer may permit the Association to use the Employer's premises outside the working hours of the employees for conducting meetings of their members, which are not related to membership recruitment, where refusal to grant permission would make it difficult for the Association to convene a meeting. The Association shall insure the orderly and proper conduct of its members who attend such meetings and agrees to be responsible for leaving facilities in good order after use.

19.02 Reasonable space on bulletin boards will be made available to the Association for the posting of official Association notices in convenient locations as determined by the Employer. Notices or other material shall require the prior approval of the Employer, except notices of meetings of their members and elections, the names of Association representatives and social and recreational affairs. Notices or other material pertaining to political matters or membership recruiting, or material which may be interpreted to reflect discredit upon the integrity or
motives of the Employer, representatives of management, other employee organizations, or individuals shall not be posted.

ARTICLE 20

LOSS OF LICENSE FOR MEDICAL REASONS

20.01 Where an employee who has been denied renewal of his Air Traffic Control license on the grounds that he does not meet the prescribed medical standards applies for a review of his case to the Civil Aviation Medical Advisory Panel, the Employer will reimburse the employee for the cost of any additional medical examinations which he is required to undergo.

20.02 The Employer will continue past practice in giving all reasonable consideration to continued employment in the Public Service of a Controller who loses his license for medical reasons.

20.03 If a Controller who has lost his license for medical reasons is offered alternate employment in the Public Service at another geographic location, the Employer shall bear the cost of removal expenses in accordance with then current Employer Regulations.

ARTICLE 21

ASSOCIATION-MANAGEMENT CONSULTATION

21.01 The Employer and the Association recognize that consultation and communication on matters of mutual interest outside the terms of the Collective Agreement should promote constructive and harmonious Employer-Association relations.

21.02 The Employer will recognize Association Committees for the purpose of consulting with management as follows:

(a) An Association National Committee consisting of not more than five (5) employee representatives of the Association;

(b) Association Regional Committees consisting of not more than three (3) employee representatives, for each Air Services Region and the Ottawa Headquarters of the Air Traffic Control Division of the Department of Transport;

(c) By agreement of the parties and where circumstances warrant, Association Local Unit Committees, consisting of not more than
three (3) employee representatives, may be established for the purpose of consultation with local management.

21.03 It is recognized that a subject suggested for discussion may not be within the authority or jurisdiction of either the management or association representatives. In these circumstances, consultation may take place for the purpose of providing information, discussing the application of policy or airing problems to promote understanding, but it is expressly understood that no commitment may be made by either party on a subject that is not within their authority or jurisdiction, nor shall any commitment made be construed as to alter, amend, add to, or modify the terms of this agreement.

21.04 Meetings with Association Regional Committees and with the Association National Committee shall take place at least every six (6) calendar months. By agreement of the parties the frequency of meetings may be increased. The frequency of meeting with Association Local Unit Committees shall be determined by mutual agreement.

21.05 All meetings shall be held on the Employer's premises at a time and for a duration determined by mutual agreement.

21.06 Full-time employees forming the continuing membership of Association Committees shall be protected against any loss of normal pay by reason of attendance at such meetings with management, including reasonable travel time where applicable.

21.07 A designated representative of Association Committees and management shall exchange written agenda for a meeting as early as possible prior to the effective date of the meeting, but in any case normally not less than fifteen (15) calendar days in advance.

ARTICLE 22

TECHNOLOGICAL CHANGE

At least ninety (90) days before the introduction of any major technological change which will result in a reduction of staff, the Employer shall notify the Association of the proposed change.

ARTICLE 23

WORKING CONDITIONS AND SAFETY

The Employer will continue to make provision for the safe and healthful working conditions of employees and in so far as is feasible,
having regard to building and space limitations, will provide proper accommodation for employees to have their meals and keep their clothes. The Association agrees to cooperate fully in the prevention of accidents to employees and in the enforcement of safety rules.

ARTICLE 24
PRESENT CONDITIONS AND BENEFITS

Wherever possible, the Employer shall consult with representatives of the Association, at the appropriate level, about contemplated changes in conditions of employment or working conditions not governed by this Agreement.

ARTICLE 25
PRINTING OF AGREEMENT

The Employer shall arrange for the printing of this Collective Agreement and amendments to this Collective Agreement hereto, and provide the Association with sufficient copies for distribution to employees in the bargaining unit.

ARTICLE 26
STATE SECURITY

Nothing in this Agreement shall be construed to require the Employer to do or refrain from doing anything contrary to any instruction, direction or regulations given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

ARTICLE 27
SHIFT PREMIUM

27.01 Operating employees and Instructors will receive a shift premium of one dollar ($1.00) for each shift worked on the 1600 to 2400 evening shift and a premium of one dollar and fifty cents ($1.50) for each shift worked on the 0001 to 0800 night shift.

27.02 An employee who in the observance of a special shift schedule works four (4) or more hours during the period of either of the
aforementioned shifts shall be paid the appropriate shift premium for such shift.

ARTICLE 28
TRAVEL

When, in the performance of his duties, an employee is authorized by the Employer to travel by authorized means of transport, time necessarily spent by the employee in such travel shall be compensated for as time worked. At the discretion of the Employer, such travel may be compensated for with equivalent time off.

ARTICLE 29
APPLICATION, DURATION, MODIFICATION

9.01 The provisions of this Agreement apply to the Association, employees and the Employer

29.02 Unless otherwise expressly stipulated, this Agreement shall be in effect from the date it is signed until midnight September 30, 1971 and, in the event that any law passed by Parliament renders null and void any provision of this Agreement, the remaining provisions of the Agreement shall remain in effect for the term of Agreement.

29.03 This Agreement may be amended by mutual consent.

29.04 Notwithstanding the provision of the term of this Agreement under 29.02, this Agreement shall remain in effect during the negotiations for its renewal and until a new Agreement becomes effective.

29.05 Except as otherwise provided in this Agreement, the provisions of this Agreement shall be implemented within ninety (90) days of the signing of this Agreement.
SIGNED AT OTTAWA, this _______ day of the month of
_________ 1969.

THE TREASURY BOARD
OF
CANADA

THE CANADIAN AIR TRAFFIC
CONTROL
ASSOCIATION
APPENDIX "A"

RATES OF PAY

The annual rates of pay shown below shall be effective on the dates indicated.

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B—July 1, 1970

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- Air Traffic Controller-in-Training
- From: $4200—$4800 (increments $75)
  - A 4600—5200 (increments $75)
  - B 5900—5500 (increments $75)
Mr. J. D. Lyon,
President,
Canadian Air Traffic Control Association,
Room 305, 56 Sparks Street,
Ottawa 4, Ontario.

Dear Mr. Lyon:

This is to confirm an understanding reached during the current negotiations in respect of loss of license for medical reasons.

Provided a Controller has performed active control duties for a period of five (5) years and subsequently has been removed from active control duties for medical reasons, it was agreed that the individual involved would suffer no loss of his basic salary for a minimum period of one year from time of removal from active control duties.

We trust that this assurance will satisfy your requirements:

Yours very truly,

M. L. Bolger,
Group Chief,
Staff Relations Division.

Received and accepted by

J. D. Lyon,
President,
Canadian Air Traffic Control Association.
Mr. J. D. Lyon,
President,
Canadian Air Traffic Control Association,
Room 305, 56 Sparks Street,
Ottawa 4, Ontario.

Dear Mr. Lyon:

This is to confirm an understanding reached during the current negotiations in respect of the provision of legal assistance to Air Traffic Controllers in certain situations.

"If an air traffic controller is named as a defendant in an action for damages brought by a person who claims to have suffered loss or injury as a result of the performance of his duties by the air traffic controller, the employer agrees to provide legal counsel to advise and represent the air traffic controller in respect of such action."

Yours very truly,

M. L. Bolger,
Group Chief,
Staff Relations Division.

Received and accepted by

J. D. Lyon,
President,
Canadian Air Traffic Control Association.
CANADA

Ottawa 4, December 22, 1969

Mr. J. D. Lyon,
President,
Canadian Air Traffic Control Association,
Room 305, 56 Sparks Street,
Ottawa 4, Ontario.

Dear Mr. Lyon:

This letter will confirm an understanding reached during the current Air Traffic Control negotiations in respect of the early retirement section of the Air Traffic Control Occupational Study Report.

It was agreed that the Association would have access to the early retirement section of the Occupational Study Report and, if there is contained in that section a recommendation for a further study of early retirement, the Association would be invited to consult with management prior to and throughout such further study in the same manner as in the Occupational Study.

Yours very truly,

M. Bolger,
Group Chief.

Received and accepted by

J. D. Lyon,
President,
Canadian Air Traffic Control Association.
Ottawa, December 22, 1969

Mr. J. D. Lyon,
President,
Canadian Air Traffic Control Association,
56 Sparks Street,
Suite 305,
Ottawa.

Dear Mr. Lyon:

You will recall that during the negotiation of a second Collective Agreement with the Canadian Air Traffic Control Association, the subject of commuting allowances was discussed. This letter is to confirm that the existing allowances will continue to be paid until increases, decreases, additions and deletions are resolved through the consultation process at the National Joint Council.

Yours sincerely,

M.L. Bolger
Group Chief,
Staff Relations Division.

Received and accepted by

J. D. Lyon,
President,
Canadian Air Traffic Control Association.
CANADA
Ottawa 4, December 22, 1969

Mr. J. D. Lyon,
President,
Canadian Air Traffic Control Association,
56 Sparks Street,
Suite 305,
Ottawa 4, Ontario.

Dear Mr. Lyon:

This is to confirm an understanding reached in the current negotiations with the Air Traffic Control Group, that employees who are qualified to receive four (4) weeks vacation leave as of the date of signing of this collective agreement, in accordance with Article 17 of the Collective Agreement, shall be eligible for four (4) weeks vacation during the 1969-1970 vacation year.

Yours very truly,

M. L. Bolger
Group Chief,
Staff Relations.

Received and accepted by

J. D. Lyon,
President,
Canadian Air Traffic Control Association.
REVISED CONSTITUTION AND BY-LAWS
AS ACCEPTED AND ADOPTED AT THE 1967 CONVENTION

By-Laws

By-Law 1 — Name
1.1 The name of the Association shall be the "CANADIAN AIR TRAFFIC CONTROL ASSOCIATION", hereinafter referred to as the ASSOCIATION.

By-Law 2 — Objects
2.1 The objects of the Association shall be:
   to promote the welfare of members of the Association;
   to promote the efficiency and conduct of members with a view to improving the status of the Air Traffic Control Services;
   to promote safety and efficiency in the control of Air Traffic.

By-Law 3 — Seal
3.1 The seal of the Association shall be of such form as prescribed by the National Council and shall have the words the CANADIAN AIR TRAFFIC CONTROL ASSOCIATION endorsed thereon.
3.2 All bonds, debentures and sealed instruments shall be attested under the hand of two officers designated by the National Council.

By-Law 4 — Official Publication
4.1 Official Organ—a newsletter shall be published as the official organ of the Association.

By-Law 5 — Head Office
5.1 The head office of the Association shall be situated at the city of Ottawa, in the province of Ontario.

By-Law 6 — Membership
6.1 Types of Membership: provision shall be made for active members, associate members, corporate members and honourary members.
6.2 Active Members: Active membership shall be granted only on election by the National Council.
6.2.1 All active members shall be entitled to all the rights and privileges of the Association, including the holding of any elective office, serving on committees and voting on any matter affecting the Association, as hereinafter provided.
6.3 Associate Members: Any person not qualified for active membership and wishing to support the aims and objects of the
Association may be granted an associate membership but shall not be entitled to hold any elective office or to vote in the Association.

6.4 Corporate Members: Any corporation, company, organization or group of individuals interested in the aims and objects of the Association shall be eligible for corporate membership. These members shall have no vote in the Association.

6.5 Honourary Members: The Association shall have the authority to grant honourary membership.

6.6 Any member who willfully acts contrary to the aims and objects of the Association shall be expelled, suspended, or censured. Said member shall have the right of appeal.

6.7 Resignation: Any member wishing to resign must submit a written resignation.

By-Law 7 — Fees

7.1 Fees shall be established by the annual meeting.

7.1.1 Honourary members shall be exempt from payment of fees.

7.2 Arrears of 60 days in payment of fees shall be sufficient cause for the removal of the name of the defaulting member from the rolls of the Association.

7.3 A member in arrears may be reinstated on payment of arrears or may be re-elected after removal from the rolls provided the National Council directs that arrears be written off.

7.4 A member in arrears as a result of a lengthy illness shall, notwithstanding, be considered a member in good standing of this Association and thus retain all rights and privileges.

By-Law 8 — Board of Directors

8.1 Authority: The Board of Directors, herein referred to as the National Council, shall be the governing body of the Association and shall be responsible to the membership through the annual meeting or any special general meeting called in accordance with these By-Laws. Members of the National Council shall serve without remuneration.

8.2 Composition.

8.2.1 Members: The following shall be the elected members of the National Council—
   President
   Vice- Presidents
   Secretary-Treasurer
   Regional Councillors

8.2.2 Ex-officio Member: The immediate past president for the two years following his term of office.
8.3 Duties of the National Council

8.3.1 General: The National Council shall have those duties and responsibilities are are defined in the By-Laws and such additional duties as are assigned by the annual meeting or any special general meeting.

8.3.2 Limitations: The National Council shall take no action to amalgamate or enter into partnership or into any arrangement for sharing of profits, union of interests, co-operation, joint adventure, reciprocal concessions or otherwise, with any company or any society, firm or person, carrying on or engaged in or about to carry on or engage in any business or transaction that the Association is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit the Association; and to lend money to, guarantee the contracts of, or otherwise assist any such company, society, firm or person, and to take or otherwise acquire shares and securities of any such company, and to sell, hold or otherwise deal with the same;

to enter into any arrangements with any government or authority, municipal, local or otherwise, that may seem conducive to the Association’s objects, or any of them, and to obtain from any such government or authority any rights, privileges and concessions that the Association may think it desirable to obtain and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions unless such action is within the objects or powers of the Corporation and has been sanctioned by a majority of all active members.

The National Council may expend such monies as it considers necessary in conducting the normal affairs of the Association, but shall not incur any expenditure for extraordinary purposes unless authorized by the annual meeting or special general meeting.

8.3.3 Head Office: The National Council shall appoint such staff as may be required to conduct the affairs of the Association. The National Council may appoint a managing director who shall, subject to the direction of the president, oversee and direct employees of the head office and perform such other duties as may be assigned by the National Council.

8.3.4 Appointments

8.3.4.1 The National Council shall have the power to appoint or nominate representatives to government committees and other national or international bodies whose activities and interests are related to those of the Association.
8.3.4.2 The National Council shall have the power to appoint chairmen of special and standing committees of the Association.

8.3.4.3 Reports of Activities: The National Council shall render to the annual meeting, through its chairman of committees, reports of the committees and activities of the Association, and through its secretary-treasurer, the financial statement and auditors report for the previous year, and a proposed budget for the forthcoming year.

8.3.4.4 The National Council shall recommend to the annual meeting auditors for appointment for the ensuing two years.

By-Law 9 — National Executive and Officers

9.1 National Executive: The National Executive, herein called the Executive, shall consist of the president, two vice-presidents and the secretary-treasurer.

9.2 Duties: The executive shall take such action as will ensure that the policies established at the annual meeting and by the National Council will be effected.

9.3 President: The president of the Association shall call meetings of the National Council or the executive. He shall also call special general meetings of the Association as provided in the By-Laws. He shall preside at such meetings and shall perform all the usual duties of his office.

9.4 Vice-Presidents: In the absence of the president, the chair shall be occupied by a vice-president, or in the absence of a vice-president, by another member of the National Council. The vice-presidents shall perform such other duties as may be required by the president or members of the National Council.

9.5 Secretary-Treasurer: The secretary-treasurer shall be responsible for all records of the Association related to membership, finance, meetings of the National Council, Executive, annual and special general meetings. He shall make such reports and returns as are required. He shall have custody of the seal of the Association.

By-Law 10 — Special or Standing Committees

10.1 Formation: It shall be the duty of the National Council to form standing or special committees as may be necessary in the opinion of the National Council or Executive. These committees shall report to the National Council. The president and secretary-treasurer shall be ex officio members of the appropriate committees.

10.2 Representation: At least one representative of members employed in a specialized type of employment shall be a member of any
committee or delegation that may be appointed to deal with matters related specifically to that type of employment.

By-Law 11 — Branches

11.1 The National Council shall make provision for branches within each of the Flight Information Regions, hereinafter known as FIR's.

11.2 Each FIR having at least twenty-five (25) members in good standing shall be represented by a councillor on the National Council of the Association.

11.3 Any geographical location having at least five (5) members in good standing may be granted authority by the regional councillor to establish a branch of the Association. Members at locations having less than five (5) members shall be assigned to a branch within the appropriate FIR. Isolated members on duty outside Canada will be assigned to the branch serving the location of the president for record purposes.

11.3.1 Each branch shall have a branch council of elected officers who shall be elected by the branch members. Such officers shall be employed at the geographical location of the branch.

11.3.2 Duties of a Branch Council: The branch council shall take such action as will ensure that the directives established by the annual meeting, the National Council and branch resolutions will be effected.

By-Law 12 — Terms of Office, Nominations, Eligibility for Office

12.1 Terms of Office

12.1.1 The term of office of the national executive shall commence at the close of the annual meeting at which they are elected and shall last for two years or until their successors take office.

12.1.2 The term office for regional councillor shall commence on the first day of March and shall last for two years or until their successors take office.

12.1.3 The term of office for a branch council shall commence on the first day of January and shall last for one year or until their successors take office.

12.1.4 In the event of a special election for any office, the elected nominee shall serve the unexpired term of office of his predecessor.

12.2 Nominations

12.2.1 At least three months prior to the commencement date of any term of elected office the national secretary-treasurer shall call upon the appropriate branches and members-at-large for nominations for that office.
12.3 Eligibility for Office
12.3.1 Only active members in good standing shall be eligible to hold any elected office.
12.3.2 Eligibility for National Council Office: Nominees must have at least one year's membership in good standing at the closing date for nominations.
12.3.3 Good Standing: Good standing shall be continuous paid-up membership during the preceding qualifying period of eligibility.

By-Law 13 — Elections
13.1 All elections of officers shall be by secret ballot.
13.2 Election of the National Executive: The national executive shall normally be elected at an annual meeting. Only accredited representatives at an annual meeting shall be eligible to vote for the president, vice-presidents and secretary-treasurer of the Association.
13.3 Election of Regional Councillors: Only active members within an FIR shall be eligible to vote for a regional councillor to represent such FIR.
13.4 Election of Branch Councils: The council of a branch shall be elected by the active members of such branch.
13.5 Time of Elections: Elections shall normally be held at such time as to allow the successful nominee to commence office as in By-Law 12.1.
13.6 Special Elections: In the event of the resignation from office, removal from office, death or incapacity of any elected officer of the Association, the executive shall, on receipt of evidence to this effect declare the office vacant and call a special election.
13.6.1 A special election for national executive office shall be conducted by a special general meeting.
13.7 A member may hold only one elected office at any one time.
13.8 Removal from Office: Any elected member may be removed from office for cause. A member removed by virtue of this By-Law shall have the right of appeal.

By-Law 14—Meetings

14.1 Annual Meeting: The annual meeting shall be held at a time specified by the National Council. Notwithstanding the foregoing, it shall not be held later than the 31st of May in each year.
14.2 Special General Meeting: A special general meeting shall be held when required by the By-Laws or whenever deemed necessary by the National Council.
14.3 The National Council shall meet at least once in each year. Additional meetings may be held on the call of the president or in his absence on the call of the vice-president, acting as president, or upon the written request of four or more members of the National Council.

14.4 The National Council shall meet on the day following the annual meeting. The president may call additional meetings of the council as required.

14.5 Branch meetings shall be held as required.

14.6 Representation at Meetings

14.6.1 As the nature of the Air Traffic Control Service makes it impossible for all members to attend any meeting of the Association, voting at annual meetings shall be representative. The following shall attend annual meetings of the Association:

- The National Council
- The Managing Director
- and normally accredited branch representatives

as follows:

- up to 30 members—1 representative
- and one additional representative for each additional 30 members or portion thereof.

14.6.2 Special General Meeting: At a special general meeting each branch shall cast the same number of votes as their number of accredited representatives at an annual meeting.

14.7 Quorums

14.7.1 A quorum at any session of an annual meeting shall be at least 60% of the accredited representatives.

14.7.2 A quorum of any session of a national council meeting shall be at least 60% of the National Council.

14.7.3 A quorum of any session of a branch meeting shall be at least 20% of the branch members or 3 members of a branch, whichever is greater and shall include the branch chairman or vice-chairman.

14.8 Voting

14.8.1 A member of the National Council shall not be represented by proxy at any meeting of the National Council.

14.8.2 Voting at annual meetings of the Association shall be restricted to accredited representatives, at National Council meetings to members of the National Council.

14.8.3 All references in these By-Laws to required voting majorities shall mean a majority of all those eligible to cast a vote, whether or not the vote is cast.
14.9 Invitees: Committee Chairmen who are not members of the National Council, and the managing director may be invited to attend meetings and may take part in any discussion, but they shall not have the power to vote or to propose motions.

14.10 Discussion: All members of the Association shall have the privilege of taking part in any discussion at any Association meeting. Part of each annual meeting shall be devoted to a closed session.

14.11 Rules of Order: All meetings of the Association shall be conducted in accordance with the Parliamentary Rules of Order, insofar as such rules are not contrary to the By-Laws, Policy Manual, or any standing procedure of the Association.

By-Law 15 — Regulations

15.1 Changes in the Constitution and By-Laws require approval by a two-thirds (2/3) majority of all accredited representatives at an annual meeting, but any changes so approved shall not become effective until approved by the Secretary of State of the Government of Canada, and where applicable, any necessary supplementary letters of patent have been issued.

15.2 Regulations covering procedures for obtaining the objects of the Association and for applying these By-Laws shall be established by the annual meeting shall be incorporated into a manual to be known as the policy manual. Such regulations must be made in accordance with the Constitution and By-Laws. Changes in the policy manual shall require approval by a two-thirds (2/3) majority of all accredited representatives at an annual meeting.
AIR TRAFFIC CONTROL-TECHNOLOGY AND LAW

PAUL P. FLYNN*

From the very start of the aviation industry, there has been a certain amount of control from the ground. At first it was by means of light signals and bonfires to assist a pilot in the landing and taking off process, as well as to remain on a predetermined flight path. Later there was radio, thus allowing the pilot to stay on course over areas where no fires or beacons were established to assist him. The problem remained that under this system constant communication between the pilot and the controller was necessary in order to maintain a definite flight path and safe distance from other aircraft.¹

Essentially there are two sets of rules under which a plane may be flown in the United States. There are the Visual Flight Rules (VFR), which are applicable up to a certain altitude in such weather as to permit the operation of a “see-and-be-seen” rule to avoid collisions. These place primary responsibility upon the pilot, nonetheless the procedures for landing and take-off remain substantially the same, and a flight plan must still be filed prior to departure. There also are Instrument Flight Rules (IFR), which operate above a certain altitude for all craft, and at lower altitudes when the weather is poor. The Air Traffic Controller is primarily concerned with those craft operating under IFR due to the fact that constant supervision is one of the characteristics of this mode of travel.

In terms of allocation of the authority and responsibility, the United States is divided into twenty-six geographical segments, with an Air Route Traffic Control Center (ARTCC) established for the ‘en route traffic’ in each sector.² Each of these centers, through the use of the equipment which will be described below, maintains constant surveillance over all of the IFR traffic which enters into its area of responsibility and directs every movement of those planes under its control.

The regulation of air traffic has been delegated by statute to the Federal Aviation Agency. This control is accomplished by means of the Federal Aviation Rules and Regulations which are issued pursuant to the Federal Aviation Act.³ The extent of their application and effectiveness is most clearly shown by following an Instrument Flight Rules movement from departure to arrival.

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Prior to the time set for take-off, the pilot must file a flight plan with the agency through the local control tower. This plan is, in effect, an itinerary of the proposed journey. When this has been accomplished, the pilot is permitted to go as far as starting his engines before further clearance must be obtained. The next step is the clearance issued by the Ground Control Tower at the airport of departure for the craft to taxi out to the runway and get in position for take-off. While the plane is accomplishing this task, the controller requests clearance from the appropriate Air Route Traffic Control Center. This is determined upon the basis of the flight plan previously filed with the agency. This clearance is transmitted to the pilot, who then switches his radio to the frequency of the Air Traffic Control Tower at the airport of departure. When the controller has issued clearance the pilot may take-off along a prescribed runway and then perform certain maneuvers in positioning his craft for the flight ahead.

At this point the Radar Controller will guide the flight and supervise his movements until the plane is at a point where the Air Route Traffic Control Center will assume control of the craft. This ARTCC will direct the en route portion of the flight, passing the craft on to other ARTCC personnel as the plane reaches their respective areas of control. This procedure continues until the plane reaches the vicinity of the airport of arrival. At that time the same procedure which was used upon take-off will be repeated in reverse, including the filing of a flight report which states the details of the flight and any abnormalities or difficulties encountered.

As is obvious, the system itself is basically simple in nature. The difficulty is that the methodology for achieving the desired results is extremely complicated. The basic reason for the existence of ATC is one of safety. The system was created when the industry was young, due to the conflicting methods of control being used, and the burden was placed upon the Federal Government to prevent collisions and to promote safety. The Air Traffic Control System, in seeking to fulfill the task set out for it, has constantly sought to improve both the service available and the reliability of that service. The most direct method of accomplishing this result has been determined to be the acquisition of new equipment which will allow far more effective and detailed supervision of the planes, thus permitting more craft to be operated within the same amount of airspace while improving the safety level.

One of the major difficulties which the industry and the ATC have lies in the fact that the growth of air travel has been grossly underestimated in

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preceding years. The result of this error is seen in the problems of today's airports and at the control towers which direct the traffic to and from these facilities.\(^6\)

A typical example of the airport problem is John F. Kennedy International at New York City. There the problem of density is more advanced and magnified, but indicative nonetheless of the situation which is, and will be, facing the ground facilities available. The delay of a craft prior to landing may run up to thirty minutes and not be uncommon, and it has been reliably predicted that this time may grow to as much as three hours in the immediate future.\(^7\) If we take a peak travel day at Kennedy, we find that planes are directed by the control towers to "stack," form circling columns at different altitudes, for as long as three or four hours before they can land. There are sometimes so many of these "stacks" that an incoming craft will be directed to "stack" some hundreds of miles away. The plane then works its way down each stack and, ultimately, is allowed to land.\(^8\)

The effects of the increased traffic density have also had their effect upon the ATC. The agency has realized that with increasing density, as well as higher speeds and more complex craft, the pilot must pay more attention to the cockpit and not to the airspace which surrounds him. This gives rise to the necessity of ground assistance, and the "...function of the tower personnel is merely to assist the pilot in the performance of the duties imposed, not relieve him of those duties."\(^9\) The situation as it exists today is such that the pilot, as well as the Ground Controller, may well be liable for injuries resulting from negligence on their respective parts.

It is to be noted that the regulations issued by the F.A.A. prohibit the operation of a craft contrary to the instructions of the ATC and provide for a fine up to $1,000 for each violation. On the other hand, the regulations also provide that the pilot of the craft shall have final authority as to the position of the craft while he is in command.\(^10\) The inconsistency is somewhat abated by the fact that the pilot may take any action necessary to avoid imminent danger.\(^11\) The facts are, however, that the F.A.A. takes a very dim view of any alteration from a prescribed


\(^7\) Supra, note 1 at 55.

\(^8\) Id.

\(^9\) United States v. Miller, 303 F.2d 703, 710 (9th Cir. 1962), cert. denied 371 U.S. 955, (1963).


\(^11\) F.A.A. Regulations, Part 91, Sec. 91.75.
course of action and the danger must be clear and imminent before the action will be excused.

The problem which now comes to the front is one of time. A pilot needs at least twenty-five seconds to see, react, and navigate so as to avoid collision. This amount of time is no longer available.\(^{12}\) In the near future with the Supersonic Craft, it is entirely possible that two craft could collide head on, and neither of the pilots would ever have seen the other craft. Again the results seem clear. It is no longer a question of the mandatory nature of the regulations and the instructions. The pilots now must rely upon the directions given as a matter of necessity in the safe conduct of the plane. While there seem to be no valid reasons to abandon the common sense principle that the faster you travel, the less reaction time is available and the more dangerous is the trip, the solution appears equally clear. If the situation as a whole is observed more closely and the desired information obtained at an earlier stage, the present safety factor will be retained, if not improved.

In light of the above factors, it is understandable that the courts have stated the basic function\(^{13}\) and duty\(^{14}\) of the ATC, the determination and maintenance of a safe distance between aircraft so as to avoid collision, will be critical factors in the placement of responsibility for resultant damages. The entire area surrounding Air Traffic Control is so closely woven as to require not only an outline of the background but also of the technique which is used in the control of aircraft throughout the country.

The systems which assist in the landing process are referred to as Instrument Landing Systems (ILS). There are presently numerous versions undergoing tests at different places throughout the country. Among the more promising methods is a miniature ILS which is hoped to have an airborne weight of some 15 pounds. This would send a "trigger" to the control station which would respond with the distance of the craft from the runway and the necessary glide path and slope. In this manner there would be further elimination of wasted time while the pilot and the controller verbally transmit information which may be able to be done automatically in a more efficient manner.\(^{15}\)

The employment of computers in the field under investigation seems to be only a question of time. Already they are being used for the reservation


\(^{13}\) Supra, note 4.


\(^{15}\) Aviation Week and Space Technology, 28 Nov. 1966, at 86.
process in commercial airlines, and their use has been evaluated for the purposes of speeding up the handling of air traffic. The computers will be tied together in such a manner that the flight plan which is filed at the commencement of the flight will be transferred automatically to the computers of the ARTCC in which the craft is operating. In this manner, the controller will automatically have at his disposal all of the information concerning the particular plane which has entered his control zone almost instantaneously. 16

The advent of radar resulted in a substantial reduction in the distance necessary between planes for the sake of safety. The problem still remained, however, that the controller who was in communication with the pilot was unable to determine to which “blip” on the radar screen he was talking. More recently the technology has provided a solution to the problem in the form of a “Transponder” or “Beacon.” In its initial stages this instrument allowed the pilot to push a button on the request of the controller and the results upon the radar screen would identify the craft. In this manner, the controller was able to keep track of which plane was which without the necessity of such constant communication. The methodology has advanced significantly as of this date.

The present radar system in use at the major airports calls for the controller to monitor the approach according to a “glide slope” and to issue the necessary corrections to the pilot. The final decision as to whether or not to land is made by the pilot at what is called the “decision altitude.” This varies according to the airport involved, but is normally 200 feet of altitude and one quarter mile from the end of the runway. As of this time, the controller has a “blip” on his screen and a set of crosshairs to evaluate the position and progress of the craft; when the “blip” is not on the line the controller calls for the necessary maneuvers.

There is a refinement of the original “Transponder” now being tested whereby the controller has either a square or a circle on his radarscope and the plane is reflected by a series of dots. When the dots go outside of the markers, then the pilot is instructed to take corrective action. The benefit to be obtained by such a system lies in the exactness of the information which is available to the controller. A number of high-powered and very narrow beams are used to obtain the dots, with a “scan” being made four times per second. This is opposed to the present method where a broad beam produces a large “blip” which is not extremely helpful during landing, and a scan is made only once per second.

The more precise the image, the more accurate the decision of the controller may be as to the landing process.17

The "Transponder" or "Beacon" may now be defined as "an airborne radar transponder which, upon interrogation by a radar pulse, transmits a synchronized reply pulse. The reply pulse can be used to determine range and direction of the aircraft and through suitable modulation indicate aircraft identity and altitude."18 Thus the controller and the pilot both have gained more time, while the available information is transmitted automatically and is available for use at any time.

The control system presently uses a 64 code 10 channel beacon format to allow the controller to assign a particular code and channel to each aircraft which he is supervising, thus insuring the availability of instantaneous communication with the craft. Further, in the event of a radio failure, the pilot is able to activate the Transponder manually so as to indicate the difficulty to the Ground Controller who can then make provisions as to the safest method of handling the routing and landing of the craft.19

In addition, there is under consideration a system which provides for the installation of small radar beacons in the runway itself. These would produce an image on a screen which had been installed in the plane which would resemble runway lighting at the present time, even though the weather was too poor to allow visual contact with the ground. In this manner, the pilot is not in the situation of relying solely on verbal directions, but is able to see what he is about to attempt, which when added to the actions and supervision of the controller, will result in an increased safety factor.20

The results of the research efforts directed at the problems of the air industry are seen in other fields as well. As an example, we may look to the new style of antenna which was put into use at La Guardia field in New York in 1967. It is known as a "waveguide glide slope" antenna, and sends out a fan-shaped radio beam similar to an invisible electronic ramp down which a pilot may guide his aircraft to a safe landing, even in bad weather.

Although there have been antennas and systems to perform this function for some twenty years, the one at La Guardia is worthy of special attention due to the fact that the existing technique called for two beams

20. Supra, note 17, at 59.
to be sent out, one along the ground and the other into the sky at a specific angle. The system was not able to operate at the airport in question with any degree of reliability due to the presence of the East River just beyond the end of the runways. This caused the ground pattern to vary according to the tide and the pilot was required to constantly correct for the deviation.

As a result of the new method, which sends one fan-shaped beam directly into the sky, the minimum ceiling for landing has been reduced from 400 feet to 100 feet and numerous flights which in the past were diverted to other airports are able to land at their prescribed destination. The cost of the system in itself was approximately double what the normal type would have been, but the additional factor is present that in order to effectively install the older type, a platform some ten acres in size would have had to be constructed on the East River at a cost of some 1.5 million dollars.

With a view of the more distant future, we see that there are already thoughts of doing away with any ILS as it is now known. This would take time, and would also require acceptance by the international aviation community in order to be effective. The designers are looking to an Advanced Integrated Landing System which would make use of microwaves, thus providing a clearer definition of the object under surveillance than the type presently in use. This would also reduce significantly the amount of reflection which is the result of nearby buildings or ground clutter. Although there are several variations under development and testing, there is one which seems to have achieved a certain amount of acceptance by a spectrum of the aviation community. The major advantage which is obtained by the use of the system is that the pilot not only has a glide slope approach line in the cockpit, but the equipment may be used for Precision Approach Radar which others are not able to accommodate.21

In addition to the advances noted in the control and monitoring of aircraft, the technology has produced results in related areas which will also assist in the fulfillment of the objectives set out for the agency. More specifically, there are a number of theories being tested which would aid the pilot in maintaining a safe distance between craft at all times. These are known as Collision Avoidance Systems and are designed to be mounted on the aircraft and to warn the pilot of impending collision, as well as to provide information concerning proper evasive action.22 While

this will amount to an assumption of a portion of the duty which is presently attached to the ATC, it is highly unlikely that the procedure will completely relieve the controller.

Any such system will, of necessity, have to perform at least four distinct tasks in order to be successful. First, it must detect all potentially dangerous craft nearby, and second, it must evaluate the situation as to whether or not a real threat to the safety of the craft is involved. The third step is to determine what precise maneuver is needed, and fourth, specify when the action should be taken so as to maximize the factor of safety.23 As is readily observable, the entire situation, both the problem and the necessary elements of solution, is of a dynamic nature and will require a new technology for the development of a completely satisfactory answer.

The existing radar has been found to be inadequate for two main reasons. First, the angle of approach of another craft cannot be accurately measured, and secondly, the physical fact that a "radar dish," that is, the transmitter which would have to be mounted on the plane, would have to be some ten feet in diameter in order to adequately cover the area around the plane.24 For these reasons, the experiments have been primarily concerned with other methods of detection.25 The implementation of such a system is not expected until the mid 1970's and, as of this time, are nearly two years away from any substantive testing procedure.26 There is an additional barrier to be scaled in the fact that the majority of the systems under consideration at the present time require that the other aircraft be equipped with similar equipment. There must be a uniform standard adopted, or a method developed which will allow two or more systems to work together, before the use of such devices will be sufficiently reliable for the general public or even commercial airlines to employ them on a wide scale.

Despite the vast amount of resources and energy that are being devoted to many of the stages of the problems involved with the technology, there are still some areas which seem to defy any solution. One of these is the phenomenon of "Clear Air Turbulence" which occurs mainly over 20,000 feet and consists primarily of powerful cross-currents of air. These are invisible and at the present time there is no manner of advance detection. The results are often dramatic, if not devastating, with the plane lurching

23. Id.
out of control and plunging 10,000 feet or more in a sudden, violent maneuver. The dangers are obvious, as is the necessity for some manner of warning the pilot in advance so that protective measures may be taken. The problem is slightly different from others mentioned in that the development of the technology may not involve the Air Traffic Control. The possibility exists, however, that the agency could either require specific equipment that would be adequate, or that the detection would be accomplished through the use of satellite observatories and the information transmitted to the pilot by means of the controller. In such a case, negligence would lead to liability in the same manner as in similar circumstances.

**Law**

As we have seen, the regulation of air traffic is in the hands of the Air Traffic Controller, who is employed by the Federal Aviation Agency. The result of this, in a legal framework, is that the potential liability of the defendant agency is determined by the Federal Tort Claims Act. The actual party defendant in these cases is the United States, and therefore, the FTCA provides the plaintiff with a forum in which to bring his suit. This is either the domicile of the plaintiff or the place of the tort. While it is necessary to initiate the suit in a Federal District Court, the results are that the court will apply the usual tests to determine which state law shall apply to the situation at hand. This choice will be based upon the law of the place where the act or omission occurred, including the conflicts law, which will often refer the court to the place of injury via the significant contact doctrine.

The theory of recovery under which damages are usually sought is that of "Proof of Fault." In general it may be stated that the fault system is based upon the showing of reliance, the reasonableness of the actions taken, the nature of the services rendered, the presence of a duty of care, and the breach of that duty as the proximate cause of the resultant damages. The concept itself has been defined as "an act or omission attributable to a defendant is a 'fault' within the meaning of this convention, a) if, without sufficient justification, it is intended to cause or to facilitate the causing of an injury; b) if, without justification, it creates

27. Supra, note 5.
an unreasonable risk of injury through a failure to exercise due care.” The most direct and effective manner of satisfying the burden of proof which rests on the plaintiff is through a showing that the negligence of the defendant proximately caused the damage to the plaintiff.

Negligence may be regarded as “conduct which falls below a standard which is set by the law for the protection of the community against unreasonable harm.” This standard has been set, insofar as the Air Traffic Controller is concerned, by the courts. The Court recently found that the ATC was liable for breach of its general duty to keep aircraft under the supervision of a controller separated. The controller failed to sufficiently observe the presence of one plane in the vicinity of the other and to transmit timely warning to the pilot of the commercial craft. The Government was held liable for the damages resulting from the ensuing collision and the ATC was found to have acted within the scope of their authority. The most logical determination of the recent cases would seem to lead to the conclusion that the courts may be expected to continue the trend which has been indicated. The theoretical formalities or letter of the law will receive less emphasis than the factor of justice in the instant fact situation.

The Air Traffic Controller will be considered negligent in the event that he clears two planes to land at the same time on the same runway; fails to maintain a safe distance between the aircraft or, in general, violates either the rules and regulations of the agency itself or performs actions which are not in accord with the general duty to prevent collisions.

The further factor of proximate cause does not seem to carry the weight in the aviation field which it once did. The theory acts as a limitation upon the responsibility of the defendant for the consequences of his conduct. It is based in the practicality of the situation and seeks to limit legal responsibility to those causes which are so closely connected with the results, and of such significance, as to warrant the imposition of liability by the courts. The evidence need only be sufficient for reasonable men to conclude that it was more probable than not that the conduct complained

32. W. Prosser, Law of Torts, 175 (1941).
of caused the harm. The defendant is normally held liable for the foreseeable results of his negligent conduct as well as for all direct consequences even though they may not be foreseeable. In a 1966 case, the court has stated that "failure to see and realize what was visible and discernible, followed by failure to give immediate warning, constituted negligence that was one of the proximate causes of the accident." The case law, of which this is indicative, lies in the direction of the court finding proximate cause where negligence of the ATC is shown unless a clearly supervening force enters the picture. In the light of the background shown and the reliance factor in these cases being so absolute, this is not a harsh rule but rather an attempt to place the responsibility where the actual authority resides.

The Union Trust case, along with the Cattaro decision may be taken as establishing the fact that the actions of the controller are not considered to be within the discretionary actions exceptions to the FTCA. The protected decision is whether or not to operate the tower, not the manner of operation. As a result of the lack of protection afforded in this area, the government counsel then began to claim that there was no duty on the part of the controller. This claim was based upon the interpretation of two cases.

On the one hand, there is the case of Furumizo v. United States where a student pilot crashed on attempting a take-off. The cause of the crash was found to be the vortex—that is, the disturbance of the air—created by a larger plane taking off, and the court concluded that the tower personnel were negligent in allowing the take-off. This was in the face of the fact that a warning had been issued by the controller. The court was of the opinion that the duty of the controller extended beyond the mere compliance with the manual and that there was a duty on his part to terminate the take-off where he observed that his warning was unheeded. The court criticized the fact that there was a lack of judgment on the part of the tower; that is, the tower failed to make a judgment, rather than that there was an erroneous one made. Again this was defended on the ground that the duty of the controller was specifically set out in the manual and he had followed those instructions. The court reasoned that the separation of aircraft on take-off is a matter of judgment with the controller, and that in the instant case, there was no exercise of that power; thus, the Government was liable.

On the other hand, there is the opinion of the Federal District Court in

39. Supra, note 36.
Georgia concerning the Hartz case. Although the fact situation in the Hartz case was almost exactly similar in nature to that of Furumizo, the results differed. The Georgia court emphasized the primary duty of the pilot and set forth a requirement that the plaintiff demonstrate the existence of a duty from the manual and then show a breach of that duty in fact. The existence of this division of authority allowed the defendant to claim no duty on every occasion. The resultant confusion was cleared when the Georgia case was reversed and there seems to be little doubt at this time that there is a clear duty existent on the part of the ATC to do more than merely follow the set of instructions; the exercise of judgment to avoid potentially dangerous situations is now required.

In the light of the case law mentioned above, the theory of using the immediate cause of the accident as a means of exculpating the ATC will no longer be valid. As a prime example of this, we may look to the case of Ingham v. United States where the tower failed to transmit a decrease in weather conditions. Although the pilot was negligent in the process, the Government was held liable nonetheless. The findings of the court were to the effect that the plane approached the runway from an angle some twenty percent off the proper course and then waited too long before instituting a missed approach procedure, with the result that the craft was too low and traveling too slow to stay airborne. It would seem difficult at best to formulate a situation where the immediate cause of the accident could be of a more serious intervening nature, yet liability followed. The conclusion to be drawn from these facts is that a controller bears, and will continue to bear in the foreseeable future, a very heavy burden of responsibility. There is, however, a connection between this responsibility and the authority exercised, and at this time it appears to be a reasonable relationship.

**CONCLUSION**

We have seen the procedural technique which has developed, as well as an overview of the technology in the field of Air Traffic Control. In addition, the present state of the law and some of the effects upon the controller have been examined. The point to be considered at this time is the overall interaction of these elements.

There is a growing web of procedural restrictions and regulations governing the conduct of flight. The Air Traffic Controller is the means

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42. Hartz v. United States, 10 Av. Cas. 17,606 (5th Cir. 1968).
43. Ingham v. United States, 373 F.2d 227 (2nd Cir. 1967).
by which these are actually applied. As his tools, the Controller makes use of technological innovations and refinements whenever possible. This is one area where the development of the technology has had, and is having, a direct effect upon the development of the law.

As our considerations would indicate, it seems clear that the more highly developed and sophisticated the technology becomes, the more strict the courts will be with those employing these methods. This appears to be equitable when we consider that the sophisticated technology is providing the Controller with more information, which is more accurate than ever before, at an earlier time. Thus, the Controller is being called upon to make efficient use of this information, arrive at correct decisions, and implement correct procedures in such a manner as to fulfill the statutorily imposed duty of facilitating aviation and maximizing safety.

The technology has shown a history of developing new methods in response to particular needs and demands. As these methods have improved, the degree of responsibility upon the Controller, who is the means of exercising the authority which has developed concurrently, has also increased. This process may be expected to continue in a similar pattern for the future.
PROSPECTS AND PROBLEMS OF THE CONTAINER REVOLUTION

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AND

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“Container revolution” is a term which is often and increasingly heard today. Reduced to its simplest denominator, the term connotes no more and no less than a box of freight in motion—a concept as timeless as transportation itself. In the modern context, however, the revolutionized box—now called a container—has created a dramatic change in existing systems for the movement of cargo in international commerce by land, ocean, and air carriers. The prospects for further change are manifold. At the same time, containerization has raised a myriad of problems, many of which will require solutions before the prospects of change may be implemented and fully realized.

I.

INTRODUCTION

The tremendous growth in the use of intermodal containers over the past several years is a matter of common knowledge. For example, in 1965, less than five per cent of the ocean liner cargo transported between Europe and the United States moved in containers; by 1975, it is variously estimated that from 50 per cent to as high as 80-85 per cent of that cargo


1. “Container” is referred to in Article 4(5) of the Hague Rules of 1924 as an “article of transport.” The United States Coast Guard, which is responsible for approving containers used for international transportation under Customs seal, proposes a definition of “container” as “an article of transport equipment (liftvan, portable tank, or other similar structure including normal accessories and equipment when imported with the equipment), other than a vehicle or conventional packaging which is . . . strong enough to be suitable for repeated use; . . . specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading; . . . [fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another; and] . . . so designed as to be easy to fill and empty.” Proposed Regulation, 49 C.F.R. §420.3(3), published at 34 Fed. Reg. 14054 (Sept. 4, 1969).

will be containerized. Similarly, a rapidly increasing volume of air cargo is being transported in containers in jet freighter aircraft (and soon in jumbo-jet freighters). Many of the advantages of containerization—such as cost savings, reduced damage and losses, and simplification of trade—already have been partially realized. However, before integrated and effective intermodal systems can be achieved, it will be necessary to overcome a number of legal, operational, and economic barriers and problems.

At the outset, it should be emphasized that international transportation of cargo to and from the United States is subject to regulation by, inter alia, three separate federal administrative agencies: the Interstate Commerce Commission (ICC), the Federal Maritime Commission (FMC), and the Civil Aeronautics Board (CAB). In addition, the Department of Transportation (DOT), established on April 1, 1967, has been charged with responsibility for developing and carrying out a national transportation policy. Within this multi-agency framework, the emergence of the container revolution has placed great emphasis upon the need for efficiency and cooperation on the part of individual transportation modes, and for close coordination on the part of regulatory bodies. The separate sets of principles and laws which have been


5. It may be noted, however, that the freighter version of the jumbo jet has attracted little interest among the airlines, primarily because of the large cargo-carrying capacity of the passenger version of the new jets. See Journal of Commerce, p. 1 (October 30, 1969).


9. The CAB has jurisdiction over air transportation, in interstate or foreign commerce, by direct air carriers (airlines) and indirect air carriers (air freight-forwarders). See Federal Aviation Act, 1958, 49 U.S.C. §§1301-1542 (1964).


10. See, e.g., Alan S. Boyd, New Dimensions in Transportation Law, 1 Transp. L.J. 1
formulated over the years and applied to each of the modes now must be
dovetailed and streamlined to permit an integrated transportation
system. In some instances, new approaches, policies, and practices
should be adequate to accommodate the goals of the new system; in other,
legislation and treaties may be required.

The purpose of this article is to identify the benefits of containerization
which already have been achieved, as well as the many potential benefits
which may be anticipated; to identify the challenging and many-faceted
problems presented by the container revolution; to determine the extent to
which those problems can be or have been resolved; and to explore the
impact which solutions to those problems may have upon the
transportation industry and upon society as well. The problem areas
discussed herein are included within three categories: (a) pricing and
liability problems, (b) competitive problems, and (c) social problems. Due
to the wealth of issues and subissues to be covered, this article is intended
primarily as a survey. A more detailed treatment of individual problem
areas raised by the container revolution is left to future articles and
studies.

In considering containerized transportation of freight, a distinction
should be made between three basic types of intermodal shipments. The
first is a container loaded and sealed at the supplier's factory and delivered
intact to the consignee's warehouse or other place of business. This is
termed a "door-to-door" container shipment. It is blessed with the
greatest cost savings obtainable from containerization but is burdened
with the greatest number of legal barriers, which will have to be
surmounted. The second type of shipment is a container loaded by a
freight consolidator at an inland point and transported to an inland point
overseas, where the container then is broken open and the contents
distributed. This is termed a "point-to-point" shipment. Thirdly, the

(1969); Paul J. Tierney, The Evolution of Regulatory Policies for Transport Coordination, 1
Transp. L.J. 19 (1969); John Harllee, Current Regulation and Modern Transportation

11. The suggestion that the three transportation agencies be combined into a single
agency to undertake regulation of all modes is not regarded as appropriate at this time. See
Hearings on S.3235, supra note 3, at 24. While such an agency would eliminate much inter-
agency friction, it would likely substitute intra-agency friction in its stead. Moreover,
creation of a single agency would not solve the difficult problem of how to regulate air and
ocean carriers of many different nationalities.

12. In this regard, the Department of Commerce, Maritime Administration, presently is
conducting a broad study, in three phases, of the impact of containerization on the United
States economy. This study has been contracted to Matson Research Corp. See Daily
movement of a container consolidated at a port or air terminal and shipped to an overseas port or air terminal, where the contents then are sorted for distribution, is termed a "port-to-port" or "air terminal-to-terminal" shipment.13

II.

ACHIEVEMENTS AND PROSPECTS OF THE CONTAINER REVOLUTION

One of the primary goals of the container revolution is reduction in transportation costs. While the precise amount of cost saving is best left for the economists, accountants, and data processing experts to determine, some general knowledge of the subject is necessary for an understanding of the prospects and problems of the container revolution. The first, though not the greatest, cost saving on a door-to-door container shipment14 results from elimination of the normal cost of export packing. When cargo is loaded in containers, there is no need for the full crating, coopering, or other preparations for stowing individual packages in the holds of ships. The insurance industry warns the shipping community of the danger of severe loss caused by improper packaging and securing of cargo within containers; however, underwriters generally agree that full export packaging is not required for such cargo and that the risk of damage is not great—assuming containers are properly loaded by shippers and properly protected by carriers.15

A second cost saving will be achieved through use of "unit-trains" to transport containerized cargo from inland points to a port. Unit trains will be used particularly in intense traffic areas, such as between Chicago or St. Louis and New York or other major ports. In 1966, one railroad filed with the ICC a unit-train rate of $16,900 per train for the transportation of containers between the Chicago area and Port Newark, New Jersey.14 The cost per container on a fully utilized train would have

13. There are, of course, many other variations of this theme, e.g., door-to-port movements, port-to-port movements, etc.
14. Containerized point-to-point and port-to-port shipments will be subject to some, but not all, of the cost savings of door-to-door container movements.
been less than $113. The announced plan was to transport the cargo
between the two cities in one day. Numerous protests against the rate were
filed with the ICC, and the rate ultimately was withdrawn by the
railroad. 17 Nonetheless, inexpensive, fast unit-train transportation does
not appear to be far off. 18 When implemented, it will provide one of the
most significant cost savings of the container revolution.

Another saving results from the location and operation of new
container terminals. The trend already is for containers to be loaded away
from port areas, at interior points. New container terminals generally are
located between the inner cities and the adjacent industrial or consuming
areas. Ship lines which have initiated container service have moved their
terminals from Manhattan or Brooklyn in New York City to Port
Elizabeth, New Jersey or Staten Island; from San Francisco to Oakland,
California; from old San Juan, Puerto Rico to Puerto Nuevo or Isla
Grande, outside old San Juan; from London to Tilbury in England; and
from the traditional port area in Rotterdam to Beatrixhaven in that city.
The basic purpose of these moves to terminals in outlying areas has been
the need for backup lands in which to park containers while they await
loading onto ships or removal by trains or tractors. Additionally, the
moves have made it unnecessary for freight to traverse the heavily
trafficked downtown areas which typically are accessible only by narrow
streets that hinder transportation.

The elimination of the cost of storage in sheds which the carrier must
provide for conventional cargo is another saving produced by
containerization. Containers are simply parked in the terminal area until
the time of departure of the ship or airplane. Moreover, the container
system eliminates the cost of unloading freight from rail cars or trucks to
a place of rest on the pier and then transferring the freight from the place
of rest (usually in the shed) to the end of the ship's tackle prior to loading
the ship. Most important, it costs far less to load or unload a full

17. The ICC ordered an investigation of the unit-train rate in Docket No. I&S 8335, The
Pennsylvania R.R. Co., Trainload Container Rates Between Illinois and New Jersey. After
several postponements of the effective date, the rates were allowed to be canceled as of
October 9, 1967. Accordingly, the proceeding was discontinued by ICC order on October

18. It has been predicted that the major United States cities will be linked by permanently
coupled unit trains specially designed to carry containers. See Traffic World, p. 22 (October
11, 1969).
container of freight than individual packages or even packages on pallets. The container is simply driven to the container yard by a chassis pulled by a tractor, the tractor is detached at a parking place, and the container awaits the ship.\footnote{19} When the ship arrives, the container on the chassis is pulled by a yard tractor alongside the ship, where a giant crane lifts the container off the chassis and deposits it into one of the vertical cells of the containership.

At the other end of the line, containerization results in the same cost savings between the time the cargo arrives at the destination port and the time of delivery to the warehouse of the distributor.\footnote{20}

Another great saving is in the ship's in-port time. Whereas it takes a conventional vessel three days to load and unload general cargo, it now takes approximately eight hours for a containership to load and unload the same amount of cargo containerized.\footnote{21} Also, containership operators try to eliminate multiple port calls in coastal areas and to stop at only two or three ports. To the extent this can be achieved, vessel expense is further reduced.\footnote{22}

The smaller number of ships required to carry the same amount of cargo in containerized form results in further cost savings. Containerships are larger and more expensive than conventional ships, but are capable of carrying many times the amount of cargo formerly carried. For example, until recently, United States Lines, Inc., operated sixteen conventional ships in the trade between North Atlantic ports in the United States and ports in Europe and the United Kingdom. Six U.S. Lines containerships now serve this trade and carry roughly the same volume of traffic.

Beyond cost savings, another advantage of containerization is that it decreases pilferage and breakage of cargo. Thus, the supplier is more confident that his merchandise will reach the customer in good condition, and the importer is less fearful that his consignment of needed traffic will

\footnote{19} Some lines, such as Sea-Land Service, Inc., keep the container on the chassis until the ship arrives and then lift the container from the chassis directly onto the ship. Other lines, such as Matson Navigation Co., remove the container from the chassis and place it on the ground or on top of other containers and then move containers within the yard by means of a specially designed straddle carrier.

\footnote{20} Sometimes the savings extend beyond the warehouse of the distributor. In the Puerto Rican trade, for example, foodstuffs are often delivered directly from the containership to the food market.

\footnote{21} Due to the huge capital investment involved, "the economics of containerships requires that they sail across the ocean like a pingpong ball." R. J. Gage, Conferences and the Container Revolution, in Seminars on the Container Revolution, supra note 15, at 27.

\footnote{22} The tendency to eliminate some ports must be weighed against the social problem of port discrimination, discussed infra.
never arrive or be useless because of breakage. To date, there has been no overall reduction in cargo insurance rates. Insurers point out that, although the number of individual shipments subject to pilferage and breakage has been reduced, entire containers of cargo now are hijacked, fall over the side of the ship, or are damaged.\textsuperscript{23} Nevertheless, containerization appears to be a generally safer way to move the cargo, and, when initial problems are solved, insurance costs on cargo in containers should be reduced.

Other benefits of the container revolution may be broadly categorized as simplification of foreign commerce. The supplier of export merchandise should be eligible for payment when he delivers the cargo to the initial carrier and should not have to wait until he receives an on-board bill of lading from the ship. Indeed, ITC Commercial Credit Card, Inc. presently is introducing a credit card system in which a supplier dealing with a buyer who has been issued a credit card will have, in effect, an instant letter of credit payable at the supplier's own bank as soon as he delivers the merchandise to United Cargo Corporation or one of its agents.\textsuperscript{24} Export documentation and in-port procedures should be dramatically simplified so that the exporter will merely arrange with the carrier to have the merchandise delivered to a destination without the exporter becoming involved in a multiplicity of carrier and port charges or in special port procedure. There are also prospects for simplified documentation of cargo.\textsuperscript{25}

Over the next several years, the transportation industry can be expected to change to a more capital-intensive and less labor-intensive industry. This should tend to stabilize costs. Once a long-range investment in ships

\textsuperscript{23} An insurance representative points out many examples of entire containers of cargo being damaged. Nevertheless, he concludes that "[o]bviously, if containerization is going to work, it should overall reduce the cost of insurance, the rate of premium—if it's going to work. But I think you can see the many questions that have to be resolved." C. E. McDowell, supra note 15, at 76-77. But see, American Institute of Merchant Shipping, 12-Month Survey: Casualty Involving Containers During Sea Transportation, Container News 10 (January 1970).

\textsuperscript{24} United Cargo Corporation is an NVO (non-vessel operator) which receives and delivers freight at inland points in the U.S. and abroad. ITC Commercial Credit Card, Inc. is a wholly-owned subsidiary of United Cargo Corporation.

\textsuperscript{25} The Department of Commerce has effected three major changes in export documentation which should result in significant savings for exporters. See Daily Traffic World, pp. 1-2 (September 17, 1969). The National Committee on International Trade Documentation has proposed a set of five standardized documents—bill of lading, special cargo policy, certificate of origin, delivery instructions, and dock receipt—designed to simplify intermodal container movements. See Journal of Commerce, p. 1 (September 18, 1969). See also, Traffic World, p. 40 (February 21, 1970).
(20- to 25-year life), airplanes, terminal real estate, containers, and unit trains is made, costs will remain relatively constant. By contrast, labor costs, at least since the end of World War II, have tended to steadily increase. To the extent that labor will be replaced by capital, the costs of providing service should become more stable.

A final benefit of the container revolution will be the elimination of certain administrative costs, such as the cost of purchasing cargo insurance and the cost of freight-forwarders and custom brokers for handling port and airport clearances. If, as discussed infra, insurance for loss or damage of cargo is included in the freight rate, cargo insurance companies will be able to deal with a single carrier rather than with a multitude of importers and exporters. The result should be an administrative saving in handling insurance.

In summary, the container revolution should result in great cost savings and other benefits. How soon these savings and benefits can be achieved, in light of the problems that will first have to be met, is the subject of the remainder of this article.

III. PRICING AND LIABILITY PROBLEMS

A. Single-Factor Rates On Through Routes

Under conventional break-bulk methods of transportation, freight typically moves by one or more land carriers from an inland point to a port or terminal, then by ocean or air carrier, and, finally, by other land carriers to an inland destination. Freight is subjected to at least six—and up to twenty—successive handicings or sortings at different stages of the movement. Shippers are charged separate transportation rates for each portion of the movement, pursuant to tariffs on file with the respective agencies charged with regulating the commerce involved.

With the advent of containerization, cargo moves in successive hauls by

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26. With regard to real estate, container lines tend to procure far greater acreage for terminal yards than is necessary to meet immediate requirements. Apparently, they would prefer to allow the land to remain fallow until needed rather than face the prospect of hiring additional labor that would be required to handle the same amount of cargo in a smaller yard. The theory seems to be that, once capital is invested in land, inflation is no longer a problem; on the other hand, if additional labor is needed, inflation becomes a significant factor.

27. The difficulties involved in transferring to such an insurance system are discussed infra, as are similar administrative and social problems.
land, ocean or air, and land carriers without rehandling. Freight may be loaded into containers at inland origins and remain untouched throughout the journey until the containers arrive at inland destinations. This change is methodology has prompted the question whether single rates, applicable to the entire intermodal movement, could be established. Such rates have been regarded as desirable because, it is said, they would allow predictability of overall transportation charges, improve control and coordination of shipments, and—not least importantly—encourage rate reductions.

There are a number of methods by which single rates might be accomplished. For example, carriers already can quote a “combination” rate, comprising the total of the separately published rates of each of the participating carriers. Under this method, the originating carrier quotes its customers a door-to-door charge, which is the mathematical combination of the land, water, and/or air carriers’ rates on file with the respective agencies plus incidental charges. Combination rates presently are widely used by carriers and groups of carriers in international commerce.

Another method of quoting single-factor rates is by including local pickup and delivery charges within the ocean or air carrier’s published port-to-port (or terminal-to-terminal) rates. Such rates have the same effect as door-to-door rates for shippers which are located within the described port area or the airport terminal area. Because local pickup and delivery service generally is regarded as “incidental” to the line-haul ocean or air transportation, the rate for that service is filed with the same agency as the rate for the line-haul service. Thus, the through rate is filed with one agency, and there is no need to break out a portion of the charge.

28. It should be noted that an increasing amount of containerized cargo is moving in connecting service by ocean and air carriers. At first, it would appear that the primary advantage of air transportation—speed in transit—would tend to be nullified when combined with a slower ocean movement. However, along certain routes (e.g., Japan to Chicago), it appears that the speed of air carriage actually is complemented by the low cost of ocean carriage. Some 11.5 million pounds of freight moved in the “Sea-Air Program” of a single airline during fiscal year 1966. C.A.B. Docket 16242, Transpacific Route Investigation, Examiner’s Recommended Decision 204, n. 266 (April 16, 1968).

29. The “originating” carrier is not necessarily the motor carrier which picks up the shipment. As ocean and air carriers usually own the containers utilized, they frequently are in a position to deal directly with shippers, at the same time advising those shippers of other carriers which participate in the combination rates.

for the land segment. This type of rate presently is being used by ocean carriers.31

For shippers located beyond local port or terminal areas, single-factor rates can be accomplished by a transportation company which is authorized to operate in more than one mode. Thus, an ICC-regulated freight-forwarder can offer a single rate between inland U.S. points and foreign ports, and hold out single carrier responsibility for the entire movement. A company offering such a service is regarded by the FMC as an NVO.32 The single-factor rate must be broken down, with the land and water portions filed, respectively, with the ICC and FMC.

A relatively small number of companies offer this type of service, due principally to the strict licensing requirements for land freight-forwarders under Part IV of the Interstate Commerce Act. Recently, however, the ICC has evidenced a more liberal approach to applications for land-forwarder permits where this will tend to effectuate coordinated intermodal operations.33 Moreover, for land/air movements, the ICC similarly has indicated a favorable attitude towards granting Part IV permits to air freight-forwarders which seek to develop integrated, through transportation of air freight.34

Another—and the most controversial—method of offering single-factor rates is the establishment of two or more carriers of joint rates covering through transportation over their combined routes. Such rates have been

31. A number of steamship lines and NVO’s include pickup and delivery service in their FMC tariffs. For example, Sea-Land Service, Inc. and Consolidated Express, Inc. provide such service in the New York-to-Puerto Rico trade and Matson Navigation Company provides the service in the Hawaii trade. Insofar as ICC-certificated motor carriers are used to perform the inland portion of the service, the rates for the land segment also are filed with the ICC. See Matson, supra note 30; Drive Away Auto Transport, Inc., Common Carrier Appl., 99 M.C.C. 75, 79 (I.C.C. 1965); Lindstrom Ext.—Southeast Alaska, 98 M.C.C. 647, 653 (I.C.C. 1965). While air carriers and air freight-forwarders file rates for pickup and delivery service with the CAB, the consistent practice has been to file separate tariffs for the airport-to-airport and pickup and delivery portions of the service.

32. Common Carriers by Water—Status of Express Companies. Truck Lines and Other Non-Vessel Carriers, 6 F.M.B. 245, 287 (1961). An NVO is a freight consolidator which, like its counterpart the ICC forwarder, purchases underlying transportation from vessel operators. See Comment, Intermodal Transportation and the Freight Forwarder, 76 Yale L.J. 1360 (1967).


34. Theodore Savage Contract Carrier Appl., 108 M.C.C. 205, 216 (I.M.C.C. 1968), wherein the Commission stated: “The field of coordinated intermodal air-motor service, therefore, is open under the controlling statute and the clear Congressional intent in enacting that statute. Within this framework, coordinated intermodal service may be provided and may enjoy an increasingly important role in the Nation’s transportation picture.”
specifically authorized by statute for land and ocean carriers operating between points in the continental United States and Hawaii and Alaska.\textsuperscript{35} Pursuant to that statute, carriers now serve the Alaska trade primarily in accordance with joint rates filed with a single agency—the ICC.\textsuperscript{36} The jurisdiction of the ICC over joint rates in the Hawaii trade has been subjected to challenge, but that jurisdiction has been upheld.\textsuperscript{37} In the foreign trades, an ocean carrier recently was requested by the FMC to delete from its United States—United Kingdom tariff that portion of a joint rate which covered inland U.S. transportation.\textsuperscript{38} The regulatory joint-rate controversy has received considerable publicity in the past year. On July 15, 1969, the ICC modified its tariff circular to permit the filing with it of joint land/ocean rates for through transportation in foreign commerce.\textsuperscript{39} Only ten days later, the FMC Chairman directed a letter to the ICC Chairman, requesting that the new tariff rule be suspended. Three days later, the ICC stayed its tariff rule, and shortly thereafter, it instituted a rulemaking proceeding looking to the adoption of rules permitting joint land/ocean rates to be filed.\textsuperscript{40} The FMC, likewise, instituted its own rulemaking proceeding to consider the

\begin{itemize}
\item \textsuperscript{35} Interstate Commerce Act, § 305(b), 49 U.S.C. § 905(b) (1964).
\item \textsuperscript{36} See Alaska Steamship Co. v. Federal Maritime Comm’n, 399 F.2d 623 (9th Cir. 1968); Sea-Land Service, Inc. v. Federal Maritime Comm’n, 404 F.2d 824 (D.C. Cir. 1968). Where pier-to-pier rates exist in the Alaska trade, they are filed with and regulated by the FMC.
\item \textsuperscript{37} On July 28, 1969, Matson Navigation Co. filed with the FMC a Petition for an Order To Show Cause Why Seatrain Lines, Inc. should not be required to file its West Coast-Hawaii rates with the FMC to the extent that Seatrain did not utilize the inland services of ICC-certificated carriers. Subsequently, Seatrain modified the tariff to exclude any possibility of its application where such inland services were not utilized. On December 3, 1969, the FMC denied Matson’s Petition.
\item \textsuperscript{38} The FMC also found that inland-overseas transportation could be included in the tariff. Disposition of Container Marine Lines Through Intermodal Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, 11 F.M.C. 476 (1968), remanded per curiam, North Atlantic Westbound Freight Ass’n v. Federal Maritime Comm’n, 397 F.2d 693; 404 F.2d 803 (D.C. Cir. 1968). The matter is pending before the FMC in Docket No. 68-8, Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11.
\item \textsuperscript{39} Special Permission No. 70-275, In the Matter of Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries, revising Rule 67 of Tariff Circular No. 20, 49 C.F.R. § 1300.67 (July 15, 1969). See Schmeltzer, The Joint-Rate Controversy—Some Possible Approaches, Traffic World 55 (September 13, 1969).
\item \textsuperscript{40} Ex Parte No. 216, Tariffs Containing Joint Rates and Through Routes for Transportation of Property Between Points in the Foreign Countries, 34 Fed. Reg. 12837-38 (Aug. 7, 1969).
\end{itemize}
adoption of a proposed rule allowing ocean/land rates to be filed with that agency.\textsuperscript{41} Comments from numerous interested parties have been filed in both rulemaking proceedings. On December 16, 1969, the FMC approved for a period of 18 months a conference agreement in the South American trades which contemplates the filing of joint land/ocean rates with the FMC; and, on April 15, 1970, the FMC adopted rules requiring carriers subject to its jurisdiction to file tariffs for any through rates established for through international transportation.\textsuperscript{42} The ICC has not yet concluded its rulemaking proceeding.

In the past, a number of efforts have been made to enact legislation which would facilitate the publication of joint rates.\textsuperscript{43} The most significant of those was the Trade Simplification Bill (S.3235), introduced on March 27, 1968. This bill was designed to allow each agency to retain jurisdiction over the carriers it regulated but, at the same time, to allow the filing of joint rates. Though supported by the Department of Transportation, Civil Aeronautics Board, and Federal Maritime Commission, the bill was opposed publicly by Sea-Land Service, Inc., the pioneer operator of containerships in foreign commerce, as well as by land freight-forwarders. The ICC took no position. The bill never was reported out of committee. On October 20, 1969, the DOT transmitted a redrafted version of the same bill to the 91st Congress; it was introduced in the House on October 23 (H.R. 14489) and in the Senate on November 14 (S. 3142).

Some of the principal questions raised by the Trade Simplification Bill concept are: whether non-equipment operating carriers, such as land freight-forwarders and NVO's, should be allowed to enter into joint rates; the extent to which the antitrust laws would apply to through transportation and land and ocean ratemaking associations; whether the divisions earned by any of the underlying carriers must be broken out and made subject to regulation by the agency to which the carrier is responsible; whether the parties to the joint rate must undertake unlimited liability for loss or damage of cargo, notwithstanding the different


\textsuperscript{43} E.g., in 1965, the ICC, FMC and CAB supported identical bills (H.R. 7793 and S.1950) which would have allowed joint rates in domestic-offshore commerce to be filed with any of the agencies. The bills would also have created a joint board to handle any regulatory problems raised by the joint rate filings. Hearings never were held on the bills. In 1966, a DOT-sponsored bill which extended the joint-board concept to foreign trade never was introduced in the Congress.
provisions for limitation of liability normally applicable to each carrier; and complications that might be introduced by foreign governments whose carriers might be a party to the joint rates.

Far too much of the consideration of proposals for filing joint rates has been focused on procedures for filing and on agency jurisdiction. The real questions which do not appear to have been carefully investigated are whether joint rates are needed, whether they would provide actual benefits and, if so, how these benefits could best be achieved.

One of the benefits claimed for a joint rate system is simplification of import-export trade. Shippers would not have to do a mass of arithmetic to arrive at transportation costs in international commerce, and, therefore, more businesses would be encouraged to enter foreign trade. The shipper would have to deal with only one carrier, which would inform him of the total price of the transportation. While this is obviously a benefit, it is difficult to believe that it is not happening now—without joint rates. Shippers presently are consulting the transportation companies with which they deal to receive a quotation which covers the combined costs of transportation.

A second claimed benefit is that, once joint rates are implemented, shippers would be provided with an official catalogue of rates for through transportation representing the total costs including transfer of cargo at terminals and pickup and delivery charges. Such an official catalogue would tend to prevent overcharges and rebating. But the question again arises: is a change in the law, or agency regulations, necessary to realize such a benefit? A simple solution under existing rules is for the land carrier to publish a through rate and break out the U.S. land portion in one column, the water portion in another column, and land transportation abroad and other accessory charges in a third column. The tariff would be filed both with the ICC, which regulates the land rate, and with the FMC, which regulates the ocean rate. The FMC would consider the through carrier an NVO for the water portion of the transportation.

A third claimed advantage is that time is saved when cargoes are under the control of a single carrier or of two carriers cooperating under a joint rate. This time saving, it is said, arises from the fact that the participating carriers are able to arrange and supervise all transfers between carriers while the cargo is under their control. However, this claim has been based on a relatively small number of shipments and requires more documentation before it can be generally accepted. Further, it needs to be determined whether carriers which are willing to cooperate could provide

44. See New England Forwarding, supra note 33, at 64.
the same coordinated transfers and speedy transportation without joint rates.

Still another claimed benefit is that joint rates for through routes would simplify limitation of liability problems and thereby define clearly which carrier is responsible to the shipper. However, it is by no means apparent that joint rates per se would create uniform limitation of carrier liability. Indeed, under most of the proposals for joint rates, the limitations of liability would continue to be governed by the law pertaining to each mode. It now appears that the only hope for adequate protection of merchandise in transit is through competition. Sooner or later, one or more of the transportation companies will offer unlimited responsibility for the entire through shipment as a means of attracting international freight. If shippers are attracted by this offer, other carriers will be obliged to match it.

Perhaps the most potent advantage claimed for joint rates is that they will foster rate reductions. The importance of this benefit depends largely upon the system of joint rates that is adopted and the degree of transportaton change that will be tolerated. If carriers are allowed to enter joint rates with undisclosed and unregulated divisions, the competitive impact will be enormous. Land and ocean carriers seeking traffic increases to fill trains or ships could reduce rates sharply without diminishing profits. Soon, other combinations of carriers would file competitive joint rates. The danger in this process is that the two strongest carriers would offer each other the lowest divisions and eliminate all significant competitors. Thus, through rates offered for the giant railroad/giant ship route would tend to be significantly less than the rates which could be held out for the small truck/small ship route, the small truck/giant ship route, or the major railroad/small ship route.

The danger of eliminating all but the strongest competitors could be avoided by requiring the participants in joint rates to make public the divisions of each carrier and to make those divisions subject to normal statutory requirements prohibiting discrimination or unfairness. Such breaking out and regulation of divisions, however, would diminish or preclude any competitive motivation for rate reductions other than those

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45. Limitations of carrier liability are reviewed infra.

46. E.g., a large railroad might be motivated to agree to a smaller division of revenue with a ship line that tendered 1,000 or 2,000 containers each week than with a ship line that tendered 100 or less containers a week. Likewise, a large ship line would be motivated to accept a lower division with a large railroad than with a small motor carrier.

47. Such a system of joint rates, requiring that the divisions between the participating carriers be clearly broken out, has been suggested by one writer. Note, Legal and Regulatory Aspects of the Container Revolution, 57 Geo. L.J. 533, 542-43 (1969).
reductions based on savings from efficiencies and improved technology. For example, the parties to a joint-rate agreement might work out arrangements for cheap and efficient use of terminal facilities. The question arises, however, whether efficiencies of that type could be achieved only through joint rates, or whether they could be achieved in other ways, e.g., by carriers offering reduced rates for freight tendered in a form which could be cheaply and easily handled.

Moreover, exposed divisions of joint rates would be closely watched by steamship conferences and rate associations. There is little likelihood that those ratemaking bodies would allow competitive rate reductions simply on the basis of the publication of through tariffs. The most that could be expected would be for the carriers to pass on to shippers savings that would result from improved methodology negotiated in joint-rate arrangements.

Several alternative courses are available for solving the controversy about joint rates. One method would be the institution of a multi-agency rulemaking proceeding. The personnel conducting the proceeding for the respective agencies could invite public comments and suggestions as to whether and what kind of joint-rate systems should be made lawful. They then could distribute a comprehensive list of alternatives and arrange hearings to question witnesses as to what results would be produced under each system. Thereafter, the hearing officers would be able to make appropriate recommendations to the agencies. Implementing action, such as legislation or regulations, could then be pursued.

The same kind of information also could be gathered by one or more committees in a Congressional investigation. The report resulting from such an investigation could be the basis for new legislation, or suggestions by the committees for agency rules, or a combination of both.

A third forum could be a Department of Transportation hearing. One of the functions of the DOT, as already mentioned, is to coordinate intermodal transportation. An investigation could be conducted pursuant to this responsibility, utilizing either the personnel of the other regulatory agencies or an officer of the DOT who would invite the testimony of other agency officials.

The critical point, in any event, is not the forum to be used; rather, it is the need for a comprehensive, well-staffed inquiry into the benefits, if any, that would result from various systems of joint rates. The investigators should insist on a demonstration of the precise manner in which claimed benefits would be realized. Such an inquiry concededly would be time-consuming, but would result in a resolution faster and surer than all the abortive, less thorough plans of attack which have been tried.
B. Integrated Pricing Systems

Tariffs published by land carriers generally prescribe rates for the inland segment of the transportation on the basis of the weight of the shipment, while ocean and air carriers generally base their rates for the water or air segment on the weight or measurement of the shipment (whichever results in the highest revenue). The reason for this divergence in practice is that weight is usually the limiting factor by truck or rail, and measurement is often the limiting factor by ship or airplane. A simple example of the difficulty caused by ocean rates based solely on weight is found in the transportation of wallboard, a commodity which changed from a dense to a bulky product over a relatively short time in response to advances in home-building technology. Water carriers charging a rate based only on weight discovered that significantly more shipboard space had to be utilized to earn the same revenue for wallboard as previously had been received.

Both land and water carriers frequently adjust rates to compensate for changes in the weight-measurement relationship of particular commodities, although ship lines have demonstrated reluctance to shift entirely to weight-based rates. As a result, it is generally impossible to determine through transportation charges in advance, unless the shipping documents include both the weight and measurement of the shipment to allow conversion of the rate. A resolution of this impediment will have to be achieved before single-factor rates can be published, quoted, or even known.

C. Container Rate Structures

There is an increasing pressure on the containership lines to offer freight-all-kinds (FAK), per-container, or containerload rates. Each of

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48. In the domestic-offshore trades, ocean rates on many commodities are stated as the higher of a charge per hundred pounds specified in one column of the tariff or a charge per cubic foot specified in an adjacent column. In foreign trades, a single rate is stated in terms of the higher per long ton (2,240 pounds) or per measurement ton (40 cubic ft.); therefore, a commodity weighing 2,240 pounds but measuring 40 cubic feet is rated the equivalent of a two-ton shipment on a measurement basis.

49. Alaska Steamship Line converted to weight-based rates in most of its services in the Alaska trade. This appeared in large part to be designed to accommodate the through shipments it carried in connection with the Alaska Railroad.

50. A steamship conference official has stated that FAK rates:

   ... might be "forced" upon us, if, indeed, that's the right word. It might be something we would want to come to.

   ... We don't want to stop the low-value, low-rated cargo from moving by giving
these rate systems are tied to the economies of container transportation and each has different ramifications to land and ocean carriers, shippers, and cargo consolidators.

FAK rates are used by railroads, truck companies, and ship lines in domestic-offshore ocean trades where containerization has been an important factor since 1957. FAK rates are usually expressed in terms of a specified amount per cubic foot or per 100 pounds of mixed cargo, and typically require that no more than a specified percentage of the cargo be composed of a single commodity. Per-container rates are simply a freight charge for transportation of a full container. South Atlantic and Caribbean Lines, for example, will carry a full container, irrespective of the contents, from Florida to Puerto Rico for $770. Containerload rates are charged per 100 pounds for a commodity which, on a volume basis, is calculated to fill the container. The containerload rate for 43,000 pounds of canned goods, which would fill a 35-foot Sea-Land Service container, is $1.15 per 100 pounds, while the rate on canned goods in any lesser quantity is $1.55 per 100 pounds. The difference between the containerload and less-than-containerload rate is designed to attract cargo in an amount which eliminates the need for consolidation by the carrier and otherwise achieves the economies of containerization. This system has long existed in the carload and less-than-carload rates offered by railroads.

NVO freight consolidators favor FAK rates or per-container rates because these enable transportation to be purchased from underlying ocean carriers at a "wholesale" rate and to be sold to shippers at a

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R.J. Gage, supra note 21, at 30.

51. The domestic-offshore trades are the trades between the continental United States and Alaska, Guam, Hawaii, Puerto Rico, American Samoa and the Virgin Islands. Containerization has been an important factor in the Alaskan, Hawaiian, and Puerto Rican trades as well as in the contiguous American trades (e.g., New York to San Francisco or New York to Houston), since 1957, when Sea-Land Service established a Puerto Rican and contiguous service and was soon followed by Matson in the Hawaii trade and Alaska Steamship Company in the Alaska trade.

52. South Atlantic and Caribbean Lines, Inc., Freight Tariff No. FMC-F No. 9, Eighth Revised Page 19. The $770 rate applies to a 35-foot container and is subject to a maximum of 40,000 pounds, with an additional charge for any excess at 86 cents per 100 pounds.

53. Sea-Land Service, Inc., Puerto Rican Division, Freight Tariff No. FMC-F No. 21, (Pan-Atlantic Series), Third Revised Page 215. The less-than-containerload rate is calculated on a volume basis, at 49 cents per cubic foot, if this results in a higher rate than the weight basis. Also, a still lower rate of $1.05 per 100 pounds is established for shipments weighing a minimum of 129,000 pounds.
"retail" rate. This is the same basic system that land freight-forwarders have developed in United States domestic transportation. Although initially discouraged by the railroads, the land forwarders now are encouraged by them. Large shippers, of course, seek to retain the containerload/less-than-containerload system of rates because it passes on to them some of the benefits of containerization and gives them an advantage over shippers of less-than-containerload traffic. The FAK and per-container systems have been effectively used in the coastwise and intercoastal ocean trades of the United States, including the trades between the continental United States and Alaska, Hawaii and Puerto Rico. Thus far, however, they have not been in general use in the foreign trades.54

Ocean carriers and the ratemaking conferences to which they belong apparently frown on FAK or per-container rates for the reason that consolidators might gain more control of cargoes. They fear that ships will become ferryboats for the ocean leg of transportation controlled by inland carriers or consolidators; and that ships then will be at the mercy of inland carriers.55 Conferences have tried to encourage transportation in containers under existing systems by offering a 10 per cent allowance on the rate for full containers delivered to the pier. The North Atlantic Continental Freight Conference has published a tariff revision allowing 30 per cent of the freight rate as a container consolidation fee.

Some shipper interests have urged the FMC to require ship lines to publish FAK or per-container rates. Thus far, the FMC has not done so. Questions arise as to FMC jurisdiction to require steamship companies to publish such rates, and as to the wisdom of such a requirement. Any regulatory authority to require ocean carriers or conferences to establish FAK rates would have to be implied from Section 15 and perhaps even Section 17 of the Shipping Act. Section 15 authorizes the FMC to, "... after notice and hearing, disapprove, cancel or modify any agreement... that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports... or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest..." 56 Section 17 provides that "[n]o common carrier by

54. A per-container rate for foreign transportation was published by Waterman Steamship Company, which does not belong to a ratemaking conference, but has been withdrawn. A special per-containerload rate has been introduced by Cartainer Lines between Europe and the Gulf Coast, applying to large-volume movements.

55. See testimony of several conferences before FMC Staff Investigation and Informal Conferences, Non-Vessel Operating Common Carriers by Water (NVOCC's) in the Foreign and Domestic Offshore Commerce of the United States (June 25-26, 1969).

water in foreign commerce shall ... charge ... any rate ... which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors."

In the absence of an FMC requirement, the lines will decide for themselves whether and when FAK rates should be offered. A report by McKinsey and Company predicts that through the process of changing to integrated door-to-door transportation, "... rates largely reflecting the value of cargo will tend to be replaced by the ship freight-any-kind principle—thus, the complexity of commodity ad valorem rates will tend to be replaced by a straight charge per container."

D. Dual Rate Systems and Other Conference Problems

Because international trade is subject to the jurisdiction of both the nation of export and the nation of import, it is difficult for either nation, through regulation, to prescribe specific transportation rates in international trade. Moreover, it is generally recognized that insistence of the sovereigns on full rate competition on the part of every carrier would cause more chaos than the trading community is able or willing to bear. Most nations, therefore, have allowed lines serving their trades to enter into ratemaking conferences. They have allowed those conferences to use certain devices to protect their rate structures from the competition of carriers choosing to remain independent. The protective device allowed under United States law is the dual rate system. Pursuant to this system, a conference may, subject to limitations, establish one set of rates for shippers who contract to give the conference lines all or a specified portion of their shipments, and a different set of rates, up to 15 per cent higher, for shippers who do not sign such a contract.

Many problems arise from the interplay of the conference systems and the container revolution. Will conference members, for example, be able to enter into joint-rate arrangements with land carriers under which the ocean carriers' division of the joint rate is lower than the port-to-port rate of the conference? Will the conference itself be allowed to publish a joint rate or have any control over the division agreed to by its member lines?

59. See Note, Rate Regulation in Ocean Shipping, 78 Harv. L. Rev. 635 (1965).
Can a member of a dual-rate-system conference that publishes only port-to-port rates receive a different amount for the port-to-port segment of a through rate which he independently establishes? These issues are being reviewed by the FMC.\(^{62}\)

Other problems relate to enforcement of dual rate systems if signatory shippers are allowed to ship their cargoes via NVO’s which, in turn, may utilize the underlying vessels of independent carriers, and to enforcement of those systems if nonsignatory shippers can tender cargoes to NVO’s which use underlying conference vessels.\(^{63}\) These problems are merely representative of the difficult questions with which existing conference systems increasingly will be confronted as a natural consequence of the container revolution.

**E. Limitation of Liability**

The limitation upon carrier liability for loss or damage to cargo on a point-to-point land/ocean shipment between the United States and most countries in Europe is different, at the present time, for each of the three segments of the transportation. On the inland U.S. segment, liability generally is unlimited except in the event the carrier had been given permission by the ICC to file a released rate.\(^{64}\) On the ocean, the limitation of liability is $500 per package or unit. This limitation is prescribed in Section 4(5) of the Carriage of Goods by Sea Act,\(^{65}\) which is a statutory codification of the 1924 Convention for the Unification of Certain Rules of Loss Relating to Bills of Lading—colloquially known as the “Hague Rules.” Virtually all ocean conferences have limited their liability to $500 per container on the theory that the container is the “package or unit” within the meaning of the Carriage of Goods by Sea Act and the Hague Rules.\(^{66}\) On land overseas, the truck limitation is an amount per kilogram

\(^{62}\) *Container Marine Lines*, *supra* note 38, involving a dispute between a conference and a member-carrier over the carrier’s asserted right to publish a single-factor rate for containerized traffic from Great Britain to ports in the United States.

\(^{63}\) See R. J. Gage, *supra* note 21, at 28-29.

\(^{64}\) The general rule of liability for United States land carriers is established by §20(11) [railroads] and §219 [motor carriers] of the Interstate Commerce Act, 49 U.S.C. §§20(11), 319 (1964). The same provisions give the ICC discretionary power to authorize released rates for those carriers. The ICC has exercised that power only sparingly.


\(^{66}\) See, e.g., North Atlantic Continental Freight Conference Tariff No. 27, FMC-2, Fourth Revised Page 34; Continental North Atlantic Westbound Freight Conference Tariff M, FMC-3, Original Page 16; Pacific Coast European Conference Freight Tariff No. FMC-14, Fourth Revised Page 47; Outward Continental North Pacific Freight Conference Tariff FMC No. 30, Original Page 8.
that converts to approximately $3.70 per pound, and the rail limitation is an amount per kilogram that converts to $15.00 per pound.

These diverse limitations of liability present two important problems. First, by insisting that the container is the package, ocean carriers have, in the absence of court interference, virtually insulated themselves from liability, generated extensive litigation, and created a different standard of liability for containerized cargo than for other cargo. Second, the limitation of liability of the carrier depends in every case on a determination of where the loss or damage occurred. While in most cases it is not difficult to determine responsibility for the loss of nondelivered cargo simply by looking at carrier receipts, it would be very difficult to determine where damage occurred in a sealed container movement. Yet, the carrier’s responsibility to the shipper for the damage would depend on whether that damage occurred in the United States, on the ocean, or in a foreign country.

A diplomatic conference was held in Brussels, Belgium during May 16-27, 1967 to deal with various maritime conventions, including a proposed protocol for amendment to the Hague Rules. One of the proposals considered was an increase in the limitation of liability under the Hague Rules from $500 to $662 per package or unit. Norway and the United States introduced a counter-proposal to eliminate the per-package limitation and to substitute a limitation of $3.70 per pound. The purpose of the counter-proposal was to establish a limit that was high enough to cover most commodities (though not the extraordinarily valuable


68. Revision of the International Conventions Concerning the Carriage of Goods by Rail (CIM), done October 25, 1952, 241 U.N.T.S. 339 (1952). Though not discussed in detail herein, it may be noted that the limitation upon air-carrier liability for international air cargo is an amount per kilogram which converts to $7.50 per pound. Convention for the Unification of Certain Rules Relating to International Carriage by Air, done October 12, 1929, 49 Stat. 3000 (1934), 137 U.N.T.S. 11 [Warsaw Convention] The separate limitation for air-carrier liability reflects a further diversity in the applicable laws which impede intermodal container transportation.

69. If the courts uphold the carriers, a package loaded directly into the hold of the ship could produce liability of $500, whereas the same package loaded into a container along with 199 similar packages could result in liability of only $2.50 per package. However, on June 5, 1970, a federal district court held that the $500 limitation applied to each of 99 individual bales of leather shipped in a container, and not to the container as a unit. Leather’s Best, Inc. v. S.S. Mormaclynx, et al., No. 69-C-1027 (E.D.N.Y., decided June 5, 1970). In that case, the description in the bill of lading was “1 container S.T.O. (said to contain) 99 bales of leather.” See also, United Purveyors v. Motor Vessel New Yorker, 250 F. Supp. 102 (S.D. Fla. 1965).
merchandise) and, at the same time, to achieve the greatest potential for uniformity on at least two segments of the multi-segment international shipment. It was thought that, if the ocean limit could be made the same as the truck limit in Europe, changes in the overseas rail convention and United States land liability provisions would be more readily obtainable, resulting, ultimately, in a single limitation of liability for through transportation in international trade.

Following the first Brussels meeting, vigorous industry opposition developed in the United States to the $3.70-per-pound proposal. Ocean carriers generally advocated a limitation of $828 per package or 60 cents per pound, whichever was higher, while cargo insurance interests favored $662 per package or 90 cents per pound, whichever was higher. On the other hand, all interested agencies and departments of the United States agreed that the limitation advocated by both industry groups was inadequate if a containerload of general cargo was to be deemed a single package. The government regarded it as unfair that a number of packages which were combined in a container—e.g., television sets—should be relegated to a 90-cent-per-pound limit when, before containerization, these packages each would have been subject to a $500 limit. Various shipper groups agreed with the government position. It was finally agreed that the United States would not oppose a limitation of $662 per freight unit or package or 90 cents per pound, provided that packages or units loaded in a container or on a pallet would be considered individually for the purpose of applying the limitation.

At the second meeting of the Twelfth Session of the Diplomatic Conference on Maritime Law held in Brussels during February 19-23, 1968, it was decided, after lengthy and heated debate, to adopt limitations of liability equivalent to $662 per package or unit or 90 cents per pound, whichever is higher, and to add a provision to accommodate the container problem. The container provision of the protocol passed by the conference reads as follows:

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.70

This provision seemed to cure the container problems, but a question arose immediately as to its interpretation. The British contended that carriers could charge an additional fee to allow the shipper to enumerate packages in the bill of lading. The United States delegation, which had drafted the container clause, construed it to preclude any additional payment for enumeration. Because shippers could recover up to $662 per package if the number of packages in the container were enumerated, but their recovery would be limited to 90 cents per pound if there were no enumeration, carriers could effectively limit their liability by demanding an unreasonable premium for allowing the shipper to enumerate. For this reason, the issue of whether an additional charge may be permitted is a critical one.

The 1968 protocol to the Hague Rules has not, as of this date, been submitted to the U.S. Senate for ratification, nor has the Department of State requested any congressional committee to amend the Carriage of Goods by Sea Act to bring it into conformity with the protocol.

For purposes of a workable liability system in intermodal transportation, the protocol to the Hague Rules does not afford the complete answer. Indeed, it appears that the answer will not result from international treaty or legislation. Rather, it is anticipated that the containership lines, together with connecting land carriers, will seek to accomplish a uniform rule of liability for through transportation and, to obtain this end, will be willing to undertake greater liability than is required under applicable law. The most likely undertaking at this time seems to be $3.70 per pound, but it is not beyond belief that containerization will so minimize loss or damage that enlightened container carriers will be willing to accept unlimited liability and thereby avoid the red tape, litigation, and shipper dissatisfaction that will probably accompany nonuniform modal liability rules.

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71. The meaning the British delegation gave to the container clause was announced in the closing hours of the conference after the clause had been passed. The meaning attributed to the clause by the United States delegation was set forth in a report of the delegation, dated April 26, 1962, to the Secretary of State.

72. If the United States decides to ratify the protocol, the procedure probably will be to submit it to the Foreign Relations Committee of the Senate for ratification, and then to submit the ratified treaty to the Merchant Marine and Fisheries Committee of the House of Representatives and to the Commerce Committee of the Senate with a request that the Carriage of Goods by Sea Act be amended to comport with the new protocol. Another approach would be to request the Congress to repeal the Carriage of Goods by Sea Act and to enact a provision to make the convention, as amended by the protocol, applicable to bills of lading.
IV.

COMPETITIVE PROBLEMS

A. Prospects of Overtonnaging

The key to the future of the container revolution is how competitive problems are handled. The present approach by the steamship companies is to build large, fast containerships and efficient container systems for the heavily trafficked trade routes of the world. The forecast of the McKinsey study, that "ship operators must introduce this technology or risk becoming uncompetitive,"73 is proving to be correct. Thus, the attention to competitive problems given by individual ship lines, conferences and national governments becomes critical. The most important competitive problem is overtonnaging of the important trade routes.

Already, it appears that the trade routes between U.S. North Atlantic ports and ports in Great Britain and the Continent are overtonnaged. Containerships first were introduced into that trade in 1966. By the end of 1968, about 28 per cent of the commercial liner traffic moving on the major North Atlantic trade route was containerized.74 During the first quarter of 1969, the container traffic inbound on that route was approximately the same as during the comparable 1968 period; significantly, however, the 1969 movement was accomplished with less than half the number of container sailings made during the 1968 period.75 While the reduction in sailings is attributable in part to the ILA strike at North Atlantic ports, "it also reflects the entrance of newer and more efficient container capacity into the North Atlantic/United Kingdom-Continent trade."76

The McKinsey study has predicted that, considering "the very high productivity of container ships," it may be expected that "only 25 ships with a capacity of less than 2,000 containers each could handle the entire European/North American general cargo trade."77 At present, Atlantic

74. U.S. Dept' of Commerce, Maritime Administration, Foreign Ocean-Trade of the United States—Containerized Cargo/Selected Trade Routes 1 (1968). On the major transpacific trade route, the comparable 1968 figure is less than 6 per cent. Id. at 3.
76. Id. at 2. Figures for the third quarter of 1969 reflect 418,000 long tons, or a 13% per cent increase in inbound containerized movements over the comparable 1968 period. Id. at 5 (3rd Qtr. 1969). The commercial container trade on the North Atlantic increased to 58 per cent of the total commercial liner traffic, inbound and outbound, during the third quarter of 1969. Ibid.
Container Lines operate six roll-on/roll-off ships in the North Atlantic trade, has one more under construction, and is authorized under the terms of the cooperative agreement among the parties to the ACL consortium to operate ten such ships. Hapag Lloyd operates four containerships in the trade and is expected to construct four more. American Export-Issbrandt Line, operating under the trade name of Container Marine Lines, has three ships in North Atlantic service and has applied for construction subsidy to build two more. United States Lines has six containerships in operation in the trade and has two more on order. Moore-McCormack Lines has three to four containerships operating in North Atlantic service. Sea-Land Service has eight containerships in the trade, and has others on order.

As of mid-1969, 79 American-flag containerships and 103 American ships with partial container capacity were operating in the trade routes of the world. On the major transatlantic and transpacific trade routes, the American-flag vessels handled approximately two-thirds of the containerized U.S. foreign commerce. At the same time, construction of new containerships has been proceeding at a rapid pace. At the end of 1968, 99 containerships and 104 ships with partial container capacities were under construction or on order. With the steady increase in container service, it should be noted that, at 1968 freight rates and operating costs, containerships break even when they are approximately 55 per cent full, and yield sharply increasing profits when they pass the break-even point.

It appears that, if competitive forces are left to themselves, there will ultimately be a fierce battle to fill ships. The weapons of the battle will be quality of service, level of freight rates, rebates and control of transportation companies that feed freight to the ships, i.e., truck lines, railroads, airlines, forwarders, and consolidators.

In anticipation of the problems of overtonnaging, all container lines serving the Atlantic have formed a new Transatlantic Freight

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78. U.S. Dep't of Commerce, Maritime Administration, United States Flag Containerships and United States Flag Ships with Partial Capacities for Containers and/or Vehicles (June 30, 1969).
79. MarAd Report, supra note 75.
80. U.S. Dep't of Commerce, Maritime Administration, Containerships Under Construction and on Order (Including Conversions) in United States and Foreign Shipyards—Oceangoing Ships of 1,000 Gross Tons and Over (December 31, 1968). By June 30, 1969, the figures had increased to 122 containerships and 112 ships with partial container capacities under construction or on order, with 19 additional ships undergoing conversion to containerships. Id. (November 30, 1969).
Conference, which they contend is better geared to the needs of containerization than the existing general cargo conferences. The conference agreement was submitted to the Federal Maritime Commission for approval on August 22, 1969. The trade covered by the proposed Transatlantic Freight Conference would include transportation of cargo in both directions between U.S. North Atlantic ports and ports in continental Europe. There are now many separate conferences, inbound and outbound, covering defined port ranges in Europe. Apparently, the new conference would immediately, upon approval, take the place of all eastbound and westbound conferences serving U.S. North Atlantic ports and would leave room for lines in the United Kingdom trades to join later.

The proposed Transatlantic Freight Conference would limit competition in rates as well as other areas. Its members, for example, have agreed to maintain a rate structure which preserves natural routing, thereby avoiding diversion of cargo to or through ports or “ranges” which are not naturally tributary to the origin of the cargo. The conference agreement would minimize transshipment between ranges for the purpose of obtaining a rate advantage and would prohibit absorption of inland costs. The agreement would permit any member line to take independent action against an individual competitor. It includes a self-policing provision that provides for fines of up to $100,000 for a single violation. The conference was expressly formed in recognition of “the


82. FMC approval of the agreement is required under the Shipping Act of 1916. See note 60, supra. Following publication of notice of the agreement, No. 9813, 34 Fed. Reg. 13953 (Aug. 30, 1969), comments were filed with the FMC by various parties, including the Department of Transportation, the Justice Department, and the Department of Defense. The FMC has ordered an investigation and hearing to determine whether the agreement should be approved, disapproved, or modified. 34 Fed. Reg. 20231-32 (Dec. 24, 1969).

83. The agreement of the proposed Transatlantic Freight Conference (dated July 29, 1969) states, at page 2: “The ‘conference trade’ means the transportation of cargo between (i) United States North Atlantic ports and ports in Europe, and (ii) to the extent now or hereafter lawfully permissible, between any points in the United States and points in Europe via United States North Atlantic ports and ports in Europe.”

84. Id., Article 6(c), pp. 7-8.

85. Id., Article 10, pp. 16-17.
modern trend towards containerized shipping, roll-on/roll-off, palletization, unitization, and other forms of specialized service," but is not limited to containerships or other special-purpose ships. 

The Transatlantic Freight Conference is a well-drawn instrument with abundant procedural guarantees. Its plain purpose is to blunt or eliminate price competition among member lines. The agreement, however, does not include a dual rate system to defend itself against rate-cutting by independent lines. In this respect, it follows the existing inbound and outbound conferences in the North Atlantic-Continent trades, which are the only major conferences in the foreign trade of the United States not protected by a dual rate system.

There are two major issues brought about by the Transatlantic Freight Conference. First, will the agreement be approved by the FMC, particularly in the face of its two-directional, multirange coverage and its novel independent-action provision? Second, if the agreement is approved, will overtonnaging of the North Atlantic cause one or more of the major lines to break from the conference and cut rates in order to fill its ships?

There is no question that steamship lines are now willing or required by business considerations to invest huge amounts of capital in containerships. The outstanding questions are the extent to which they will be allowed to institute restraints on competition, and whether those restraints will work. If the lines are allowed to form a strong conference which proves effective, any overtonnaging will force most of the ships to operate with considerable empty space. This would necessitate an increase in rates to a level which will pay for ships operating at perhaps 50 per cent of capacity. If overtonnaging becomes too severe, some of the containerships will be diverted to other trades. The newer ships tend to be the larger ones, and these would remain on the transatlantic, transpacific, and other major trade routes. Thus, the rates to support expensive containerships sailing half-full can be sustained only if the conferences are effective. Conversely, if the attempt to maintain effective conferences fails, rates would be driven down by competition. While shippers would receive excellent container service at low rates, the steamship industry might be placed in turmoil. Cargo would likely be attracted by lower overland rates away from certain trade routes such as the U.S./Mediterranean routes and the routes between Europe and the U.S. West Coast. Some lines would be forced to leave the high-volume routes and institute containership service, at reduced rates, on other routes that do not

86. Id., Article 3, p. 3.
87. Id., Article 1, p. 1.
generate as much traffic. The weakest companies would have to go out of the liner business. It is entirely possible that the threat of such a severe competitive climate will induce steamship companies to seek a system of rate control by national, bilateral or international bodies.

An alternative system—besides effective containership conferences or governmental regulation—would involve operation of ship lines on a completely competitive basis much akin to the present international tanker and bulk carrier markets. Under this approach, ships or portions of ships would be chartered by land transportation companies which would then be responsible for attracting cargo to the vessels which they chartered. At this stage in the container revolution, it is impossible to foresee which approach to competition will prevail or which system will be best for future development of international transportation.

B. Uniform Container Standards

During the years 1966-1968, there was a drive to prescribe uniform container standards for the steamship industry. The most difficult of the many proposals which were advanced related to standardization of lengths of container into adaptable units of 10, 20, 30 or 40 feet, particularly in light of the fact that Matson Navigation Company, one of the important early container operators, was using 24-foot containers, and Sea-Land Service, Inc., another pioneer, was using 35-foot containers.

In 1967, several bills were introduced in the Congress relating to standardization of containers. The primary bill, S. 2419 and H.R. 12954, was designed to preclude the establishment of standard container dimensions. Hearings on the bill were held before the House Committee on Merchant Marine and Fisheries. On November 29, 1967, the Committee issued a report condemning standardization of container sizes. Illustrative of the attitude adopted by the Committee toward uniform container standards is the following passage from the report:

89. If the container revolution reaches this highly competitive state and some lines are driven away from the principal trade routes or out of business, the public may have to face the issue of how to control the remaining lines which, in the absence of competition, may be free to increase rates sharply.

90. During the third quarter of 1969, 66,000 containers were utilized in the North Atlantic trade, of which 40 per cent were 20 feet in length and 41 per cent were 40 feet in length. MarAd Report, supra note 76.

The purpose of this legislation is to prevent the application of discriminatory policies or practices by any government agency against any carrier by giving preference as between them upon the basis of length, height, or weight of cargo container cells, except when required by military necessity. 

The further development of containerized transportation systems is dependent upon free play in the marketplace, at least for the near future.

It appeared from the Committee hearings that, while it is important to have adaptable containers that can be used by any inland or ocean system, it is not essential that the containers be of uniform length. Matson and Sea-Land both indicated that, when this became necessary, they would modify their ships to handle 40-foot containers as well as the size presently carried; i.e., most of the container cells would continue to be 24 feet long for Matson and 35 feet for Sea-Land, but some would be 40 feet long. The bill was enacted into law on March 16, 1968.92

The length of the containers is not a problem in roll-on/roll-off, as opposed to cellular, ships. Moreover, cellular ships having horizontal rather than vertical container cells also would largely eliminate the problem of containers of varying lengths.

C. Container Interchange Practices

It is no longer unusual for ship lines to carry cargo in containers which belong to other ship lines, container-leasing companies, NVO’s, and even shippers.93 Steamship lines exchange container equipment with each other under agreements filed with and approved by the FMC pursuant to Section 15 of the Shipping Act.94 Similar agreements can be entered and approved between NVO’s—or other persons subject to the Act—and steamship lines. The ICC, under Section 5b of the Interstate Commerce Act, can approve the exemption from the antitrust laws of container-equipment interchange agreements among land carriers.95 There is doubt, however, whether an agreement for a pool of container equipment

93. Many shippers construct special-purpose containers for their own commodities and tender them to the ship lines in accordance with tariff rules and rates. Some shippers are considering building their own special-purpose barges to be carried on LASH or Seabee barge-carrying ships.
94. Shipping Act, supra note 56. Approval under §15 exempts agreements under the antitrust laws.
belonging to land and ocean carriers would be exempted from the antitrust laws, even if all members received the blessings of the ICC under Section 5b or of the FMC under Section 15.

To allow for the formation of such a pool of container equipment by land and ocean carriers, the Equipment Interchange Bill, H.R. 8968, was introduced in the Congress on March 13, 1969. This bill was not approved, primarily because of the pendency at the same time of the Trade Simplification Bill which contained a provision allowing for equipment interchange. The Trade Simplification Bill provision, however, was limited to pooling or interchange among parties to joint-rate agreements, whereas the Equipment Interchange Bill would have allowed any carrier to enter the agreement, irrespective of joint rates. Neither the Trade Simplification Bill nor the Equipment Interchange Bill was passed by the 90th Congress. However, as already noted, the Trade Simplification Bill has been reintroduced in the 91st Congress. It is difficult to imagine any valid objection which could be raised against legislation to allow interchange of containers with reasonable limitations.

D. Joint Utilization of Container Facilities

Sea-Land Service and Matson Navigation have established the practice of operating their own container terminals. In most cases, terminal properties are under long-term, exclusive leases, so the wharfage charges previously paid to port authorities for the account of the shipper have been eliminated. Container terminals ordinarily include a large parking area, a building for receiving and delivering containers, an administrative building, berths, and huge container cranes. Except in the large container operations at major ports, the containers of several lines can be handled at one terminal which has multiple, backup parking areas. The ships can be scheduled to use the berths in an orderly way.

96. S.3235, 90th Cong., 1st Sess., discussed supra note 43 and accompanying text.
97. Id., §4, provided: "A common carrier subject to the jurisdiction of an agency may agree to establish joint rates for international transportation... Subject to section 8 of this Act... the pooling or interchange of equipment... may be fixed by the carriers participating in a joint rate arrangement."
99. Sheds or other closed storage areas are not needed in the container system (unless the carrier consolidates or breaks the containers), because the enclosed container is itself sufficient protection from the elements.
Multilane container terminals are able to achieve better utilization of expensive berths and cranes than are terminals used by individual lines. Several systems are available for implementing joint terminal operations: a ship agent providing terminal facilities for a number of ship lines at a single facility; a terminal operator providing a single facility for many ship lines; or a port authority operating the berths and cranes necessary to handle containers from the individual backup container yards of each of the lines serving the port. Such systems as these can be established pursuant to Section 15 agreements filed with the FMC and exempted from the antitrust laws.

A significant problem can arise if a single line is able to obtain leases placing it in a superior competitive position vis a vis other lines which may be unable to lease facilities because of land limitations at a port area. However, most port authorities include in container terminal leases a provision that the lease will in no way restrict them from offering similar terminal facilities to other lines.108

E. Control of Rebating and Container Inspection Programs

It may be considered healthy, on the one hand, for technology and competition to force the lowering of transportation rates, at least within certain limits. On the other hand, commerce generally is not benefited by private deals to rebate part of freight rates to certain shippers or by the reduction of a shipper’s transportation charges because of his intentionally misdescribing the cargo which is carried. The shipping public normally must bear the cost of the monies siphoned off to certain shippers engaged in such unlawful practices. Virtually all transportation statutes include provisions outlawing rebating and misdescription.109

When ship lines do not have sufficient cargo to fill their ships at tariff rates, they sometimes resort to rebating not only by direct means, but also through absorption of inland freight charges and other indirect practices. In many cases, rebating makes it difficult for legitimate shippers to meet the competition of shippers receiving the rebates and for the carriers observing their tariffs to compete with carriers paying rebates to their customers. Largely as a result of an investigation from 1959 through 1961 by the Celler Committee of the House of Representatives,102 the Shipping

100. See, e.g., Agreement No. T-1870, supra note 98, at 20.
101. See Shipping Act, 1916, §16, 46 U.S.C. §915 (1964); Intercoastal Shipping Act, 1933, §7, 46 U.S.C. §847, Interstate Commerce Act, §§2, 216(d), 217(b), 305(c), 306(c), 404(b), and 405(c), 49 U.S.C. §§2, 316(d), 317(h), 905(c), 906(c), 1004(b), and 1005(c); Federal Aviation Act, §§403(h) and 404(b), 49 U.S.C. §§1373(b) and 1374(b) (1964).
102. Hearings Before the Anti-Trust Subcomm. (Sub-Committee No. 5) of the Comm.
Act of 1916, as revised in 1961, requires that ocean conferences institute an adequate system for the policing of obligations under the conference agreement.\textsuperscript{103}

A policing system that could eliminate all rebating probably is impossible. Various attempts by conferences to punish lines allegedly engaged in rebating have failed for procedural reasons.\textsuperscript{104} There appears to be no feasible way for a governmental body such as the FMC to eliminate rebates that are paid abroad, particularly in view of the refusal of foreign governments to enter into bilateral or multilateral programs to curtail such practices. Thus far, the lines themselves do not appear to have been successful in preventing rebating. The proposed Transatlantic Freight Conference includes well-defined procedures for self-policing and a fine of up to $100,000, which may be effective if the self-policing authority is sufficiently strong. Notwithstanding the proposal of that Conference, there is no reason to expect that rebating will be markedly reduced in all trades in the very near future.

As already noted, misclassification of cargo sometimes can be a form of rebating. This takes the form of misweighing, mismeasurement, and misdescription of cargo. Even if the carrier does not tolerate misclassification as a matter of policy, solicitors or agents attempting to attract cargo may close their eyes and cooperate with shippers in misdescribing shipments.\textsuperscript{105} In the U.S. domestic offshore trades, misclassification had become so serious that some carriers requested the FMC to institute a policing program. Virtually every carrier serving those trades agreed to cooperate fully—even to the extent of paying for unloading containers so that they might be inspected. The policing program was instituted in 1966 and has proved effective. Misclassification practices which have been plaguing the trades were curtailed. As of the present time, it appears that misclassification practices have not returned


\textsuperscript{105} See Royal Netherlands Steamship Co. v. Federal Maritime Board, 304 F.2d 938 (D.C. Cir. 1962).
to the domestic trades. The FMC program is continuing and may prove to be a useful tool in the foreign trades.

V. SOCIAL PROBLEMS

A. Dislocation of Labor

Like most other major technological innovations, the container revolution will displace people who hold particular types of jobs under the old system. In the shipping field, there will be three important labor dislocations: reduction of the number of seamen needed to transport ocean freight, reduction of the number of longshore workers, and an accommodation between teamsters and longshoremen as to who is entitled to load and unload the freight that moves on ships.

American-ship labor unions are important, strong, and have vigorous leadership.106 Wages of American seamen are more than double the wages of seamen on foreign vessels which compete with American ships for international freight. In order to make American-flag ships competitive with foreign ships, the United States Government pays an operating differential subsidy to American passenger and cargo liners in the foreign commerce of the United States.107 Not all American liners in foreign trade are parties to subsidy contracts, and those which have no contracts must compete without the benefit of subsidy. Under the controlling statute, the “amount of the operating-differential subsidy [may] not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not

106. The National Maritime Union generally supplies seamen for American-flag, subsidized ships operating from the Atlantic Coast of the United States and for Lyke Bros. Steamship Company operating out of the Gulf Coast. Its president for many years has been Joseph Curran, one of the leaders of the dramatic union movement in the United States in the 1930’s. Seamen for ships operating from the Pacific and Gulf Coasts generally are supplied by the Seafarers International Union or one of its affiliates), headed by Paul Hall, an important leader in the AFL-CIO. Mr. Hall also is president of the Maritime Trades Department of the AFL-CIO, whose vast membership includes most of the building trade unions and many of the metal trade unions. Both Mr. Curran and Mr. Hall are on the Executive Committee of the AFL-CIO. The Masters, Mates and Pilots Union, headed by Thomas O’Callaghan, supplies masters and mates for the majority of American-flag vessels on all coasts. The Marine Engineers Brotherhood Association supplies engineers to most American-flag ships. Jesse Calhoun is president of District 1, and Ray McKay is president of District 2, of the Engineer’s Union.

107. Ships in the domestic trades are protected from foreign competition by the cabotage laws (Merchant Marine Act, 1920, §27, 46 U.S.C. §883 (1964)), and, therefore, operating differential subsidy is not paid in these trades.
compensated by insurance, wages and subsistence of officers and crews . . . over the estimated fair and reasonable cost of the same items of expense . . . if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors . . . ."\textsuperscript{108}

Each new containership being introduced replaces two to three conventional ships, yet has approximately the same number of seamen as a single conventional ship.\textsuperscript{109} The seagoing labor unions, however, have not opposed the container revolution.\textsuperscript{110} The probable reasons for the unions' decision are the critical reduction of the share of U.S. foreign commerce carried by American-flag ships\textsuperscript{111} and the refusal by the government to appropriate increased funds for operating differential subsidy.\textsuperscript{112} The seagoing unions apparently recognize that their jobs will be safe only if American shipping becomes competitive with the fleets of other nations and that a United States lead in the container ship field is one of the few means by which such competitiveness can be achieved. Because a container ship carries much more cargo per year than does a conventional ship, the labor cost per ton is greatly reduced and, therefore, the importance of subsidized labor is less than on conventional ships. For this reason, operating differential subsidy may be curtailed in the future on high-volume traffic routes such as the North Atlantic and transpacific.\textsuperscript{113}

Longshore labor faces no direct foreign competition and is not involved in a government subsidy system. However, it has had to face a sharp reduction in the number of longshoremen needed to load cargo on


\textsuperscript{109} See Journal of Commerce, p. 24 (October 3, 1969). It is anticipated that, regardless of whether the Administration's new merchant marine program is effectuated, seafaring employment will decrease by one-third to one-half the present levels (approximately 56,700) in the next ten years. Journal of Commerce, p. 1 (October 29, 1969).

\textsuperscript{110} Contracts between seagoing unions and ship operators were negotiated early in 1969. Those contracts provided increased wages and benefits, but did not include provisions which would thwart containerization.

\textsuperscript{111} E.g., during 1956, American-flag ships carried approximately 20.7 per cent, by weight, of our total foreign commerce; this share was reduced to 10.2 per cent in 1959; to 5.3 per cent in 1967; and to 6.0 per cent in 1968. Preliminary data places the 1969 share at 4.8 per cent. U.S. Dept. of Commerce, Maritime Administration, Value or Tonnage of Commercial Cargo Carried in United States Oceanborne Foreign Trade.

\textsuperscript{112} With regard to operating subsidy, the new maritime program introduced by the Nixon Administration would base subsidy upon broader wage indices than before and would eliminate the requirement that a portion of profits be paid to the Government. H.R. Rep. No. 91-1073, Report on H.R. 15424, House Committee on Merchant Marine and Fisheries, Merchant Marine Program, 91st Cong., 2d Sess. (May 12, 1970).

\textsuperscript{113} See id. at 39-41.
containerships as opposed to conventional ships. Although the longshore unions have not resisted containerization, they have insisted that their members be compensated for the increased productivity of the new system and that funds be established by the operators to retrain or retire longshoremen.

The first major labor contract directed toward control of containerization was established in 1960 by the International Longshoremen's and Warehousemen's Union, which operates on the West Coast and Hawaii, and the Pacific Management Association, on behalf of the ship lines and terminal operators on the West Coast. The agreement provided for a mechanization and modernization fund that maintained labor peace until June 1966, protected longshoremen, and allowed establishment of the containership system on the West Coast.114 By contrast, labor rules governing containerization were not negotiated so deliberately on the other coasts. There were intermittent strikes before an agreement directed toward containerization became effective at the Port of New York in February 1969. That agreement, between the International Longshoremen's Association and the New York Shipping Association, was followed by similar agreements at most East Coast, Gulf Coast and Great Lakes ports during February and March 1969. The longshore agreements provided basically for increased wages and benefits, as well as a rule to the effect that containers loaded or consolidated more than 50 miles from the port may be packed by non-ILA labor, but containers consolidated within the 50-mile limit have to be loaded at ocean terminals by ILA members. The agreement has already produced litigation.115

The significance of the 50-mile rule is that it provides a guideline for a division of labor between longshoremen and teamsters. Traditionally, trucks were loaded at inland points by teamster labor, and ships were loaded on the piers by longshore labor. To the extent that the cargo now is carried in containers loaded at inland points, rather than unloaded from trucks and reloaded into conventional ships by terminal labor, longshoremen will be deprived of jobs. Thus, longshoremen who formerly

114. The agreement was extended in 1966 for an additional five-year period. For a full discussion of the mechanization and modernization agreement and the factors that led to its establishment, see H. Bridges and W. Horvitz, Labor Negotiators Look at the Container Revolution, in Seminars on the Container Revolution, supra note 15, at 85-105.

loaded all cargo into ships will not load containers at inland points and will not load containers consolidated outside the 50-mile limit. They will have to content themselves with transferring full containers onto ships and, if their 50-mile rule prevails, with loading containers where the consolidation takes place within 50 miles of the port.\textsuperscript{116}

Whether this labor system works will depend largely on an accommodation between the Teamsters and Longshoremen’s unions. The structure for labor rules to meet the container revolution has been established, and the parties, particularly the unions, will have to operate responsibly under the rules for the system to work.\textsuperscript{117} Nothing would be more tragic than for containerships, which cost tens of millions of dollars and which can increase and expedite foreign trade, to lie idle because of jurisdictional disputes.

\textbf{B. Dislocation of Freight-Forwarders}

Ocean freight-forwarders (shipper’s agents on export traffic) fear that they will be displaced by the container revolution, and their fears are not without good cause. Cargo in containers consolidated by inland freight-forwarders, who also operate as NVO’s, does not require the port services that ocean freight-forwarders historically have performed. Inland carriers, ocean carriers, and NVO’s together are seeking methods for moving the cargo through ports as quickly as possible. Inevitably, the process of change will result in elimination of many of the functions of ocean forwarders.

Ocean forwarders and customhouse brokers employ more experts in inland transportation than does any other industry. Unlike the labor unions, it is doubtful whether these companies have the power to secure and maintain their current functions in the face of the container revolution. They will, of course, continue to operate in trades where containerization is not and will not be overwhelming. To the extent they are displaced, they will probably either become port consolidators,\textsuperscript{118} move inland to perform consolidation and documentation functions, enter


\textsuperscript{117} One writer predicts that containerization will result in emergence of a new, highly skilled breed of “container men.” Container News, p. 26 (October 1969). See also, Container News, p. 20 (June 1970).

\textsuperscript{118} As discussed above, they can become consolidators only if they reach an accommodation with the longshoremen.
the NVO field,\(^1\) or become employed directly by or as agents for other transportation companies.

C. **Port Dislocations**

Some of the large ports of the world are fearful of being bypassed by container cargo, because containerships operate most efficiently on restricted schedules with cargo funneled by inland carriers through a few centrally situated ports. With the advent of containerization, cargo that was considered naturally tributary to certain ports may be funneled away from them, unless there is some legal prohibition. The legal safeguards preclude absorption by ocean carriers of inland freight charges,\(^2\) equalization of inland charges as between various ports,\(^3\) and single-factor rate systems where routing of freight is in the hands of the carriers rather than the shippers.

However, a political problem also arises as to the future of the labor force and business communities formerly involved in shipping at those ports which the container revolution will tend to bypass. The problem is not limited to the United States—it will have to be faced by all the major commercial powers. It will be a matter of weighing the social interest of continuing the port life of many large cities against the achievement of the most efficient possible system of containerized transportation. On the East Coast, the Massachusetts and Delaware River Port Authorities have worked together to prevent absorption of inland freight charges which would have the effect of diverting to New York cargoes that were once naturally tributary to those ports.\(^4\) Whether these and other ports similarly situated can continue by legal or political means to withstand the economic expediency and operational forces which impel the funneling of cargo through a few major ports remains to be seen.\(^5\)

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\(^1\) The alternative of entry into the NVO field has been suggested by an FMC Commission and an educator. J.F. Fanseen and E.W. Williams, Jr., speeches before the International Federation of Forwarding Agents Association, Journal of Commerce, p. 3 (October 3 and 6, 1969).


\(^3\) E.g., *Stockton Port District v. Pacific Westbound Conf.*, et al., 9 F.M.C. 12 (1965); *City of Portland v. Pacific Westbound Conf.* et al., 4 F.M.B. 664 (1955).


\(^5\) E.g., in FMC Docket No. 70-19, *Intermodal Service to Portland, Oregon*, the FMC, on April 22, 1970, instituted an investigation to determine, *inter alia*, whether container operators lawfully can serve a particular port on a regular basis by moving cargoes through a neighboring port via inland motor carrier services and by absorbing the inland transportation charges.
FORTY YEARS IN THE WILDERNESS: MARITIME PERSONAL INJURY ACTIONS SINCE THE LONGSHOREMEN'S ACT

BY

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The official theory [for the development of law] is that each new decision follows syllogistically from existing precedents. But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them forgotten, the result of following them must often be failure and confusion from the merely logical point of view.

Holmes, Oliver Wendell, The Common Law, p. 35, (1881)

As one studies the law, a common phenomenon seems to consistently reoccur: The legal (or social) reason which gave rise to a particular legal decision has been forgotten or, more appropriately, ignored, and courts continue to shape a patchwork of decisions upon a form of yesterday's vintage. When reviewing the prickly pear of multi-party suits involving the injured longshoreman, it cannot escape observation that the establishment of this judicial Donnybrook Fair¹ never should have been, and, therefore, should be congressionally eliminated.² The purpose of this article is to review the expansion of litigation concerning maritime personal injuries indemnity actions and the resulting round-robin of crossclaims and counterclaims which illustrates an urgent need for congressional attention.

I. The Longshoreman Goes to Sea

In order to properly understand the course courts have taken on their advance of "dots and dashes"³ in this area, a review of the legal background and development is important.

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1. As stated Judge Brown in one of these cases:

This is another of the growing number of multiparty Donnybrook Fays in which like kilkenny cats, . . . . all lash out against each other in the hope that some wary from someone, somehow all or part of the Sieracki-Ryan-Yaka-Italia fallout can be visited on another. D/S Ove Skou v. Herbert, 365 F.2d 341, 344 (5th Cir. 1966).

2. Although in 1204 King John of England believed the establishment of the Donnybrook Fair outside of Dublin, Ireland was based on the best of polities, it took six hundred and fifty years before error was admitted and the Fair abolished.

3. "Our course of advance, therefore, is neither a straight line nor a curve. It is a series of dots and dashes." Cardozo, Benjamin N., The Paradoxes of Legal Science, P.6 (1928).
In looking to the needs of employees engaged in commerce, Congress in 1908 enacted the Federal Employers' Liability Act enlarging tort liability of railroad companies and in 1920 enacted the Jones Act which extended the benefit of the FELA to seamen. Neither of these Acts purported to deal with longshoremen, and it was accepted that a longshoreman had the same common-law right of action against his employer as did any shoreside employee. Because of the nature of his work, it was determined that a longshoreman might, at his election, bring an action either at common law or in the admiralty court. In the admiralty court, the longshoreman had the benefit of the rule that contributory negligence would not bar recovery as it would at common law. The reason for affording longshoremen the benefits of the admiralty court was "justified" by Justice Hughes in 1914 in the case of Atlantic Transport Company v. Imbrovek.

The libellant was injured on a ship, lying in navigable waters, and while he was engaged in performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo of this character, upon its proper performance, depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly, the work was done by the ship's crew; but, owing to the exigencies of increasing commerce, and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' [Emphasis added]

4. 35 Stat. 65 (1908); 45 U.S.C., Sections 51-60.
5. 41 Stat. 1007 (1920); 46 U.S.C., Sec. 688.
7. The Max Morris, 137 U.S. 1 (1890).
8. 234 U.S. 52 (1914).
9. Id. at 61-62. Cf., Campbell v. Hackfield, 125 Fed. 696 (9th Cir. 1903) where it was held that such a case was not a maritime tort; the Supreme Court specifically refused to follow this reasoning. Remedies for visitors or repairmen or other shoreside individuals were classed with longshoremen. See e.g., Leather v. Blessing, 105 U.S. 626 (1881); Pacific American Fisheries v. Hoff, 291 Fed. 306 (9th Cir. 1923), cert. den., 263 U.S. 712 (1924); The Anaces, 93 Fed. 240 (4th Cir. 1899). See, The Osceola, 189 U.S. 158 (1903) where the rights of seamen were reviewed. An injured seaman could recover certain benefits in case of injury, such as maintenance and cure, but could only collect indemnity for an injury when it was the result of the unseaworthiness of the vessel; no recovery could be had when injury was caused through the negligence of a fellow crew member.
This identification would, unfortunately, prove to be irrevocable as it related to further consideration of the status of longshoremen.

In 1929, six years after the Jones Act was enacted, the Supreme Court held in *International Stevedoring Company v. Haverty*¹⁰ that the statute applied to an action brought in a state court against a stevedore by his longshoreman-employee for personal injuries suffered while unloading a ship. The basis of the decision was that since seamen and longshoremen were similarly engaged in activities in the same industry, Congress undoubtedly intended to include longshoremen under the benefits of the statute. As will be seen, however, this "intention" seemed to be overlooked by all concerned.

During this first twenty-five years of this century, protracted efforts were underway to legislate benefits that would favor the employee regarding responsibility of employers for the personal injuries of their employees. Nearly all states enacted a form of workmen's compensation statutes which generally provided for a fund to protect every employee and his dependents from destitution when the employee suffered personal injury in the course of the employer's business regardless of who or what caused the injury.¹¹ It was assumed that such statutes would cover all land based employees and that the particular locale of the injury was immaterial. Consequently, at that time longshoremen were considered to be within the jurisdiction of the state workmen's compensation acts.¹² This assumption was unfortunately to be shortlived.

In a 5-4 decision in 1917 in *Southern Pacific Company v. Jensen*,¹³ the Supreme Court held that a widow of a longshoreman who was killed while unloading a ship in New York Harbor could not recover under the New York Workmen's Compensation Law.¹⁴ The Court reasoned that since the Constitution of the United States granted federal judicial power over "all cases of admiralty and maritime jurisdiction",¹⁵ such state legislation "works material prejudice to the characteristic features of the general

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¹⁰. 272 U.S. 50 (1926).
¹³. 244 U.S. 205 (1917).
¹⁵. U.S. Const., art. I.
maritime law or interferes with the proper harmony of that law in its interstate relations." 16

It is important to note that the court relied heavily upon the definition of the longshoreman as articulated in the Imbrouek case previously discussed. 17 The result of Jensen was to leave longshoremen injured upon navigable waters without workmen's compensation of any sort. Within a year after Jensen, Congress enacted legislation to authorize the application of state compensation for employment injuries occurring with admiralty jurisdiction by amending the savings clause to give "claimants the rights and remedies under the workmen's compensation law of any state. . . ." 18 The Supreme Court found the legislation unconstitutional by reaffirming the Jensen rationale that such was an unconstitutional delegation to the states of congressional power to regulate maritime affairs. 19 Congress tried again in 1922 to sanction state compensation coverage for longshoremen by passing legislation that eliminated coverage for "the master or members of the crew of a vessel." 20 The Supreme Court again struck down the legislation holding that, although it excluded seamen, it still extended coverage to longshoremen unloading vessels upon navigable waters, thus raising the same constitutional objections as stated in Jensen on the Imbrouek reasoning. 21

The Court, however, extended a helping hand and spelled out for Congress the manner in which to accomplish their objective:

Without a doubt, Congress has the power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employer's liability law or general provision for compensating injured employees; . . . 22

With this guiding light, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927. 23 Although the Act solved some immediate problems, its passage and subsequent decisions regarding it created a multitude of difficulties. The maze of factual patterns demanded a wary traveler between the Jensen rationale and the coverage afforded by state compensation. The task was to provide compensation to

16. supra, note 13 at 216.
17. supra, note 9.
22. Id. at 227.
23. 44 Stat. 1424 (1927), 33 U.S.C., Sec. 901, et seq.
those employees who were precluded from state coverage while providing as much as constitutionally possible to state compensation. Although the scope of this article is not to review in depth the state versus the federal workmen’s compensation problems under this Act, it will suffice to say that Jensen and the resulting legislative and judicial counters have plagued the courts and writers ever since—and will undoubtedly continue to do so unless some coherent conclusion can be established. The confusion wrought by the Imbrovsek-Jensen-Haverty cases in identifying longshoremen so closely with maritime law established judicial refinements that only continued to confuse rather than clarify. The

24. E.g., Caldarola v. Eckert, 332 U.S. 155 (1947) [longshoreman right to bring an action against general agent of United States for maritime tort depended in a state court upon local law]; Davis v. Department, 317 U.S. 249 (1942) [workman drowned while working from a barge on abandoned drawbridge can collect state compensation]; Employer’s Liability Co. v. Cook, 281 U.S. 233 (1930); [non-stevedoring employee temporarily so engaged may not recover state compensation]; Smith v. Taylor, 276 U.S. 179 (1928) [longshoreman drowned by blow of ship’s sledge knocking him off dock into water received impact on land and, therefore, can recover compensation from state]; Grant Smith Co. v. Rohde, 257 U.S. 469 (1922) [state act may be applied to injury on vessel under construction in navigable waters]; Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968) [jurisdiction of Longshoremen’s Act depends on function or status rather than situs of injury]; Noah v. Liberty Mutual Ins. Co., 267 F.2d 218 (5th Cir. 1959) [injury on land but knocked into water where Longshoremen’s Act applied].


26. It is interesting to note that in 1924 the constitutionality of the Jones Act was upheld in Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) which was the same year that the Court struck down the last congressional attempt to bring the longshoremen under state compensation acts in Washington v. Dawson, 264 U.S. 219 (1924). In the Dawson case, as mentioned, the Court suggested the basis for the Longshoremen’s and Harbors Workers Compensation Act but apparently no thought was given to applying the Jones Act to longshoremen. Also, the Jones Act application did not seem to occur to witnesses testifying for the passage of the Longshoremen’s and Harbor Worker’s Compensation Act. See Hearings, House Committee on Judiciary, 69th Cong., 1st Sess. 40 (Apr. 8, 15, 22, 1926); Sen. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). The Haverty case holding that the Jones Act applied to longshoremen was decided in October, 1926 while the Longshoremen’s Act was adopted in March, 1926, supra, note 10.
longshoreman had gone to sea with seamen, and his rights and remedies, unfortunately, would sink or float based on maritime considerations.

II. An Age of Judicial Legislation

Under basic tort concepts, a longshoreman employed by a stevedoring business injured through the negligence of a third person can bring an action for damages against the third party regardless of the Longshoremen's Act regarding the relationship between the longshoremen-employee and his stevedoring-employer. For almost twenty years after the passage of the Longshoremen's Act, however, there were relatively few cases brought against third parties. The basis of the few claims made was that the vessel owner, its agents or employees were negligent in some duty owed the longshoreman.

Then in 1946, the Supreme Court took another pull on the oar and sent the longshoreman further out to sea, and the shipowner and stevedore companies to the courthouse. In *Seas Shipping Company v. Sieracki*, a majority of the court held that a vessel on which a longshoreman was working owed an absolute duty of seaworthiness to the longshoreman as it did to a seaman. No authority could be cited for the decision, and Justice Stone correctly stated in his dissent that:

[t]he Court has thus created a new right in maritime workers, not members of the crew of the vessel, which has not hitherto been recognized by maritime law or by any statute. For this I can find no warrant in history or precedent, nor any support in policy or in practical needs. [Emphasis added]

The latter phrase is essentially the basis of the controversy still continuing today. The doctrine of unseaworthiness traditionally afforded seamen and now extended to longshoremen, was obviously a species of strict liability. It is also important to note that recovery for such

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27. 44 Stat. 1440 (1927), 33 U.S.C., Sec. 933(a).
30. *Id.* at 103.
32. *As stated in* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549-550 (1960): [T]he decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care.

The duty is absolute, but it is a duty to furnish a vessel and appurtenances
unseaworthy conditions would not restrict itself to the vessel’s equipment, but would include circumstances where a longshoreman was injured by defective equipment brought aboard the vessel by the longshoremen’s stevedoring employer and circumstances where injury was caused or contributed to by the negligence of the stevedore or its employees.

As mentioned above, even prior to *Sieracki* the shipowner party was occasionally sued by the longshoreman as a third party. In such cases, the shipowner sometimes sought indemnity from the longshoremen’s stevedore-employer on the ground (1) that it was entitled to full indemnity because its liability was solely passive in nature and was caused by the active negligence of the stevedore or its employees or (2) that the shipowner was entitled to contribution from the stevedore since the stevedore’s negligence contributed to the condition. Obviously, one logical extension of *Sieracki* was to point the way for automatic institutions of indemnity actions by shipowners against the stevedore-employer. Under the *Sieracki* reasoning, the shipowner could be held for unseaworthiness (in addition to negligence) even when the stevedoring-employer’s negligence caused or contributed to the injury by creating an unseaworthy condition. The flood gates of protracted litigation had thus been partially opened.

Courts had differed, however, on whether there could, in fact, be any right over by the shipowner against the stevedore-employer. Section 5 of the Longshoremen’s Act specifically stated: “The liability of the employer shall be exclusive and in place of all other liability of such employer to the employee.”[37] [Emphasis added]

The legislative history contemplated that the stevedore-employer’s liability for injury or death of an employee would be entirely limited to the provisions of the Act calling for compensation payments.[38] It had been

reasonably fit for their intended use. The standard is not perfection, but reasonable fitness . . . .


34. *See, e.g.*, Crumady v. The Joachin Hendrik Fisser, 358 U.S. 423 (1959); *see note 56 infra.*

35. *See, e.g.*, Seaboard Stevedoring Corp. v. Sagadahoc S.S. Co., 32 F.2d 886 (9th Cir. 1929).


37. 44 Stat. 1426 (1927), 33 U.S.C., Sec. 905.

specifically held in *American Mutual Liability Company v. Matthews* that the language of the Act would clearly preclude contribution. The Court reasoned that since contribution among tortfeasors required *common liability* to the injured party (i.e., jointly or severally liable), and that the Longshoremen’s Act limits the stevedore-employer’s liability to compensation payments, there obviously can be no common liability between the shipowner and the stevedore. 

The differing philosophical ramifications of this issue was thoroughly explored in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation* which began its two year journey through the courts about the same time the *Matthews* case was decided. The District Court had apportioned damages between the shipowner and the stevedore on a contribution theory. The Court of Appeals of the third circuit rejected this conclusion and alternatively held that the Longshoremen’s Act limited the stevedore’s liability only to the amount that the stevedore-employer would be obligated to pay compensation under the Act. The Supreme Court rejected both rationales of the lower courts, and in this writer’s judgment reached a proper result—*but for the wrong reasons*. The Court stated that just where the economical loss should fall between the shipowner and the stevedore-employer (when both supposedly had common liability) belonged to Congress and not the Courts.

In absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution between joint tortfeasors. . . . We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted injuries. . . . Many groups of persons with varying interest are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. . . .

This reasoning was extremely unfortunate for a variety of reasons. First, and most importantly, the Court completely ignored and avoided

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39. 182 F.2d 322 (2d Cir. 1950).
41. 342 U.S. 282 (1952); see note 21, Geo. Wash. L.R. 241 (1952).
43. 187 F.2d 403 (3rd Cir. 1951).
44. *Supra*, note 41 at 285-286.
Section 5 of the Longshoremen’s Act which would have barred any liability by the stevedore beyond compensation payments as in *Matthews*, or at least limited payments as the *Halcyon* decision by the Court of Appeals. Such a result would have put to rest the Alice-in-Wonderland world that had been created by *Sieracki*. Secondly, the question of *indemnity* as against *contribution* was quickly placed in limbo. Courts faced with the problem that contribution was not permitted blithely called “contribution” indemnity and proceeded forward; indemnity was still recognized as untouched by *Halcyon*.

The *Sieracki* rule was further extended by the Supreme Court in the case of *Pope & Talbot v. Hawn* without the need to consider the *Halcyon* problems. The *Haverty* case was exhumed for reference to the “historic doctrine of unseaworthiness” to hold that a longshoreman had the right to seek workmen’s compensation or sue the vessel as a third party for a breach of seaworthiness, *and* to sue the vessel as a third party for negligence. Justice Jackson’s dissent underscored the situation that was clearly being created. He stated, in part, that

... Congress knew and respected the difference between the seaman to whom it preserved admiralty remedies plus the remedies of the Jones Act, and harbor workers, such as claimant, who are given the remedies of the Compensation Act, like most other shoreworkers.

I cannot bring myself to believe that it is either the Congressional will or the tradition of maritime law or common sense to mingle the two wholly separate types of labor in their remedies as is being done in this case.

Thus, over all obstacles, the longshoremen had the best of both worlds—land and sea. Although confusion reigned, it was clear that the remaining battles were to be fought between the stevedore-employer and the shipowner on indemnity and contribution questions blurred in species of contract and tort. As will be seen, the varied approaches to spread fault (and, therefore, payment) would be confined only by the imagination of

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45. It is curious that with all the judicial efforts to attach longshoremen to the sea and maritime tort law, the *Halcyon* decision rejected the doctrine of contribution among joint tort feasors when maritime law fully recognizes the doctrine of comparative negligence and consequently recognizes that fault may be shared.

46. See e.g., States S.S. Co. v. Rothchild International Stevedoring, 205 F.2d 253 (9th Cir. 1953).

47. *Crawford v. Pope & Talbot*, 206 F.2d 784 (3rd Cir. 1953).


49. *Id.* at 426.
the lawyer in building bridges to exoneration from the untidy residue of Supreme Court decisions on the subject.

Three years after Halcyon, the Court again was faced with a factual pattern where a shipowner sought indemnification against the stevedore when the stevedore's negligence was a contributing factor to the injury. In the landmark case of Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, the Court once again had the opportunity to consider the exclusive provison of Section 5 of the Longshoremen's Act which the Halcyon decision had sidestepped. The reasoning in Matthews was urged but the Court held that the shipowner had a cause of action for breach of an implied warranty in the stevedoring contract that was an independent one, and not "on account of" the longshoremen's injury. Of course, it was obvious that the measure of damages and the "breach" was clearly dependent upon the injury. The Court specifically reserved, however, the issue of the exclusionary effect of Section 5 upon a shipowner's right of action not based upon contractual obligations. On the implied contract theory, the Court reasoned that the stevedore had a duty to prevent the shipowner from incurring liability due to the conduct of the stevedore. It was pointed out that this duty was independent of the duty owned by the stevedore to its employee as provided by the Longshoremen's Act. Halcyon was distinguished on the ground that since the instant claim was not for contribution "considerations which led to the decision in Halcyon . . . are not applicable."

There was a material question unanswered as to whether Ryan intended to eliminate the concept of contribution among joint tort feasors because the right to indemnity rests on the contractual relationship rather than a tort theory, or, simply, that the duties owed by the stevedore to its employees and to the shipowner are independent. The flood gates were, however, opened wider and the cases continued to flow due to the variety of unanswered questions in Ryan. The most unfortunate result, of course, was that the Court failed to adopt the reasoning that the shipowner's cause of action against the stevedore was one "on account of such injury or death", and consequently barred because of the exclusivity provision of Section 5 of the Longshoremen's Act. This was the theory adopted by the four dissenters written by Justice Black.

52. Id. at 133.
Two years later the Court again faced the indemnity question in *Weyerhaeuser Steamship Company v. Nacirema Operating Company.* The injury to the longshoreman was caused by the falling of a temporary shelter built by the stevedore-employer that should have been torn down by the shipowner prior to going to sea. The Supreme Court held that *Ryan* should not be limited to circumstances involving a stevedore's negligent handling of cargo but that the duty of workmanlike performance includes the use of equipment incidental to any cargo operations. Obviously this was not a question of seaworthiness and the jury had specifically found that the condition did not render the vessel unseaworthy. In short, then, if the stevedore performed any work which led to foreseeable liability of the shipowner, he would be "entitled to indemnity absent conduct on its part sufficient to preclude recovery." The significance here, of course, is the fact that after *Ryan* and before *Weyerhaeuser,* it could have been argued that indemnity would not be applicable where the stevedoring-employer's negligence did not create or contribute to an unseaworthy condition—especially, on contract principles. By *Weyerhaeuser,* however, the Court permitted the indemnity doctrine to be extended to situations where the longshoreman's injury was not the result of an unseaworthy condition, but simply the result concurrent negligence of the stevedore and the shipowner.

*Ryan* had implied that indemnity was dependent upon a contractual relationship between the shipowner and the stevedore. This "requirement" was all but removed in *Crumady v. The Joachim Hendrik Fisser.* Here the action was brought *in rem* against the vessel rather than *in personam* against the vessel owner. At the time of the injury, the vessel owner had it chartered, and the charterer engaged the stevedore. The contention that *Ryan* demanded a contractual relationship was avoided by the Court by regarding the vessel owner as a third-party beneficiary to the contract since the stevedoring contract would indicate that the vessel itself was the intended beneficiary of the stevedore-employer's warranty of workmanship. This reasoning brought back the ghosts of the *Imbrovlek* and *Sieracki* cases as to the seaworthiness issue of the vessel.

The Court also suggested that the stevedore-employer could be liable

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55. *Id.* at 567. The quoted phrase of "conduct on its part sufficient to preclude recovery" has never been defined by the Supreme Court—nor could it in view of its later cases.
56. 358 U.S. 423 (1959); see note 34, N.D. Lawyer 576 (1960).
57. The third-party beneficiary doctrine was not new to Maritime law. *See, e.g.,* Hagen v. Scottish Ins. Co., 186 U.S. 423 (1903); The John Russel, 68 F.2d 901 (2d Cir. 1934); O'Rourke v. Peck, 29 Fed. 223 (S.D.N.Y. 1886). *See also,* Corbin, *Contracts,* Sec. 776.
for indemnity without privity between the stevedore and shipowner on the basis that the stevedore's warranty of workmanlike performance was similar to a manufacturer's warranty on its products under *MacPherson v. Buick Motors Company*.

Clearly, the contractual considerations discussed in *Ryan* had all but disappeared, and in 1960 the Court seemed to indicate that of the two theories with respect to privity suggested in *Crumady*, the warranty theory was preferrable. In *Waterman Steamship Corporation v. Dugan & McNamara, Inc.* an action in *personam* was brought against the shipowner. The contract of the stevedore-employer, however, was between the consignee of the cargo and the stevedore. Although the Court relied on the *Crumady* discussion relating to both third-party beneficiary and warranty theories to dismiss the difference in an *in rem* or an *in personam* action, the *Waterman* case can be rationalized on warranty theory much easier than on a third-party beneficiary theory. The stevedore's "warranty of workmanlike service" can presumably be held to run to those within the scope of performance which would obviously include the shipowner. On the other hand, it is far more difficult to apply a third-party beneficiary theory to the relationship between a consignee of the cargo, the vessel and the vessel owner enforceable against the stevedore. At least in *Crumady*, the charterer had certain duties arising from the contract between it and the shipowner where the third-party beneficiary theory could be applied against the stevedore when the action was *in rem*.

The Court's continued effort to judicially legislate was carried to a new high in *Reed v. The S.S. Yaka*—even to a point beyond the theories presented by counsel! In short, the Court held that the exclusiveness of Section 5 of the Longshoremen's Act was subordinated to the warranty of seaworthiness and that a longshoreman-employee could sue his stevedore-employer when the shipowner, albeit *pro hac vice*, was the stevedore's employer. Incredibly enough, this issue was not even presented to the Court. The majority of Court conceded that the result was inconsistent with Section 5 of the Longshoremen's Act, but the Court

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58. 217 N.Y. 382, 111 N.E. 1050 (1916). Such strict liability has been delightfully characterized as "a freak hybrid born of illicit intercourse of tort and contract." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1126 (1960).


61. 44 Stat. 1426 (1927); 33 U.S.C., Sec. 905.

reasoned that since the *Sieracki* rationale held that the Act was not a bar to recovery on unseaworthiness grounds, and, that since the *Ryan* rationale held that the Act was not a bar to recovery over by the shipowner from the stevedore, it was inconsistent to deny the same rights simply because the employer was also the shipowner. By this boot strap theory, the Court continued to perpetuate the initial fallacious reasoning on the excuse that Congress must act to show the Court the error of its ways.

[W]e cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki*, *Ryan*, and others, the holdings of which have been left unchanged by Congress.65 [Emphasis added]

As indicated in the dissent, and it is clear from the Court’s opinion, the contract theory of *Ryan* was now myth.

[W]e pointed out several times in the *Sieracki*, case which has been consistently followed since, that a shipowner’s obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and the shipowner’s obligation is rated, not in contracts, but in the hazards of the work.64 [Emphasis added]

One year later the Court finally stated what it had been avoiding in its previous decision by dealing with various themes of contract and tort. In *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*,65 the Court judiciously stated that “liability should fall upon the party best situated to adopt preventive measures and thereby to reduce likelihood of injury.”66 In this case the injury was caused when a latentlly defective rope broke which had been supplied by the stevedore-employer. A provison in the contract between the stevedore and the shipowner provided that each would be responsible for personal injury or death resulting from its employees’ negligence. Such a provision would seem to have amounted to an express disclaimer of the implied warranty of workmanlike service. The Court, however, made short shift of this argument:

We think that the stevedore’s implied warranty of workmanlike

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63. 373 U.S. at 414-415.
64. Ibid.
66. 376 U.S. at 324.
performance applied in these cases is sufficiently broad to include the respondent's [stevedore] failure to furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct.\textsuperscript{67}

At least in \textit{Ryan}, the stevedore had been negligent, but in \textit{Italia}, the \textit{Ryan} doctrine was clearly extended to one of liability without fault\textsuperscript{68} which \textit{Sieracki} had prophesied.

In the wake of these decisions, it is not surprising to find cases where the stevedore-employer has brought in the longshoreman-employee seeking indemnification of the amount the stevedore was required to pay the shipowner. The full circle of such an action seems absurd in the face of the Longshoremen's Act, but the rationale has been provided by the "logical" extensions of the \textit{Sieracki-Ryan-Yaka-Italia} syndrome. Usually, such an action would be of little practical value. However, following the Court's reasoning to conclusion, when the longshoreman is the original plaintiff whose negligence was the sole cause of the stevedore's liability for indemnity, he would have a fund to pay a judgment resulting from the initial action against the shipowner. It would appear that courts would be justified in allowing such a claim based on the reasoning in \textit{Italia}: "Liability should fall upon the party best situated to adopt preventive measures and thereby to reduce likelihood of injury."\textsuperscript{70} Courts have not been so inclined, however, for several reasons.

It will be recalled that in \textit{Ryan} the Court pointed out that the duty (i.e., warranty) running between the shipowner and the stevedore was not the same as running between the stevedore-employer and the longshoreman-employee. Consequently, such indemnification principles supposedly would not apply. Subsequent decisions following \textit{Ryan}, however, clearly indicate that the Court really is talking about warranty of workmanship-period.\textsuperscript{71}

Obviously, the most compelling reason to deny such an action is that of policy. To permit recovery by the stevedore-employer against the

\textsuperscript{67} Id. at 320.


\textsuperscript{70} \textit{Supra}, note 66.

longshoreman-employee would do violence to the policy of distributing losses in maritime personal injury. It seems clear to this writer, however, that such a result underscores the problem the Supreme Court has created. It is not a question of considering the consensual contract theory versus a warranty of workmanship theory, but a question of a clear understanding of the unneeded extensions of \textit{Sieracki} and \textit{Ryan}, and subsequent cases in the face of the Longshoremens's Act.

In \textit{Federal Marine Terminals, Inc. v. Burnside Shipping Company, Ltd.}\textsuperscript{73} the Supreme Court once again had an opportunity to review its past course when considering whether a stevedore may sue the shipowner directly for compensation payments paid to its longshoreman-employee. The Court quickly found that the appropriate provision of the Longshoremens's Act\textsuperscript{74} did not bar a direct action, and secondly, that under federal maritime law the shipowner owed the stevedoring contractor a duty whose breach would give rise to a direct action for damages. The Court pointed out that this duty was not the same to the stevedore-employer as it is to the longshoreman-employee citing the \textit{Weyerhaeuser}\textsuperscript{25} case. The Court also quickly pointed out that such a direct action would be for indemnity, not contribution, thus reaffirming the \textit{Halcyon} case. The most interesting consideration by the Court, however, was its treatment of the question of whether the stevedoring contractor has a direct action against the shipowner on some other theory rather than tort. For example, just as there is supposedly an implied warranty running from the stevedore to the shipowner, there should be reciprocal contractual warranties running from the shipowner to the stevedore. In this case, it was argued that such reciprocal warranties were recognized in \textit{Ryan} by the Court's statement that "the stevedoring contractor . . . has received a contractual \textit{quid pro quo} from the shipowner for assuming

\textsuperscript{72} See, \textit{e.g.}, \textit{Casumano v. Wilhelmsen}, 267 F. Supp. 164 (S.D.N.Y. 1967) [attempt of stevedore to recoup from longshoremen]; \textit{Chevis v. Luckenbach Overseas Corp.}, 228 F. Supp. 642 (E.D. Tex. 1964) [division of award between shipowner and stevedore on contribution theory]. The District of Columbia has a particular problem based on the \textit{Ryan} theory alone as it relates to the holding section 5 of the Longshoremens's Act does not bar an action by the third party against the employer since the Longshoremens's and Harbor Workers Act is the workmen's compensation act applicable in the District of Columbia, D.C. Code, Sec. 36-501 (1967). See \textit{Moses-Ecco Co., Inc. v. Roscoe-Ajax Corp.}, 115 U.S. App. D.C. 366, 320 F.2d 685 (1963); \textit{Liberty Mutual Ins. Co. v. Goode Const. Co.}, 97 F. Supp. 316 (D.C. 1951). Consequently, the Supreme Court's holdings have had a material influence on multi-party litigation in the District of Columbia.

\textsuperscript{73} 394 U.S. 404 (1969).

\textsuperscript{74} 73 Stat. 391 (1959), 33 U.S.C., Sec. 933.

\textsuperscript{75} 394 U.S. at 416 citing 355 U.S. 563, 568 (1958).
responsibility for the proper performance of all of the latter's stevedoring requirements.\textsuperscript{76} [Emphasis in original]

Prior consideration of this issue by courts has been limited to consideration of the shipowner's duties only in the context of a stevedore's defense to a shipowner's claim for breach warranties as discussed in \textit{Ryan}.\textsuperscript{77} It was also argued that in addition to an express or implied contractual right, the stevedore has right of indemnity conferred by law in order to place the liability where it belongs under the \textit{Italia} theory.\textsuperscript{78} Since all the facts were not before the Court, it did not decide this issue but specifically permitted the issue to be raised in the District Court. Further, the Court pointed out that \textit{Ryan} did not meet the question of a non-contractual right of indemnity and that \textit{Ryan} recognized the "difference between" the non-contractual right of indemnity and the claim for contribution from a joint tort feasor.\textsuperscript{79} Again, the unanswered questions were abundant.

\textbf{III. Conclusion}

It has been said that "experience is the name everyone gives to their mistakes".\textsuperscript{80} It seems clear that the mistakes of the ill-advised decisions of \textit{Sieracki}, \textit{Halcyon}, and \textit{Ryan, et al} will continue to be perpetuated by the Supreme Court in the name of judicial experience. Although the gradual development of the illogical result can be found as far back as the \textit{Jensen} case attaching maritime law to longshoremen, the turning point would be the enactment of the Longshoremen's and Harbor Workers Compensation Act and the unfortunate rulings thereunder—especially \textit{Sieracki}. The shadow of uncertainty cast by these decisions can only be removed by a light of Congressional action.

It is submitted that attempting to urge tort analysis over contract considerations as to indemnity questions only amplifies the main problems. The implications made in the \textit{Yaka} case that cases "like \textit{Sieracki}, \textit{Ryan}, and others . . ." have been unchanged by Congress and, therefore, imply Congressional approval clearly puts the issue in perspective. The Supreme Court within its own framework could, of course, provide some consistency on the indemnity questions by

\begin{footnotes}
\item 76. 394 U.S. at 419, note 19 citing 350 U.S. at 129, note 3.
\item 78. \textit{Supra}, note 66.
\item 79. 394 U.S. at 421, note 25 citing 350 U.S. at 132, note 6.
\item 80. Wilde, Oscar, \textit{Lady Windermere's Fan}, Act III.
\end{footnotes}
eliminating certain fictitious distinctions on the contractual warranty and tort concepts. Although such a course would be preferable over existing rulings, it avoids the core of the difficulty.

Even prior to Sieracki, under general tort principles a longshoreman-employee injured through the negligence of a third party was permitted to recover damages from the third party regardless of the existence of a workmen's compensation act. As we have seen, Sieracki extended the traditional seaman's protection of the doctrine of unseaworthiness to longshoremens. It is submitted that this concept should be eliminated. Prior to this decision, of course, indemnity actions by a shipowner held liable to a longshoreman on negligence principles were undertaken against the stevedore-employer. These actions were either based upon the situation where the shipowner's liability was solely a question of passive failure to prevent a dangerous condition from occurring through the negligence of the employees of the stevedore or based upon mutual fault concepts involving contribution. With the Sieracki unseaworthiness extension, the shipowner could be held liable to the longshoreman not only for negligence but also for unseaworthiness under facts when the stevedore-employer's negligence also contributed to the accident or where the stevedore-employer's negligence created the unseaworthiness.

It appears that Congress has two alternatives to correct the present situation. The first, and most obvious, would be to limit the stevedore-employer's liability to that of compensation payments thus leaving the shipowner without any remedy for indemnification. As was seen in the Burnside case, the stevedore-employer who pays compensation to the representative of a deceased employee not only has a subrogation remedy to recover the payments under the Longshoremen's Act but can bring a direct action in tort against the shipowner for compensation payments and did "not preclude the possibility of a direct action under some other theory" which, of course, raises the blurred concepts of the non-contractual right of indemnity. It would appear, therefore, that to limit the employer's liability to the Act, thus barring an indemnity action by the shipowner but allowing the stevedore-employer its subrogation under the Act and a direct action against the shipowner would only cause further

81. Supra, note 63.
82. See, e.g., Seaboard Stevedoring Corp. v. Sagadahoc S.S. Co., 32 F.2d 886 (9th Cir. 1929).
84. Supra, note 74.
85. 394 U.S. at 419.
difficulty in seeking to place the ultimate liability "on the company whose default caused the injury." 86

The most practical approach would be to remove the doctrine of unseaworthiness from the land based longshoreman-employee. This doctrine espoused by the Imbrovck-Jensen-Haverty case culminating in Sieracki is clearly unwarranted. By removing this extension, all the remedies would be available to provide a procedural course of action permitting recovery and the burden of payment to be placed upon the entity responsible. Thus, when a longshoreman-employee elects to sue the third-party shipowner in negligence, the shipowner can bring an action against the stevedore-employer for indemnity and contribution. When the facts so warranted the stevedore-employer could either take advantage of its subrogation right under the Act or bring a direct action against the shipowner to recoup the compensation payments made to the longshoreman-employee. Such an alternative would reverse the Alice-in-Wonderland world created by the Supreme Court.

"THE PROMISE OF COST RELATED RATES IN MICHIGAN—KEPT, BENT OR BROKEN?"

BY

PETER B. SPIVAK*

In 1958 the Honorable Otis M. Smith, then Chairman of the Michigan Public Service Commission appointed a Truck Advisory Board. This was done because, as he put it, of

"The fact that the present minimum rate order has already become obsolete and a new schedule of rates is necessary to meet the needs, not only of the shipping public, but the motor carrier industry as well; but before this study is undertaken it is felt that two important questions should be answered by this Commission after advice from the new Truck Advisory Board. The first question is whether or not a minimum rate order should be redeveloped and maintained by the Commission..."¹

Chairman Smith, later a Justice of the Supreme Court of Michigan appointed academics, shipper representatives, carrier people, consultants and individuals with regulatory experience and responsibility to the Board. From the onset it worked very closely with the Cost Section of the Commission. Committees were established on Cost, Traffic Flow, Small Shipments and Classification.

These committees which functioned as "Study Committees", met frequently and the result was a Truck Advisory Board Report published by the Michigan Public Service Commission in September of 1963. The Report, which in hard cover ran 105 pages including charts and graphs, made a number of detailed and specific recommendations. The Advisory Board by a vote of 3 to 2 on December 7, 1962, recommended that a minimum rate order not be redeveloped or maintained by the Commission.²

Those opposing the recommendation of the Truck Advisory Board argued that the absence of a minimum rate order would drive some carriers out of business by the establishment of rates set at levels below out-of-pocket cost. They also argued that under Michigan law adequate safeguards would not be provided absent a minimum rate order. The minority also expressed an apprehension over what it called "destructive rate wars" which would result if the Commission's minimum rate

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² Ibid. Page 81.
authority was repealed.3 Those in favor of the committee's majority report stated that inherent in the Michigan Public Service Commission's authority were safeguards against what the majority called "irresponsible" carriers.4 The majority also indicated that carriers who cut rates "unreasonably" would incur "practical difficulty" if the same carriers attempted to raise the same rates at a later date. The three members who signed the report supporting the majority represented shippers,5 The four members who signed a statement supporting the minority position included one public representative and three representatives of carriers.6 The latter group strongly argued that the Commission's original minimum rate order in 1940 and its 1950 revision was "dictated" by the "proven necessity" to protect the public interest and provide an adequate transportation system. The group argued that the same considerations existed in 1962 and 63, and that in many instances the problem was much more acute.7 They argued that a minimum rate order was needed on truckload traffic to prevent carriers from establishing rates below cost. Recognizing that truckload traffic competition is "extremely keen" that the usual result is for the carrier with the lowest rate to get the traffic. They pointed out that in the past several years there had been hundreds of commodity rates published on a point-to-point basis which in their view, created "further inequalities". Their argument pointed out the technological changes in transportation which have occurred since 1950, and which I would add even more so since 1940 which altered the operation of the motor carrier industry and the bases upon which costs and charges really should be established.

The report for the minority concluded "For these reasons, we strongly urge that the public interest requires that the Michigan Public Service Commission proceed forthwith to hold necessary hearings for the purpose of revising and continuing a minimum rate order based on up-to-date cost studies applicable to Intra-State Motor Carrier Traffic."

Responding to this report the Commission held hearing on Docket No. T-311 on October 14 and 15, 1963, December 10th, 11th and 12th, 1963 (April 7, 8, 27 and 28, 1964.) The April 7th hearing was my first on the Commission and it was a rather striking baptism of fire. The witness who testified as the expert for the Motor Transportation Division of the Michigan Public Commission was Dr. William H. Dodge, than Associate

3. Ibid. Pages 82 and 85.
4. Ibid. Pages 81, 82 and 84.
5. Ibid. Page 8.
Professor of Commerce at the University of Wisconsin. Dr. Dodge testified extensively (his direct testimony covered 61 pages) and was cross-examined at exhaustive length. Dr. Dodge opposed a so-called case by case method. He emphasized the advantages of a minimum rate order over that approach as forestalling what he called spurious rate proposals by shippers and carriers. He believed that many rate levels based on comprehensive cost studies resulted in giving all parties and the general economic community what he called an opportunity to explore the existing cost theories and techniques. It was his belief that minimum rate orders did contain the apparatus whereby changes required in cost finding procedures would be evaluated in terms of what he regarded as "broad regulatory policies" rather than these changes coming about through a judgment of one specific rate. His testimony envisioned the transportation rate system as a sensitive and malleable one which could both anticipate and react based upon the adequacy and continual updating of cost studies to the economic system within which it was to function. He envisioned all the parties involved, shippers, carriers, regulative bodies, and others in public interest continually presenting their investigations, reviews and updating at hearings held on a regular basis within the general umbrella of the Commission.

Dr. Dodge testified most favorably concerning the study done by the A.T. Kearney & Company retained by the State of Michigan to consider this matter. As a result of the foresight of Chairman Smith, the Kearney Company had been retained at a cost to the State of Three Hundred Thousand ($300,000) Dollars to do this study. Dr. Dodge referred to it as comprehensive and comprehensive is a mild word for the depth and detail which the Kearney Study brought before the Commission. As Dr. Dodge indicated, the staff of the Commission had also done considerable work. It was Dr. Dodge's position that these studies should form a basis for establishing minimum rate levels and that the Commission should review the studies after all the parties had had an opportunity to analyze the studies and recommend improvement. Dr. Dodge's testimony anticipated that the Commission would find it desirable to make cost studies of contract motor carriers on its own. He urged that the Commission work toward a uniformity of cost theory, based not upon an artificial uniformity but upon an honest assessment of the reasons for analyzing of actual cost variations.

Dr. Dodge's testimony emphasized that the Commission and the Cost Studies should do nothing to impede incentives for efficiency. Difficult as

it might seem this regard for incentives must be done within the context of some concepts of "averaging" in order to make the results of a cost study "meaningful". It was, he said, necessary for regulatory agencies to decide on cost levels by following a course which embodied the "reasonably efficient carriers" and still leaving an incentive for all carriers to work toward an efficiency improvement. The peril potential for windfalls to inefficient carriers is present in this philosophy, as Dr. Dodge recognized, but that peril makes it all the more interesting, in my view, the challenge to the regulatory body and those working with it is to arrive at a relevant and meaningful course of action.

An example cited by Dr. Dodge of a distinction between operational efficiencies and environmental efficiencies is the fact that changes in the proportion of labor and capital employed in dock operations could alter the cost of performing certain dock functions. It is my experience that the cost and efficiency attributes of various docks of some of Michigan's best carriers are for them a morass. There is more than one dock in more than one locality, and many do not have physical set-ups or even systems which would enable an employee to be transferred from one to the other without some difficulty and period of adjustment which causes delays in efficiency of operations. Partly this is true because of mergers, acquisitions, and amalgamations but partly it is true just because it's true. This kind of costing and cost problem is precisely what it seems to me Dr. Dodge's testimony was attempting to focus attention upon. The Kearney Cost Study directed its attention to the cost of what it refers to as "work centers". Those centers involve the handling at docks, general pickup and delivery problems, clerical situation at terminals (presumably including the integration or invasion of computers, (H.A.L. esque or otherwise), the transferring and breaking of bulk, claims and line hauls and interlining. The study goes through breakdowns of expense and through a distribution of cost to the work centers on the basis of the cause of cost. It determines unit cost through statistical and engineering facts and by use of the techniques available to those doing the costing, evaluate levels of efficiency and, ideally, set up a basis for determining that goal which it set for itself "reasonable operating efficiency".

The cross examination of Dr. Dodge went heavily into the subject of the necessity for competition and the maintenance of a relatively free enterprise system. It was the Commission's view that he defended his position quite well on these subjects and that his testimony along with those who supported his position was most persuasive. One hundred and two appearances of parties were on file in Docket T-311.
On July 23, 1964 Commissioner John E. Tormey, Commissioner George Washington, and myself entered the following Order.9

OPINION

I. INTRODUCTION

The Commission has heard the first, second and third phases of the General Investigation of Rates and Charges for the Transportation of Property by Intrastate For-Hire Motor Carriers. The parties of interest in these hearings have requested that the Commission should provide a provisional statement as to its position regarding the first three phases of the hearing, namely:

(1) Principles of rate making,
(2) Implementation, and
(3) the use of cost as a basis for rate making

The Hearing Notice contained a series of questions which are considered in the following paragraphs.

The hearings have been preceded by an extensive study of for-hire motor carrier rates by the Truck Advisory Board which was set up in 1958. The Board has submitted its report, including an extensive cost study conducted by A.T. Kearney & Company, a consulting firm. The report also includes a series of policy recommendations. These recommendations have been considered by the Commission along with the position of various interested parties in contemplating the future of Michigan intrastate motor carrier minimum rate regulation.

II. MOTOR TRANSPORTATION RATE STRUCTURE

The Commission has considered and adopts Recommendation No. 12.1, Principles of Rate Regulation:

"The Board recommends in the public interest that to maintain an adequate for-hire transportation system for shippers and receivers, both large and small, and so that all shipments shall, as nearly as possible, bear their fair share of for-hire motor carrier costs, it is necessary to establish a level of rates which includes not only the cost of service, but a fair profit above cost. However, the rate structure should be flexible, giving special consideration to certain commodities where different treatment is justified. Where an

adequate showing of facts is present, the establishment of rates may be authorized at a level not below out-of-pocket costs.”

The principles set forth in this recommendation reasonably summarize our philosophy and attitude toward a motor carrier rate structure.

The first question is—should rates be cost related? The answer of the Commission is “Yes”. We consider that the key phrase in the TAB’s recommendation which bears upon this question is: “... that all shipments shall, as nearly as possible, bear their fair share of for-hire motor carrier costs, it is necessary to establish a level of rates which includes not only the cost of service, but a fair profit above cost.” We reason that the implication of this excerpt is that rates should not only be cost related, but should be based upon motor carrier cost of service. We believe that this is essential to establish a realistic rate structure and also that it is a logical basis on which to construct and maintain an effective minimum rate policy.

We believe that “fair profit above cost” describes an area in which management should function with the least interference except in maximum rate regulation. The profit earned on rendering transportation service, or in the sale of any product or service, is the incentive which encourages the conduct of a business and particularly in this instance, the transportation business. It is for this reason that management should have the maximum appropriate freedom to set earnings above cost. In an industry with monopolistic characteristics, and which by law is subject to regulation, the level of return or profit will be affected by maximum rate regulation; however, maximum rate regulation is not a subject for consideration at this time.

The second question is—should factors such as value of service be considered? The Commission’s answer to this question is “Yes”. It is our opinion that the statement included in the TAB recommendation which bears directly upon this question is: “However, the rate structure should be flexible, giving special consideration to commodities where different treatment is justified.” We accept the premise in the Board’s recommendation that special circumstances and conditions will exist which may require a deviation from a policy of rate regulation. Value of service is a phrase which describes the equity relationship between carriers in setting rates. We believe that the “fair share” principle based upon economic considerations is essential. This is not to say that a regulatory body in regulating rates should not concern itself with equity relationships between shippers and carriers in appropriate circumstances. Although this flexibility is a requisite to effective regulation, the facts and circumstances surrounding the deviation from the “fair share” principle must be based
on thorough investigation and knowledge. To allow deviation with less than full knowledge would weaken any principle of regulation.

III. Determination of Motor Carrier Cost for Minimum Rate Regulation

The Commission adopts the Board's Recommendation No. 12.5, The A.T. Kearney & Company Report, as a Test of Intrastate Motor Carrier Rates:

"It is recommended that the cost study compiled by the A.T. Kearney & Company be utilized by the Commission as a test to determine motor carrier costs in the Lower Peninsula of Michigan subject to the limitations and recommendations of the Board's report. There may be alternative cost tests presented which should be given due consideration. It is further recommended that the Commission through its Cost Section continue updating and improving the material in the A.T. Kearney & Company study, and also that it utilize all reports and studies available now and in the future."

The third question is—should the Kearney Company's approach to cost be used? The Commission's answer is "Yes". We believe that a minimum rate should consist primarily of cost of service. The Kearney cost study lends itself to development of realistic carrier cost and will contribute to an effective minimum rate regulation system.

Many participants in the proceedings held thus far have advocated use of the ICC formula. Thus, it is appropriate to set forth the significant aspects of both the ICC and Kearney formulas. The ICC formula is based upon historical accounting cost.

These cost studies are derived from the operating expenses and statistics of past years. In this accounting approach cost adjustments can not be reflected except on an annual basis. Secondly, in the ICC methodology all items of expense are considered 90% variable and 10% fixed, regardless of the volume of traffic. The expenses incurred in an operating company may vary because of leasing practices with parent or subsidiary companies. Further, accounting practices may not be standardized sufficiently to insure uniformity.

The Kearney approach places less emphasis on past cost and more emphasis on engineering and statistical cost. This treatment can reduce the lag time between cost charges and the inclusion of these changes in cost scales. The Kearney approach further does not make the debatable assumption that all cost items are 90% variable and 10% fixed, but instead
leaves the way open to analyze each work-center cost and determine the percentage of fixed and variable applicable in each case. This more nearly reflects the actual situation. The Kearney study also contains more detail in analyzing the actual cost incurred by the particular shipments. As an example, labor standards have been developed to reflect material handling cost by weight, density, and pieces. A final significant contribution to costing found in the (sic) it will promote the “fair share” principle, contribute to a stabilized transportation industry, and reduce the threat of private competition and causes of rate wars.

The fourth question is—should out-of-pocket cost constitute a minimum? The Commission’s answer is “No”. Our definition of out-of-pocket cost is the second level of cost as developed in the Kearney cost study: directly assignable cost plus work-center overhead. Out-of-pocket cost is the absolute floor below which rates will not be allowed. Thus, out-of-pocket, or directly assignable cost plus work-center overhead, is not the minimum rate level but is the cost level which is a rate floor. The statement in the TAB’s recommendation which bears upon this question is: “Where an adequate showing of facts is present, the establishment of rates may be authorized at a level not below out-of-pocket costs.” We accept the Board’s recommendation that the establishment of rates may be authorized at a level not below out-of-pocket cost. Or stated differently, out-of-pocket cost is the floor below which rates shall not be authorized.

The second recommendation of the TAB relating to a minimum rate level and which the Commission adopts as a temporary measure in determining fixed and variable costs of special commodity truckload movements is Recommendation No. 12.1.1, Recognition of the Co-existence of Long Run Variable Costs and Fixed Costs:

“The Truck Advisory Board recommends that the Michigan Public Service Commission recognize the co-existence of long run variable costs and fixed costs. The ‘long run’ is defined as the time interval sufficient to allow for changes in type or size of plant facility corresponding to changes in level of production. Fixed costs are defined as those costs remaining constant in the usual and practical nature of business with changes in production.

“Until such time as the relationship between fixed and long run variable cost can be more accurately defined and developed by the Michigan Public Service Commission, it is recommended that the relationship as developed by the Interstate Commerce Commission be used to determine the out-of-pocket level of Michigan intrastate for-hire motor carrier costs.”
This recommendation is adopted, principally, to bridge the gap between
the present lack of any determination of fixed and variable cost, and the
time when a determination of fixed and variable cost can be made by the
Commission. The Commission does not accept the cost approach of the
Interstate Commerce Commission as one to be indefinitely employed as
part of its revised minimum rate regulation system.

V. Minimum Rate Order

The TAB makes no recommendation as to whether the Commission
should revise its minimum rate order. The Board's report does contain a
discussion of the minimum rate order but presents no recommendation.
The principal question given to the Board to answer at the time of its
creation in 1958 was: "Whether or not a minimum rate order should be
redeveloped and maintained by the Commission." This question is
rephrased in the Hearing Notice as "Should the principles which may be
adopted be applied through a minimum rate order?" Even though the
Board provides no recommendation, the Commission's answer to the
question is "Yes, the minimum rate order should be redeveloped."

In deciding whether or not a minimum rate order should be
redeveloped, we are actually faced with a choice of one of two
alternatives—minimum rate control based on carrier groups acting
collectively, or minimum rate control based on the merits of individual
operations. The minimum rate order is employed to administer minimum
rates over carriers collectively, because it is constructed by averaging the
costs of the group and is concerned with the average cost of the group. The
case-by-case method does not use an average standard but requires instead
a standard cost formula for developing cost; the effect is to emphasize the
cost of the individual carrier. We believe that, at least in the short run, the
group or collective approach to minimum rate regulation is sound,
practical and realistic. The minimum rate order is desirable because it will
facilitate the development of effective standards; it will be of material
assistance to carrier, shippers and the public as an information media;
adjustments in minimum rates can be applied in a relatively short period
of time; the number of rate cases which the Commission must hear must
be reduced; it can be effectively administered with the least staff additions;
and appropriate groups standards will foster and preserve the Michigan
transportation system.

The case-by-case method means: that the number of rate cases before
the Commission will be greatly increased because the standard will be a
cost formula applied to the cost base of any carrier or group making
application, producing the likely result of confusion from multiple criteria, as well as multiple rate levels for the same traffic; adjustments to minimum rates will require prolonged periods of time to apply because of the necessity to hear cases of individuals as well as groups; and administration will be made unduly complex and require substantial staff additions.

The outstanding feature of the case-by-case method in a cost of service rate policy is that the minimum rate becomes one that is predicated on the cost of the most efficient carrier in any locale or region.

The extreme result of a minimum rate based on the cost of the most efficient carriers is an industry of few carriers within any region or authority, and little duplication of authorities. A more likely result, as a practical matter, is a premature contraction of participating carriers in the motor transportation industry. We, like many, are attracted to the most efficient carrier concept. However, when it is considered that the proposed revised regulation system represents a significant departure from existing practices, it is imperative to proceed with caution. We must avoid the creation of a system which may contribute to an unstabilized Michigan motor transportation industry.

It is our opinion that responsible action dictates the appropriateness of the group approach to minimum rate regulation. Thus, the statement on the level of minimum rates is amplified to read: The Commission adopts a level of minimum rates which is full cost of service, exclusive of return, of reasonably efficient carriers with allowable deviations above and below full cost as indicated in the section on Minimum Rate Level.

We believe that redevelopment of the Minimum Rate Order will facilitate the improvement of costing techniques, selecting carrier groups for the purpose of determining reasonably efficient carriers, and development of a cost-based rate structure; these are necessary prerequisites to achieve realistic and uniform group standards. A published minimum rate order will aid substantially in the development of an effective minimum rate regulation system.

VI. Cost Section

The Commission adopts the TAB's Recommendation No. 12.9, Commission Emphasis on the Work of Its Cost Section:

"The Board strongly advises that we encourage and urge the Commission to continue the Cost Section activities, cost studies in particular, and, that the Commission consider a study on shipments presently moving under common carrier commodity rates. Further,
the Board recommends that those special studies that have been completed by the Cost Section be used as a factor in establishing motor carrier rates."

Should the Commission’s Cost Section be continued? The answer is “Yes”. In view of the Commission’s position on minimum rates based on motor carrier cost, adoption of the Kearney cost approach, a minimum rate level geared to cost of service and redevelopment of a minimum rate order, it becomes patently clear that the Cost Section is essential. It behooves the regulatory body which adopts a level of minimum rates limited to or based upon cost of service to be armed with a minimum rate regulation system which includes the most effective costing methodologies and techniques. The Cost Section is required to improve costing methodologies and techniques, to extend the preparation of cost studies, to implement the recommendation: “... continue updating and improving the material in the Kearney study...”, to participate in rate cases which come before the Commission, and to advise the Commission as to effective administration of the minimum rate regulation system.

VII. MISCELLANEOUS

There are three questions in the Hearing Notice which are not covered in the preceding paragraphs:
(1) What other factors should be considered in rate making? Competition is the most significant factor other than cost which should be considered.
(2) Should the principles (principles of rate making including cost-related rates) be applied to all future rate hearings? The Commission’s answer is “Yes”.
(3) Should the irregular route studies of the Commission’s Cost Section be heard at this time? We believe, that in view of the complexity of the general investigation of rates, it is advisable that the irregular route studies should be deferred until the present hearings are complete.

VIII. CONCLUSION

The Commission has given this matter careful consideration and FINDS that:
1. Rates should be based on motor carrier cost of service.
2. Value of service should be considered under appropriate circumstances and conditions.
3. The level of minimum rates should be full cost of service, exclusive of return of reasonably efficient carriers; however, under conditions which
meet requirements as enunciated in the section on Minimum Rate Level, minimum rates may be allowed which include a nominal contribution to return; also minimum rates may be allowed below full cost but limited to out-of-pocket cost, or directly-assignable cost plus work center overhead.

4. The Minimum Rate Order should be redeveloped.

5. The Kearney Company's approach to cost should be used. During the interim the ICC formula for developing cost should be used as a temporary measure until such time as the Commission's costing methodologies and techniques are refined, and effective standards are developed.

6. The Commission's Cost Section should be continued because it is essential to effectively administer the minimum rate regulation system.

7. Competition is the most significant factor other than cost that should be considered in rate making. The principles of rates based upon cost of service should be applied to future rate hearings, and the irregular route studies of the Commission's Cost Section should be deferred until the present hearings are completed.

As you can see from the foregoing, the Commission in its conclusion indicated a strong interest in the concept set up by Dr. Dodge of "reasonably efficient carriers". At the time this Order was issued it was felt we were moving into a most significant area and that the work started by Chairman Smith six years previously was well on its way to fruition. A further hearing was held on October 12, 1964. Then, because of a number of matters to be discussed later, no more hearings were held. On March 18, 1966 the Michigan Intra-State Motor Tariff Bureau, Inc. filed a petition for further hearing on Docket No. T-311.¹⁰ That petition referred to the October 1964 hearing as having been "adjourned with the understanding that the carriers would proceed as rapidly as possible with the development of a proposed revised rate scale". The petition indicated that the carriers have been working on proposed rate scales which was described as time consuming and requiring considerable efforts on the part of some of the committees which were established by petitioner. Special committees established by petitioners.

The petition states that there was a "compelling necessity" to update the Kearney cost study. Some of the rates proposed in this petition was adopted and made a part of the minimum rate order presently in effect known as Docket No. T-347.

At the time of the 1964 hearings and during much of the time of the Truck Advisory Board proceedings, the Commission had a cost section. It

consisted at its peak of eight individuals. They were young and they were eager and industrious. The establishment and nurturing of this section was the cost invested by the State in addition to the Three Hundred Thousand Dollars with the idea of effectuating the goals set forth by Chairman Smith, by the Truck Advisory Board Study and by whatever. What came out of the investigation of the Kearney Company’s study? In 1965, a change took place in the budgeting procedure within the administrative arm of the State Government and through attrition and through transfer of personnel, over the objections of the Commission, the cost section disappeared. It is for this reason that the phrase “established by petitioner” appears in the application of the Intra-State Motor Tariff Bureau under date of March 18, 1966.

In 1967 the Michigan Legislature departed from previous precedent and established authority for the Michigan Public Service Commission to regulate carriage within the Detroit commercial zone. Ratemaking authority was included. As of June 30, 1970 no rates for any commodities have been established by the Commission for that commercial zone.

The end result of these circumstances is that the carriers and the shippers continue to negotiate and compromise on minimum rates and percentage rate increases. With no one knowing who the reasonably efficient carriers are for any commodity or what makes them reasonably efficient. The mandate of the Commission’s 1964 Order six years later seems further from fulfillment than it did then. More than one major trucking company official in Michigan has told me that his company does not know what it costs to handle anything. Some have had their own dock efficiency studies made and they have served in some instances to contradict each other. Since the 1964 minimum rate order one major Detroit area carrier put in a revolving dock. It then abandoned it and, I presume, wrote off the cost. How valid that carrier’s experience was in terms of this overall operation and in terms of information which could have been available to the commission and to other carriers, very few know. Companies which have been in business thirty years or more are still not certain where their profit or loss comes from except in the most obvious of areas.

Both the commission and the Motor Carrier Industry seem firm in the desire that rates should be based upon “full cost of service, exclusive of return of reasonably efficient carriers” and that the “principles of rates based upon cost of service should be applied to future rate hearings”.

There is a good question whether rates set based upon various so-called operating ratios are even within the ballpark of those announced objectives. If the net result of the investment of considerable time and
public and private funds is that there should be a return to the so-called case by case method, it is clearly contrary to the intention of Dr. Dodge's testimony and the Order issued in 1964 by the Commission. It is also questionable whether rates which really represent a so-called compromise at three and a half percent or six percent or some percent really qualify as being an outgrowth of or even relate to what so many worked so hard to achieve.

In Michigan almost all of the cost of operating all the functions of the Michigan Public Service Commission is paid for by the carriers. The work involved in the Truck Advisory Board in the Kearney Cost Study, in the numerous lengthy hearings, in the offices of the carrier and in the shippers and the concepts inherent in the 1964 Order are of value not only to Michigan carriers but to the industry in the United States. It's been six years since the 1964 Order. It's been three years since cartage regulations in the Detroit commercial zone became a fact. "Reasonably efficient" carriers and their counsel will not wish the status quo to go on much longer.

In closing this article I return to the beginning of it quoting the Hon. Otis M. Smith as stating twelve years ago that "the present minimum rate order has already become obsolete and a new schedule of rates is necessary to meet the needs, not only of the shipping public, but the Motor Carrier Industry as well . . . the first question is whether or not a minimum rate order should be redeveloped and maintained by the Commission . . . ."
COMMENTS

A NOTE ON THE DEFINITION AND MEASUREMENT OF COMPETITION IN REGULATED INDUSTRIES WITH SPECIAL REFERENCE TO TRANSPORT

By K. W. Studnicki-Gizbert*

The purpose of this note is to clarify problems inherent in the determination of the existing competition in regulated industries. No attempt is made to develop statistical measurements; such measurements can be derived only after the problems have been defined and must take into account the particular structure of the industry in question. The problem of measurement of competitive conditions can only be approached after the general analytical difficulties are solved.

The determination of the degree of monopoly

The problem of an operationally meaningful definition of the degree of monopoly has received considerable attention in economic literature.¹ The fundamental problem of its measurement (or conversely of the measurement of the degree of competition) relates not only to the lack of available data, but also to the conceptual difficulty of relating the observable phenomena of the market structure to the behaviour of the firms. For a systematic analysis of the problem two alternative approaches may be distinguished, namely, the “morphological approach” (which implies the study of the number of competing firms and degree of concentration) and “behavioural approach” which studies the way the firms actually behave. “Monopolistic behaviour occurs if a seller

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in his economic plan reckons that his sales depend only on his own parameter of actions (for example, on his price) and on the behaviour of the buyers, but does not depend on the action-parameters of other sellers. As soon as a seller reckons that his sales also depend on the action-parameters of other sellers he is no longer behaving as a monopolist. He no longer feels himself alone on one side of the market . . . There can be no doubt that for the course of the economic process through time it is only the mode of behaviour of the economic subject that is relevant. The morphological structure of an economic area, or the number of sellers and buyers in it, plays no role . . . It can only be monopolist. He modes of behaviour are bound to particular forms of supply and demand. Such a relationship does not necessarily hold".  

Under conditions of regulation, the behaviour of the firms must necessarily be affected also by the expectations regarding possible actions of the regulating agencies.

The difficulty of relating observable market structures to the monopolistic behaviour does not imply that investigation of such market structures are of minor interest. They cannot be considered to be a substitute for the analysis of the output, pricing and investment policies of the firm, but they provide useful supplemental information on the structure of the industry and often suggest explanations for certain behavioural patterns. The following sections will deal with some of the more important difficulties in empirical studies of the market structure with special reference to regulated transport industries.

**Definition of the Market**

Since the existence and the degree of competition is always defined in terms of a "market", the definition of a market is basic to our further consideration. Market can be defined as the network or relationships between the potential buyers and sellers of a service or a commodity. Thus in order to define the market it is necessary to define the commodity or service in question.

In the case of transport, the definition of a service involves certain complications. These complications relate to the directional characteristics of transport output, specificity of transport capacity (e.g. a

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2. Erich Schneider, *Pricing and Equilibrium* (English version by E. Bennathan, London: 1962, pp. 57 and 58. In the case of "perfect competition" the actions of a great number of firms establish the "market price" which a competitive firm has to accept.

tank truck cannot be used for transport of automobiles!) and non-storability of the capacity produced. Transportation output is defined differently from the point of view of a transport enterprise (carrier) and from the point of view of the buyers of a transport service, consignees and/or consignors). From the point of view of a transport enterprise, the output is defined as a capacity to carry certain types of goods, at a certain point of time between points of origin and destination. Thus the three characteristics defining the output are: (i) capacity (ii) time (iii) location of points between which the movement takes place and its direction. From the point of view of a buyer a transport enterprise (carrier) the "output bought" is simply the carriage of a certain quantity of goods (or persons) from a point of origin to destination at a particular time under certain conditions usually described as "service quality" (e.g. speed, probability of loss in transit, etc.). In addition, the buyer of a transport service is also interested in "service availability", output are: (i) capacity defined in terms of probability of being accommodated within a specific period of time.

It follows, from the above analysis, that a "transport market" must be defined in terms of the availability of a particular type of service of certain characteristics from a particular (origin) to a particular point (destination). It is the number of independent firms providing service within such a defined market—not an overall number of firms in an industry—which is relevant from the point of view of assessment of the competitive conditions prevailing in a particular transport market. It also follows that little specific meaning can be attached to a general statement of the nature: "competition in the road, (air, rail, water, etc.) transport industry", except as a generalization of conditions existing in a great number of specific transport markets which a particular transport industry serves. In other words a statement that transport industry A is more competitive than transport industry B can only be interpreted to mean that transport markets served by industry A are more competitive than transport markets served by industry B, if a suitable index for this comparison can be developed. The number of firms in each industry do not—by themselves—define the degree of competition. This can be

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4. The two main implications of this definition are: (i) movement of carrying capacity from A to B, usually involves the generation of similar capacity from B to A; (ii) part of the capacity which is not utilized is lost—this leads to the problem of the load factor risk, i.e. who (the carrier or the buyer of transport service) pays for the costs of moving unused capacity.

5. In some cases it is more convenient, and more meaningful, to consider a number of related points (usually within the same area) as an origin or destination.
illustrated by the following example: assume industry A is composed of two carriers, and industry B is composed of ten carriers, each serving eight equal sized markets; carriers to industries A and B are assumed to be competitive in commonly served markets. The competitive conditions are illustrated by the following table:

<table>
<thead>
<tr>
<th>Market</th>
<th>Industry A</th>
<th>Industry B</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>2 (a 1, a 2)</td>
<td>4 (b 1, b 2, b 3, b 4)</td>
<td>5</td>
</tr>
<tr>
<td>II</td>
<td>2 (a 1, a 2)</td>
<td>4 (b 1, b 2, b 3, b 4)</td>
<td>5</td>
</tr>
<tr>
<td>III</td>
<td>2 (a 1, a 2)</td>
<td>3 (b 5, b 5, b 7)</td>
<td>5</td>
</tr>
<tr>
<td>IV</td>
<td>2 (a 1, a 2)</td>
<td>3 (b 5, b 5, b 7)</td>
<td>5</td>
</tr>
<tr>
<td>V</td>
<td>2 (a 1, a 2)</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>VI</td>
<td>2 (a 1, a 2)</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>VII</td>
<td>2 (a 1, a 2)</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>VIII</td>
<td>2 (a 1, a 2)</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>IX</td>
<td>0</td>
<td>2 (b 8, b 9)</td>
<td>2</td>
</tr>
<tr>
<td>X</td>
<td>0</td>
<td>1 (b 8, b 9)</td>
<td>2</td>
</tr>
<tr>
<td>XI</td>
<td>0</td>
<td>1 (b 10)</td>
<td>1</td>
</tr>
<tr>
<td>XII</td>
<td>0</td>
<td>1 (b 10)</td>
<td>1</td>
</tr>
</tbody>
</table>

The average number of competing carriers serving industry A's markets is 3.5; a similar average for industry B is 3; no market served by carriers of industry A has less than two competing firms; in one quarter of the markets served by industry B monopolistic conditions prevail. This example is admittedly an artificial one, but it serves to illustrate the dangers of counting the overall number of firms in a certain industrial classification to determine the degree of competition.

However the sizes of competing carriers serving markets are relevant as far as their ability to compete is concerned. In this way, a firm serving a number of transport markets may influence the rates and standard of service prevailing in each of the markets it serves to a degree larger than that indicated by the measurement of its share of traffic in a particular market.

Direct, potential and indirect competition

In addition to "direct" competition i.e. the firms actually competing in a particular market, the competitive behaviour of the firms is affected—often to an important degree—by the existence of "potential
competition”, i.e. the existence or potential existence of firms which, given certain profit expectations, could enter the market.⁶

In a regulated industry, the existence of a licensing system restricts the freedom of entry. However the possibility of new licenses which can be issued, and the assumption that there are usually carriers interested in entering the market which is inherent in restricting the freedom of entry, (if they were not restrictive licensing would be meaningless) may—and usually does—affect the behaviour of carriers protected by licensing. Furthermore, the licensing does not completely block the freedom of entry; in many transport industries, notably in of firms which, given charter, the potential competition from “private carriage” often exists. This type of potential competition is particularly dangerous, since the threat is greatest where the revenues from a particular account are highest, and, secondly, once “private carriage” often exists. This type of potential competition is particularly dangerous, since the threat is greatest where the revenues from a particular account are highest, and, secondly, once “private carriage” organization is established by a customer he has a maximum incentive to use it in preference to the services of “public carriers”.

In addition to potential competition one must often consider the existence of “indirect competition”. Indirect competition is defined as a state where the output of a particular industry (say, transport) is an input of another industry which sells its products in a competitive market. In other words, indirect competition exists where the demand for the product of an industry is a derived demand of another competitive industry. If the services of an industry—such as transport—form a considerable part of the costs of the industry which purchases them, and if the “customer” sells under competitive conditions, then the effects of such a state of affairs on the carriers’ pricing (rate setting) policies are likely to be quite profound. This helps to explain why even in the days of “railways’ monopoly” certain “low value, high volume” commodities enjoyed very low rates: transport costs of such commodities formed a considerable part of their total costs at a point of final sale, and if the commodity in question was marketed under competitive conditions the “traffic could not bear” high transport costs.⁷

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⁶ This is one of the important reasons why the existence of “free entry into an industry—free exit from the industry” is one of the necessary conditions for the existence of perfect competition.

⁷ Thus “low value” of the commodity which “could not bear” high transport costs existed because it was sold in competitive markets; “high volume” referred to in this context was relevant because it often was associated with a high proportion of transport cost total costs (at a point of final sale).
A special manifestation of indirect competition exists in cases where a particular movement (or movements) of traffic forms a part of a more involved pattern of commodity movement. Two examples should help to illustrate the typical cases:

Example I: Product of an area X is destined for export to an overseas country Y. The exports could be routed either via port A or port B; in such a case carriers connecting X with A and carriers connecting X with B are in indirect—nevertheless real—competition with each other.

Example II: Point P could be supplied either by traders located in Q or R. In this case routes QP and QR are indirectly competitive and form a part of the same transport market.

In both examples, the effectiveness of competition does not only depend on the actions of the carriers in question (defined here as "indirectly competitive") but also on factors such as relative efficiency of competing ports, traders in competing supply centres etc.

The interest of regulatory agencies in the existence of "competitive" conditions.

The interest of regulatory agencies in the existence and degree of competition is, in the final analysis, related to the existence of choice and the problems of pricing.

It is usually assumed that competition is "good" because its existence guarantees the greater choice for the customer. This may or may not be true in cases where the number of competitors is very limited (in an extreme case in the case of duopoly). Under such conditions "duopolistic", or even "oligopolistic competition" may lead to a smaller range of choice; this tendency is sometimes referred to as the "principle of minimum differentiation", which is well documented in Steiner’s study of the effects of competition in broadcasting. Steiner observed that broadcasting competition leads to the concentration of service in the majority market, with minority markets being less well served than under monopoly conditions. Similar examples are available in air transport, where duopolistic competition often leads to "bunching of

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schedules'—i.e. both competing airlines aiming at obtaining the greatest share of the market tend to schedule their flights at the same times (peak times), whereas a monopoly carrier would spread the schedules more evenly. In such a case the passengers wishing to travel at times other than peak would find their choice actually diminished because of the competition.

It is also assumed that the existence of competitive conditions will lead to lower rates by elimination of "monopoly profits". In other words, the existence of competitive conditions brings about automatic price regulation through the workings of the price mechanism. This is quite correct, if (i) perfect competition exists, and (ii) the existence of competition does not result in the competing forms being less than of the optimum (most efficient) size. Under conditions of perfect competition all firms would operate at a level at which the full opportunity costs (including the opportunity costs of entrepreneurs or "normal profits") are covered but no monopolistic profits exist. Given free entry and exit into and out of the industry and mobility of factors of production, no reason exists why the firms could not eventually grow into the optimum size (although this may lead to the mass elimination of competing firms and thus the disappearance of perfect competition). However, given the normal conditions in transport markets "competitive" conditions, even if they exist are far from those of perfect competition; monopolistic or imperfect competition or oligopoly is likely to mechanism. This is quite of production, especially entrepreneurial talent and finance, are not likely to be perfectly mobile; thus conditions of temporary excess capacity, long term existence of firms of less than optimum size, as well as temporary shortages of capacity and monopolistic profits are quite likely to be common.

Under these conditions the "lowest possible rates consistent with long term availability of service" may or may not be consistent with the maximum degree of competition. Low profits and high rates are not necessarily mutually exclusive, and once such conditions become established they may quite easily perpetuate themselves. The exploration of this problem is, however, outside the scope of the present note. It is assumed here that the regulatory agency or policy makers (including those who investigate the industry structure to establish facts on which policies could be based) are interested in the determination of the degree of competition. The previous analysis of the nature of transport markets and of the complexities introduced by the existence of "potential" and "indirect" competition indicated the difficulties which an empirical measurement scheme must resolve. Obviously, it is unlikely that sufficient
data would exist to allow direct quantification without further simplifications and approximations. The quantity and quality of data available varies tremendously from industry to industry; with the most sophisticated and relatively most adequate data existing for air transport (at least in Canada, the United States and major aviation countries); at least adequate data existing for high transport. The differences in the structures of the two industries do not fully explain this phenomenon, which is largely the result of the different development patterns and managerial characteristics.⁹

In addition to statistical measurement an extensive—although difficult to systematize—source of information is the material provided at regulatory agencies' hearings and special inquiries. The quality of such material varies tremendously. Shippers' evidence regarding the availability and quality of service, rate practices etc., is often highly coloured by the interests and feelings of individual shippers and their willingness to risk revealing information about their own activities. sophisticated and relatively carriers to present pertinent facts (and their willingness to do so) often depends on factors such as managerial attitude to regulatory procedures, ability to obtain relevant data and talent of the legal advisers retained. All that points to the importance of regulatory agencies assuming an active part in obtaining the relevant evidence, and is predicated on the adequate briefing of the agencies (and their examiners) by research staff and the availability of data. In short, the more the agency knows, the more it can learn through hearings and special inquiries—and this applies to the problem of the determination of the degree of competition with as much force as to the establishment of any other relevant set of facts.

Acknowledgement

The author wishes to acknowledge the generous assistance of his colleague, Dr. K. Mills of the Faculty of Administrative Studies, York University, in clarifying some of his ideas and eliminating some—but not all—of the unnecessary confusion in their formulation.

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⁹ Technological complexity and relatively high capital costs of equipment in air transport made airline management much more conscious of the usefulness of data gathering and analysis and more willing to accept sophisticated methods of data processing and operations analysis. Growing within the same area industry may bring about similar attitudes to that industry.
BOOK REVIEW


The title of Dr. Redford's book is inviting to students of regulatory proceedings who have never found a satisfactory one-volume work on the subject; it is especially inviting to those who are involved in regulatory matters within the aviation industry. Unfortunately, the book is a grave disappointment.

For the unindoctrinated the book serves little useful purpose because of a compulsion for excruciating detail and the use of the most complex regulatory jargon without explanation. For the less naive, several glaring errors render the book of dubious value as a reliable reference tool.

Dr. Redford's Chapter 1 will frighten away all but the most determined readers because, in that chapter entitled "Prospectives for the Study of Government Regulation" Dr. Redford suggests that the study of governmental regulation is almost a mystical matter which must be related to the metaphysical world. For example, in an attempt to put the study of the regulatory processes into focus, the subject is described as a "universe of social action" for which "ecology is an essential element in the study of behavior in the functioning and for which anatomy is a second element required in the study." Another sampling:

"The anatomy of a universe of social action [the regulatory processes being a series of social actions] will differ from that of an animal organism in at least two respects."

However novel this approach in the dissection of the regulatory processes, it is one that adds meaningless confusion to an already highly complex subject.

One of the early chapters of Dr. Redford's book deals with the relationship of the Congress and the various regulatory agencies: in this instance specifically the relations between the Congress and the Civil Aeronautics Board. Dr. Redford's book is copyrighted in 1969, but in it he makes constant reference to Senator Mike Monroney as though he were still in the Senate. Senator Monroney was defeated for re-election in the fall of 1968. Nonetheless, one would expect that the Senator continues

* Assistant to General Counsel, Delta Air Lines, Inc.; B.S., U.S. Naval Academy (1956); J.D., University of Florida (1963).
active in civil aviation matters in the Congress after reading Dr. Redford’s book. While this might be excusable on the theory that the book was written sometime before Senator Monroney’s departure and the author merely failed to update his text, the chapter describing his influence on civil aviation matters is tantamount to a glorification of the gentleman:

“His [Senator Monroney’s] strategic position, interest, and competence help make him a strong and effective leader on all matters affecting civil aviation in the Senate and, in fact, have made him one of the dominating figures in the national aviation picture. One is led to surmise that his position as a leader in civil aviation is much more important than that of a member of the Civil Aeronautics Board.”

Those involved in proceedings before the Civil Aeronautics Board will no doubt take strong issue with much if not all of the foregoing statement. While there can be no dispute that Senator Monroney had a large influence on civil aviation matters while he was in the Senate, many of his doings were controversial and Dr. Redford’s line in this respect is hard to swallow. The suggestion that the Senator’s position is [was] more important—influential, perhaps—than a Board member is quite unacceptable.

In Chapter 5, Dr. Redford examines the “administrative center at work”—in this case the CAB. For some reason Dr. Redford chose the General Passenger Fare Investigation of the early 1950’s as the regulatory case to be followed step by step. While there is no doubt that the case is of tremendous historical importance to the industry, it is one of a kind and it would have been of much more value had he chosen one of the typical licensing cases which comprise the bulk of matters coming before the Board. In any event, the tracing of the various steps in the case becomes bogged down in painful minutia resulting in a loss of the over-all picture for the reader, while this single chapter consumes precisely 33-1/3% of the book’s total pages.

Dr. Redford describes the various bureaus within the Civil Aeronautics Board and herein makes his most glaring errors. For example, he describes the “Bureau of Air Operations” as the:

“... largest unit within the CAB. It carries responsibility for development of all aspects of the program of economic regulation, except compliance in accounting and statistical reporting, including matters related to domestic and international routes ... and rates. It has the responsibility for developing and presenting the public’s
position on routes and on rates before the Examiners and the Board."

In actuality, the Bureau of Air Operations, as such, was abolished several years ago. More correctly, the Bureau of Air Operations was divided into two bureaus—the Bureau of Operating Rights and the Bureau of Economics. Today, the Bureau of Operating Rights participates in matters related to routes; the Bureau of Economics, matters of rates. There are several other factual errors concerning the composition of the Board and the various bureaus and staffs under it.

Dr. Redford devotes an entire chapter to the Air Transport Association, which is an association comprised of a majority of the scheduled air carriers in the United States. This chapter, which traces the history of the Association and describes its functions and organization, is one of the most informative chapters of the book. The chapter successfully portrays the many-faceted operations of the ATA, but conspicuous by its absence is the fact that the ATA plays a very small role in the actual regulatory proceedings of the industry, which raises the question of what the chapter is doing in the book in the first place.

In summary, Dr. Redford's book is not easy reading; it seems to digress from the central theme and is both repetitive and unnecessarily detailed. It cannot be recommended for an introduction to the regulated industry or as a reference tool.
OTHER TRANSPORTATION PUBLICATIONS


Administrative Ruling #4 of the Bureau of Motor Carriers was the controlling regulation on leasing from 1936 until superseded by the Dixie Ohio Case (17 MCC 735) in 1939. Between that time and 1947, the Bureau of Motor Carriers suggested rules for consideration and the Interstate Commerce Commission held extensive hearings in Ex Parte MC-43. The rules promulgated by the Division of the ICC as a result of the hearings were drastically changed by the Commission on review, and final rules of the Commission were taken to the United States Supreme Court. In 1953 the Supreme Court upheld the Commission's rules on leasing, and on September 1, 1953 the "final" leasing rules became effective. There have been many changes in the regulations since the September 1, 1953 release, and Congress later passed legislation specifically limiting the operation of the rules on certain kinds of transportation.

The Leasing and Interchange Regulations reproduced and explained in this publication are based on those rules and regulations in effect at the time of publication, and as amended 1/30/68 by the ICC. After each section of the regulations is a general discussion with examples based on the Commission decisions and rulings. All points in the discussion following the rules are based on administrative rulings or cases; there may be some situations on which no official answer is available.

The appendix in the publication contains other ICC and D.O.T. Regulations that must be considered when leasing or interchanging equipment. Also reproduced in the appendix are those parts of the Motor Carrier Act cited in the Leasing Regulations.

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